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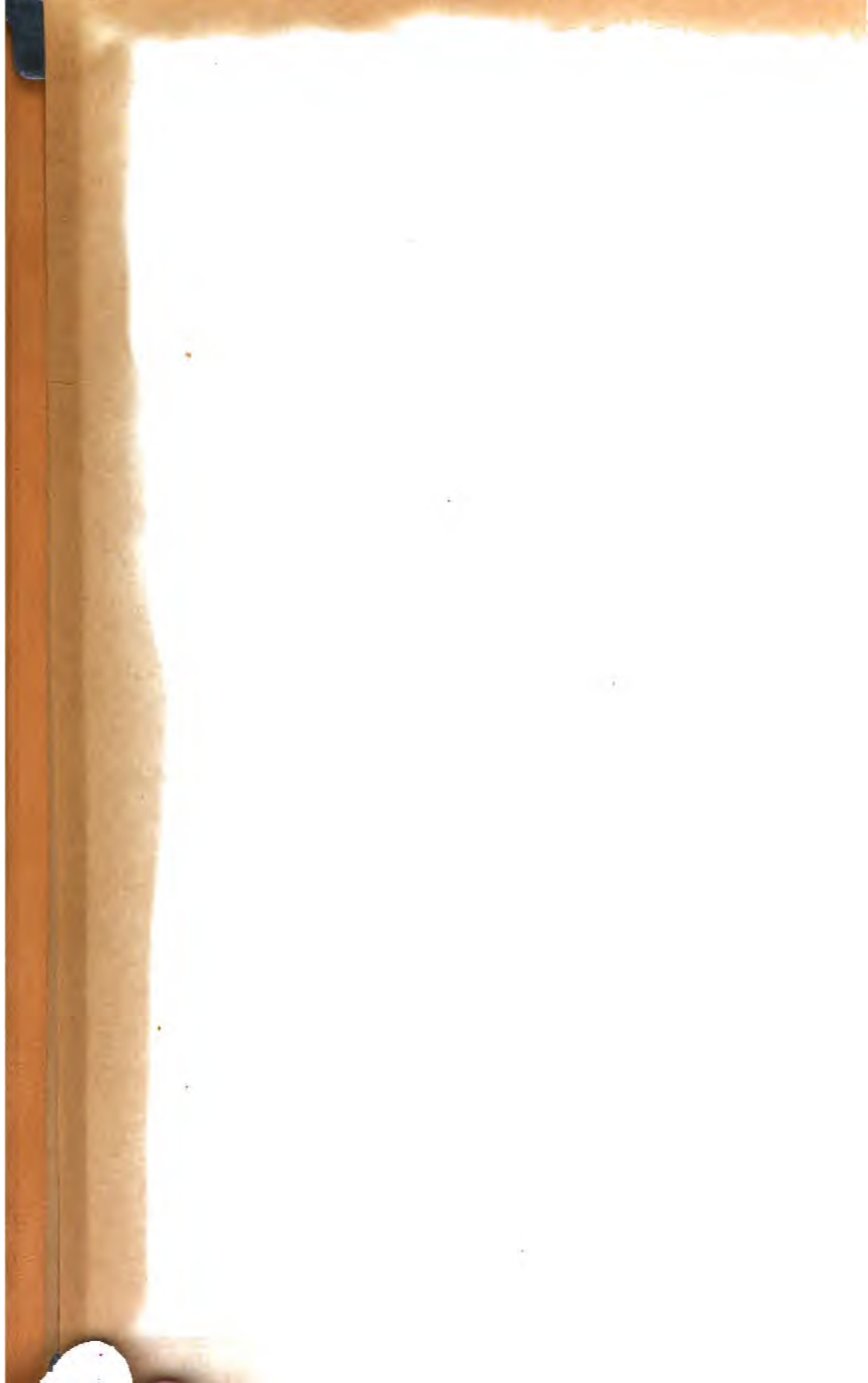
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AN INDEX
TO
ALL THE REPORTED CASES

DECIDED IN THE SEVERAL
COURTS OF EQUITY AND BANKRUPTCY IN ENGLAND
AND IRELAND,
&c., &c.

THE FOURTH EDITION.

VOL. VII.



CHITTY'S INDEX
TO
ALL THE REPORTED CASES

DECIDED IN THE SEVERAL
COURTS OF EQUITY IN ENGLAND,
THE PRIVY COUNCIL, AND THE HOUSE OF LORDS.

WITH A SELECTION OF IRISH CASES :
ON OR RELATING TO
THE PRINCIPLES, PLEADING, AND PRACTICE
OF
Equity and Bankruptcy ;

FROM THE EARLIEST PERIOD.

THE FOURTH EDITION.

WHOLLY REVISED, RE-CLASSIFIED, AND BROUGHT DOWN TO END OF YEAR 1883.

BY

HENRY EDWARD HIRST, B.C.L., M.A.,

OF LINCOLN'S INN, ESQ., BARRISTER-AT-LAW.

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NOTE.—*The Titles printed in italics contain Cross-References only.*

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I. ARTICLES AND SERVICE THEREUNDER.

1. Where a party agreeing to be bound to a solicitor in Ireland paid to him the amount of the stamp duty, Queen's Inn fees, etc., and shortly afterwards paid his apprentice fee, and made the usual affidavit before one of the Masters, under the impression that everything necessary to constitute him an apprentice was performed; he served five years. The solicitor did not pay the stamp duty, or prepare any indenture of apprenticeship until after the five years had elapsed. It was held, he had made

a case to be admitted a solicitor of the Court of Chancery in Ireland. In granting the application, the Court could not allow the conduct of its officer to pass unnoticed, but required him to show cause why he should not be struck off the rolls. *Re Power*, 10 Ir. Eq. R. 175.

2. Application by a person who kept five terms as a law student, served two terms in a solicitor's office before the execution of his indentures, and eighteen after, to be admitted an attorney, refused. *Re Tierney*, 10 Ir. Eq. R. 178.

3. An articled clerk had neglected to file the necessary affidavit within six months; but the omission "had arisen from inadvertence only":—Held, that this was not a sufficient ground for relieving him from the consequences under the 6 & 7 Vict., c. 73, s. 9. *Re Benson*, 10 Beav. 435.

4. Where articles were, by a mere slip, not filed within six months, the Court relieved the clerk from the effect of the error. *Re Follett*, 30 Beav. 629.

5. Where an apprentice to an attorney had not attended any of the courts in Dublin any term in the fifth year of his apprenticeship; but after the fifth year, his master being then dead, attended the courts for two terms without having any master, his application for admission refused. *Semble*, indentures cannot be assigned after five years from the date thereof. *Semble*, the sickness and accidents provided for in 13 & 14 Geo. 3, c. 23, refer to the apprentice and not to the master. The terms for attendance must be in the three years next preceding the application for admission. *Exp. Roberts*, 8 Ir. Eq. R. 507.

6. The Court has jurisdiction, in a proper case, to vacate the enrolment of the indentures of apprenticeship of an attorney. Neither the humbleness of the origin of the applicant, nor his having filled the office of a process server of civil bill process, nor his having been dismissed from that office for having violated a rule of the Assistant Barrister's Court, under the belief that it did not apply to him, nor his having on a particular occasion acted as a bailiff in the execution of a *fi. fa.*, will disqualify him from becoming apprentice to an attorney, his character and conduct being in other respects unimpeached. *Re McColgan*, 6 Ir. Eq. R. 207.

The Court will not vacate the enrolment of an indenture of apprenticeship to an attorney, on the ground that the benchers were deceived, and ought not to have admitted the party to become an apprentice. *S. C.* 5 Ir. Eq. R. 481.

7. The Court will not exercise its discretion in relaxing the rule prescribed by the statute concerning the period of an attorney's apprenticeship, when the apprentice had been incapacitated by illness from serving five of the twenty terms, though it was sworn that he had attended his master's office for three years before he was bound, and his master had consented to his being now sworn. *Re Dease*, 1 L. & T. 654.

Semble. The Court will not take notice, in such cases, of the applicant's family affairs, except where a father has been an attorney and there is danger of the business of the office being lost to the family. *Ib.*

8. As a general rule, from which there will

be no deviation, unless under peculiar circumstances, the Court in computing the period of apprenticeship to an attorney, will not allow credit for time elapsed before the payment of the stamp duty upon the indentures. *Exp. Sterne*, 2 Ir. Eq. R. 378.

1. An apprentice to an attorney who, during the period of his apprenticeship, filled the office of a salaried clerk in the office of one of the six clerks of the Court of Chancery:—Held, notwithstanding, to be entitled to be admitted a solicitor of the Court. *Re Lyons*, 1 Dr. & Wal. 327; 1 Ir. Eq. R. 267.

2. No person can be admitted to be an attorney who has not been bound. A person was admitted to be an attorney of this court, who having been bound for five years had only served a few days; it appearing that he was fully qualified, and that inconvenience would otherwise result to the clients of his brother, who had been an attorney, and had recently died. *Re Symes*, 7 Ir. Eq. R. 339.

3. Where an apprentice to an attorney upon the death of his master entered the office of another attorney for the purpose of completing his apprenticeship, but before his indentures were assigned, a term elapsed; he was, under the circumstances, allowed credit for the term which had so elapsed before the assignment of the indentures, and having served twenty clear terms, inclusive of that term, was admitted an attorney of this court. *Re O'Brien*, 1 Ir. Eq. R. 480.

4. In computing the period of apprenticeship to an attorney, the Court reckons by terms. Therefore a party who has served for twenty terms, is entitled to be admitted an attorney. *Re Powell*, 1 Ir. Eq. R. 328.

5. A person who was a student of college at the time he was bound apprentice to an attorney for five years, subsequently graduated, and served for three years after he had taken his degree, but without being bound *de novo*:—Held, that under the 1 & 2 Geo. 4, c. 48, he might (with his master's consent) be admitted an attorney, although the original term of his apprenticeship had not been completed. *Re Collum*, 1 Ir. Eq. R. 278.

6. The Court will not swear in an apprentice who had been in attorney's office for five years, where for part of the time he had been upon trial, and was not articulated until afterwards. *Re Kirwan*, Hay. & J. 726.

7. When a party was only regularly bound in Hilary Term 1830, the Court, under the circumstances, admitted him in the following Michaelmas Term. *Exp. Fitzgibbon*, Hay. 139. n.

8. A person cannot be admitted as an attorney, unless notice of application have been posted before the *essoign* day of the term in which he seeks to be admitted. *Exp. Thompson*, Hay. 206.

9. Nor where the applicant's notice was posted before Trinity Term, and he was prevented by illness from attending until Michaelmas Term, for which term he had not posted any notice. *Exp. Black*, Hay. 206. n.

10. The Court has no discretion to dispense with the provisions respecting the period of a solicitor's apprenticeship, except, perhaps, to cases of fatality, and therefore under the stat. 1 & 2 Geo. 4, c. 48, s. 4, refused to admit

a graduate on a three years' apprenticeship, commenced more than four years after his decree. *Anon.*, 12 Ir. Eq. R. 237.

11. Under the Attorneys and Solicitors Act, 6 & 7 Vict., c. 73, s. 8, it is the duty of an attorney to enrol the articles of his articulated clerk, and where he had omitted to do so the Court dismissed a claim to foreclose a mortgage given to secure the premium. *Dufaur v. Sigel*, 4 De G. M. & G. 520; 22 L. J., Ch., 678.

12. When a clerk who had articulated himself for three years was absent by reason of illness for sixteen months, and afterwards served thirteen months:—Held, that he could not be examined, and must enter into fresh articles for six months. *Exp. Digby*, 45 L. J., Ch., 692.

13. Service by a clerk after the expiration of the five years of his articles is not (without any further contract in writing) such service under the contract made by the articles as is required by 6 & 7 Vict., c. 73, s. 3, and such contract cannot be extended by parol. *Exp. Adams*, 25 W. R. 54.

An articulated clerk must not only be bound for five years, and serve five years, but the service itself must be under written articles. S. C. 46 L. J., Ch., 42; 4 L. R., Ch. D., 39; 35 L. T., N. S., 751.

A clerk was articulated in September 1870 for five years, and served up to October 1873, when he was assigned to another solicitor for fifteen months. At the expiration of that period he returned to his first master, and served him under the original articles until the expiration of the five years in September 1875. It having been decided that the fifteen months could not be counted, the clerk continued to serve his first master under a parol contract of service until November 1876, when he applied to be admitted to the final examination:—Held, that he might be examined, but that he must enter into fresh articles for a period of fifteen months before he could be admitted. *Id.*

14. A clerk, having a connection of his own, derived from a former master, articulated himself to a solicitor, and managed the business introduced by him under an arrangement with the solicitor that he should draw 150*l.* a year out of the profits, and the rest be retained to form the solicitor's share of the capital of a partnership which was to be entered into between them upon the clerk's becoming admitted. On an application by the clerk to be admitted to the final examination:—Held, that he had so far complied with the requirements of the statute as to service, as to be entitled to present himself for examination. *Exp. Joyce*, 46 L. J., Ch., 295; 4 L. R., Ch. D., 596; 25 W. R. 340.

15. A clerk was articulated to his father in April 1872, for the term of five years, and attended the office regularly for that time, but from Michaelmas 1875, to Michaelmas 1876, his father was absent from ill-health, and business was practically suspended, although the office remained open:—Held, that he might be allowed to go in for his final examination in April 1877, but must enter into fresh articles for a year and serve under them before he could be admitted. *Exp. Fereday*, 46 L. J., Ch., 504.

16. W. was articulated in 1861 to R., a solicitor, for

five years, but left him after two years' service, the articles with R.'s consent being considered as cancelled. In 1864 he was re-articled to R. for the remaining three years, and under these new articles he continued in his service for two years, when he left on account of ill-health and under medical advice. In 1869 he was assigned and re-articled by R. to, and served with, L. for the remaining one year. An application by him that the several periods of service under the three articles might be reckoned as constituting the full five years' service, was granted, it being held that both the first and second articles had been cancelled by mutual consent, within s. 13 of the 6 & 7 Vict., c. 73. *Exp. Williamson*, 4 L. R., Ch. D., 581; 35 L. T., N. S., 695; 46 L. J., Ch., 624.

II. PREMIUM.

1. Where a solicitor, to whom a clerk is articled, dies shortly before the expiration of the second year of the articles, a bill will lie, on behalf of the clerk, against the executors of the solicitor, for a return of a proportionate part of the premium of the clerkship. *Hirst v. Tibson*, 16 Sim. 620; 18 L. J., N. S., Ch., 308; 13 Jur. 596. Affirmed 2 Macn. & G. 184; 2 H. & Tw. 359; 19 L. J., N. S., Ch., 441; 14 Jur. 559.

2. A., an attorney, being confined of an illness whereof he died, takes B. as his clerk, and receives with him 120*l.*, and by articles agrees with the father of B. to return 60*l.* of the money if A. died within the year; A. died within three weeks. A.'s executor decreed to pay back 100*l.* *Newton v. Rowse*, 1 Vern. 460.

3. A clerk was articled to a solicitor at a premium of 150*l.*, and the articles contained a receipt for and a release from the money. Contemporaneously the clerk gave an IOU for, and agreed to execute a mortgage of certain property for securing the money. The clerk voluntarily left the master seven months after the date of the articles. The master brought an action on the IOU, to which the clerk pleaded never indebted, payment, and release, and the master abandoned the action. He then filed his claim to enforce the mortgage security and foreclosure. One of the Vice-Chancellors dismissed the claim, on the ground that the Court would not set aside the plaintiff's own legal bar, but without costs, the defendant undertaking to pay 21*l.* as the proportion of the premium for the time his services lasted. The plaintiff appealed, but it appearing that he had not, in compliance with the provisions of the Attorneys and Solicitors Act, 6 & 7 Vict., c. 73, made or caused to be made the necessary affidavit to enable the defendant to enrol the articles, the Court dismissed the appeal without costs, without (under the authority of the 62nd section of the stat. 15 & 16 Vict., c. 86) sending the parties to law; and it appearing upon the affidavits of the defendant that there was matter impertinent to the issue between the parties, the Court ordered the defendant (under the authority of the 17th section of the same statute, and the 30th Order of the 7th August 1852) to pay the plaintiff 20*l.* for such impertinent matter, and refused to relieve him

from his undertaking to pay the 21*l.* *Dufaur v. Sigel*, 22 L. J., Ch., 678; 4 De G. M. & G. 20.

4. A ward was articled to a solicitor, under the direction of the Court, and a premium of 300 guineas was paid. Subsequently the ward desired to change his profession, and proposals were accordingly, with that object, brought before the judge in chambers. The solicitor was served with notice of the proceedings and attended. An order was made, by which the articles were ordered to be cancelled, and 100*l.*, part of the premium, directed to be returned by the solicitor. There was no allegation of misconduct on the part of the solicitor:—Held, that the Court had no power to direct the return of any part of the premium. *Craven v. Stubbins*, 10 Jur., N. S., 1189; 13 W. R. 208; 11 L. T., N. S., 402; 34 L. J., Ch., 126.

5. A premium paid on the occasion of a son being articled to an attorney and solicitor is an advance to the son, within the meaning of the Statute of Distributions. *Boyd v. Boyd*, 4 L. R., Eq., 305; 36 L. J., Ch., 877.

See also APPRENTICE.

III. PRACTISING IN COMPETITION WITH MASTER.

6. A., on being articled to B., covenanted not to be concerned for any of B.'s clients, and to forfeit 100*l.* for any such breach. A., after being admitted, acted in contravention of this covenant. He was restrained by injunction. *Nicholls v. Stretton*, 7 Beav. 42. And see S. C. 10 Q. B. 346.

7. A clerk to solicitor, commencing practice for himself, not to be restrained from acting as solicitor for parties against whom his master was employed, upon general allegations of his having in his former service acquired information likely to be prejudicial to the clients of his master. *Brieheno v. Thorp*, Jac. 300.

8. Articles under which A. had served his clerkship to an attorney, contained a proviso that A. should not practise within a certain district; and also a covenant on the part of his father, that A. should, within a month after he came of age, execute a bond in a specified penalty, to secure his fulfilment of the proviso. A., who was an infant at the time of the execution of the articles, served under them for three years after he attained his full age, but was never called on to execute any bonds; and with a knowledge of the purport of the articles completed his clerkship, and afterwards began to practise as an attorney within the district from which the articles purported to exclude him. A motion for an injunction to restrain him from practising within the district was refused with costs. *Capes v. Hutton*, 2 Russ. 357.

9. P., a solicitor, having accepted the situation of clerk to E., a solicitor practising at N., entered into a bond with him, which, after reciting that P. had been appointed agent to O., was conditioned to be void if P. should abstain from practising as a solicitor at N., or within thirty miles thereof, without the consent of E., and should not act as O.'s legal adviser, except as E.'s clerk, and should not accept or undertake any other agency or

appointment (except such as he then held) without E.'s consent; and, in case the engagement with him should be put an end to or determined, should not continue to act as agent to O. E. afterwards gave P. three months' notice to leave his office, and thus put an end to his engagement. At the expiration of that time P. resigned his appointment as agent to O., but he subsequently resumed it, and he obtained the office of clerk to the magistrates, and other offices. On motion on behalf of E., the Court granted an injunction to restrain P. from acting as agent to O., as clerk to the magistrates, and from otherwise violating the stipulations of the bond. *Edmonds v. Pless*, 6 Jur., N. S., 1091.

1. A solicitor and his clerk executed a bond, conditioned that if the clerk should carry on the business of a solicitor within the prescribed distance, then, provided he paid 1,000*l.* as liquidated damages, the bond should be void. The clerk commenced business as a solicitor within the prohibited limit:—Held, that the solicitor was entitled to an injunction. *Howard v. Woodward*, 10 Jur., N. S., 1123; 34 L. J., Ch., 47; 13 W. R. 132; 11 L. T., N. S., 414; 5 N. R. 8.

2. A solicitor's clerk, employed at a yearly salary, and who was allowed at the same time to keep his name up at a separate house in the same town as his employer and to practise for himself, having had disputes with his employer, suddenly left him without notice, and set up entirely for himself at the house he had been in the habit of using as his office. A motion to restrain him from so practising was, under the circumstances, refused. *Shepherd v. Neve*, 22 W. R. 725.

3. The defendant bound himself to a London solicitor by articles for a term, and covenanted that he would not at the expiration of the term, or at any time thereafter, either solely, or jointly with, or as agent for, any other person or persons, directly or indirectly practise the business of an attorney or solicitor within the city of London, or the counties of Middlesex or Essex, nor directly or indirectly act as such attorney or solicitor for any client or clients of the plaintiff, or any partner or partners of the plaintiff, or for any person or persons who should have been a client or clients of the plaintiff, or any partner or partners of the plaintiff, at any time during the term. At the expiration of the term the defendant having commenced business on his own account in Southwark:—Held, that the restriction was not unreasonable, and that the defendant's acting for a petitioner in the London Court of Bankruptcy was a breach of the covenant. *May v. O'Neill*, 44 L. J., Ch., 660.

IV. OTHER CASES.

4. An articled clerk to an attorney and solicitor is not an apprentice within the meaning of the 49th section of the Bankrupt Act, 6 Geo. 4, c. 16. *Esq. Prideaux, Re Bush*, 3 Myl. & C. 327. Reversing 7 L. J., N. S., Ch., 202; 2 Jur. 366. *S. P. Esq. Russell, Re Bush*, 3 Mont. & A. 67; 2 Dea. 158; 6 L. J., N. S., Bky., 34.

5. It is the duty of an attorney to enrol the articles of his clerk, and where he had omitted

to do so the Court dismissed a claim to foreclose a mortgage given to secure the premium. *Dufaur v. Sigel*, 4 De G. M. & G. 20; 22 L. J., Ch., 678.

II. Admission and Qualification.

- I. *In General*, 6377.
- II. *Amending or Restoring Name to Rolls*, 6378.
- III. *Certificate and Renewal Thereof*, 6378.
- IV. *Recovery of Bill of Costs when Uncertificated*, 6378.
- V. *Practising in another Solicitor's Name*, 6379.
- VI. *Attorney acting as Solicitor in Court of Chancery*, 6379.
- VII. *Law Stationer acting as a Solicitor*, 6379.

I. IN GENERAL.

6. A party, under the special circumstances, admitted an attorney *nunc pro tunc*. *Esq. Tanner*, 3 Dea. & Ch. 10.

7. The admission of a solicitor, under peculiar circumstances, ordered to be inrolled *nunc pro tunc*. *Anon.*, 3 Dea. & Ch. 417.

8. An attorney, unable from bodily infirmity to attend to be sworn in, was allowed to be admitted in the Court of Review on an affidavit sworn before a Master in Chancery. *Esq. Swain*, 1 Dea. & Ch. 15.

9. An attorney may practise, though a bankrupt. *Esq. Brown*, 2 Ves. J. 68.

10. Notice of motion given by one not allowed to act as a solicitor, not good. *Esq. Grosvenor*, 3 P. W. 104.

11. Where a father, who never was duly qualified pursuant to the 53 Geo. 3, c. 127, after carrying on for some years the business of a proctor conjointly with his son, who was duly qualified, retired, and his son granted him an annuity, payable out of the capital or profits of the business, in consideration of his retiring, and giving up his share in the profits:—Held, that it was not illegal to grant the annuity in consideration of the father ceasing to do that which was illegal; and that the fact that the annuity was to be paid out of the profits of the business did not make the transaction illegal, within the 53 Geo. 3, c. 127, s. 8, but that the grant was voluntary, and that the consideration was not good against the son's creditors for value. *Edison v. Rothery*, 10 Jur., N. S., 943; 12 W. R. 1138; 11 L. T., N. S., 134.

12. A solicitor, duly admitted and inrolled in the Court of Chancery, may practise as a solicitor on the equity side of this court, and recover his costs as such solicitor, without being admitted and inrolled as a solicitor on the equity side of the court. *Att.-Gen. v. Malin*, Younge 567; 1 L. J., N. S., Exch. Eq., 184.

13. A commissioner in bankruptcy is not bound to hear a person who, although a duly admitted solicitor of the Court, does not appear as the solicitor of the party for whom he appears, but only as the clerk of such solicitor. *Esq. Re Broadhouse*, 2 L. R., Ch.,

655; 36 L. J., Bky., 29; 15 W. R. 126; 17 L. T., N. S., 126.

B. gave notice to dispute an adjudication which had been made against him, the notice being signed by D. and L., as his solicitors. When the validity of the adjudication came on for argument before the Commissioners, R., who was the managing clerk of D. and L., and who was himself a solicitor of the Court, appeared for the bankrupt. The commissioner, however, declined to hear him, and although the bankrupt, who was in court, said that he wished R. to be heard on his behalf, the commissioner confirmed the adjudication with costs against the bankrupt:—Held, that the commissioner was right in refusing to hear R., so long as he appeared in the character of clerk to D. and L.; but that the bankrupt ought to have been more fully informed of the position in which he stood, and to have had an opportunity of constituting R. his solicitor if he desired to do so. *Ib.*

II. AMENDING, OR RESTORING NAME TO, ROLLS.

1. Upon the application of a solicitor who had assumed the name of Chamberlain in addition to his own, the Court, being satisfied with the reasons, ordered an entry of the change of name to be made upon the roll of solicitors. *Exp. Matthews*, 1 W. R. 44; 22 L. J., Ch., 22; 17 Jur. 29; 16 Beav. 245.

2. A court of equity will neither admit a solicitor nor restore him to the rolls without his first having been admitted or restored to the rolls by a Court of common law; and this Court refused to make an order to issue a certificate to allow a solicitor to practise, where two applications, having a similar object, had been refused by a Court of common law, but the petition was ordered to stand over, and leave was given to apply. *Re Barber*, 23 L. J., Ch., 874; 19 Beav. 378; 2 W. R. 606.

Observation on the serious inconvenience arising from one Court interfering in a matter already determined by another Court of co-ordinate jurisdiction. *Ib.*

3. A solicitor who had been struck off the rolls for misconduct restored after a lapse of ten years, during which, amidst great privation and suffering, he had maintained an irreproachable character, the application being supported by a memorial signed by a very large number of solicitors, and not opposed by the Law Institution, though opposed by one individual solicitor only. *Anon.*, 17 Beav. 475.

III. CERTIFICATE AND RENEWAL THEREOF.

4. Solicitor who had become incapable of practising (without being re-admitted), in consequence of having neglected to obtain a certificate for one whole year, ordered to be re-admitted, on payment of a small fine only, without the arrears of duty. *Exp. Murray*, T. & R. 56.

5. Where a solicitor has neglected to take out his certificate for more than a year, admission *de novo* is in no case necessary (the words "null and void" as applied to his admission in

the 37 Geo. 3, c. 90, s. 31, being used in a qualified sense), and re-admission will restore him to a capacity to practise, unless he has been guilty of some fraud in procuring it. Whether re-admission is necessary in a case where an attorney or solicitor has not taken out his certificate, nor practised for more than a year after his admission, *quære*. *Exp. Chambers*, *Re Wilton*, 2 Keen 497; 9 L. J., N. S., Ch., 200; 2 Jur. 489.

6. Application to strike out an appearance entered by an attorney after the determination of his certificate for the current year, and before payment of the duty on his fresh certificate, but after it had been issued, refused with costs. *Sparling v. Brereton*, 2 L. R., Eq., 64; 12 Jur., N. S., 330; 35 L. J., Ch., 461; 14 L. T., N. S., 166; 14 W. R. 515.

A solicitor who has been duly admitted and inrolled, but who has neglected to take out his annual certificate in proper time, is nevertheless competent, while uncertificated, to bind a client ignorant of the want of the certificate, as between such client and third persons. *Ib.*

7. A solicitor who, by a slip, neglected to produce his certificate to the registrar within a month, as required by 23 & 24 Vict., c. 127, s. 21, relieved from the consequences, and it was ordered that the certificate should have effect from the time of stamping the same. *Re Smith*, 33 Beav. 248.

8. A solicitor, who had ceased to take out his certificate in 1853, with the intention of being called to the bar, which he had abandoned, was allowed to renew his certificate without undergoing an examination in 1863. *Re Senell*, 32 Beav. 475.

9. A solicitor who did not take out a certificate for eleven years on account of ill-health, but kept up his legal studies and pursuits, was allowed to renew his certificate without examination. *Re Elton*, 37 L. J., Ch., 482; 16 W. R. 323; 17 L. T., N. S., 487.

10. An application for liberty to renew certificate will not be heard after a similar one has been refused by another Court. *Re Barber*, 2 W. R. 606.

Solicitors are neither admitted nor restored to the roll in Chancery until they have been admitted or restored as attorneys in a common law court. The same rule applies to an application to renew a certificate. An application by an attorney to renew his certificate having been twice refused by the Queen's Bench, the Court refused to entertain a similar application, though supported by additional evidence since discovered. Observation on the serious inconvenience arising from one Court interfering in a matter already determined by another Court of co-ordinate jurisdiction. *S. C.* 19 Beav. 378; 23 L. J., Ch., 874.

IV. RECOVERY OF BILL OF COSTS WHEN UNCERTIFICATED.

11. *Semble*, a solicitor on taking out his certificate, according to 37 Geo. 3, c. 90, will be entitled to his costs for business done previously in the same year. *Burcott v. Parsons*, 3 L. J., N. S., Ch., 24.

12. Where an attorney omitted to take out his certificate for more than a year after admission:—Held, that admission *de novo* was not

necessary, but that having been re-admitted without fraud, he was restored to a capacity of acting; but the objection to an order for taxation of his bill on the ground of his being incapable of acting, is a ground of application by petition and not by motion. *Exp. Chambers, Re Wilton*, 2 Keen 497; 9 L. J., N. S., Ch., 200; 2 Jur. 489.

1. The 6 & 7 Vict., c. 73, The Attorneys and Solicitors Act, s. 26, does not extinguish the debt of a solicitor or an attorney for costs in respect of business done while uncertificated, but only his remedy. *Re Jones*, 9 L. R., Eq., 63; 39 L. J., Ch., 83; 18 W. R. 159; 21 L. T., N. S., 482.

Therefore, where a client had taken out an order of course for taxation of his solicitor's bill, with the usual submission to pay what should be found due, and the Master had disallowed certain items for business done while his certificate had not been renewed:—Held, that he was entitled to be allowed the items in question. *Id.*

2. A person who has been ordered to pay costs cannot, on the ground that the solicitor on the other side was uncertificated, refuse to pay the costs. *Re Hope*, 7 L. R., Ch., 766; 20 W. R. 1026; 47 L. J., Ch., 797.

The 6 & 7 Vict., c. 73, s. 26, merely prevents an attorney or a solicitor from maintaining any action or suit for the recovery of his costs in respect of business done by him while uncertificated; but when a client has paid his solicitor his costs of business done while uncertificated, and the client's adversary is ordered to pay his taxed costs, the client is entitled to have the costs so paid to his solicitor included in the taxation. S. C. 27 L. T., N. S., 670.

V. PRACTISING IN ANOTHER SOLICITOR'S NAME.

3. A solicitor may practise in the name of an attorney as his agent in the courts of law, but an attorney at law cannot practise in the name of a solicitor, as his agent in the courts of equity. *Hockley v. Bantock*, 2 Myl. & K. 437; 3 L. J., N. S., Ch., 93.

4. A B., a solicitor, agreed to act for C. D., another solicitor, in his personal business on the terms of principal and agent. C. D. neglected to take out his certificate during part of the time:—Held, that the agreement was not invalid, and an order of course to tax was sustained. *Exp. Foley, Re Smith*, 11 Beav. 456.

5. A solicitor of the Court of Great Sessions in Wales, cannot practise in the name of a solicitor of the Court of Chancery. *Turner v. Ford*, 1 Myl. & C. 1; 5 L. J., N. S., Ch., 34.

See also X. II. post.

VI. ATTORNEY ACTING AS SOLICITOR IN COURT OF CHANCERY.

6. No person but a solicitor can be entitled to costs for practising in Chancery, and if a solicitor allows an attorney to practise in his name, neither party can recover costs. *Semble, French v. Morgan*, 1 Hog. 230.

7. An attorney who practises in the name of

a solicitor without having previously obtained his permission to do so, cannot recover any costs from his clients. *Lawrence v. Sharp*, 1 Hog. 84.

8. After the plaintiff's costs had been taxed and paid, it was discovered that their agent in the cause had never been admitted as a solicitor, and an order was thereupon made that the Master should review his taxation and disallow all such items as did not consist of fees paid to the clerk in court, with a view to having them refunded. *Coates v. Hankyard*, 1 Russ. & M. 746.

9. Under an award in a cause, which award was afterwards made an order of court, the costs of certain parties were directed to be taxed and paid to them out of the fund; a part of these costs was incurred in proceedings upon a case sent to law; when the bills were carried in for taxation it was discovered that the person who had acted as their solicitor throughout the suit, and who had already been paid in full, was not a solicitor, but an attorney only; the Master thereupon disallowed all the items in the bills, except disbursements to the clerk in court, and his taxation was confirmed on appeal. *Prebble v. Boghurst*, 1 Russ. & M. 744; 2 Sim. 247.

10. It appearing upon a reference to tax an agent's bill of costs in a chancery suit, that he never had been a solicitor of the court, the Master was directed to disallow all the items except those for disbursements made to his clerk in court. *Sumner v. Ridgway*, 1 Russ. & M. 748.

VII. LAW STATIONER ACTING AS A SOLICITOR.

11. Law stationers, not qualified as solicitors or proctors, were accustomed upon the instruction and in the names of London or country solicitors to take the registry of the Probate Division original wills and the engrossments thereof, with the proper affidavits, and if these were in order, to fetch away the probate: if any question arose as to the sufficiency of the documents the stationers communicated it to the solicitors. All the charges between solicitor and client were made by the solicitors, and the stationers charged the solicitors for their clerks' time only:—Held, affirming the decision of the Court of Appeal, that the stationers had not acted as solicitors or proctors, and were not liable to the penalties imposed by 23 & 24 Vict., c. 27, s. 26. *Law Society v. Waterson, Law Society v. Skinner*, 8 L. R., App. Cas., 407; 52 L. J., Q. B., 674; 49 L. T. 141; 31 W. R. 754. Affirming, 9 L. R., Q. B. D., 1; 51 L. J., Q. B., 249; 46 L. T. 187; 30 W. R. 820.

III. Relations between Town Agents and Country Solicitors.

- I. In General, 6380.
- II. Change of, 6380.
- III. Lien of, 6380.
- IV. Account, 6381.

I. IN GENERAL.

1. A country solicitor who is authorised to institute a suit, is justified in employing a London agent for that purpose, in whose name, as agent, the bill may be filed. *Solley v. Wood*, 16 Beav. 370.

2. If a bill is ordered to be taken off the file, on the ground that the plaintiffs assume to sue in a corporate character, to which they are not entitled, the costs will be ordered to be paid by the town agent of the plaintiffs, and not by their solicitor in the country. *Ruthin (Burgesses of) v. Adams*, 7 Sim. 345; 4 L. J., N. S., Ch., 167.

3. Where an affidavit is reported to be scandalous, the agent in London who filed the affidavit is responsible for the costs as between attorney and client, notwithstanding the country attorney may have himself drawn the affidavit. *Epp. Wake*, 3 Dea. & Ch. 246; Mont. & Bli. 259; 2 L. J., N. S., Bky., 38.

4. A country client employs an attorney or solicitor in the country in a cause in Chancery; the solicitor employs a clerk in Chancery; the client in the country pays his solicitor, but the clerk in Chancery is unpaid. The client is not bound to pay the clerk in Chancery; but if the latter has any papers in his hands, he may retain them. *Farewell v. Coker*, 2 P. W. 460.

5. A solicitor assigns his claim for costs to W., and becomes bankrupt, and W. gives notice to the London agents of the solicitor of their claim, and the assignees in bankruptcy petition for payment to them, subject to the London agents' claim:—Held, that the notice to the London agents, as far as costs became payable to them, took those costs out of the order and disposition of the bankrupt, the costs being ordered out of the fund in court. Petition refused. *Sharples v. Marsh*, 2 W. R. 400.

6. At the request of the client of a country solicitor, R. paid to the solicitor a sum of money in part discharge of costs due to the solicitor in respect of administration suits to which the client was defendant, and the repayment was secured by a mortgage of the solicitor's lien. Afterwards the costs were ordered to be taxed, and paid out of a fund in court to the town agents of the solicitor:—Held, that the costs so ordered to be paid to the agent must be paid to R. in satisfaction of his claim under the mortgage. *Cockayne v. Harrison*, 15 L. R., Eq., 298; 42 L. J., Ch., 660; 21 W. R. 520.

7. A country solicitor personally attending an appeal instead of employing his London agent, will be allowed the additional charges and expenses thereby occasioned. *Re. Foster*, *Epp. Dickens*, 8 L. R., Ch. D., 598; 26 W. R. 915.

8. Co-plaintiffs may employ separate solicitors acting by a common agent. *Waldon v. Thompson*, 37 L. J., Ch., 751; 6 L. R., Eq., 7.

II. CHANGE OF.

9. A solicitor in the country employed an agent in London to conduct a suit under a special contract. He afterwards obtained an order of course to remove the agent without

mentioning the special contract. The order was discharged for irregularity on the motion of the agent. *Richards v. Scarborough Market Co.*, 1 W. R. 250; 17 Jur. 294; 17 Beav. 83; 22 L. J., Ch., 759.

III. LIEN OF.

I. In General, 6380.

II. On Fund in Court or Property Recovered, 6381.

1. In General.

10. A country client employs an attorney or solicitor in the country in a cause in Chancery; the solicitor employs a clerk in Chancery, the client in the country pays his solicitor, but the clerk in Chancery is unpaid. The client is not bound to pay the clerk in Chancery, but if the latter has any papers in his hands he may retain them. *Farewell v. Coker*, 2 P. W. 460.

11. A clerk in court who lends money to the solicitor is not entitled thereby to detain a client's papers as a pledge. *Gray v. Cookeril*, 2 Atk. 114.

Where a clerk in court had obtained an order for taxing the costs of the solicitor who employed him, and afterwards another order for payment of the costs of taxation, he was allowed to detain the papers of the solicitor's client till the costs reported due under the first order were paid, but not for the costs of taxation. *S. O. Barnard*. 264.

12. Lien of the agent in town upon the papers in his hands, for what was due to him, as agent in the cause, from the solicitor in the country. *Ward v. Hepple*, 15 Ves. 297.

13. Where town agents of country solicitor (since a bankrupt) had received papers from him belonging to his client, for purposes of his client's business, they have a lien against the client for amount of money due from him to solicitor, and from solicitor to them, on account of business done in that cause. And where client had, after the solicitor's bankruptcy, paid the agent his bill to obtain such papers, although an action had been previously commenced against him by assignees for recovery of it, the Court granted and continued an injunction against the action on the ground of agent's lien. *Bray v. Hine*, 6 Price 203.

14. A London agent of a country solicitor, acting in the ordinary course of business, is always taken to give credit to the country solicitor, not to the country solicitor's client. *Waller v. Holmes*, 1 John. & H. 239; 6 Jur., N. S., 1367; 30 L. J., Ch., 24; 9 W. R. 32; 3 L. T., N. S., 289.

Therefore the London agent of a country solicitor has no lien for costs on the documents of the country solicitor's client where, though the country solicitor has not paid his London agent, the client has paid the country solicitor's bill. *Id.*

Where a client has paid the bill of his country solicitor before receiving notice of anything remaining due from the solicitor of the London agent, the latter has no lien on documents which have come into his hands in the course of the suit. *Id.*

It makes no difference whether the bill has

been paid in cash or by set-off in account, if at the time of the lien claimed nothing remains due to the country solicitors. *Id.*

1. A client paid her country solicitor his bill of costs before receiving any notice that the town agent of the solicitor claimed a lien upon the documents in his possession for a balance alleged to be due to him from the country solicitor on accounts stated between them:—Held, that the town agent's lien did not attach, and that he must deliver up all the documents in his possession. *Vyse v. Foster*, 32 L. T., N. S., 219. Affirmed 23 W. R. 413.

2. A London solicitor acting as agent for a country solicitor has a general lien against the country solicitor upon any money recovered in an action, for all costs for agency business and disbursements due from the country solicitor, whether in the particular action or in any other proceedings; but as between the town agent and the client, the lien of the former extends only to the costs of the particular action in which he is engaged. *Lawrence v. Fletcher*, 12 L. R., Ch. D., 858; 27 W. R. 937.

3. A decree was made in the usual form, ordering the payment of costs to the London agents of E. E.'s client had satisfied all claims of E. against him, and now prayed that the costs might be paid to him:—Held, that the order for payment to the London agents gave them no rights of lien or of set-off in respect of the costs, or in any way altered the rights of the principals. *Peatfield v. Barlow*, 17 W. R. 516; 38 L. J., Ch., 310; 20 L. T., N. S., 217; 8 L. R., Eq., 61.

2. On Fund in Court or Property Recovered.

4. Under s. 28 of the 23 & 24 Vict., c. 127, the town agent held entitled to a charge on all property recovered in three suits for an unascertained balance due to him by the country solicitor. *Tardrew v. Howell*, 3 Giff. 381; 31 L. J., Ch., 57.

L. was, as town agent, employed by a country solicitor in certain suits, in one of which the country solicitor was himself the plaintiff. An unascertained balance for costs, which were the subject of taxation by a Master of the Court of Common Pleas, was due to L., who had ceased to act as such town agent. The Court was of opinion that the 23 & 24 Vict., c. 127, applied, and made a declaration that L. was, as town agent, entitled to a charge for what should remain due to him from such country solicitor, in respect of the costs in the suits in which he was employed, upon all sums of money and other property recovered or preserved in the suits, so far as such sums were chargeable to the country solicitor for his costs in respect of any order, either made or to be made, in the suits. S. C. *nom. Tardrew v. Howell, Parry v. Howell*, 7 Jur., N. S., 1120; 10 W. R. 32; 5 L. T., N. S., 276.

5. When an order of court in the usual form directed payment of costs out of a fund in court to the London agent, it was nevertheless held that the client of the country solicitor might set off a debt due from such solicitor to himself, the client, against the costs. *Peatfield*

v. Barlow, 38 L. J., Ch., 310; 20 L. T., N. S., 217; 8 L. R., Eq., 61; 17 W. R. 516.

Such an order creates no independent right or lien upon the fund in favour of the town agent as against the principal. *Id.*

IV. ACCOUNT.

6. A bill was filed by a country solicitor against his town agents for an account of cash transactions between them:—Held, that as the account might have been obtained under the common order for taxation, the bill must be dismissed. *Harvey v. Mayhem*, 2 W. R. 128.

7. A bill in equity alleged a particular contract as to agency, but charged that the defendant pretended that the contract was one of partnership, and that upon either construction he was liable to account, and prayed for discovery of all matters of business relating to the agency; that he might deliver his bills of costs for taxation, and for an account. Demurrer overruled. *Ward v. Lamson*, 21 W. R. 88; 8 L. R., Ch., 65; 42 L. J., Ch., 273.

When there is an agreement as to costs, which only goes to the extent of the charges to be paid, the Master may take that into consideration, and a bill in equity is not the proper remedy; but where the agreement goes farther, and there is, on the face of the bill, a dispute as to whether the agreement was one of agency or of partnership, a bill will be sustained. *Id.*

8. A solicitor agreed to undertake the defence of another solicitor upon agency charges. On special petition, a taxation of his bill was ordered "having regard to the agreement." *Re Gedge*, 23 Beav. 347.

A solicitor agreed to conduct the defence of another solicitor upon agency terms, in case of the defence being unsuccessful. On entering into the agreement, the latter suppressed from the former the existence of a material correspondence, which was the principal ground of a decree being made against him. But the solicitor, after the discovery, still continued the defence without objection:—Held, that he was not released from the contract. *Id.*

9. Notwithstanding the definition of the word "client" in s. 3 of the Attorneys and Solicitors Act 1870, that Act does not apply to accounts between country solicitors and town agents. *Ward v. Eyre*, 15 L. R., Ch. D., 130; 49 L. J., Ch., 657; 43 L. T. 525; 28 W. R. 712.

IV. Retainer and Authority.

I. *What is and Proof of*, 6382.

II. *Retainer by Particular Persons*, 6383.

III. *Joint or Several*, 6383.

IV. *Authority to Institute or Conduct Legal Proceedings*, 6384.

V. *Personal Liability when acting for Client*, 6389.

VI. *Retainer. Other Cases*, 6389.

VII. *Authority. Other Cases*, 6389.

VIII. *Inquiry respecting by Taxing Master*. See XVI. XVII. 4 post.

I. WHAT IS AND PROOF OF.

1. As to what constitutes a relationship of attorney and client. *Goddard v. Carlisle*, 9 Price 169.

2. The retainer of a solicitor need not be in writing, but if he neglects taking that precaution, and his retainer being afterwards questioned there is nothing but assertion against assertion, he must bear the costs of the risk he thus undertakes. *Wiggins v. Peppin*, 2 Beav. 403.

3. Although an authority may be given to file a bill by parol, yet the solicitor must abide by the consequence if he omit to take a written authority; and where there was assertion against assertion, an order was made to take the bill off the file, and that the solicitor should pay the costs. *Martindale v. Lamson*, C. P. C. 83.

4. A. and B. sue out a commission as solicitors to the petitioning creditor, and the assignees afterwards appoint C. to act as solicitor, but it is agreed between him and A. and B., with the privity of the assignees, that all three shall jointly act as solicitors and share the profits, and the assignees afterwards recognise the acting of A. and B. as such joint solicitors:—Held, first, that this amounted to a retainer by the assignees of A. and B. as joint solicitors with C.; secondly, that the Court of Review had jurisdiction on the petition of A. and B. (C. having been served with it) to enforce the payment by the assignees of the solicitor's bills of costs; thirdly, that the assignees were liable for the payment of such costs whether they had funds in their hands or not. *Exp. Hammond, Re Wooding*, 3 Dea. & Ch. 626; 1 Mont. & A. 328; 3 L. J., N. S., Bky., 62.

5. If a solicitor has used the name of a party as plaintiff in a suit with his knowledge, but without his authority, and such party allows the suit to proceed without taking steps to have his name removed from the record, this will not be an adoption of the solicitor, nor equivalent to a retainer of him by the party. *Hall v. Laver*, 1 Hare 571; 4 Y. & Coll. 218; 5 Jur. 241.

A party to a cause, for whose benefit, in common with others, the cause has been prosecuted, cannot avail himself of the benefit resulting from the suit discharged of the expenses of it, although he may have been made a party without his authority. *Ib.*

A solicitor who used the names of the parties as plaintiffs in a suit without their consent, was held to have no lien for his general bill of costs on the fund in court. S. C. 4 Y. & Coll. 216.

6. The solicitor of a lessor who has prepared a draft lease cannot recover for his services from the intended lessee, unless there is a privity of contract between them. *Re Ipstone Park Colliery Co., Brough's claim*, 18 W. R. 285.

It is not sufficient for the lessee to have instructed his own solicitor, and that solicitor to have handed over the work to the lessor's solicitor. *Ib.*

7. A solicitor had a retainer to act generally for a company, and also a special retainer to conduct a chancery suit on behalf of the company. Being employed by another client

to go to America, he collected information on behalf of the company in furtherance of their suit, but without special instructions from the company to do so. On his return to England, he reported to the company what he had done, and they made use of the information he had obtained. He afterwards took three journeys to Paris to conduct negotiations for a compromise of the same suit, without instructions from the company, but with the knowledge of some of the directors, and on two of them he was accompanied by the chairman:—Held, that, under the special circumstances of the case, the solicitor was entitled to charge the company for his professional services in America, and also for his professional services and expenses on his journeys to Paris. *Re Snell*, 5 L. R., Ch. D., 815; 36 L. T. 534; 25 W. R. 736. Reversing 25 W. R. 40.

8. A letter written by a deceased solicitor, proposing to act as the solicitor of a particular individual, is not receivable in evidence, as having been written by the authority of that individual, on proof merely that there was such a solicitor in practice at the time, that the letter was in his handwriting, and that it came from the custody of the person to whom it purported to be addressed; and, in order to render the letter receivable, it must be proved *alimunde* that the writer had been duly authorised by the individual for whom he professed to act as solicitor. *Bright v. Legerton*, 2 De G. F. & J. 606.

Proof of. 9. Issue directed under the circumstances to try whether solicitor authorised to use relator's name, although such relator afterwards acknowledged the authority. *Att. Gen. v. Skinners' Co.*, C. P. C. 1.

10. Two counsel appearing for the same party by different attorneys, petition to stand over, to verify retainer of the attorney by affidavit. *Buttsworth v. Clapham*, cited 1 Jac. & Walk. 673. n.

Where a solicitor writes a letter, purporting to be on behalf of a client, it is *prima facie* evidence of authority from the client, and is receivable in evidence against him. S. C. 6 Jur., N. S., 1179; 29 L. J., Ch., 852; 29 Beav. 60. Affirmed 7 Jur., N. S., 559; 30 L. J., Ch., 338.

A letter by a solicitor since deceased, making an offer on behalf of a *cestui que trust*, will, in a suit by the *cestui que trust* twenty years after against the trustee, be admitted as evidence, though the *cestui que trust* denied that the solicitor was employed by him, or that he acted on his behalf, but the value of such evidence is for the consideration of a jury or the Court which has the province of a jury. *Ib.*

A bill of costs sent to trustees by a solicitor who acted for them will be admitted in a suit by a *cestui que trust* against trustees for an account as evidence of attendance on the *cestui que trust*, and of his having knowledge of the business transacted. *Ib.*

A cash account of a deceased solicitor of trustees is admissible in evidence, in a suit instituted by the *cestui que trust*, twenty years afterwards, to charge his trustees. *Ib.*

See also IV. i. *infra*.

II. RETAINER BY PARTICULAR PERSONS.

1. *Infant*, 6383.
2. *Lunatic or Incapacitated Person*, 6383.
3. *Married Woman*, 6383.

1. Infant.

1. Infant is bound by conduct of his solicitor in a cause. *Tillotson v. Hargrave*, 3 Madd. 495.

2. A continued employment of an attorney by an infant client, after the latter comes of age, may amount to an undertaking to pay a prior bill of costs. *Guy v. Burgess*, 1 Smith 117.

3. A suit was instituted in the name of two infants by their next friend. One came of age, and some time afterwards the next friend obtained an order for changing the solicitors of the plaintiffs. It was discharged with costs. *Brown v. Brown*, 11 Beav. 562.

2. Lunatic or Incapacitated Person.

4. A solicitor employed on part of a lunatic can have no action against him for his bill of costs. *Barnesley v. Powell*, Amb. 102.

5. A solicitor, who had been retained to conduct proceedings under a commission of lunacy, and acted on behalf of the committees, was held entitled to stand as a simple contract creditor against the estate after the death of the lunatic, in respect to his costs, although more than six years had elapsed from the order of the Chancellor directing taxation of the costs incurred in reference to the commission, the statute having no operation till after the death of the lunatic. *Stedman v. Hart*, 2 W. R. 462; 1 Kay 607.

6. A solicitor who has been instructed by a defendant to defend a suit for him can properly continue to do so, although the defendant, through an attack of paralysis, has become incapable of attending to matters of business. *Steel v. Cobb*, 1 N. R. 302; 11 W. R. 298.

3. Married Woman.

7. A married woman, having separate property, and living apart from her husband, employed the plaintiffs as her solicitors, and promised them, by letter, that she would pay their bills, but did not refer to her separate property:—Held, that that property was liable to pay the bills. *Murray v. Barlee*, 4 Sim. 82, 95; 9 L. J., Ch., 87. Affirmed 3 Myl. & K. 209; 3 L. J., N. S., Ch., 184. And see 7 Sim. 194.

8. A retainer by a married woman to a solicitor to act in respect to one portion of her separate estate, operates as a charge upon all property settled to her separate use, and is not confined to the particular property upon which the solicitor is called upon to act. In such a case the solicitor does not lose his lien from the circumstance of the property ceasing to be separate estate of the wife by the death of the husband. *Bolden v. Nicholas*, 3 Jur., N. S., 884.

Lands belonging to a lady were, upon her

marriage, conveyed to such uses as she should by deed or will, notwithstanding coverture, appoint; and subject thereto, to the separate use of herself during the joint lives of herself and husband; remainder to the use of herself for life; remainder over. She employed a solicitor, during her husband's life, first to mortgage the lands, and then to sell the equity of redemption. The sale was not completed during his life, although the mortgage was:—Held, that the solicitor was entitled to be paid his costs out of the purchase money (which, according to the contract, was to come to her separate use), when the same was paid after her husband's decease, although she could then have no separate estate. *Id.*

9. A solicitor who had been employed by a married woman to conduct a suit for judicial separation, which suit ended in a compromise, claimed to prove as a creditor against the estate of the husband for his costs, as necessities supplied to the wife. The Court being of opinion that there was no reasonable ground for the suit, and that the solicitor, though he believed that there was, might, by making proper inquiries, have ascertained that there was not:—Held, that in these circumstances the claim could not be sustained. *Re Hooper, Baylis v. Watkins*, 2 De G. J. & S. 91; 10 Jur., N. S., 114; 33 L. J., Ch., 300.

[*Liability of Separate Estate for Costs.*] See HUSBAND AND WIFE, XI. XI. 6.

III. JOINT OR SEVERAL.

10. Circumstances under which the solicitor of an annuitant, selling under a power of sale, was considered also the solicitor of the grantor of the annuity. *Re Bloye's Trusts*, 1 Macn. & G. 488; 2 H. & Tw. 140; 19 L. J., N. S., Ch., 89; 14 Jur. 49.

11. A solicitor, on the sole retainer of the debtor, prepared a creditors' deed, the first trust of which was to pay the costs of its preparation. The trustees acted, and employed the same solicitor in the trust. The solicitor is entitled to charge the costs of preparing the deed, though retained by the trustees for that purpose. *Re Sadd*, 34 Beav. 650.

12. The solicitor appointed by the creditor's assignee in bankruptcy is the solicitor of all the assignees in the bankruptcy, but he is not by such appointment constituted the agent of the official assignee. *Hughes v. Morris*, 9 Hare 636.

13. The solicitor of a lessor who has prepared a draft lease cannot recover for his services from the intended lessee, unless there is a privity of contract between them. *Re Ipton's Park Colliery Co., Brough's claim*, 18 W. R. 285.

It is not sufficient for the lessee to have instructed his own solicitor, and that solicitor to have handed over the work to the lessor's solicitor. *Id.*

14. Where, by the constitution of the committee, the acts of the majority of the managing committee of a railway company bound the whole:—Held, that a solicitor, employed by the committee in a suit, instituted against the committee by some of the shareholders for misconduct, was authorised to enter an ap-

pearance for any one of the members of the committee. *Goodman v. De Beauvoir*, 4 Rail. Ca. 380; 12 Jur. 989. Affirmed 12 Jur. 1037.

1. Three petitioners retained the same solicitor in an application to wind up a company. The order was made, and subsequently two of the petitioners severed, and obtained an order of course at the Rolls to change their solicitor:—Held, that the two had no right to act separately, and the order to change solicitors must be discharged. *Re Norwich & Norfolk Provident Permanent Building Society*, 22 W. R. 854.

2. Two executors in a suit gave a joint retainer to a firm of solicitors. In the course of the proceedings it was certified by the chief clerk that one executor, who had since died insolvent, was indebted to the testator's estate:—Held, that the surviving executor was entitled to be paid out of the estate all the costs for which he was liable, and that the costs incurred for the deceased executor in taking the account of his debt must be set off against the sum found due from him. *Watson v. Row*, 18 L. R., Eq., 680; 43 L. J., Ch., 664; 22 W. R. 793.

3. To determine the liability for costs of co-plaintiffs in a suit the Court will look into the transaction to see whether the contract, though joint in form, was intended by the parties to be joint and several, and such intention may be presumed from the circumstances. *Furlong v. Scanlan*, 9 Ir. R., Eq., 202.

Therefore where C. was employed to conduct a partition suit on the joint retainer of M. and S., co-plaintiffs with equal rights as tenants in common, there being no special contract, and it appeared that the benefit of the partition would enure to each of them severally:—Held, that the liability for costs was several as well as joint, and that C. might prove against M.'s assets for the amount. *Id.*

4. In a suit by a shareholder against the directors, secretary, and the company to restrain an action for calls, to be relieved of his shares on the ground of misrepresentation in the prospectus, and to be indemnified by the directors, the defendants, having all appeared by A., the same solicitor, put in a joint and several answer, signed by one counsel, and joined in their defence, signed three separate retainers to A., all in the following terms:—"You having up to the present time conducted the defence of this suit on behalf of all the defendants, and in pursuance of their instructions in that behalf, we the undersigned do hereby confirm such instructions, and request you to continue such defence, and to take such steps as you may consider necessary in the matter":—Held (affirming the Taxing Master's decision), that the retainers were separate and not joint, and that the assets of the company (in liquidation) were liable for one-ninth only of the costs. *Re Allen, Davies v. Chatwood*, 11 L. R., Ch. D., 244; 48 L. J., Ch., 358; 27 W. R. 485; 40 L. T. 358.

Taxation.] 5. It is the settled practice in the office of the Taxing Master in Chancery, where in a suit two or more parties have

employed the same solicitor in taxing his bill of costs, to allow against each of his clients only such client's proportion of the general costs of the suit, notwithstanding that each client may be liable at law for all the costs upon the joint retainer. *Re Colquhoun*, 17 Jur. 409; 22 L. J., Ch., 484. Affirmed 2 Eq. Rep. 304; 1 W. R. 195.

6. A solicitor was separately retained by more than one defendant to a suit, and upon the application of one of such defendants his bill of costs was ordered to be taxed; the taxing officer allowed, as against the defendant on whose application the taxation was ordered, only a proportionate part of the charges of proceedings which were common to all those defendants, although those charges were not increased by the proceedings having been taken on behalf of all such defendants:—Upon appeal, first, to one of the Vice-Chancellors, and, secondly, to this Court, the certificate of the Taxing Master was affirmed; but as the second appeal was made at the suggestion of the Vice-Chancellor, it was dismissed without costs. *Exp. Ford*, 23 L. J., Ch., 515.

See also VI. II. *post*.

IV. AUTHORITY TO INSTITUTE OR CONDUCT LEGAL PROCEEDINGS.

1. *Sufficiency of Retainer*, 6384.
2. *Liability of Solicitor for Costs*, 6385.
3. *Compromise of Actions*, 6387.
4. *Other Cases*, 6388.

1. Sufficiency of Retainer.

7. A solicitor may, in the exercise of the general authority given him by his client, defend a suit, but cannot institute one without a special authority for the purpose. *Wright v. Castle*, 3 Meriv. 12.

8. A solicitor ought to have a special authority from his client for instituting a suit, but such authority need not be in writing. *Lord v. Kellett*, 2 Myl. & K. 1.

9. It is not sufficient for a solicitor, before he commences a suit against executors, to obtain an authority from his client to take proceedings to get an account; there must be, in substance, a clear authority to institute a suit. *Atkinson v. Abbott*, 3 Drew. 251.

10. A solicitor seeking to charge a person with the costs of legal proceedings conducted in the name of another, must support his claim by the clearest and most unequivocal evidence. *Re Clark*, 13 Beav. 173. Affirmed 1 De G. M. & G. 43; 15 Jur. 1047; 21 L. J., Ch., 20.

11. A solicitor received authority in 1831 to file a bill in an administration suit on behalf of a woman then unmarried. In 1836 he informed her that she and her husband would be co-plaintiffs to a bill in the same suit. In 1849 he wrote to her as a widow, for information, to which she replied, hoping that there might be immediate distribution. The solicitor afterwards filed bills of supplement and revivor in the suit, making her a co-plaintiff:—Held, that he had sufficient authority. *Bewley v. Seymour*, 14 Jur. 213.

1. Where parties moved to have their names struck out of the record on the ground that they had been used by the solicitor without their authority, and the solicitor could not produce any written authority from them, the Court refused the motion, the facts and documents showing that the parties had been aware of the use of their names, and had allowed a long space of time to elapse without taking any steps. *McNally v. Know*, 5 L. T., N. S., 186.

2. Liability of Solicitor for Costs.

2. Order to dismiss a bill, with costs to be paid by the plaintiffs' solicitor, the bill having been filed without special authority from the plaintiff. *Wright v. Castle*, 3 Meriv. 12.

3. Where a solicitor had taken no written authority to file a bill, and the parol one, which he asserted, was denied by the plaintiff, the bill was taken off the file, and the plaintiff ordered to pay the costs of the defendant in the first instance, and the solicitor to pay the costs both of plaintiff and defendant. *Martindale v. Lawson*, C. P. C. 83.

4. An attorney who makes a person even a formal plaintiff without his express consent, is himself liable for the costs incurred by such plaintiff. *Peed v. Cussen*, Hayes 66.

5. A bill being filed without the written authority of one of several co-plaintiffs, and the evidence being unsatisfactory as to the retainer; his name was struck out as co-plaintiff, with costs to be paid by the solicitor. *Pissner v. Knights*, 6 Beav. 174.

Where a solicitor files a bill without a written authority, the onus of proof is cast on him. If there be any doubt on the matter, the Court will hold him liable. *Id.*

6. A solicitor, after the revocation of his authority, cannot take any further steps, and, if he does, will be answerable for the costs of them, as well as for the costs of any motion to restrain him from proceeding. *Freeman v. Fairlie*, 8 L. J., N. S., Ch., 44.

7. A solicitor, taking a proceeding in a suit in the name of a person, without his authority, is personally liable to pay the costs, charges, and expenses occasioned to the other parties thereby; and such a proceeding having taken place in the Master's office, the Court, on the petition of the parties injured, ordered the costs, etc., to be taxed and paid by the solicitor. *Malins v. Greenway*, 10 Beav. 564; 17 L. J., N. S., Ch., 26, 331; 12 Jur. 66, 319.

8. If a solicitor gives a relator an indemnity for costs, or uses his name without authority (though afterwards assented to), the Court will order the information to be taken off the file with costs, to be paid by the relator and attorney. *Att.-Gen. v. Skinners' Co.*, C. P. C. 7.

9. Bill filed by solicitor from instructions of brother-in-law of plaintiff, solicitor having never received any communication from plaintiff himself, dismissed, and solicitor ordered to pay costs, plaintiff having absconded before bill was filed. *Hall v. Bennett*, 2 Sim. & S. 78. See also *Betagh v. Burke*, 2 Moll. 384. *Wade v. Stanley*, 1 Jac. & Walk. 674. *Eap. Struckey*, 2 Cox 283; *Dundas v. Dutens*, *id.* 236.

10. The retainer of a solicitor need not be in writing; but if he neglects taking that pre-

caution, and, his retainer being afterwards questioned, there is nothing but assertion against assertion, he must bear the costs of the risk he thus undertakes. *Wiggins v. Peppin*, 2 Beav. 403; 3 Jur. 721.

11. A suit instituted by a solicitor without authority dismissed on motion with costs of the suit, and of the motion as between solicitor and client. *Allen v. Bone*, 4 Beav. 493.

12. Where a solicitor carries on suits, and was employed by the assignees, without the authority of the majority in value of the creditors, the estate of the bankrupt is not liable to his bill for such suits. *Eap. Whitchurch*, 1 Atk. 210.

13. If a bill is ordered to be taken off the file, on the ground that the plaintiffs assume to sue in a corporate character, to which they are not entitled, the costs will be ordered to be paid by the town agent of the plaintiffs, and not by their solicitor in the country. *Ruthin (Burgesses of) v. Adams*, 7 Sim. 345; 4 L. J., N. S., Ch., 167.

14. A solicitor who used the names of the parties as plaintiffs in a suit without their consent, was held to have no lien for his general bill of costs on the fund in court. *Hall v. Laver*, 4 Y. & Coll. 216; 1 Hare 571; 5 Jur. 241.

15. Cause at issue, one of the plaintiffs applies to have name struck out of bill, on ground that he knew not of its insertion. Defendant objected, he being only plaintiff of ability to pay costs. Objection good, and application refused; but solicitor who inserted plaintiff's name ordered to indemnify him. *Titterton v. Osborne*, Dick. 350.

16. One of several co-plaintiffs concurred in the prosecution of the suit up to a particular period, and then instructed the solicitor of the plaintiffs not to take any further proceedings in the cause. On proceedings being, nevertheless, taken, the dissentient co-plaintiff moved that the solicitor for the plaintiffs might be ordered to indemnify him in respect of subsequent costs of the suit. The motion was refused, with costs. *Winthrop v. Murray*, 7 Hare 150; 18 L. J., N. S., Ch., 484; 13 Jur. 955.

17. The mother of an infant employed a solicitor to prosecute a suit on behalf of the infant. The person first named as next friend in the cause died; the mother subsequently discharged the solicitor; and after such discharge, he amended the bill and named a new next friend without the mother's sanction. The Court ordered that, on payment by the mother to the next friend of the costs incurred by him in the suit, the next friend should be removed and another appointed, and that the solicitor should pay the costs of the application and of the new appointment. *Lander v. Ingersoll*, 4 Hare 596.

18. A bill was filed by a married woman concerning her separate property, in the name of a next friend, who had died two days before the bill was filed. About fifteen months afterwards her solicitor substituted B. as her next friend, without his knowledge. A year later the bill was dismissed for want of prosecution, with costs. Notice of this motion to dismiss the bill was served on the plaintiff's agent, and by him sent by post to B., but not in time to enable him to appear on the motion. This

was the first intimation that B. received of the existence of the suit. The solicitor of the married woman had become insolvent, and had absconded to America. B. moved, without serving the solicitor, personally, or by substitution, with notice of the motion, to vary the order dismissing the bill with costs, by ordering that the solicitor should pay the costs. This motion was refused, with costs. *Bligh v. Tredgett*, 5 De G. & Sm. 74; 21 L. J., N. S., Ch., 204; 15 Jur. 1101.

1. Bill taken off the file at the expense of solicitor, who had taken no written authority to sue, and whose parol authority was denied. *Martindale v. Larson*, C. P. C. 83.

2. The names of persons made plaintiffs in a bill, without their authority, ordered to be struck out with costs to be paid by the solicitor, their application, after they were apprised of the fact, having been made without delay. Where persons who have been made plaintiffs without their consent, have, after the fact has come to their knowledge, acquiesced for a considerable period, their names will not, on their application, be struck out of the bill, *semble*. *Wilson v. Wilson*, 1 Jac. & Walk. 457.

3. A bill was filed in the name of several co-plaintiffs, but, as to one of them, without his authority. His interests being found conflicting with those of the other co-plaintiffs, and not having acquiesced, he obtained an order, after replication, and on motion, that his name might be struck out as one of the plaintiffs, and that his costs of suit and of the application might be paid by the solicitor who filed the bill. *Tabbemor v. Tabbemor*, 2 Keen 679; 6 L. J., N. S., Ch., 19.

4. A., who was an equitable mortgagee by deposit of deeds of property belonging to the estate of B., was paid off by C. on an agreement with the executors of B. (as their solicitor stated), that proceedings should be taken in A.'s name to enforce the mortgage security, and thereby to effect a sale of the whole or part of the mortgaged property; and the solicitor of the executors filed a claim for foreclosure in the name of A. against the representatives of B. A. denied that he had given authority to file the claim in his name, and moved that it might be taken off the file:—Held, that there being only assertion against assertion, and the solicitor alone stating that the instructions were given in the presence of A., the case was to be governed by *Allen v. Bone* (4 Beav. 493), and the claim was dismissed, with costs to be paid by the solicitor. That in such a case the Court could not adjudicate between the solicitor, by whom the claim was filed, and the defendants, the representatives of B., by whom the instructions were given to file the claim in A.'s name; and the Court left the solicitor to any legal remedy he might have against such parties. *Crossley v. Croxther*, 9 Hare 384; 21 L. J., Ch., 565.

5. Ordered that plaintiff's solicitor personally pay costs of the day, and the claim ordered to be struck out of the paper. *Somerville v. Jamieson*, 1 W. R. 123.

6. A bill filed by an insolvent as assignee of a debt against trustees of a creditor's deed, but which was filed by a solicitor without the plaintiff's authority or knowledge, ordered to be taken off the file, with costs as against the

solicitor; and the defendants are not necessary parties to such an application. *Jordain v. Bright*, 10 W. R. 380; 6 L. T., N. S., 279.

7. A bill had been filed by one of the directors of an incorporated company, in the name of the company, praying an injunction against the other directors of the company, to restrain them from allotting, or pretending to allot, any shares, from affixing their seal, or otherwise acting or pretending to act in the name of the directors of the company. On motion to take the bill off the file, on the ground that the solicitor had not the authority of the company, it appearing that one director alone had authorised such bill to be filed, without the consent of the other directors:—Held, that such bill should be taken off the file, and the costs of the application and of the suit should be paid by the solicitor filing such bill. *Fergus Navigation & Embankment Co. v. Kingdom*, 4 L. T., N. S., 262.

8. A., one of five co-plaintiffs, moved to have his name struck out of a bill as having been inserted without his authority. He also asked that the solicitor might pay the costs. After the date of the motion the solicitor died. The co-plaintiffs opposed the motion, and proved that A. had assigned the subject matter in dispute by an instrument not under seal, and had thereby authorised the assignee to use his name:—Held, that the authority in the assignment must have been intended to have some meaning, and the motion refused with costs. *Rees v. Rees*, 2 Eq. Rep. 234.

9. Where a solicitor files a bill, the onus lies upon him to show that he had the plaintiff's authority for doing so, and if he fails to show such authority, or a subsequent acquiescence on the part of the plaintiff, the plaintiff is entitled to have his name removed from the record, with costs to be paid by the solicitor. *Maries v. Maries*, 23 L. J., Ch., 154; 2 W. R. 635; 2 Eq. Rep. 361.

10. Solicitors of the assignees of a bankrupt estate instituted a suit in the names of the assignees, but without any written retainer from the official assignee, against a mortgagee of the bankrupt's property to redeem the mortgage, which was dismissed with costs:—Held, on the petition of the official assignee, that although he was cognisant of the existence of the suit, yet as there was no sufficient evidence of his having given a retainer, the solicitors were bound to pay and indemnify the official assignee against the costs. *Norton v. Cooper*, 3 Sm. & G. 375.

11. A solicitor obtained a retainer to proceed against executors, who had, after a long lapse of time, neglected to prove the will, and had rendered no account, to compel probate of the will, and to take such other proceedings for obtaining an account as might be necessary. He instituted a suit to compel probate, and obtained in it an account which was insufficient. He took then no other steps for three years, and then, without further consulting the client, filed a bill for an account; he had no other authority than that retainer, and the client denied any parol authority to file a bill:—Held, that the retainer did not justify the solicitor, and the bill was dismissed, with costs to be paid by the solicitor, as in *Allen v. Bone* (4 Beav. 493). *Atkinson v. Abbott*, 3 Drew. 251.

1. Solicitors instituting a suit in their client's name, without authority, are liable to indemnify him from all costs, and a passive acquiescence by the client in the use of his name does not of itself amount to an adoption of the proceedings. All the partners are equally liable notwithstanding only one of them may have conducted the suit. *Re Manby*, 26 L. J., Ch., 313; 3 Jur., N. S., 259.

M., a member of a firm of two solicitors, M. & H., in 1847, without any authority given by B., instituted a suit in B.'s name, as one of several co-plaintiffs, and carried it on for nine years, when B., on being served with a subpoena for payment of costs of unsuccessful exceptions, became for the first time aware of the unauthorised use of his name:—Held, upon petition by B. in the suit, that M. was responsible for the costs of the suit from beginning to end, and that H., though not personally cognisant of his partner's misconduct, was also liable, at all events, for costs incurred up to the time when upon the dissolution, in 1849, of the partnership between himself and M., his name ceased to appear on the records of the court as one of the solicitors for the co-plaintiffs in the suit. *Ib.*

Semble, that if B. had during the course of the litigation become aware of the use of his name, his subsequently omitting to interfere actively to prevent its continuance would not, *per se*, have been sufficient to relieve the solicitors from liability to him for the costs. *Ib.*

2. The name of a plaintiff having been inserted on the record without his knowledge, consent, or authority, on motion by the defendants to dismiss for want of prosecution, and on motion by the plaintiff to have his name struck out from the record:—Held, that the solicitors to the record who had purported to act for the said plaintiff, were liable to pay his costs of the motion as between solicitor and client, and also to pay the costs of the defendants of the action and all the motions therein. *Nurse v. Durnford*, 13 L. R., Ch. D., 764; 49 L. J., Ch., 229; 41 L. T. 611; 28 W. R. 145.

The form of order in *Dundas v. Dutens* (1 Ves. 196) not followed. *Ib.*

The practice at common law as laid down in *Reynolds v. Horrell* (8 L. R., Q. B., 398) followed. *Ib.*

It appearing that the solicitors had inserted the plaintiff's name through the fault of a deceased co-plaintiff:—*Semble*, they would have a right of proof for the costs they were ordered to pay against his estate. *Ib.*

3. Where a solicitor has commenced an action in the name of a plaintiff without authority, the proper course is for the plaintiff to serve notice of motion on the defendant, as well as on the solicitor, that the action may be dismissed, and that the solicitor may pay the costs of the plaintiff as between solicitor and client, and the costs of the defendant as between party and party. In cases where no rule of practice is laid down by the new orders, under the Judicature Act, and there is a variance between the old practice of the Chancery and common law courts, that practice is to prevail which is considered by the Court most convenient. *Newbiggin-by-the-Sea Gas Co. v. Armstrong*, 13 L. R., Ch. D., 310; 49 L. J., Ch., 231; 41 L. T. 637; 28 W. R. 217.

4. When a solicitor acts without authority, he must as a general rule pay the costs thereby occasioned. *Re Savage*, 15 L. R., Ch. D., 557; 29 W. R. 348.

5. Where an action was commenced on behalf of a married woman by a next friend acting without her authority, the Court, on the application of the defendants, ordered the action to be dismissed, and that the solicitors acting for the next friend should pay all the costs. *Schjott v. Schjott*, 45 L. T. 333.

6. The rule that proceedings taken by a solicitor without proper authority will be annulled with costs, to be paid by him, does not apply unless he was aware of the circumstances which invalidated his authority; and notice from the other side is not sufficient to fix him with knowledge, if he had good reason to suppose that the facts stated in the notice were not true. *Thomas v. Finlayson*, 19 W. R. 255.

7. Costs paid under a decree or order, which is afterwards reversed on appeal, must be repaid by the solicitor who received them to the person from whom they were received. *Malone v. O'Connor*, 2 Ir. Eq. R. 13.

3. Compromise of Actions.

8. An attorney on behalf of his client, the defendant, promises to pay 500*l.* to plaintiff; this being done by the authority of the client, attorney not liable, but only client. Otherwise, if the attorney had no authority from client to make this engagement. *Johnson v. Ogilby*, 3 P. W. 277. See *Exp. Bentley*, 2 Dea. & Ch. 578; 2 L. J., N. S., Bky., 39.

Brokers and factors, who act or agree for their principals, not liable in their own capacities. *Id.* 279.

9. A party is bound by the consent of his counsel given in court, though they had no instructions to consent, if they were at the time apprised of all those facts of which the knowledge was essential to the proper exercise of their discretion, but he will be relieved from an order made by such consent, if they give that consent in ignorance of material circumstances. How far a party will be affected by the remissness of his solicitor in not immediately objecting to an order, made by consent of counsel in court, when neither the party nor his solicitor was present, and instructions to consent had not been given by either. *Furnival v. Bogle*, 4 Russ. 142; 6 L. J., Ch., 91.

10. An *avoué* in Canada has authority to bind his client by any proceeding in the cause, but not by any transaction *dehors* the cause, such as an agreement to settle. *King v. Pinsonneault*, 6 L. R., P. C., 245; 44 L. J., P. C., 244; 32 L. T. 174; 23 W. R. 576.

11. A solicitor has authority to enter into an undertaking on behalf of his client, not to issue a writ of *fierti facias* against the client's debtor, in consideration of the acceleration of payment of the debt. *Re Commonwealth Land, Building, Estate, & Auction Co., Exp. Hollington*, 43 L. J., Ch., 99; 29 L. T. 502; 22 W. R. 106.

12. An attorney has not, by virtue of his office, an implied authority to compromise an action, but a client may become bound by a compromise entered into by his attorney

without his authority, by not repudiating it within a reasonable time. *Swinfen v. Swinfen*, 24 Beav. 549; 3 Jur., N. S., 1109; 27 L. J., Ch., 35. And see 8 C. at law, 1 C. B., N. S., 364; 3 Jur., N. S., 85; 26 L. J., C. P., 97.

A compromise is nothing more than a sale of the subject matter of the suit by one party to the other; and as an attorney, acting within the scope of his authority, has no power to sell the subject matter of the suit to a stranger, so he has no power to sell it to the other side. *Ib.*

At the trial of an issue, counsel agreed upon terms of compromise, and it was made a rule of the court of common law. The compromise was unauthorised by the plaintiff, and effected without the instructions of his attorney. There being no subsequent acquiescence, a bill by the defendant in the action for specific performance of the compromise was dismissed. *Ib.* See 8 C. on appeal, slightly varying the decree, 4 Jur., N. S., 774; 27 L. J., Ch., 491; 6 W. R. 480.

If an agreement to compromise is sought to be enforced in a court of equity, the case will be tried on the ordinary principles which guide the Court in cases of specific performance. 8 C. 6 W. R. 10.

1. A solicitor or counsel has full authority to either compromise or abandon the claims of his client, provided it is in a matter within the scope of the suit. *Re Wood, Exp. Wenham*, 21 W. R. 104.

Scous, in a collateral matter. *Ib.*

2. A compromise entered into by a solicitor under his implied authority is not affected by his client's subsequent repudiation, nor by the client's previous express prohibition, unless the opposite party had notice of it. *Berry v. Mullen*, 5 Ir. R., Eq., 368.

4. Other Cases.

3. Upon enlarging the time for making an award, all parties consenting in court, except one, whose solicitor consented for him:—Held, this did not bind the client, though admitted it would have been binding at law. *Colwell v. Child*, 1 Ch. Ca. 86.

4. Four plaintiffs instituted an original and two supplemental causes, and three of the same plaintiffs on a subsequent abatement filed a supplemental bill by a new solicitor, making the other plaintiff a defendant, who also appeared by another solicitor. On a petition in the four causes, the solicitor in the last supplemental suit, and not the solicitor on the record in the first three causes, was held entitled to appear for the plaintiffs. *Ward v. Swift*, 6 Hare 309.

5. After considerable delay in the prosecution of a suit, the solicitor of a deceased party was served with a notice of motion:—Held, that his duty to the Court rendered it proper for him to appear on the motion. *Charlie v. Gwynne*, 9 Beav. 319.

6. Upon an alleged misjoinder of husband and wife as petitioners, counsel, upon the instructions of the solicitor, undertook to amend by making it the petition of the wife by her next friend:—Held, that the solicitor was not personally responsible for the performance of the undertaking. *Re Williams*,

12 Beav. 510; 19 L. J., N. S., Ch., 422; 14 Jur. 561.

7. In a sale under a decree, the solicitor of the plaintiffs, having the management of the sale, is to be considered (as between the vendors and the purchaser) to be the agent of all the parties to the suit. *Dalby v. Pullen*, 1 Russ. & M. 296; 8 L. J., Ch., 74.

8. A proper party to a suit, whose name has been inserted in the bill as a plaintiff, without his own knowledge or concurrence, will not, while the record remains in that state, be allowed to appear by a distinct solicitor. *Pyecroft v. Gregory*, 2 L. J., Ch., 122.

9. A plaintiff instructed his solicitor to give no further indulgence to the defendants: the solicitor's clerk, who was ignorant of that circumstance, and who was sworn to be ignorant of the practice of the Court, consented in writing, in the name of his master, to alterations made in the title of the answer after it was deposited with the clerk of records and writs. On the application of the plaintiff, the Court ordered the answer to be taken off the file, with liberty for the defendants to re-swear it within three weeks. *Raistrick v. Elsworth*, 12 Jur. 782.

10. A joint and several answer, filed for two persons by a solicitor having authority from one only, will not be ordered to be taken off the file on the application of one party in the absence of the other. *Wiggins v. Peppin*, 2 Beav. 403. And see 8 C. 3 Jur. 721.

11. Want of authority to the solicitor to file a bill cannot be raised in opposition to a motion in the cause; it must be made the subject of a substantive motion to stay proceedings or to take the bill off the file: and such a motion may be made by a defendant. *Bowen v. Bowen*, 7 Ir. R., Eq., 251.

12. A solicitor has authority to enter into an undertaking on behalf of his client, not to issue a writ of *fiore facias* against the client's debtor, in consideration of the acceleration of payment of the debt. *Re Commonwealth Land, Building, Estate, & Auction Co., Exp. Hollington*, 43 L. J., Ch., 99; 29 L. T. 502; 22 W. R. 106.

A breach of such an undertaking, by the issue of writs against the debtor, was held to be contrary to good faith, and the solicitor was ordered to pay the expenses of issuing such writs, and of an application to recover them. *Ib.*

13. A brother and sister entitled, in moieties, to a reversionary interest in a fund in court, mortgaged it to secure a debt of the brother, the sister joining as surety for the brother. The mortgagee obtained a stop order, and afterwards on his marriage assigned the mortgage to trustees, who however neither obtained a stop order nor gave notice to the sister of the settlement. On a petition by the brother, stating that the tenant for life had assigned to him her life interest in his share of the fund and that he had paid a portion of the mortgage, and praying for a transfer of his share of the fund, a solicitor who had acted for the sister, and for the mortgagee on the occasion of the mortgage, took upon himself, without authority, to instruct counsel to appear for the sister and her husband, and also for the mortgagee, who was abroad, and to consent to, or not oppose, the petition. Upon the hearing of this petition the fund was ordered to be and

was transferred out of court:—Held, that the mortgagee was not bound by the unauthorised appearance for him. *Wheatley v. Bastow*, 7 De G. M. & G. 261; 1 Jur., N. S., 1124; 24 L. J., Ch., 727.

1. Where a solicitor has put in a fraudulent defence for his client without the knowledge of the client, the client is not bound by the act of the solicitor. *Williams v. Preston*, 20 L. R., Ch. D., 672; 51 L. J., Ch., 927; 47 L. T. 265; 30 W. R. 555.

2. An order to attend proceedings obtained by a solicitor without the written authority of his client, will be discharged on the application of that client. *Bird v. Harris*, 43 L. T. 434; 29 W. R. 45.

3. A solicitor has no implied authority to pledge his client's credit to counsel by an express promise to pay his fees, whether they relate to litigation or not, so as to enable the counsel to sue the client for them. *Moatyn v. Moatyn, Ex p. Barry*, 5 L. R., Ch., 457; 39 L. J., Ch., 780; 18 W. R. 657; 22 L. T., N. S., 461.

[*Entry of Appearance.*] See PRACTICE (APPEARANCE).

V. PERSONAL LIABILITY WHEN ACTING FOR CLIENT.

4. In what case an agreement made by a scrivener, on behalf of his client, to compound a debt, shall bind the scrivener, though not the client. *Parrot v. Wells*, 2 Vern. 127.

5. *Semble*, the defendant's attorney, having given a written undertaking to pay to the plaintiff whatever the deficit might be on a sale of the mortgaged premises under the decree in a foreclosure suit, will be compelled to perform it, notwithstanding the death of his client. *Bailey v. Daniell, Hay & J.* 586.

6. A solicitor who attends a sale, and bids for his client, is responsible for the payment of the deposit, and will be attached if it is not paid. *Hobhouse v. Hamilton*, 1 Hog. 401.

7. A solicitor contracted, in his own name, to purchase a freehold; he resisted the performance of it on the ground that he had acted as the mere agent of a client, and that, it being a case of hardship, damages at law would be an adequate remedy to the vendor:—Held, that he was bound to perform the contract. *Saxon v. Blake*, 29 Beav. 438.

8. A contract having been entered into by a firm of solicitors acting on behalf of their client, to pay the plaintiff certain sums of money, the plaintiff filed a bill against the client and the solicitors, alleging that the client was bound by the contract, but that the client denied that he was so bound, on the ground that the solicitors had no authority to enter into such contract, and the bill prayed specific performance by the client or otherwise, if it should appear that the solicitors were not authorised, then that the solicitors themselves might be declared personally liable to perform the same. A demurrer to the bill by the solicitors was allowed on the ground that the plaintiff did not himself allege that the client was not bound, and, also, that alternative relief could not be prayed against one defendant in case relief could not be

obtained against another defendant. *Clark v. Rivers (Lord)*, 5 L. R., Eq., 91.

VI. RETAINER. OTHER CASES.

9. A retainer implies a promise to pay all costs rightly and properly incurred upon the retainer. *Bolden v. Nicholas*, 3 Jur., N. S., 884.

10. The retainer and employment of a solicitor in such a matter as a bankruptcy, an administration, or winding-up, do not constitute an entire contract so as to deprive the solicitor of his right to payment, except for costs out of pocket, till the whole matter is completed, and successive bills of costs in such a matter are not necessarily to be treated as one bill brought down to the date of the latest delivery. *Re Hall and Barker*, 9 L. R., Ch. D., 538; 47 L. J., Ch., 621; 26 W. R. 501.

11. *Semble*, there is no doubt of the unsoundness of the doctrine that A. employing B., a professional lawyer, to do any act for the benefit of C., A. having to pay B., and there being no intercourse of any sort between B. and C., if through the gross negligence or ignorance of B. in transacting the business, C. loses the benefit intended for him by A., C. may maintain an action against B., and recover damages for the loss sustained. If this were law a disappointed legatee might sue the solicitor employed by a testator to make a will in favour of a stranger, whom the solicitor never saw or before heard of, if the will were void for not being properly signed and attested. There must be privity of contract between the parties. *Robertson v. Fleming*, 4 Macq. H. L. Ca. 167.

[*Retaining Fee. Currency.*] 12. The fees of solicitors and attorneys in Ireland upon retainers, since the 5th January 1826, are within the 4th section of the 6 Geo. 4, c. 79, and therefore not payable in the present currency. *Solicitors and Attorneys in Ireland (case of)*, L. & G. temp. Sugd. 349.

VII. AUTHORITY. OTHER CASES.

13. An objection to title on purchase having been waived, an offer of compensation made by a clerk of the vendor's solicitor, without express authority, is of no effect. *Burnell v. Brown*, 1 Jac. & Walk. 168.

14. A vendor instructed her solicitors to sell a house, subject to stipulations, for a fixed sum; and an intending purchaser agreed to give the sum. After some delay, the solicitors of the vendor wrote to the purchaser to say, that they had been instructed "to proceed with the sale to you of these premises. The draft contract is being prepared, and will be forwarded to you for approval in a few days":—Held, first, that this acceptance was conditional upon the terms of the draft contract being agreed to. *Chinnoch v. Ely (Marohioness)*, 11 Jur., N. S., 329; 13 W. R. 597; 12 L. T., N. S., 251. Reversing 13 W. R. 176; 11 L. T., N. S., 536.

Held, secondly, that if such acceptance had been unconditional, it would not have been binding upon the vendor, as it would have been *ultra vires* the solicitors. *Id.*

1. The mere fact that a solicitor is in possession of a mortgage deed executed by his client does not authorise him to receive the mortgage money for the client. If the client has not received the money the mortgagee cannot maintain the validity of the mortgage deed by showing that he paid the money to the solicitor, unless he can show that the solicitor was expressly authorised by the client to receive it. *Exp. Swinbanks, Re Shanks*, 11 L. R., Ch. D., 525; 48 L. J., Bky., 120; 27 W. R. 898; 40 L. T. 825.

A solicitor, having been instructed by a client to raise 400*l.* for him by a mortgage of some houses belonging to him, prepared a mortgage of the property to another client, the deed containing a recital that the mortgagor had applied to the mortgagee for a loan of 400*l.*, which the mortgagee had agreed to lend on the security of a mortgage of the property. The solicitor induced the mortgagor to execute the deed, without receiving the money, and afterwards handed it over to the mortgagee as security for a debt of 300*l.* which he (the solicitor) already owed to the mortgagee, telling him that he had himself made advances to the mortgagor. He had, in fact, advanced the mortgagor 200*l.* The solicitor soon after absconded. It was not shown that the mortgagor had expressly authorised him to receive the mortgage money:—Held, by the Court of Appeal, that, even if it was the intention of the mortgagor that the solicitor should be paid the 200*l.* out of the 400*l.* when paid by the mortgagee, the mortgagee was not entitled to hold the mortgage deed as security to the extent of the 200*l.* due from the mortgagor to the solicitor. The deed was accordingly declared void as against the trustee in bankruptcy of the mortgagor. *Id.*

V. Change of.

2. Where plaintiff changes his solicitor, the former solicitor has no right to stop him from proceeding till his costs are paid. *O'Dea v. O'Dea*, 1 Sch. & Lef. 315.

3. Attorney cannot be changed without leave of the Court: whether he can relinquish the suit, though not paid, and as to the effect of security, *quære*. *Conell v. Simpson*, 16 Ves. 281.

4. A solicitor may refuse to continue in the conduct of a suit upon sufficient grounds, and, upon his giving up the suit before it is concluded, upon good grounds, he may sue his client for the costs incurred during the time of being employed. *Bryan v. Twigg*, 3 L. J., Ch., 114.

5. Where a solicitor by arrangement with his client retired from the conduct of a suit in equity, and another solicitor conducted it thenceforth to its conclusion:—Held, on there being a deficiency in the fund applicable to the payment of costs, that the latter solicitor had priority. *Cormack v. Beisley*, 3 De G. & J. 157.

6. The Order of the 18th October, 1842, is intended to substitute the solicitor for the six clerks, and not to give the solicitor a right to insist, as against his client, upon acting in the

cause until removed by the order of the Court. *Ward v. Swift*, 6 Hare 309.

7. Upon the decease of the solicitor employed by a party to a suit, proceedings taken by a new solicitor employed by him are regular, although the change of solicitor is not authorised by any special order of the Court. *Whalley v. Whalley*, 17 Jur. 254; 22 L. J., Ch., 632.

8. When a plaintiff in a creditor's suit sells his debt after decree, the purchaser has no right to an order of course to change solicitors. *Topping v. Searson*, 2 Hem. & M. 205.

The proper course, in such a case, is for the purchaser to bring all the facts before the Court on a motion to obtain the conduct of the cause. *Id.*

Semble, that the Court would not entertain such a motion where the debt was insignificant, if it was opposed by the principal creditors. *Id.*

9. An order of course had been obtained at the Rolls to change the solicitor of two of the defendants. The solicitor was a mortgagee of certain sums of money to which these defendants were entitled in the cause, and by the mortgage deed there were special powers given to him to conduct the suit on their behalf. On motion, the order of the Rolls discharged, with costs, as it ought to have been made the subject of a special application. *Jenkins v. Bryant*, 3 Drew. 70; 18 Jur. 992; 3 W. R. 30; 3 Eq. Rep. 61.

10. A country solicitor agreed to employ a town agent for fifteen years. Before the expiration of the term, he obtained an order of course, in a suit, to change the agent, suppressing the existence of the special contract. The order was discharged for irregularity, with costs. *Richards v. Scarborough Market Co.*, 17 Beav. 83; 17 Jur. 294; 22 L. J., Ch., 759; 1 W. R. 250.

11. Three petitioners retained the same solicitor in an application to wind up a company. The order was made, and subsequently two of the petitioners severed, and obtained an order of course at the Rolls to change their solicitor:—Held, that the two had no right to act separately, and the order to change solicitors must be discharged. *Re Norwich and Norfolk Provident Permanent Building Society*, 22 W. R. 854.

Delivery up of Documents on Change of Solicitor. See XV. i. 3 post.

VI. Relations with Clients.

I. *General Duties*, 6390.

II. *Acting for Several Clients*, 6391.

III. *Acting for Trustees*, 6392.

IV. *Acting against Former Client or Disclosing his Affairs*, 6392.

V. *Investment of Client's Money*, 6394.

VI. *Lien of Client*, 6395.

I. GENERAL DUTIES.

12. When lands are decreed to be sold, the solicitor of the defendant, the inheritor, is

bound to give the benefit of his peculiar means of information and assistance in making out title, for which he is to be paid a reasonable compensation. *Blennerhassett v. M'Namara*, 1 Moll. 52.

1. It is to be presumed that legal advisers, in discharge of their duty to their client, investigate suspicious transactions and satisfy themselves, before they approve them, that it is for the client's benefit to confirm them. *De Montmorency v. Devereux*, West 64; 7 Cl. & F. 188; 2 Dr. & Wal. 410; 4 Jur. 403. Affirming 1 Dr. & Wal. 119.

2. An attorney is bound to give sufficient advice to his client; and if any advantage of property come to him by his ignorance, or the neglect of his duty, he shall be a trustee thereof for the benefit of the person who would be entitled thereto, if the attorney had known and done his duty. *Bulkley v. Wilford*, 2 Cl. & F. 177; 8 Bli. N. S. 111.

3. A prudent solicitor never takes an order for time to answer, on the condition of a sergeant-at-arms, in the terms of the 21st Order of December 1833. *Holmes v. Baddeley*, 7 Beav. 69.

4. Solicitors are justified in obtaining from a witness, prior to his examination, a statement of the facts; but it is improper to obtain a statement upon oath, unless required for the purpose of the cause. *Harvey v. Mount*, 8 Beav. 439; 14 L. J., N. S., Ch., 233; 9 Jur. 741.

5. *Semble*, it is a breach of duty in a solicitor, for which he may justly be blamed, if, in dealing with a public company, he places the smallest reliance on any representation of any agent of the company as to its future acts. A solicitor, dealing with a public company, ought never to be satisfied with anything but the most solemnly-executed agreement of the company. *Leominster Canal Co. v. Shrewsbury & Hereford Railway Co.*, 3 Jur., N. S., 930.

6. There is no obligation on an attorney or a solicitor to produce his client for the purpose of being served with process by a third person, and a security obtained by the solicitor from his client during the period of the client's concealment will not be thereby avoided in favour of such third person. *Shaw v. Neale*, 6 H. L. Ca. 581; 4 Jur., N. S., 695; 27 L. J., Ch., 444.

7. A solicitor, before instituting proceedings for a client, especially on behalf of a wife against her husband, is bound to ascertain how the facts stand, and whether there is a reasonable expectation that the proceedings will be successful. *Baylis v. Watkins*, 10 Jur., N. S., 114; 33 L. J., Ch., 300; 12 W. R. 324; 9 L. T., N. S., 741.

8. An attorney, not acting as such on a particular occasion for his client, may throw off that character, and exercise his independent rights. *Austin v. Chambers*, 6 Cl. & F. 1.

9. Duty of solicitors to check useless litigation. *Ottley v. Gilby*, 8 Beav. 602; 14 L. J., N. S., Ch., 177.

10. If a solicitor institutes unnecessary proceedings, the Court will take care that the client shall not suffer by the course adopted. *Wood v. Wood*, 4 Russ. 558.

11. In a cause which has been much delayed, the Court will not, at the expense of farther delay, relieve the plaintiff from the

consequences of the gross neglect of his solicitor. *Turner v. Turner*, 1 Swan. 156.

12. A bankrupt having employed A., a solicitor, to procure signatures of creditors to his certificate, and then ceased to employ him, cannot oblige his A.'s clerk to make affidavit of witnessing the signatures without first paying A. his costs for such business. *Eap. Shore, Re Lucas*, 1 Dea. & Ch., 509; Mont. & B. 268; 1 L. J., N. S., Bky., 115.

13. Solicitor who had instituted suit as plaintiff's solicitor, but was afterwards made defendant, after several years, not having put in an answer, ordered to answer within a week. *Mootham v. Hale*, 3 Ves. & B. 92.

14. It is the duty of solicitors to have the original documents at the hearing. *Gallimore v. Gill*, 4 W. R. 773.

Protection by taking Opinion of Counsel.]

15. Counsel's opinion is not necessarily a justification of a solicitor for the course he adopts in the conduct of a suit. *Bryan v. Twigg*, 3 L. J., N. S., Ch., 114.

16. *Quare*, how far an attorney is justified, as between him and his client, by the opinion of counsel, in prosecuting an action which is unsuccessful, and which the Court considers to have been groundless. *Re Clark*, 1 De G. M. & G. 43; 15 Jur. 1047; 21 L. J., Ch., 20. Affirming 13 Beav. 173.

An attorney is clearly responsible unless acting on the opinion of counsel. S. C. 13 Beav. 173.

II. ACTING FOR SEVERAL CLIENTS.

17. Practice for one solicitor and clerk in Court to be concerned for all parties, admitted; but disapproved by the Lord Chancellor. *Dyott v. Anderson*, 3 Ves. & B. 177.

18. A joint and several answer filed for two persons by a solicitor, having authority from one only, will not be ordered to be taken off the file on the application of one party in the absence of the other. *Wiggins v. Peppin*, 2 Beav. 403; 3 Jur. 721.

19. Co-plaintiffs may employ separate solicitors acting by a common agent. *Waldon v. Thompson*, 37 L. J., Ch., 751; 6 L. R., Eq., 7.

20. Where, in a mortgage transaction, the mortgagor is himself a solicitor, and prepares the mortgage deed, the mortgagee employing no other solicitor, the mortgagor is considered as the agent or solicitor of the mortgagee in the transaction: and it makes no difference that the mortgagor is not paid by the mortgagee. *Hewitt v. Loosemore*, 9 Hare 449; 21 L. J., N. S., Ch., 69; 15 Jur. 1097.

21. Sufficient ground for the interference of equity that a person entrusted to act as attorney for all parties, abuses the confidence placed in him. *Costigan v. Hastler*, 2 Sch. & Lef. 165.

22. The solicitor appointed by the creditors' assignees is the solicitor of all the assignees in the bankruptcy; but he is not by such appointment otherwise constituted the agent of the official assignee. *Hughes v. Morris*, 9 Hare 636. See S. C. 16 Jur. 603; 21 L. J., Ch., 761.

23. *Quare*, whether a solicitor acting for both sides, if he omits to call for payment of the trust-moneys into court, may not be made

answerable for any loss occasioned thereby. *Gresley v. Heathcote*, 3 L. J., Ch., 107.

1. In a transaction where a lease was assigned as a security for a loan, a solicitor, generally acting for the borrower in other cases as well as in this, acted also for the lender, but did not make to the latter any charge for his services:—Held, that he was nevertheless liable to the latter, and his representatives, for a failure of the security occasioned by want of notice to the lessor. *Donaldson v. Haldane*, 7 Cl. & F. 762.

2. A. purchased an estate from B., and on the completion, one solicitor acted for both parties, and the purchase money was paid into his hands. Afterwards, the purchaser was defeated by C., who had a paramount mortgage. The purchaser presented a petition against the solicitor, asking payment by the solicitor out of the purchase money of the losses occasioned, or that he might indemnify the petitioner. The petition was dismissed with costs, the Court holding, first, that it had no jurisdiction to award compensation or damages in such a case; and, secondly, that the money having come to the hands of the solicitor as agent of the vendor, and not of the petitioner, it could not interfere. *Tylee v. Webb, Re Hinton*, 14 Beav. 14; 15 Jur. 1023.

3. H. and B. were clients of the same solicitor M., to whom B. gave an authority in writing to sell certain property. Acting on this authority M. entered into an agreement with H. to sell the property to him:—Held (reversing 2 Jur., N. S., 922), that this was a transaction in which there was a necessity for the utmost openness of dealing, and the Court, not being satisfied that this existed in the case before it, refused specific performance of the agreement entered into. *Hesse v. Briant*, 6 De G. M. & G. 623; 5 W. R. 108.

M., a solicitor, had a written authority from B., his client, to sell certain property for 1,100l. Without the knowledge of B. he had previously written to H., another client, about the purchase of the same by H., but B. had told M. that H. had made a proposal to that effect. On the day when the authority was signed, H. called at M.'s office, where B. was at the time, but retired as H. was announced, and M. then offered H. the property for 1,125l. Four days afterwards a contract for the sale of the same at that amount was signed by M. as agent for B., and by H. as purchaser. M. informed B. next day of the fact of the sale, but did not name H., and it did not appear that B. knew that H. was the purchaser for some weeks afterwards. There was no satisfactory evidence of inadequacy of price. Bill for specific performance of the contract of sale dismissed. *Id.*

See also IV. III. *ante*.

III. ACTING FOR TRUSTEES.

4. It is the duty of a solicitor to inform his client, when a trustee, that if he does not tax his bill of costs, the items not properly chargeable will be disallowed in passing his account. *Exp. Flower*, 18 L. T., N. S., 457.

5. It is improper conduct in a solicitor

acting for a trustee to attempt to protect his client against the just demands of a *cestui que trust* by throwing formal difficulties in the way of the latter, which the solicitor would not otherwise have insisted on as necessary for the protection of his client. *Aylmer v. Winterbottom*, 4 Jur., N. S., 19.

Liability of Trustees for Acts of. See TRUSTS, XXII. 1. 4.

IV. ACTING AGAINST FORMER CLIENT OR DISCLOSING HIS AFFAIRS.

6. An attorney, or solicitor, cannot give up his client and act for the opposite party in any suits between them. *Cholmondeley (Earl) v. Clinton (Lord)*, 19 Ves. 261.

Attorney is prevented from communicating his client's secrets, even by striking off the roll: not permitted to give evidence of them. *Id.* 268.

Solicitors in partnership cannot dissolve their partnership, as against their client, without his consent, so as to enable the retiring partner, as discharged, to act against him. *Id.* 273.

Practice of solicitors, partners, dividing business, considering one only as agent to the other, disallowed, the client being entitled to their united exertions. *Id.*

7. Motion to restrain a solicitor from giving evidence of confidential matters, refused; the propriety of his being examined being left to the consideration of the Court before which he might appear as a witness. *Beer v. Ward*, Jac. 77.

A solicitor who has been discharged, may, upon proof of his misconduct, be restrained from communicating information that came to him confidentially from his client, *semble*. *Id.*

8. Injunction decreed to restrain a solicitor from communicating, to a party who was suing a former client, documents or matters of evidence which had come to the possession or knowledge of the solicitor in respect of his employment for such client, and to restrain the party suing from using in his action, or otherwise, any documents or matters of evidence which he had so obtained. *Lewis v. Smith*, 1 Macn. & G. 417.

9. Refusal by the Court of an application for disclosure by solicitor of his client's address. *Clark v. Compton*, 4 N. R. 15.

10. A bill was filed by the residuary legatees under a will, against the executors, of whom one was also beneficially interested as a legatee, and had undertaken the sole management of its affairs. The bill charged particular acts of mismanagement, and the appropriation by the managing executor to his own purposes of part of the trust funds. The solicitor for the plaintiffs, having been for several years the friend and solicitor of the managing executor, had become well acquainted with the circumstances of the trust; he had been engaged in recovering money from a debtor to the estate, and had been consulted by the managing executor when one of the residuary legatees, the present plaintiff, had applied for the executorship accounts, which had been delivered under the solicitor's advice.

The solicitor's bill for the matters was made out against the managing executor, not as executor, but personally. The bill was taxed, and an action brought for the amount, which was paid, and the character of solicitor and client thus ceased in 1847. A motion by the managing executor, the former client, for an injunction to restrain the solicitor from acting as the solicitor for the plaintiffs in the cause against him, was dismissed. *Parratt v. Parratt*, 2 De G. & Sm. 258; 17 L. J., N. S., Ch., 346; 12 Jur. 740.

1. A clerk to a solicitor commencing practice for himself, not to be restrained from acting as solicitor for parties against whom his master was employed, upon general allegations of his having in his former service acquired information likely to be prejudicial to the clients of his master. *Bricheno v. Thorp*, Jac. 300.

2. A solicitor who has been discharged by his client, cannot be afterwards concerned against him in the same suit. *Hutchins v. Hutchins*, 1 Hog. 315.

3. B. E. L. filed a bill for the guardian of a female infant, and acted as the infant's solicitor, until the cause abated by her marriage, when her husband peremptorily refused to revive it: B. E. L. then ceased to act as solicitor in the cause, although his name remained as solicitor upon record, but he prepared the infant's marriage settlement, and after the marriage acted as the husband's solicitor in taking steps with a view to effect a loan of money to pay off all charges on the wife's estate, of which B. E. L. finally offered to take an assignment to himself upon certain terms: the husband having declined the loan upon the terms proposed, B. E. L. filed a bill in the name of C. M. to foreclose a mortgage upon the wife's estate: the statements in the second bill were very similar to those of the first bill, except a charge which was directly contrary to the opinion given by counsel: C. M. had been made a party to the first cause, in which his mortgage, although at one time disputed, was finally fully admitted; B. E. L. had been solicitor to C. M. long before he became concerned for the husband and wife: B. E. L. was restrained at the instance of the husband and wife from acting in the second cause as solicitor for C. M., who was also restrained from employing him. *Brady v. Lawless*, Sau. & Sc. 365. n.

4. A., a solicitor, had been employed by B. to negotiate and conclude an agreement on her behalf. Disputes then arose between them as to A.'s bill of costs, which B. procured to be taxed and reduced. A suit was subsequently commenced by C. against B., the object of which was to set aside the agreement, and in which A. and D., who had lately become his partners, were solicitors for C. The Court restrained A. and D. from acting as the solicitor of C. in the suit, and restrained A. from communicating to C. any information relating to the agreement that had come to his knowledge confidentially as the solicitor of B. *Davies v. Clough*, 8 Sim. 262; 6 L. J., N. S., Ch., 113; 1 Jur. 5. Affirmed 8 Sim. 269. n.

5. The solicitor of a deceased client, and who had also acted as such for his executrix and devisee, was restrained, at their instance, from acting as solicitor for a creditor, in whose name he had filed a bill to raise the amount

of a judgment debt out of the estate of the deceased; although such creditor had been the client of the solicitor before he became concerned for the deceased, and although the solicitor contended that he had been discharged, and insisted that it was not in his power to communicate anything which could injure the estate; all material facts and documents having, as he alleged, been put in issue by a bill, previously filed by another creditor of the deceased. It appearing however, from inspection of the two bills, that a document, which the solicitor himself had recommended to be kept secret, was more fully stated in the bill filed by the solicitor than in the bill filed by the other creditor, and that such statement of it must have been made from an inspection of the document:—Held, that the Court will not permit a solicitor to disclose any communications, made to him in that character, and will not speculate about their materiality:—Held, also, that the obligation to keep secret confidential communications does not cease with the death of the client. *Biggs v. Head*, Sau. & Sc. 335. See also *Hobhouse v. Hamilton*, id. 359. n. *Keon v. Nesbitt*, id. 365. n. *Waller v. Fowler*, id. 869. n.

Semble, there is no substantial distinction between the cases of a discharged solicitor, and of one who refuses to act. *Id.*

The application to restrain a solicitor may be made by motion in the cause in respect of which such injunction is sought, and need not necessarily be made by petition. *Id.*

6. The Court refused to restrain, at the instance of an administratrix, a solicitor who had acted on behalf of the administratrix in the affairs of her intestate's estate, from acting as the solicitor of some of the next of kin in a suit for the administration of the estate. *Hutchinson v. Newark*, 3 De G. & Sm. 727.

7. How far solicitor may, after being concerned for one party, be restrained from being concerned for the opposite party. *Robinson v. Mullett*, 4 Price 353.

8. The jurisdiction to restrain a solicitor from acting for the antagonist of his former client is founded upon the principle that a man ought to be restrained from doing any act contrary to the duty he owes to another; and will be exercised at the instance of the former client, irrespective of the question whether the solicitor was discharged by him or had discharged himself, whenever the transaction in reference to which the injunction is sought so flows out of or is connected with that in which the solicitor was formerly retained that the same matter of dispute may probably arise. *Hutchins v. Hutchins* (1 Hog. 315) and *Biggs v. Head* (Sau. & Sc. 335) approved and adopted. On appeal, the injunction granted by the Vice-Chancellor was disapproved and dissolved by consent, the solicitor undertaking not to disclose his client's secrets. *Little v. Kingwood Collieries Co.*, 20 L. R., Ch. D., 733; 52 L. J., Ch., 56; 47 L. T. 323; 51 W. R. 178. Reversing 51 L. J., Ch., 498.

9. Notwithstanding the rule that a solicitor must not use information acquired in his professional capacity in any subsequent proceedings against his former client, a solicitor, who has acted in the formation of a company and been discharged, may act for a petitioner to wind up the same company, when all the facts upon

which the petition is based might have been ascertained by any person in the position of the petitioner. *Re Holmes, Re Electric Power Co.*, 25 W. R. 603.

V. INVESTMENT OF CLIENT'S MONEY.

1. Scrivener, etc., receiving money, and giving a note to place it out at interest, is bound to do so, and is not discharged from paying interest for it, unless his employer accepts the security and interest. Balance of an account, stated by such scrivener, etc., will carry interest. *Barrell v. Parker*, 2 Ves. 364.

2. Scrivener or attorney puts out his client's money on a security, which he might on the least inquiry have found to be defective, or even where he had notice of ejectment delivered on a prior mortgage, yet could not be charged in equity to answer the money. *Luke v. Bridges*, Pre. Ch. 146.

3. Solicitor in a cause charged with interest on money directed to be laid out for an infant's benefit, notwithstanding a deed from his grandmother giving other moneys in trust for the infant, and directing that he should not be so chargeable. *Brown v. Pring*, 1 Ves. 407.

4. A solicitor took an insufficient security for his client, and the nature of the transaction was such as in the opinion of the Court to create a case of combined agency and trust:—Held (under the circumstances), that he was personally responsible for the deficiency, and for the costs of the suit. *Craig v. Watson*, 8 Beav. 427.

5. A solicitor, being entrusted with moneys from time to time, professed to lay them out upon ample and perfect security, only mentioning that one was reversionary. The solicitor died, and it was discovered that the mortgagors in every case were not worth suing, and two had been bankrupts, and he had himself purchased one security, but as to some railway shares he had been a loser. On claim filed alleging fraud, after six years, and a contention on the part of the general creditors that it was a case for damages for negligence and not for fraud:—Held, that in all the cases in some shape the estate of the deceased solicitor was liable; and although accounts had been rendered and might be regarded as settled, they were still open to surcharge and falsification; and where, as in this case, more than six years had elapsed, the remedy was in equity for gross negligence amounting to fraud. *Smithe v. Pocock*, 2 W. R. 285; 2 Drew. 197; 33 L. J., Ch., 545; 18 Jur. 478; 2 Eq. Rep. 368.

6. Want of fidelity in a solicitor cannot, upon a question of certificate, be visited with merely slight penalties, and public interest being concerned in the matter, no private dealing (an amount to a condonation of the offence. *Exp. Selby*, 6 De G. M. & G. 783; 2 Jur., N. S., 29; 25 L. J., Bky., 13.

Where, therefore, solicitors received a client's money, to be invested on good security, and applied it in repaying to one of them a sum which he had advanced on a mortgage of a reversionary interest in a trust fund (a transfer of the security to the client being prepared), and afterwards the transferor, who was one of the trustees of the fund, procured the concurrence of the *cestuis que trustent*, and also of his

co-trustee (to whom he never disclosed the transfer), in selling out the fund, and thus realised the mortgage money, and applied it to his own use, but continued to pay the interest to the client, to whom he represented the mortgage as still subsisting:—Held, the solicitor having become bankrupt, that his certificate had been properly refused; and that the client's having continued to correspond with him after discovering the misconduct, did not alter the case. *Ib.*

7. A solicitor having received money to invest for a client upon mortgage of a particular property, represented in writing to the client that the money was all invested as arranged, and paid him interest as on the mortgage. After the solicitor's death it was discovered that the solicitor had not effected the mortgage, but had mixed the money with his own, and had invested a larger sum, purporting to be his own money, upon mortgage of the identical property. In a creditor's suit for the administration of the insolvent estate of the solicitor:—Held, under the circumstances, that the solicitor's estate was bound by the representation, and that the client's money was repayable out of the proceeds of sale of the mortgaged estate. *Middleton v. Pollock, Exp. Wetherall*, 46 L. J., Ch., 39; 4 L. R., Ch. D., 49; 35 L. T. 608; 25 W. R. 94.

8. A party gave a sum of money to a firm of solicitors, to invest upon freehold security. They found a security, and invested the money upon it. The security turned out valueless:—Held, that the giving money to a solicitor for the purpose of general investment does not in itself create the relation of trustee and *cestui que trust*, so as to make the solicitor liable as trustee for a deficiency in the security. *Mare v. Lewis*, 4 Ir. Eq. R. 219.

Held, also, that as this was a single isolated transaction, a bill for an account, as between principal and agent, could not be maintained as against the solicitors. *Ib.*

9. A solicitor invested the money of one of his clients without his knowledge on an improper mortgage security. The client, believing the security to be insufficient, proved against the estate of a partner of the solicitor, which was being administered in Chancery, for the whole amount of the debt, and, under a compromise, received a dividend out of the estate. Afterwards it turned out that the security was sufficient to pay the client in full:—Held, that the dividend must be repaid to the solicitor's estate, and did not enure for the benefit of the subsequent incumbrancers on the mortgaged property. *Smyser v. Goodwin*, 1 L. R., Ch. D., 351; 45 L. J., Ch., 289; 34 L. T., N. S., 635; 24 W. R. 493.

10. A client, in 1869, entrusted money to a solicitor to invest on mortgage of land, trusting to representations by the solicitor (who acted for both parties), that the property was of fee-simple tenure, and free from incumbrances. The mortgagor died in 1879, and the solicitor died in 1881, when the client discovered that part of the property was only leasehold for lives, and also that the solicitor held a prior mortgage on part of the lands. In an action to make the solicitor's estate liable for the deficiency of the security:—Held, that though on the evidence the solicitor would have had no defence to the action if

brought in his lifetime, yet it was not maintainable against his executors. *Young v. Wallingford*, 52 L. J., Ch., 590; 48 L. T. 756; 31 W. R. 838.

Held, also, that the solicitor's mortgage must be postponed to the plaintiff's mortgage. *Ib.*

1. Where money is entrusted by A. to his solicitor for investment, but without any particular investment being then in contemplation, and is allowed to remain in the hands of the solicitor, the amount becomes a debt due from the solicitor to A. If the solicitor afterwards misapplies the money, and to cover his fraud obtains from another client, B., upon a false representation, a transfer of B.'s equitable interest under a previously executed mortgage, no money of A. being then paid to B., the transfer thus obtained may, on B. discovering the fraud, be set aside in equity, for no money of A. having been received by B. at the time the transfer was executed, no interest passed to A. by its execution. *Wall v. Cookerell*, 10 H. L. Ca. 229; 11 W. R. 442; 8 L. T., N. S., 1; 1 N. R. 486.

What circumstances may constitute acquiescence of B. in the solicitor's fraud, and deprive him of the right to relief. *Ib.*

2. A firm of solicitors received money from R., a client, for the purpose of investment. No investment was made at the time, and the money was employed by them for their own use. After the death of one of the partners his executors commenced a partnership action, in which H., the surviving partner, was appointed one of two receivers. H., without communicating with his co-receiver or with R., put certain deeds forming part of the partnership property into a box with R.'s name outside. R. subsequently obtained possession of these deeds and claimed to retain them as security for the money owing to her by the firm. The articles of partnership contained a clause providing that, on the death of either partner, the surviving partner should, within six months of the next general annual account, pay to the representatives of the deceased partner, his share of the profits of the year, and should execute a bond for payment within two years to them of the share of the capital of the deceased partner:—Held, that H. had no power of giving R. a security upon these deeds, which formed part of the partnership property, and that R. must deliver them up to the receivers in the partnership action. *Hills v. Reeves*, 30 W. R. 439. Affirmed 31 W. R. 209.

See also *X. v. post*.

VI. LIEN OF CLIENT.

3. A solicitor deposited some of his own deeds as a security for a sum of money due to two of his clients in a box belonging to them. He retained the box, but after his death it was found that he had abstracted the deeds from the solicitor's other deeds:—Held, that the clients had a lien on all the solicitor's other deeds for their debt. *Mason v. Morley*, 34 Beav. 475.

4. C., confidential solicitor of H., borrowed money on the security of his mortgage deeds,

and purchased an estate. On payment of the mortgage, C. applied the money to the payment of his debt, representing to H. that the money was re-invested:—Held, that H. was entitled to a charge on the estate to the amount of his claim. *Hopper v. Conyers*, 2 L. R., Eq., 549; 12 Jur., N. S., 328; 14 W. R. 628.

See also Preceding Subdivision.

VII. Negligence and Misconduct.

- I. *Liability for. In General*, 6395.
- II. *Action for Negligence*, 6397.
- III. *Personal Liability for Costs*, 6398.

I. LIABILITY FOR. IN GENERAL.

5. If a solicitor, knowing that money in court belongs to one person, presents a petition and obtains payment to another, he is personally responsible. The principle applies, if he has merely a knowledge of circumstances, which, if duly considered, would lead to a knowledge of the facts. *Ezart v. Lister*, 5 Beav. 585; 11 L. J., N. S., Ch., 11.

6. An attorney on behalf of his client, the defendant, promises to pay 500l. to plaintiff; this being done by the authority of the client, attorney not liable, but only client. Otherwise, if the attorney had no authority from client to make this engagement. *Johnson v. Ogilby*, 3 P. W. 277.

7. Attorney as agent, on sale of an estate, not disclosing to the buyer an incumbrance, and leading him to suppose the title would be a good one, held liable to make satisfaction in default of the vendor. *Arnot v. Biscoe*, 1 Ves. 95.

8. On a contract for purchase, a part of the purchase money was paid as "deposit" to the vendor's solicitor, who paid it away at the desire of the vendor without the concurrence of the purchaser. This created a difficulty in completing the purchase, as a mortgagee of the estate would not join in the conveyance without payment to him of the deposits. In a suit by the purchaser for specific performance, the solicitors were declared liable to make good the money. *Wiggins v. Lord*, 4 Beav. 30.

9. In 1825 an assignment from provisional assignee to assignee was prepared, but through neglect of solicitor never executed. The provisional assignment ordered to be vacated, and a new assignment executed by the commissioners. It seems the 1 & 2 Will. 4, c. 56, s. 25, does not apply in such a case. The solicitor, having been paid for the assignment, ordered to refund. *Exp. Bennett, Re Stephens*, 2 Mont. & A. 306; 1 Dea. 70; 5 L. J., N. S., Bky., 5.

10. The solicitor for some of the defendants was agent for the rest; the former were entitled to move to dismiss, and they moved accordingly, but no order could be made, as the time for the other defendants to answer the amendment had not expired. Motion refused with costs, as the solicitor must have known that the motion could not succeed. *Partington v. Baillie*, 5 Sim. 667; 4 L. J., N. S., Ch., 40.

1. On a contract for the sale of part of an estate, the purchaser requiring a fine to be levied of it for the purpose of removing admitted defects in the title, the vendor employed an attorney who was his relation, and had been professionally employed by him on previous occasions, to levy the fine and complete the contract. The attorney advised the levying of a fine of the whole of the vendor's estate, without telling him the effect of it; such fine was accordingly levied, and the vendor died without declaring its uses, and without re-publishing his will, previously made, by which he had devised the whole estate to his wife, who survived him. After the vendor's death the attorney claimed the estate as his heir-at-law, alleging that the will was revoked by the fine, and he brought actions of ejectment to recover possession thereof. The widow filed a bill in Chancery for relief; and on an issue directed by that court, a jury found that the attorney fraudulently omitted to tell the vendor what effect the fine would have upon a devise of the property comprised in it. The Court of Chancery, upon that verdict, decreed the attorney to be a trustee for the devisee of the lands and hereditaments, which so descended to him as heir-at-law. The House of Lords, affirming that decree, further held, that the attorney's alleged ignorance of the effect of a fine on a will of the lands comprised in it, and his omission to inquire whether the consor, his client, had made a will, were such professional ignorance and neglect as afforded a principle by which a court of equity might, independently of the ground of fraud, hold him to be a trustee, for a third person, of any benefit resulting to himself, from his professional ignorance or neglect, to the prejudice of that person. *Bulkley v. Wilford*, 2 Cl. & F. 102; 8 Bli. N. S. 111.

An attorney shall not be heard to plead ignorance of the effect of a fine on a will; he is bound to have the knowledge and to give the information to his client, and shall not have any benefit from his ignorance. The principles of equity that are applied to trustees are also applicable to persons entrusted with the management of property, in legal proceedings respecting it, even without fraud. S. C. 2 Cl. & F. 181; 8 Bli. N. S. 111.

It is a principle of equity that no professional man shall take advantage of his ignorance or negligence. An attorney should know that a fine would revoke a will, and he as well as a barrister is bound to know the effect of acts which he is often employed to perform. S. C. 2 Cl. & F. 183; 8 Bli. N. S. 111.

It is the duty of an attorney employed to levy a fine, to ask his client whether he has made his will. S. C. 2 Cl. & F. 179; 8 Bli. N. S. 111.

2. A. and B. were in partnership as solicitors. A. received from a client, H., 4,000*l.* to be laid out on good mortgage security, and without consulting H. lent it to B., taking a transfer of a mortgage which B. had for the same amount on a reversionary interest belonging to S. in a sum of stock, and the money was applied for the purposes of the firm. In the next year the stock was sold out, and the proceeds received by B., who was one of the trustees. H.'s 4,000*l.* was never again in any way secured,

but the firm at first, and afterwards B., continued to pay him interest for twenty years, as on S.'s security, and represented to him that the money remained on that security. In 1850 H. discovered the truth, but still remained on friendly terms with B. B. became bankrupt in 1854, and the money was lost:—Held, that B. had been guilty of such a gross breach of the obligations of a solicitor to his client—obligations which the interests of society require the Court strictly to enforce—that a certificate could not be granted. *Exp. Selby*, 2 Jur., N. S., 29; 25 L. J., Bky., 13; 8 De G. M. & G. 783.

The advancing the money to one of the partners was a breach of duty, though this alone might not be enough to disentitle the bankrupt to his certificate, *Semble*. *Id.*

Held, that the conduct of the client after discovering the fraud could not have the effect of a condonation, the interests of society being involved. *Id.*

3. A solicitor was retained by a debtor to prepare a composition deed, the first trust of which was the payment of the costs of preparing the deed. The trustees accepted the trusts, and acted upon the deed. It was afterwards discovered, according to a case decided before the deed was prepared, that the deed was invalid, as not binding non-assenting creditors. The debtor was subsequently made bankrupt. The trustees refused to pay the solicitor's bill of costs, first, on the ground of non-retainer, and, secondly, on the ground of gross negligence; but both objections were overruled. *Re Sadd*, 11 Jur., N. S., 774; 34 L. J., Ch., 562; 13 W. R. 1009; 12 L. T., N. S., 816.

4. A receiver was appointed by the Court, upon the representation of the plaintiff's solicitor that the receiver had entered into the usual recognisances, which he had not, in fact, done. A loss occurred, in consequence of the receiver's liability being only in the nature of a simple contract debt. The solicitor was, at the instance of a defendant, made personally liable for the loss occasioned by his neglect. *Simmons v. Rose*, *Weeks v. Ward*, *Re Ward*, 31 Beav. 1.

Held, also, that the country solicitor was liable, though the representations were made by his London agents. *Id.*

5. B., being in pecuniary difficulties, consulted her solicitor as to the best means of raising money. He suggested that leasehold property, which had been settled by her upon trust for herself for life with remainder to her children, might be treated as belonging to her absolutely and be mortgaged. The trustees of the settlement declined to join in raising money, but, knowing all the circumstances of the case; retired from the trust conditionally on other trustees being appointed. This was done, and money raised by the new trustees, the existence of the settlement being concealed from the mortgagees. On a bill by the mortgagee against B., her solicitor, and the old and new trustees, nine years after the discovery of the fraud, praying for a declaration that all were liable to make good the moneys advanced by the mortgagee:—Held, that all were liable as prayed. *Clark v. Hoskins*, 15 W. R. 1161.

6. When it was sought to restrain a solicitor from proceeding in a suit to recover costs, and

to declare him guilty of fraud, on the ground of not having disclosed a will affecting the title in property which his client was about to purchase, it appearing that a copy of the will having been handed to a solicitor who had previously acted for the vendee in the sale:—Held, that fraud should not be presumed against him, notwithstanding the fact that he had prepared an answer to be sworn by the plaintiff in a chancery suit, in which it was expressly stated that the plaintiff made the purchase without any notice of the will. *M'Elroy v. Murphy*, 22 W. R. 501.

1. The plaintiff advanced money on a mortgage of certain property, on the faith of certain representations made to him by the solicitor, who negotiated the mortgage for him, that the security offered was a good one. These representations were untrue, and were known by the solicitor, when he made them, to be so. The misrepresentation was not discovered until after the solicitor's death, and shortly after that the plaintiff commenced this action against the solicitor's executors to recover the amount lent, and the arrears of interest:—Held, that, although the plaintiff would have had a good claim against the solicitor himself if he had been alive, yet that, never having asserted it in his lifetime, he could not now, after the death of the person who was to blame for the loss, assert it against his representatives. *Young v. Wallingford*, 52 L. J., Ch., 590; 48 L. T., 756; 31 W. R. 838.

II. ACTION FOR NEGLIGENCE.

2. In an action on the case against an attorney for negligence, the Court held that the cause of action arose at the time the negligence occurred, and not at the time negligence was discovered, or the consequential damages ensued. *Smith v. Fbz*, 6 Hare 386; 17 L. J., N. S., Ch., 170; 2 Jur. 130.

3. The plaintiffs lent A. B. money on mortgage on the application of his solicitor, who assured them in writing, that in his opinion he would be able to pay the amount. The plaintiffs, alleging this to be a false and fraudulent misrepresentation, instituted a suit in equity to make the solicitor personally liable:—Held, that their remedy, if any, was at law. *Whitmore v. Mackeson*, 16 Beav. 126.

4. A solicitor who defends an action brought against him by a client, ought to be able to show grounds of defence not merely available at law, but affording a moral justification of the defence. *Exp. & Re Blackhurst*, 3 De G. & J. 39.

5. Although relief may be given at the suit of a client against his solicitor for loss sustained by gross negligence, yet where the loss was in respect of a matter of conduct as to which the advice of the solicitor was founded on the opinions of competent surveyors as to the value of the property, and those opinions submitted to the judgment of the client, the Court dismissed the bill; and as fraud and improper motives were charged without evidence to support those charges, the bill was dismissed with costs. *Chapman v. Chapman*, 9 L. R., Eq., 276; 18 W. R. 533; 22 L. T., N. S., 145.

6. A receiver was appointed by the Court,

upon the representation of the plaintiff's solicitor that the receiver had entered into the usual recognisances, which he had not, in fact, done. A loss occurred, in consequence of the receiver's liability being only in the nature of a simple contract debt. The solicitor was, at the instance of a defendant, made personally liable for the loss occasioned by his neglect. *Simmons v. Rose, Weeks v. Ward, Re Ward*, 31 Beav. 1.

Held, also, that the country solicitor was liable, though the representations were made by his London agents. *Id.*

7. If a solicitor in a cause, having assumed, improperly, the character of a receiver, neglects to collect the rent, while the parties consider him to be acting as a receiver, he makes himself responsible for any rents lost in consequence of his neglect. *Wood v. Wood*, 4 Russ. 558.

8. Where an attorney, being employed by masters to take proceedings against apprentices for misconduct, did so specifically on a wrong section of a statute:—Held, such an instance of want of skill and diligence as to render him liable to repay to his clients all damages and costs occasioned by his error. *Hart v. Frame*, 6 Cl. & F. 193; MacL. & R. 595.

9. An attorney or law agent is only responsible in damages to his client for gross ignorance or gross negligence in the performance of his professional services. A declaration or a summons against an attorney or law agent to recover damages for loss occasioned by his mismanagement of a cause, must charge gross ignorance or gross negligence, or must at least contain allegations of facts from which the inference is inevitable that the defendant has been guilty of one or the other. The law as to both these matters is the same in England and in Scotland. *Purves v. Landell*, 12 Cl. & F. 91.

10. Allegation by client that costs have been occasioned by solicitor's negligence, is clear case of equitable set-off. *Piggott v. Williams*, 6 Madd. 95.

11. I never had any doubt of the unsoundness of the doctrine that A. employing B., a professional lawyer, to do any act for the benefit of C., A. having to pay B. and there being no intercourse of any sort between B. and C., if through the gross negligence or ignorance of B. in transacting the business, C. loses the benefit intended for him by A., C. may maintain an action against B., and recover damages for the loss sustained. If this were law, a disappointed legatee might sue the solicitor employed by a testator to make a will in favour of a stranger, whom the solicitor never saw or before heard of, if the will were void for not being properly signed and attested. There must be privity of contract between the parties. *Robertson v. Fleming*, 4 Macq., H. L. Ca., 167.

12. When it is sought to make a solicitor liable for negligence, that issue must be raised clearly upon the pleadings. *Bettynes v. Maynard*, 49 L. T. 389; 31 W. R. 461.

13. A bill in equity will not lie against a solicitor for negligence in investigating a title. *British Mutual Investment Co. v. Cobbold*, 19 L. R., Eq., 627; 44 L. J., Ch., 332; 23 W. R. 487; 32 L. T., N. S., 251.

A bill charged that a solicitor had negli-

gently recommended the plaintiff company to accept a freehold house as security for a loan of 5,000*l.*, and had advised that the mortgagors had the absolute fee simple in the house free from incumbrance, whereas, in fact, they had only an interest in one moiety, and that subject to incumbrances and a contract for sale. The bill prayed that the solicitor might be decreed to make good the 5,000*l.* and costs, and to take over the security from the client. A suit for the realisation of the security was pending, and the mortgagors were bankrupts, so that the actual loss, if any, was not ascertained:—Held, that the Court had no jurisdiction to grant such relief, and that even if such jurisdiction existed there was a discretion to refuse to exercise it in such a case, and a demurrer was allowed. *Ib.*

1. In the absence of fraud the Court has no jurisdiction to make a solicitor pay the costs of an action rendered necessary by his mistake or carelessness. *Clark v. Girdwood*, 26 W. R. 90; 47 L. J., Ch., 116; 7 L. R., Ch. D., 9; 37 L. T. 614.

The client's remedy is by an action for damages. *Ib.*

III. PERSONAL LIABILITY FOR COSTS.

See also BANKRUPTCY, II. vii. 4.

1. *Misconduct and Improper Proceedings*, 6398.
2. *Negligence and Mistakes*, 6399.

1. Misconduct and Improper Proceedings.

2. Costs against solicitor for improper petition. *Exp. Williamson*, Mont. & Bli. 226; 3 L. J., N. S., Bky., 48.

3. Where a bankrupt presented an unnecessary petition, his solicitor was ordered to pay 40*s.* costs. *Exp. Parker*, Buck. 313.

4. Solicitor ordered to pay all the costs occasioned by his refusing to appear for defendant at the hearing, pursuant to his undertaking, and the costs of the application. *Cook v. Broomhead*, 16 Ves. 133.

5. An attorney saying he only followed directions in drawing deeds, under fraudulent circumstances, will not excuse him from paying costs. *Bennett v. Vade*, 2 Atk. 328.

6. A solicitor, assisting his client in obtaining a fraudulent release, is properly made a party, and liable to costs, if the principal be not solvent. *Bowles v. Stewart*, 1 Sch. & Lef. 227.

7. The petition dismissed, and the costs directed to come out of the solicitor's pocket who took the affidavits. *Re Hogan*, 3 Atk. 813.

8. *Semble*, if a bill be dismissed at the hearing, with costs, and the plaintiff be then out of the jurisdiction, and the plaintiff's suit be so frivolous and vexatious that the bill could not have been filed *bonâ fide* in expectation of a favourable decree, or if the solicitor of the plaintiff guarantee his client against the costs of the suit, the Court, upon the petition of the defendants, will compel the solicitor of the plaintiff to pay the taxed costs. *Cockle v. Whiting*, 1 Russ. & M. 43.

9. If the plaintiff's attorney wilfully in the

bill describe the plaintiff as resident within the jurisdiction, when, in fact, he is resident out of the jurisdiction, he will be ordered to pay the costs of the motion to stay the proceedings, until security for costs be given. *Know v. O'Brien*, 3 Ir. Eq. R. 62.

10. Where unfounded charges of corruption were brought against commissioners by a petitioner, who appeared to be the tool of other parties, the Court ordered the commissioners their "costs, charges, and expenses," and suspended the order until the attorney for the petitioner should show cause why he should not personally pay the costs. *Exp. Williams*, 3 Dea. & Ch. 103.

11. Solicitor having inserted scandalous matter in an answer, and put counsel's name thereto without authority, committed, and ordered to pay costs. *Bishop v. Willis*, 5 Beav. 83. n.

12. The attorney for the defendant having been examined as their witness, and having made certain scandalous and impertinent statements in his deposition in reply to the last interrogatory, was compelled to pay the costs of expunging it. *Gude v. Mumford*, 2 Y. & Coll. 446; 1 Jur. 577.

Semble, that the examiner is not liable for the costs of expunging scandalous and impertinent matter from depositions made in answer to specific interrogatories, nor from depositions made in answer to the last interrogatory, where the witness is an attorney in the cause. *Ib.*

13. Where an affidavit is reported to be scandalous, the agent in London who files the affidavit is responsible for the costs as between attorney and client, notwithstanding the country attorney may have himself drawn the affidavit. *Exp. Wake*, 3 Dea. & Ch. 246; Mont. & Bli. 259; 2 L. J., N. S., Bky., 38.

14. If the solicitor upon whom the subpoena to hear judgment is served refuses to indorse on the original an admission of the service thereof, he will be ordered to pay the costs rendered necessary by such refusal. *Ross v. Wood*, 2 Dr. & Wal. 490.

15. Upon a taxation, a solicitor put in an insufficient examination. He was ordered, on motion, to pay the costs occasioned thereby, and of the four-day order and of the application. *Re Bainbridge*, 11 Beav. 620.

16. Though an attorney, by signing his name in conformity with the general order, is not to be considered as guaranteeing the success of a petition in bankruptcy, yet where it appears to have arisen out of his interested views, he will be made to pay the costs of it. *Exp. Cuthbert*, 1 Madd. 78.

17. A solicitor acted for both parties in the matter of a voluntary settlement, which was set aside for undue influence. He was made a defendant to the suit for that purpose. The Court, though exonerating him from culpability in the matter, made him bear his own costs, because he had not acted with proper prudence in the matter. *Harvey v. Mount*, 8 Beav. 439; 14 L. J., N. S., Ch., 233; 9 Jur. 741.

18. A solicitor employed in the sale of an estate knew that the title-deeds were in the possession of an adverse party; he however proceeded to prepare and obtain the execution of the conveyance and memorial. The sale went off in consequence of the absence of

the title-deeds. He was disallowed the costs of the proceeding, and, the deed being a cloud on the title, he was also ordered to deliver it without being paid the costs thereof. *Potts v. Dutton*, 8 Beav. 493.

1. Bill by mortgagor against mortgagee and his solicitors, praying to have a sale under the mortgage deed set aside for fraud and oppression, dismissed as against the solicitors, the main charges in the bill against them not having been made out, but without costs, on the ground that they were the substantial movers and authors of the sale, which, as between the mortgagor and the mortgagee, was proved not to be sustainable in a court of equity. *Matthie v. Edwards*, 2 Colly. 465; 10 Jur. 347.

2. An order was made by the Court, in 1858, for the sale by private contract of lands, and an application was made by an illiterate person to the vendor's solicitor, who had the conduct of the sale, to become the purchaser of part of the premises, and a conditional contract was entered into, whereby the vendors agreed to sell and the purchaser to buy the premises. The purchaser also agreed, at his own expense, to obtain an order of the Court confirming the sale, and in default that the vendors might obtain such an order at the purchaser's expense. On the same day the purchaser gave a written retainer to the vendor's solicitor to act as his attorney. The purchaser was a marksman, and both the above instruments were witnessed by the same solicitor. Afterwards an order was obtained confirming the purchase, and ordering payment of the money into court. The purchaser, after the contract, finding that a good title could not be made, failed to pay the purchase money, whereupon another order was obtained for payment, in default of which the purchaser was attached and committed to prison. On motion to set aside the attachment, the vendors and their solicitor opposed the application; but the Court ordered the attachment to be set aside and the prisoner to be discharged, the agreement to be delivered up and cancelled, and the costs of the prisoner throughout the proceedings, and of all parties on the motion, to be paid by the solicitor. *Bromage v. Davies*, 4 Jur., N. S., 683.

3. Where a solicitor has been retained for the prosecution of a suit, and he has by *crassa negligentia* in the conduct of the suit caused the suit to be lost, he cannot recover any portion of his bill. *Stokes v. Trumper*, 2 Kay & J. 232; 3 W. R. 140. S. C. on appeal 3 W. R. 615.

4. In a cause commenced by information, the relations' solicitor intending to cross-examine two defendants who had previously been examined in chief on behalf of a co-defendant, such defendants were, by mistake, examined upon interrogatories for the examination of witnesses in chief on the part of the informant, and, by reason of this mistake, the information was dismissed, with costs:—Held, that the mistake was *crassa negligentia* on the part of the solicitor, and disentitled him to recover any portion of his bill of costs. *Id.*

5. When, under an order for the payment of costs in chancery, a writ of *fiat facias* had been issued and executed by the sheriff, the Court refused to set aside the writ; but,

believing it had been issued in bad faith, ordered the solicitor who had taken it out to pay all charges attending its issue and execution, and also the costs of a motion for that purpose. *Re Commonwealth Land, Building, Estate, & Auction Co., Exp. Hollington*, 22 W. R. 106; 29 L. T., N. S., 502; 43 L. J., Ch., 99.

A solicitor has authority to enter into an undertaking on behalf of his client, not to issue a writ of *fiat facias* against the client's debtor, in consideration of the acceleration of payment of the debt. *Id.*

A breach of such an undertaking, by the issue of writs against the debtor, was held to be contrary to good faith, and the solicitor was ordered to pay the expenses of issuing such writs, and of an application to recover them. *Id.*

6. The Court of Chancery will not order the costs of proceedings to be paid personally by the solicitor conducting them, on account of any misconduct unconnected with those proceedings, or upon an application not giving him proper notice of the charges against him. *Re Gregg*, and *Re Prance*, 39 L. J., Ch., 107; 9 L. R., Eq., 137; 18 W. R. 589; 23 L. T., N. S., 234.

7. The Court of Chancery will, in a proper case, order a solicitor to pay the costs of litigation occasioned by deeds improperly prepared by him. *Baker v. Loader*, 42 L. J., Ch., 113; 16 L. R., Eq., 49; 21 W. R. 167.

8. An agreement had been come to between A. and B. The agreement was broken by B., and, as the claim alleged, the breach was accompanied by false instructions to counsel given by a solicitor, and by the solicitor's false statements upon oath:—Held, on an action for injunction consequent upon the breach by B., that, on the claim as alleged, there was no right of action against the solicitor for costs. *Blackburn Union v. Brooks*, 25 W. R. 57.

9. Where accounts are being taken in chambers before the chief clerk, either party has a right to have an item which has been found against him adjourned before the judge without taking out a summons for that purpose. And where a question of principle is involved in a particular item it may be necessary to do this. But the ordinary practice is to wait till the account is completed, and then take the adjournment once for all before the judge. If a solicitor were to insist upon his right to take particular items before the judge in an unreasonable manner, the Court might make him pay the costs personally. *Upton v. Browne*, 20 L. R., Ch. D., 731; 47 L. T. 289; 30 W. R. 817.

2. Negligence and Mistakes.

10. Upon solicitor's appearing to be guilty of a gross neglect, the Court will order him to pay the costs. *Fawkes v. Pratt*, 1 P. W. 593.

11. Solicitor to fiat must bear any expense which his neglect would cause the estate. *Exp. Bennett*, *Re Stephens*, 2 Mont. & A. 308; 1 Dea. 70.

12. Order being rendered nugatory by mistake in the title of the cause, the solicitor was

ordered to pay the costs of motion to rectify the mistake. *Black v. Creighton*, 2 Moll. 552.

1. The solicitor of a party beneficially interested, using the name of a mere trustee, in litigating a question of interest to his client, is bound to put such mere trustee on his guard, as to his responsibility for damages or costs, and, by neglecting to do so, may render himself responsible in default of his principal, without giving any undertaking, or being guilty of any misconduct. *Exp. Scallan*, 1 Moll. 63.

2. A pauper's solicitor will be ordered to pay the costs of any irregular proceeding. *Brown v. Danson*, 2 Hog. 76.

3. When in notice of motion on behalf of feme covert, no *prochein ami* is named, her solicitor will be liable for costs awarded against her. *Cox v. McNamara*, 1 Hog. 78.

4. Where a motion is made on behalf of a married woman, without a next friend being named, the Court has jurisdiction to make the solicitor who gave the instructions for the motion pay the costs of it. *Pearse v. Cole*, 16 Jur. 214.

5. In drawing up a decree, the word "inquiry" was erroneously inserted for the word "sale." It became necessary for the defendant to make an application to correct the error:—Held, that the solicitor of the defendant must bear the costs. *Re Bolton*, 9 Beav. 272; 10 Jur. 22.

6. A solicitor was ordered to pay the costs of an application rendered necessary by his own delay and mistake. *White v. Hillacre*, 3 Y. & Coll. 278. S. C. *nom. White v. Hillane*, 8 L. J., N. S., Exch. Eq., 65.

7. A plaintiff's solicitor held personally liable to the costs of a reference to the Master, to inquire and report whether a purchaser was entitled to any and what compensation, by reason of a misdescription in the rental, caused by his neglect in not examining the tenants' leases lodged in the Master's office. *Taylor v. Gorman*, 11 & K. 567; 4 Ir. Eq. R. 550.

8. Plaintiff's solicitor ordered to pay the costs of the day, in consequence of his non-attendance in court when the cause was called on. *Courtney v. Stock*, 2 Dr. & War. 251. S. C. *nom. Courtenay v. Stock*, 1 Con. & L. 366.

9. When there was a decree with costs in this court, which was subsequently reversed by the Lords, who directed that the bill below should be dismissed with costs, but before the appeal the plaintiff's solicitor had compelled the defendant to pay the costs below, upon receiving the plaintiff's receipt therefor; and the plaintiff had directed his solicitor to retain those costs in his possession for the purpose of defending the appeal:—Held, that the defendant could not, upon the decree of the Lords, compel the solicitor of plaintiff to refund the costs so paid. *Smith v. Clarke*, 2 Con. & L. 160; 3 Dr. & War. 344; 5 Ir. Eq. R. 423.

10. It is the duty of solicitors not to take office copies without being authenticated; and where the copy of depositions proved to be very incorrect, but was taken and paid for before it was compared or attested, the solicitor was ordered to pay the costs of the day. *Morgan v. Roe*, 12 Ir. Eq. R. 21.

11. A solicitor having exhibited gross neglect in not carrying out a decree of the Court, he

was ordered to pay the costs of the Master's report, together with the costs of the application and order consequent thereon. *Ridley v. Tiplady*, 1 Jur., N. S., 249; 24 L. J., Ch., 207; 3 W. R. 276; 20 Beav. 44.

12. A solicitor, employed by the relators in an information to conduct their case, causes by mistake two of the defendants to be examined in chief (as if on behalf of the relators), his intention being to cross-examine them. The information, which prayed a decree against all the defendants, was dismissed in consequence of this examination of defendants on behalf of the relators:—Held, upon a claim by the solicitor for his bill of costs against the executor of the relators, that he had shown *crassa negligentia* and a want of reasonable skill; and his whole claim, the contract to conduct the suit being entire, was disallowed. *Stokes v. Trumper*, 2 Kay & J. 232; 3 W. R. 503. S. C. on appeal 3 W. R. 615.

13. When persons, even without *mala fides*, make or adopt a statement, the contrary of which they ought to have known by reasonable diligence to be the truth, and a wrongful order is made by the Court grounded on such statement, all such persons are liable to indemnify the persons who suffer through such an order from all the consequences. *Re Spencer*, 39 L. J., Ch., 841; 18 W. R. 240; 21 L. T., N. S., 808.

The primary liability in respect of costs falls upon the solicitor, through whose agency the order was obtained, and the primary liability as to the fund lost through the order falls upon those who wrongfully received it. *Id.*

14. A bill having been dismissed with costs, owing to the plaintiff's solicitor having neglected to instruct counsel or deliver papers, the cause was, on motion supported by affidavit, under the circumstances ordered to be restored upon payment of costs by the plaintiff's solicitor. *Birch v. Williams*, 24 W. R. 700.

15. A verbally agreed with B., his solicitor, for the sale of land to B. This agreement, which was never reduced to writing, provided that B. should bear all expenses of making out the title, that possession should be at once given, and that the purchase-money should be paid at a fixed future date, with interest in the meantime. B. entered into possession, but took no further steps in completion of the purchase, and, before the purchase-money became due, died. In a suit by A. for specific performance against the executor of B.:—Held, that B., as A.'s solicitor, ought to have had an agreement in writing prepared, and that the executor was bound to complete the purchase and pay the costs of the suit. *Brafield v. Scriven*, 22 W. R. 202.

16. In the absence of fraud the Court has no jurisdiction to order a solicitor who has made a mistake in the preparation of a document to pay the costs of a suit for its rectification. *Clark v. Girdwood*, 47 L. J., Ch., 116; 7 L. R., Ch. D., 9; 26 W. R. 90; 37 L. T. 614.

17. The taxing master in taxing a bill of costs between a solicitor and his client has power to disallow the costs of proceedings in an action conducted by the solicitor which were occasioned by the negligence or ignorance of the solicitor. But if the negligence goes to the loss of the whole action, he ought not to disallow them, but to leave the client to

bring an action for negligence against the solicitor. *Re Massey and Carey*, 26 L. R., Ch. D., 459; 53 L. J., Ch., 705; 51 L. T. 390; 32 W. R. 1008.

See also SETTLEMENT, XVII. v. 6.

VIII. Striking off the Rolls and Suspending from Practising.

- I. Jurisdiction. When Exercised, 6401.
- II. Practice on, 6402.

I. JURISDICTION. WHEN EXERCISED.

1. An order of the Recorder's Court in the colony of Sierra Leone, disbaring and striking off from the Rolls a practitioner of that court, for alleged contumelious conduct, on appeal reversed and rescinded. *Smith v. Sierra Leone (Justices of)*, 3 Moo. P. C. 361.

Appeal allowed from orders made by the judges at Sierra Leone, striking a practitioner of the courts in that colony off the rolls of proctors of the Vice-Admiralty Court, and also off the rolls as attorney of the court at Freetown, upon terms, that the petitioner gave notice of the allowance of such appeal to the judges, with liberty to the petitioner to set down his case to be heard *ex parte* at the expiration of six months after notice served. S. C. 7 Moo. P. C. 174.

Two orders made by the judges at Sierra Leone, striking a practitioner of the courts off the rolls, for alleged misrepresentation, contempt, and misconduct:—Held, on appeal, by the Judicial Committee, to have been improperly made, and ordered to be discharged, and the appellant restored to the rolls. But, under the circumstances of the case, the Judicial Committee directed the appellant to apply to the Court in the colony for such re-admission. *Id.*

2. Where a party had been duly admitted and practised as a barrister and attorney in a colonial court, and upon his arrest on *meane* process claimed and was allowed his privilege, but the colonial judge at the same time suspended him from practising in the court, upon grounds stated, but unsupported by evidence, the Judicial Committee rescinded the order as irregular. *Re Monckton*, 1 Moo. P. C. 455.

3. Solicitor falsely representing that an injunction was granted, liable to damages, to an indictment, and to be struck off the roll. *Kimpton v. Ede*, 2 Ves. & B. 352.

4. Court will not strike solicitor off the roll at his own request, without affidavit that there is no apprehension another party will apply for the same purpose. *Exp. Owen*, 6 Ves. 2. S. P. *Exp. Foley*, 8 Ves. 33.

5. Where a solicitor is guilty of malpractices, he may be degraded by applying to strike him out of the roll. *Anon.*, 2 Atk. 273.

6. A solicitor, guilty of gross fraud towards, and abuse of confidence of, his client, struck off the roll; and in a fit case, such as this, for the exercise of the jurisdiction of the Court, the circumstance of the latter having been

negotiating for a compromise:—Held, not a ground for refusing the public protection. *Re Martin*, 6 Beav. 337.

7. On a bill filed by parties interested under a will against the sole acting trustee and executor, and against his solicitor, under whose advice the trust property had been improperly sold out by the trustee, and applied principally to the solicitor's use, praying that the stock might be replaced, the Court at the hearing, after directing certain inquiries, ordered that the solicitor should show cause why, having regard to his answer and the evidence in the cause, his name should not be struck off the roll of solicitors of the Court of Chancery. *Goodwin v. Gosnell*, 2 Coll. 457; 10 Jur. 422.

A solicitor having advised his client (a person in an humble station of life) to commit a breach of trust by selling out stock of which the client was a trustee, and having himself profited by the breach of trust, was ordered to be struck off the roll unless he showed good cause to the contrary; but having in obedience to the decree in the cause replaced the stock and paid the costs of the suit, the Court (taking into consideration his youth and other circumstances) abstained from further proceeding in the matter, upon his undertaking to pay to the other parties to the suit their costs, charges, and expenses. S. C. 2 Colly. 462; 10 Jur. 422.

8. An attorney or solicitor cannot give up his client and act for the opposite party in any suits between them. *Cholmondeley (Earl) v. Clinton (Lord)*, 19 Ves. 261.

Attorney prevented from communicating his client's secrets, even by striking off the roll; not permitted to give evidence of them. *Id.* 268.

9. Where a solicitor took upon himself without authority to instruct counsel to appear for parties, one of whom was abroad at the time, and to consent to or not oppose a petition to transfer a fund in court in which the parties had important interests, and upon which petition the fund was ordered to be transferred, and the fund was lost, these circumstances appearing in evidence, although the solicitor was not a party, but only a witness in the cause, the Court directed him to be served with notice to show cause why he should not be struck off the rolls. *Wheatley v. Barston, Collins' case*, 7 De G. M. & G. 261; 1 Jur., N. S., 1124; 24 L. J., Ch., 727; 3 Eq. Rep. 859.

The solicitor's explanation of his conduct in the above case not being satisfactory, he was ordered to be struck off the roll. S. C. 1 Jur., N. S., 1125; 24 L. J., Ch., 732; 3 Eq. Rep. 865. S. C. *nom. Re Collins*, 7 De G. M. & G. 558.

Semble, No circumstances can justify a solicitor in instructing counsel to consent, on behalf of a client, to the disposing of funds in Court, in which the client has an interest, without express authority from the client. S. C., 3 Eq. Rep. 865.

10. An attorney on the roll of the High Court of Bengal, prepared a conveyance on behalf of his brother, containing a false recital as to the consideration, knowing the same to be false, and attested the execution of the deed with such false recital, and signed his name as a witness to the receipt of the considera-

tion money, knowing that no consideration had passed or was intended to pass. The deed was duly registered. The Court ordered him to be struck off the roll:—Held, on appeal, that he was properly called upon to explain the circumstances under which the deed was executed; but, that, as there was no evidence that he was guilty of any fraudulent or dishonest intention, and as no dishonest use was attempted to be made of the deed, and as no person had been injured thereby, the circumstances were not sufficient to warrant the order of the Court. *Re Stewart*, 37 L. J., P. C., 25; 2 L. R., P. C., 88; 5 Moo. P. C., N. S., 187; 16 W. R. 1000.

1. A solicitor, who had filed a bill for specific performance in the name of the assignee of a bankrupt, without having obtained his consent or retainer, and who had also allowed his client to make an affidavit containing a statement which he knew to be false, was sentenced to be suspended for the space of ten years from practising as an attorney or solicitor. *Re Gray*, 20 L. T., N. S., 730.

2. Where an attorney has fraudulently obtained and withheld his client's money, the repayment of the money is not a purgation of the offence. If an attorney be called upon to answer matters in an affidavit merely, however dissatisfied the Court may be with his answer, the Court will not order him to be struck off the rolls without giving him an opportunity to be heard. *Re H—*, 31 L. T., N. S., 730.

Solicitor Trustee. 3. Where a solicitor was a trustee, and had appropriated the trust fund, which was in court, to his own use, the Court ordered him to be struck off the roll. *Thorn-dike v. Hunt*, 5 Jur., N. S., 879.

4. A solicitor who, being one of the trustees of a settlement, had been guilty of fraudulent misapplication of, and misrepresentation as to, a part of the trust fund, was ordered to be struck off the rolls upon the petition of his co-trustees. In such a case, the fact that the delinquent was not, at the time of committing the fraud in question, acting as the solicitor of the defrauded *cestuis que trustent* is immaterial. *Re Hall, Dolland v. Johnson*, 4 W. R. 686.

H., a solicitor, was in 1846 appointed a trustee of a settlement, which was prepared by himself and his partner, who, as alleged, continued to act as solicitors for the *cestuis que trustent* and for the petitioners. He, in July 1854, received the accountant-general's cheque in payment of a sum which belonged to the parties in a cause, which he paid in to his own bankers to his own account, and subsequently sent to the petitioners a statement, by which he represented that a certain sum had been received and duly invested. In October 1855 he was required to give information respecting the state of the trust fund, and, in reply, he made out and delivered a memorandum, that a sum had been paid to the trustees and invested; but it afterwards turned out that he had made no such investment. On petition presented for that purpose by the co-trustees:—Held, that H. had been guilty of such a misrepresentation, in addition to a breach of trust, that he could not be allowed to remain an officer of the court;

and his name was accordingly struck off the roll. S. C. Jur., N. S., 633.

5. A court of equity, *ex mero motu*, ordered a solicitor trustee who had been guilty of a breach of trust, to show cause why he should not be struck off the roll. *Thompson v. Finch*, 25 L. J., Ch., 681.

6. A solicitor induced his co-trustee to join him in executing a power of attorney, by which trust stock standing in their joint names was sold, and he obtained from such co-trustee an authority to place the proceeds to his private account at his bankers. The proceeds were subsequently lost through the solicitor's insolvency; and although he was himself entitled to a reversionary interest in a portion of the trust-property, he was struck off the rolls. *Re Chandler*, 2 Jur., N. S., 366; 25 L. J., Ch., 396; 22 Beav. 253.

II. PRACTICE ON.

7. Though the rule of another court for striking an attorney off the roll be produced, *semble*, an order *nisi* only can be obtained in this court in the first instance. *Re Mark*, 4 Dea. & Ch. 482.

Where it was sworn that an attorney had no place of residence in this country, an order *nisi* for his being struck off the roll was permitted to be served at his last place of residence. S. C. 4 Dea. & Ch. 28.

8. Application to remove a solicitor from being or acting as a Master Extraordinary of the Court of Chancery, and to strike him off the roll of such court, though it may be properly made, by reason of his conduct in matter of bankruptcy, should not be made in bankruptcy, but should be addressed to the general jurisdiction of the Court. *Exp. Lone*, 1 G. & J. 78.

Restoring Name to Roll. See I. II. *ante*.

IX. Summary Jurisdiction of the Court.

- I. *When Exercised*, 6402.
- II. *Practice*, 6406.

I. WHEN EXERCISED.

1. *Orders for Payment of Money*, 6402.
2. *Negligence*, 6404.
3. *In Other Cases*, 6405.
4. *Under Debtors Act.* See DEBTORS ACT.

1. Orders for Payment of Money.

9. A summary application being made against three attorneys, jointly, to pay over to the assignees a sum of money which they had received as the bankrupt's solicitors under an order of the Court of Chancery:—Held, not sustainable, as they were not all collectively attorneys of this court. *Quare*, whether such an order would have been made, if they had

been all attorneys of this court. *Exp. Hicks*, 2 Dea. & Ch. 573; Mont. & Bli. 256; 2 L. J., N. S., Bky., 48.

1. A married woman, to whom a sum of money was payable for her separate use, received a cheque from the accountant-general, and handed it over to her solicitor, who accompanied her. The solicitor was, on motion, ordered to pay the balance to his client, and held, that the onus being on the solicitor to show cause for not paying it over, he could not set up a voluntary agreement to pay her husband's debt. *Manhood v. Milbanke*, 15 Beav. 36.

2. A purchased an estate from B., and, on the completion, one solicitor acted for both parties, and the purchase money was paid into his hands. Afterwards, the purchaser was defeated by C., who had a paramount mortgage. The purchaser presented a petition against the solicitor, asking payment by the solicitor out of the purchase money of the losses occasioned, or that he might indemnify the petitioner. The petition was dismissed with costs; the Court holding, first, that it had no jurisdiction to award compensation or damages in such a case; and, secondly, that the money having come to the hands of the solicitor as agent of the vendor, and not of the petitioner, it could not interfere. *Tylee v. Webb*, 14 Beav. 14; 15 Jur. 1023.

As to the summary jurisdiction of the Court over solicitors, where moneys are paid to them by clients in that character. *Id.*

3. If attorney (being concerned as well for mortgagor as mortgagee) has been appointed receiver of rents and profits of mortgaged estates; and on the order made for delivery of possession, there is found to be a balance remaining in his hands beyond what is sufficient to satisfy the mortgagee; he will be ordered to pay such balance into court, notwithstanding the general report has not yet been made, on which there may possibly be found to be a greater sum of money due to him than the balance in his hands. *Lewes v. Morgan*, 5 Price 42.

4. By an order of the Court, the costs to be incurred by a married woman suing by her next friend in a future proceeding were ordered to be paid to A. B., her solicitor. Pending the proceedings, A. B. was discharged, and C. D. appointed solicitor. A. B. received the whole costs:—Held, that the Court had jurisdiction, on petition, to order A. B. to pay over to C. D. his share of such costs. *Exp. Bailey & Hope, Re Barnard*, 14 Beav. 18.

5. Where a client had corresponded and dealt exclusively with one only out of a partnership of three solicitors, and remitted a sum of money to that one alone, although desired by him to remit the money to the firm, a motion against all three partners, under summary jurisdiction of the Court to compel them to pay the money, refused as to the two partners who had thus been excluded from the fair means of the knowledge of the remittance. The summary jurisdiction of the Court over its officers extends to relief only in cases of personal misconduct and neglect of duty. *Re Lawrence*, 2 Sm. & G. 367; 18 Jur. 742; 23 L. J., Ch., 791. *S. C. nom. Exp. Burdon, Re Lawrence*, 2 W. R. 680; 2 Eq. Rep. 931.

A solicitor who allows his name to be used

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by others conducting in his name the business of solicitors, incurs the peril of personal responsibility. *Id.*

Where a solicitor receives money to be paid into court, and neglects to do so, the Court, under its summary jurisdiction, can compel him to repay the money. *Id.*

A., B., and C., a firm of solicitors, were employed by R. B., a defendant in a suit, to conduct the proceedings on his behalf, but which were conducted by C. only. A. was only a nominal partner, but of this fact R. B. was ignorant. The correspondence was carried on between R. B. and C. only, and though the latter wrote to the former sometimes in the name of the firm, he did so more frequently in his own name; and on one occasion C. said, "Will you send us a crossed cheque, and we will pay it into court." The letter was signed by C. only, and R. B. remitted the cheque to him. C. some time afterwards wrote to R. B., and stated that that sum and another had been paid into court and invested. R. B., in June, 1853, received a letter from C., inclosing a power of attorney, authorising B. and C. (as C. stated) "to receive the principal sum of 800*l.*, due in March last, and paid by us. It will enable us to pay the premiums," etc. The power was executed, and C. obtained payment of the money. The moneys remitted to C. were not applied as they ought to have been. In December 1853 the partnership as to C. was dissolved. On motion by R. B., that A., B., and C. might jointly and severally be ordered, under the summary jurisdiction of the Court, to pay into court within three days the moneys misapplied by C., an order was, under the circumstances, refused as against A. and B. and made as of course against C., but without costs. *Id.*

6. A receiver having been appointed for the plaintiffs in a cause, paid certain moneys to one of a firm of solicitors of the plaintiffs, who were also his solicitors in the matter. The partner to whom the money was paid misapplied the moneys and absconded, and the plaintiffs moved that the other partners might make good the deficiency:—Held, that the receiver not being a party to the motion, no order could be made. *Chater v. Maclean*, 1 Jur., N. S., 175; 3 W. R. 261; 3 Eq. R. 375.

Where the other partners disputed their liability for the acts of the defaulting partner:—Held, that no order could be made against them under the general jurisdiction of the Court over solicitors. *Id.*

7. A solicitor, professionally concerned in a transaction for A., received on his account, in the course of that transaction, a sum of money. Afterwards, it was arranged between A. and B. and the solicitor, that the sum should remain in the solicitor's hands as a security for the payment of the expenses of certain proceedings taken in Parliament by B. to obtain an Act for a divorce. The application to Parliament having failed, and the costs of it not having exhausted the fund:—Held, that, under the summary jurisdiction of the Court over the solicitor, it could order the repayment to A. of the balance. *Exp. Wortham*, 4 De G. & Sm. 415.

8. A solicitor who has received and has in his hands the money of his client will be

summarily ordered to pay over the amount. *Re Becke*, 18 Beav. 462.

A solicitor received moneys for his client, an administratrix:—Held, that he could not set up proceedings by the next of kin, of whose rights he had notice, as a defence for not paying the administratrix. *Ib.*

1. Where an executor and a residuary legatee employed a solicitor in the matter of the executorship, and transferred into the joint names of client and solicitor stock to answer a legacy, and subsequently employed the same solicitor in two suits in equity and in an action, in all of which matters costs were incurred, the Court, having, by an order made in both suits, ordered the payment of the legacy out of the fund, and the costs of the parties to the suits to be paid by themselves, refused a motion made on the part of the client, pending an action for the balance of bills of costs, asking that the solicitor might be ordered to join in transferring the balance of the fund, after payment of the legacy, into the client's name, on the ground that the proceedings in respect of which the costs claimed were incurred were closely connected with the purposes for which the fund was invested, and that the claim was one to be settled by a court of law. *Re Robinson*, 5 Jur., N. S., 1021.

2. A solicitor received from his client a sum of money to pay off a mortgage. He did not so apply it, but claimed a lien on it for his costs. He was summarily ordered to repay the amount to his client, but without interest. *Re Cullen*, 27 Beav. 51.

3. A solicitor was appointed a member of a committee of a company, with power to compromise two suits. He, with the approbation of his co-committee, compromised them and received the money. A summary application that he might pay over the money or be struck off the rolls was refused with costs. *Re Harvey*, 27 Beav. 330.

4. The Court will not, in the exercise of its summary jurisdiction over solicitors, call upon a solicitor to account for moneys received by him where they were received by him, not in the character of solicitor to the person making the application, but of solicitor to another person. *Dixon v. Wilkinson*, 4 De G. & J. 508; 5 Jur., N. S., 1063; 4 Drew. 614.

A. was solicitor to the plaintiff in a cause, and also to the receiver, and the receiver was in the habit of remitting the rents to him:—Held, that A. must be considered to have received the rents as solicitor or agent of the receiver, and that the plaintiff could not call upon him to account for them under the summary jurisdiction. *Ib.*

Assuming the Court to have jurisdiction to make a solicitor answerable for losses occasioned to his client by mere ignorance, mistake, neglect, or mismanagement, apart from fraud or malfeasance, the Court has a discretion as to exercising or declining to exercise that jurisdiction, according to the circumstances of each particular case. *Ib.*

Semble, the Court has such a jurisdiction. *Ib.*

5. An order upon the former solicitor to the creditors' assignee of a bankrupt's estate to pay over money forming part of the estate, and admitted by him to be in his hands,

ought not to be made *ex parte*. *Exp. Franco*, *Re Kemp*, 18 W. R. 55; 21 L. T., N. S., 341.

6. An order was made that a solicitor (who was also a trustee of a will) should pay into court trust money which he had by affidavit admitted that he had in his hands, upon motion made by the *cestui que trust* in a suit to administer the estate of the testator, the notice of motion being entitled in the suit and in the matter of the solicitor. *Re Clorikew*, *Re Howard*, 19 W. R. 939; 24 L. T., N. S., 890.

7. When a solicitor made default in the payment of a sum of money which he received on behalf of his client, and an order for payment within a certain date was obtained from the Court, the client undertaking to give credit for any sums due by her, on non-payment of the sum, within the fixed period, an order for an attachment was obtained. The solicitor not having made any affidavit of credits due from the client was not allowed to treat them as a set-off against the sum for non-payment of which the attachment was sought. *Anon.*, 22 W. R. 479.

8. A solicitor was ordered to pay money to a receiver of the Court on pain of sequestration and imprisonment. His property was seized on a *fi. fa.* under the order, but possession was given up under an agreement:—Held, on breach of the agreement by him, that he could not be attached under the order. *Harvey v. Hill*, 43 L. J., Ch., 95; 16 L. R., Eq., 324; 28 L. T. 734; 21 W. R. 783.

9. A solicitor, employed to obtain money charged on lands sold in the Landed Estates Court of Ireland, proved the claim, and having drawn out the money by means of a power of attorney, executed by his client under his own advice, failed to pay it over to the client:—Held, that his misconduct was committed in his capacity of solicitor, and that he was accordingly liable to attachment. *Re M.*, 1 L. R., Ir. 67, 188.

For Non-payment of Balances due on Taxation. See XVI. xxv. *post*.

See also DEBTORS ACT.

2. Negligence.

10. Where a solicitor has been negligent in attending to a client's business, the Court can grant an attachment against him; and courts of law exercise the same summary jurisdiction over attorneys. *Floyd v. Nangle*, 3 Atk. 568. S. C. *nom. Lloyd v. Nangle*, Dick 129.

11. The solicitor employed by the bankrupt to procure his certificate, neglecting to obtain the signature of the commissioners to the certificate, which had been long before signed by the proper number of creditors, ordered to deliver up the certificate and affidavits of the bankrupt, and to pay the costs of the application. *Exp. Houghton*, 1 G. & J. 14.

12. The Court has no jurisdiction to make a solicitor responsible for negligence in the conduct of a suit. *Frankland v. Lucas*, 4 Sim. 586; 1 L. J., N. S., Ch., 124.

13. Where solicitors have been guilty of even gross negligence in the conduct of a cause, the Court has no summary jurisdiction to give relief on petition. *Dixon v. Wilkinson*, 4 Drew.

614. But see S. C. on appeal 4 De G. & J. 508; 5 Jur., N. S., 1063.

3. In Other Cases.

1. The Court will only exercise a summary jurisdiction over an attorney when he is acting in the character of an officer of the Court, and not in an ordinary case of attorney and client. *Exp. Bull*, 3 Dea. & Ch. 116; 2 L. J., N. S., Bky., 76.

2. A solicitor is an officer of the Court, and is liable to serious consequences if he neglects his duty of explaining the effect of the bill of sale to the grantor. He is also liable to an action by his client, as well as to proceedings of a penal character. Per James, L. J., in *Exp. National Mercantile Bank, Re Haynes*, 15 L. R., Ch. D., 52; 49 L. J., Bky., 62; 43 L. T. 36; 28 W. R. 848.

3. The Court will not exercise its summary jurisdiction to compel a vendor's solicitor to perform an undertaking given by him at the sale to do certain acts for clearing the title to the estate. *Pearl v. Bushell*, 2 Sim. 38.

4. Performance of agreement, to compromise a suit entered into by the solicitor for the plaintiff and the solicitor for the defendant, for payment by the latter of the former's costs, not enforced by order in a summary way. *Gilbert v. Cooper*, 17 L. J., N. S., Ch., 265. 15 Sim. 647. n. Reversing 15 Sim. 343.

5. On motion, which was opposed, to enlarge the time for closing evidence until one month after the production, as a witness, of S., an order granting the enlarged time was made, upon the undertaking of both B., the husband of S., and his solicitor, that in the event of S. being produced for examination, no attempt should be made, either directly or indirectly, to discover her place of residence, or in any way to molest her. B. and his solicitor signed the registrar's book at the foot of the undertaking. On the examination of S. before the examiner, the solicitor of B., after the terms of the undertaking had been read to him, served her with a subpoena to attend as a witness in another cause:—Held, on motion to commit the solicitor to prison for a breach of his undertaking, that the service of the subpoena upon S. while before the examiner amounted to an act of molestation; and though the Court did not commit him to prison, yet it ordered him to pay the costs of the application. *Lanford v. Spicer*, 2 Jur., N. S., 564.

Semble, that S. was not bound to obey the subpoena served upon her. *Id.*

6. The defendant in an action in this court being in prison for contempt, his solicitors, in order to induce the plaintiff's solicitors to give their consent to his release from arrest, entered into an undertaking, in terms unconditional, to pay an agreed sum as the costs of the application for his committal. This undertaking not having been performed, the plaintiffs moved in this matter for a summary order that the defendant's solicitors should be ordered to pay to the plaintiffs or their solicitors the agreed sum, pursuant to the undertaking, and the costs of that application. There was a conflict of evidence as to whether the undertaking was intended to be unconditional, or conditional only upon its being in accordance

with the practice of the Court (which it was now admitted it was not) to make the order for release only on terms of payment of costs:—Held, that the Court had jurisdiction to entertain the application; that the application was properly made; that upon the evidence the undertaking was unconditional; and that there must, therefore, be an order in terms of the notice of motion. *Re Woodfin and Wray*, 51 L. J., Ch., 427; 30 W. R. 442.

7. The Court will interfere to restrain an action at law the bringing of which is against the spirit, although not within the letter, of a former injunction. A solicitor assisting his client in bringing such an action may be called upon by the Court to answer the matters of the affidavits. *Brenan v. Preston*, 1 W. R. 173.

8. A bill filed without the authority of the plaintiff was dismissed with costs, and the plaintiff was taken under an attachment for non-payment of costs. The Court, on motion, ordered the solicitor to indemnify A., but refused to release A. as against the claim of the defendants:—Held, also, that A. was not, on such application, to be deprived of his right against the solicitor to damages for his imprisonment. *Hood v. Phillips*, 6 Beav. 176.

9. A. purchased an estate from B., and on the completion, one solicitor acted for both parties, and the purchase money was paid into his hands. Afterwards the purchaser was defeated by C., who had a paramount mortgage. The purchaser presented a petition against the solicitor, asking payment by the solicitor out of the purchase money of the losses occasioned, or that he might indemnify the petitioner. The petition was dismissed with costs, the Court holding, first, that it had no jurisdiction to award compensation or damages in such a case; and, secondly, that the money having come to the hands of the solicitor as agent of the vendor and not of the petitioner, it could not interfere. *Tyles v. Webb, Re Hinton*, 14 Beav. 14; 15 Jur. 1023.

As to the summary jurisdiction of the Court over solicitors, where moneys are paid to them by clients in that character. *Id.*

10. A trustee, who is a solicitor, cannot be removed under the jurisdiction of the Court of Chancery over solicitors, that jurisdiction being exercised only in respect of acts done by a solicitor in that character, or in some relation immediately arising out of it. *Re Blanchard*, and *Re Le Douloet*, 30 L. J., Ch., 516; 9 W. R. 647; 4 L. T., N. S., 426.

11. A client agreed in writing to lend his solicitor a sum of money to enable him to make a purchase of land, but if the purchase was not completed, the money was to be at once repaid. The purchase was not made, and the money was not returned. The client applied for an order for re-payment, under the summary jurisdiction of the Court:—Held, that, there being no relation of solicitor and client between the parties in respect of the agreement, no order could be made under the summary jurisdiction of the Court. *Re Bryant*, 50 L. T. 450.

12. In the absence of fraud, the Court has no jurisdiction to make a solicitor pay the costs of an action rendered necessary by his mistake or carelessness. *Clark v. Girdwood*, 7.

L. R., Ch. D., 9; 47 L. J., Ch., 116; 37 L. T. 614; 26 W. R. 90.

The client's remedy is by an action for damages. *Id.*

II. PRACTICE.

1. A solicitor, having answered the matter of a petition against him pursuant to an order of the Court, is not entitled to move that the petition be dismissed with costs, for want of prosecution, until one clear term has elapsed after notice of the answering affidavit. *Bucke v. Murphy*, 3 Ir. Eq. R. 373; Fl. & K. 173.

2. Solicitor, from whom a sum was found due, ordered to pay all the costs of proceedings to compel payment. Whether it is necessary, in demanding payment by attorney, to leave a copy of the power of attorney, *semble* not. *Re Dufaur & Blakeney*, 16 Beav. 113.

3. The jurisdiction of the Court of Chancery over solicitors, as officers of the Court, for misconduct, is very special, and will not be exercised on an ordinary summons for taxation of a bill of costs. *Re Forsyth*, 2 De G. J. & S. 509.

On the occasion of a transfer of the securities of first and second mortgages to a third mortgagee, a sum of money was paid to the solicitor acting on behalf of the first and second mortgagees and the mortgagor on account of his costs, and was added to the mortgage debt. Afterwards he sent in his bill of costs to the third mortgagee, which included charges for business done for the mortgagor, and also for business done for the mortgagees in a common law court. The third mortgagee took out a summons for taxation of the bill.—Held, that he could have no relief upon that application, either under the 6 & 7 Vict., c. 73, or under the general jurisdiction of the Court. *Id.*

4. An application for the Court to exercise its jurisdiction over a solicitor on account of conduct disclosed in an action may be made in the action, and therefore is a further proceeding within Order LI., Rule 1a. Judicature Act. *Cave v. Cave*, *Re Cave*, 49 L. J., Ch., 656; 43 L. T. 158; 28 W. R. 764.

5. An order was made that a solicitor (who was also a trustee of a will) should pay into court trust money which he had by affidavit admitted that he had in his hands, upon motion made by the *cestui que trust* in a suit to administer the estate of the testator, the notice of motion being entitled in the suit and in the matter of the solicitor. *Re Clorihen*, *Re Howard*, 24 L. T. 860; 19 W. R. 939.

6. The Chancery Division will exercise the jurisdiction over solicitors conferred on it by s. 87 of the Judicature Act 1873, according to the practice familiar to the Chancery Division, and will not grant a rule *nisi*. *Re Copp*, 32 W. R. 25.

Service of Order.] 7. The Court refused to make an order that service of a petition against an attorney for an order to pay certain costs for which he had been declared liable, by leaving a copy at his chambers, should be deemed good service. *Re Sandys*, 3 Dea. & Ch. 34.

8. Before a motion can be made to compel a solicitor or other officer to answer a petition complaining of his conduct, he must be four days served with it. *Pitcairne v. Woodroffe*, 2 Moll. 353.

9. An action was ordered to be stayed, and the costs of the defendants to be paid by the plaintiff's solicitor. The order was served by leaving a copy at the office of the solicitor, but was not obeyed. Upon the application of the defendants, the Court made an order for an attachment to issue against the solicitor, and for payment by him of the costs of the application and the attachment as between solicitor and client. *Tilney v. Stansfeld*, 28 W. R. 582.

10. Service of a notice of motion for a writ of attachment upon the solicitor on the record of the party against whom the attachment is to be issued is sufficient notice to the party, without personal service. *Browning v. Sabin*, 46 L. J., Ch., 728; 5 L. R., Ch. D., 511; 25 W. R. 602.

11. A notice of motion for a writ of attachment for disobedience to an order made on an original petition need not, as well as the order, be served personally on the respondent to the petition, but may be served by being left at his residence. *Browning v. Sabin* (5 L. R., Ch. D., 511; 46 L. J., Ch., 728; 25 W. R. 602) explained. *Re A Solicitor*, or *Re Ryan*, 14 L. R., Ch. D., 152; 49 L. J., Ch., 295; 42 L. T. 310; 28 W. R. 529.

X. Rights and Liabilities as Partners.

I. Articles, 6406.

II. Unqualified Practitioner, 6407.

III. Goodwill and Profits, 6408.

IV. Dissolution, 6410.

V. Liability for Acts of Co-Partner, 6411.

I. ARTICLES.

12. A. and B., and the son of B., entered into partnership as solicitors, and, by articles, agreed—(2) that the partners were diligently and faithfully to employ themselves in carrying on and managing all the professional business in which they or either of them might be employed or concerned; (5) that B. should use his best endeavours to obtain the appointment of the partnership firm to three offices or clerkships which were then held by B., and such offices should be partnership appointments; (6) that all other compatible offices should be obtained if possible in the name of the firm, and the emoluments treated as part of the profits of the partnership; (15) that if B. or his son should retire, or A. or B. or his son should die, the share of the deceased partner should accrue to the surviving partners; that if B. or his son retired they were to use their best endeavours to secure the practice to the continuing partners, and such retiring partner should not practise within thirty miles; (16) that if either partner should not diligently and faithfully employ himself in carrying on the said partnership

practice, and should, on receiving moneys, bills, notes, etc., knowingly or wilfully omit immediately to make entries thereof, or if A. or the son of B. should absent himself more than two months in one year, the others or other of the partners, if they or he should think fit, should be at liberty to dissolve the partnership by giving to the offending partner a notice to that effect, and the partnership should from that time, or the time specified in the notice, be dissolved, in the same manner and with the same consequences as if it had been determined by the voluntary retirement of the offending partner. B. and his son subsequently procured their own appointment, or the appointment of one of them, to the offices or clerkships, and did not endeavour to procure the appointment of A. It was afterwards discovered that B. was greatly involved in debt, and he absconded in January 1849, and did not return to the business. In May 1849 A. served a notice, in the manner pointed out by the articles on B. and his son, to dissolve the partnership from that date; and he then filed his bill against B. and his son to have the dissolution declared by the Court, an injunction to restrain them from practising within thirty miles, and a decree that they should resign the several offices or clerkships:—Held, that the plaintiff was entitled to dissolve the partnership as to B., but not as against the other partner, the son of B., and that he was not entitled to dissolve it by notice under the sixteenth clause without the concurrence of his co-partner (the son). That B. not having procured, or endeavoured to procure, for the partnership firm the appointments to the several offices or clerkships, so as to give the plaintiff at the dissolution either a share of the profits of the offices, or the chance of competing for them, but such appointments having been procured for B. and his son to the exclusion of the plaintiff, B. and his son were not to be allowed to retain the offices for their exclusive benefit. That inasmuch as from the nature of the offices they could not be sold, nor could any manager or receiver be appointed to carry them on, the defendants ought to be charged with the value of the offices in the partnership accounts. That the plaintiff having given a notice of dissolution (acting under the sixteenth clause), and his co-partner having adopted it, the partnership should be treated as dissolved from the time of the notice, although not with the consequences attaching to a dissolution under the fifteenth clause. That the consequences of a dissolution under the fifteenth clause not having attached, the plaintiff therefore was not entitled to the injunction to restrain the defendants from practising within thirty miles. *Smith v. Mules*, 9 Hare 556; 16 Jur. 261; 21 L. J., Ch., 803.

1. An agreement between two solicitors in partnership together, that one of them should continue to carry on the business under their joint names, and should be entitled to all the profits thereof, and should grant to the other partner an annuity of 300*l.* during the life of his mother, and in the event of his dying in the lifetime of his mother, should pay to his widow an annuity of 100*l.* during the remainder of his mother's life, and should indemnify him against all liability in respect of his name being used, and that the partnership should

cease on the death of the mother of the retiring partner:—Held, not to be void as against public policy, but to be a valid and binding agreement. *Aubin v. Holt*, 2 Kay & J. 66; 25 L. J., Ch., 36.

Held, also, that the agreement must be considered to mean that an annuity was to be granted by deed, and that the retiring partner was entitled to enforce specific performance of such agreement. *Ib.*

Held, also, that, as incidental to such relief, the Court would decree an account and payment of the arrears of the annuity, and would not direct the deed to be ante-dated, so as to cover them, and leave the plaintiff to recover at law upon the deed. *Ib.*

Semble, that the plaintiff ought strictly to have tendered a deed for execution before filing the bill; but, as it was proved that he had made a formal demand for the arrears:—Held, that he was entitled to his costs. *Ib.*

2. A deed of partnership for life between two solicitors contained a covenant that on the death of either the survivor should, during the joint lives of himself and the widow of the deceased partner, pay such person or persons as the deceased partner should appoint an annuity of 200*l.* per annum, or one-fourth of the annual profits of the survivor, as the survivor should elect, and also provided for the admission, on certain conditions, of a son of the deceased partner into the "partnership business." One of the partners, by an antenuptial settlement made shortly after the execution of the partnership deed, exercised the power of appointment in favour of his wife, and several years afterwards died greatly indebted to the firm. The survivor continued to practise as a solicitor for some years, and realised profits by his business, if estimated without regard to the former business, but they were insufficient to make good the outstanding liabilities of the late partnership, and he became bankrupt without having made any payment to the widow of the deceased partner, or electing between the two modes of payment mentioned in the articles:—Held, that the assignees were entitled to make the election. *Esq. Harper*, 1 De G. & J. 180; 3 Jur., N. S., 724; 26 L. J., Bk., 74.

Held, secondly, that on their electing not to pay the annuity, the widow had no provable demand, the business carried on by the survivor being, according to the true construction of the deed, a continuation of the partnership, and the payments made on account of the partnership being properly set off against the profits of the sole business. *Ib.*

II. UNQUALIFIED PRACTITIONER.

3. G., a native of Scotland and resident there, employed F., a writer to the signet, as his professional agent, and F., who had been in the habit of employing P. (a solicitor in England) to act for him in his own affairs, also employed him to act as solicitor for G. in any causes, suits, or matters in which G. was engaged in England, and G. subsequently sanctioned this appointment of P. Some time after, F. ceased to be the agent of G.; but P. continued to act as his solicitor. In the course of litigation between G. and F., the

former suspected there was some arrangement between F. and P. to share the profits of the English business; this being denied by F., all objections on that head were abandoned. G. afterwards ceased to employ P. as his solicitor, and F. having afterwards died, the following letters from P. to F. came to light: "27th July 1828. Sir,—In consideration of your having obtained for me the business of the L. family (in which G. was engaged), I oblige myself to pay you one-half of the free profits arising therefrom, and that so long as I shall retain the said business either directly or indirectly." "27th August 1829. Sir,—The within written contract of copartnership I agree shall refer to all business in which I am at present or shall in future be directly or indirectly employed by you, and oblige myself to pay you one-half of the free profits thereof." The bill of costs of P. being submitted for taxation, G., on the above letters, presented a petition praying that the taxing Master might, on taxation, have regard to the agreement contained in the letters, and might be directed to disallow all charges for attendances with F., and all such part of the profits as had arisen from the bills and had been agreed to be given to F., and that G. should be allowed only his share as partner:—Held, that the petition could not be supported: that the agreement was either legal or illegal; if the former, then P. had only charged what he was entitled to charge, and G. had no right to any benefit under the agreement, inasmuch as F. contracted for himself, not for G.; if the latter, then P. could make no charge on G. to which he was not strictly entitled, and G. would have only to pay what he would have had to pay if there had been no contract. *Gordon v. Dalzell*, 21 L. J., N. S., Ch., 206; 16 Jur. 186.

The stat. 22 Geo. 2, c. 46, being penal, must be construed strictly, and though a person not duly sworn, etc., as thereby provided, acting as a solicitor, is liable to be struck off the rolls; yet neither on authority nor principle is the client entitled in such a case to any benefit. If P. allowed F. (an unqualified person) to use his name, he renders himself subject to the penalty; but if P., being himself qualified, transacts the business, the statute is inapplicable; and as P., being a duly qualified solicitor, would be entitled to charge, there would be nothing to prevent his giving a share of the profits to any third party whatever, and therefore to F. Even if the agreement were legal, and F. could not on that account enforce payment, the client could not claim the benefit of it, and require a deduction from the bills of costs of the share agreed to be given to F. *Ib.*

1. Granting a moiety of the profits of the business of an attorney to an unqualified person, for the mixed consideration of the goodwill of the business, which descended from father of grantor, and the advancement of money and family affection, is not contrary to the policy of the 22 Geo. 2, c. 46, s. 11. *Candler v. Candler*, 6 Madd. 141; Jac. 225.

2. But it is otherwise to enter into partnership with an unqualified person. *Tenak v. Roberts*, cited 6 Madd. 145.

An agreement to share profits, and act as a writer in the office, but not to be considered as a partner, is, in fact, a partnership, and within the above statute. *Ib.*

3. A partnership between a solicitor of a superior Court, and a solicitor of an inferior Court, in which both undertook to divide the profits of their general business, to recommend clients to the other, and to keep the partnership secret, is illegal. *Giffellan v. Henderson*, 2 Cl. & F. 1.

4. The mischief against which s. 32 of the 6 & 7 Vict., c. 73, was directed is the practice of acting as an attorney or solicitor without being duly qualified. And the offence prohibited is not the mere permitting your name as an attorney or solicitor to be made use of in an action or suit "upon the account or for the profit of an unqualified person," but doing it in such a manner as thereby to enable such unqualified person to appear, act, or practise in any suit at law or in equity. *Scott v. Miller*, 1 Johns. 220; 5 Jur., N. S., 858; 28 L. J., Ch., 584.

An agreement by an attorney with a certificated conveyancer, that in case the latter should introduce to the former any matters of professional business, for which the attorney would have a claim for costs, he would pay to the conveyancer a commission, is not, on the part of the attorney, such a permitting of his name to be made use of upon the account or for the profit of an unqualified person as was intended to be provided for by 6 & 7 Vict., c. 73, s. 32. *Ib.*

Such an agreement would not subject the parties to penalties for common barratry. *Ib.*

III. GOODWILL AND PROFITS.

5. Where articles of partnership between London solicitors provided that either partner might retire, and that in that case the continuing partner should pay the retiring partner for his share and goodwill the fair marketable value, and the retiring partner should not practise within one hundred miles of the General Post Office, but should use his best endeavours to promote the interests of the existing partners:—Held, that the goodwill must be taken to mean only the interest which the retiring partner would have had if he had remained in the partnership till the expiration of it by effluxion of time. *Austin v. Boys*, 2 De G. & J. 626.

The term "goodwill" seems wholly inapplicable to the business of a solicitor, which has no local existence, but is entirely personal, depending upon the trust and confidence which persons may repose in his integrity and ability to conduct their legal affairs. *Ib.*

F., H., and B. carried on the business of solicitors in partnership. A. was afterwards admitted as a partner, and in 1838 F. retired; he reserved to himself the right of introducing T. as a partner. In 1846 H., B., and A. entered into new articles of partnership, the term of which was extended to 1853, and articles were inserted for the valuation and purchase of the share of any retiring or deceased partner during the term; these articles were made subject to the right reserved by F. of introducing T. In 1848 H. died, and his widow was paid the value of his share. In 1849 F. introduced T. as a partner. A memorandum was then drawn up, without reference to the articles of 1846, declaring that from September

1850, T. should have one-fifth of the profits until September 1853, from which date he was to take an equal share in the profits; the partnership to continue for ten years from the 1st September 1850. A clause was afterwards added, that in the event of the death or retirement of either of the senior partners before the 1st September 1853, his two-fifths should be divided into thirds, two-thirds to be taken by the surviving senior partner, and one-third by T. A., in connection with his signature to this memorandum, wrote that it was not to annul or prejudice the articles of 1846. In August 1853, A. signified his intention of retiring from the business, and he claimed the value of his share of the partnership and of the goodwill. Upon a bill filed by A., to have the value of his share in the business and the goodwill thereof ascertained:—Held (affirming 24 Beav. 598; 3 Jur., N. S., 1285; 27 L. J., Ch., 243), that A., by his notice, had dissolved the partnership; that the two days intervening between the notice and the determination of the partnership under the articles of 1846 could give no marketable value to the goodwill in the business, and that A. was only entitled to the profits during the continuance of the partnership. 8 C. non. *Austen v. Boys*, 4 Jur., N. S., 719; 27 L. J., Ch., 714.

1. Specific performance of an agreement to purchase the business of an attorney refused, upon a bill by the vendor; there being no express stipulations by which the Court might be enabled to carry it into effect on his part, in return for the defendant's purchase-money; and there being no conditions generally applicable to transactions of this nature, so as to come within the description of "usual clauses" to be inserted in an instrument to be drawn up in pursuance of the agreement. *Bacon v. Farlow*, 1 Meriv. 459.

Quære, whether such an agreement, if legally a valid agreement, is of such a nature as is capable of being enforced in equity. *Id.*

2. An agreement by a solicitor, made for valuable consideration on the sale of his business, not to practise as solicitor in any part of Great Britain for twenty years without the consent of the purchaser, held valid, and an injunction granted to restrain the seller accordingly from practising, and from endeavouring to induce any persons who were clients of the former and present firm to cease to employ the latter. An injunction was also granted to restrain the seller from detaining or destroying certain papers and documents belonging to the firm which he had got in his possession. *Whittaker v. Hone*, 8 Beav. 383.

Profits. 3. *Prima facie*, the emoluments derived from offices of the character of a clerkship to the guardians of a union do not fall within the ordinary description of profits of an attorney. *Collins v. Jackson*, 31 Beav. 645.

The profits of the offices of clerkship to poor law guardians, of superintendent registrar of births, deaths, and marriages, treasurer of turnpike trust, stewardship of a manor, treasurership of a charity, and receivership of tithes, at a fixed salary:—Held, to form part of a partnership between solicitors. *Id.*

4. Where two separate solicitors are retained by the same clients in the same business, the presumption of law is, that as their liability is

joint, the profits are to be equally divided; and this presumption is not removed by the delivery of separate bills of costs where the solicitors have conducted different parts of the business irrespective of the quantity of work performed by each. *Robinson v. Anderson*, 7 De G. M. & G. 239; 20 Beav. 98.

Where the contrary is alleged, the burthen of proof is on him alleging it. Where, therefore, the evidence in favour of an agreement for a different division was not stronger than that against it, the Court decided in favour of equality. *Id.*

Where two solicitors, who are not then in partnership, are employed in the same matter for a client, as in the defence of an action, the *prima facie* inference of law is, that they are partners as to that particular matter, and entitled to an equal share of the joint profits.

5. Two solicitors are partners under articles which provide that certain offices shall be conducted by one alone, but that the profits of such offices shall be divided equally, and this is done at the instance of the employer. One partner dies, and, in taking the partnership accounts, the surviving partner carries in a claim for sums due from the deceased partner in respect of the above offices which he had paid. This is objected to as a private and not a partnership debt, and, on that question:—Held, that the offices were personal, and no action by or against the partnership would lie in respect of them; therefore the claims were not partnership claims. *Alston v. Sims*, 8 W. R. 431; 1 Jur., N. S., 438; 24 L. J., Ch., 583.

6. In 1852, the plaintiff and his partners and K. agreed to co-operate as joint solicitors to a new scheme of railway, and any profits which might arise from the business of getting up the company, and obtaining the Act of Parliament, should be equally divided between the plaintiffs' firm and K. The provisional committee of the company, in 1853, passed a resolution that the plaintiffs' firm and K. should continue to act as solicitors, on the understanding that they should have no personal claim against any member of the committee. The plaintiff and K., in March 1855, made a proposal to the directors of the company, which was accepted, that they should be allowed 1,500*l.* in paid-up shares, in addition to their disbursements, such 1,500*l.* to be received in full for all professional business up to that time, but to be subject to revision in case the line should be completed, in which case they had an equitable claim for such portion of the preliminary expenses as might be fairly applicable to any extension of the railway. In July 1855 the directors paid to the plaintiff and to K., on account of past disbursements, 150*l.* and 100*l.* The works of the railway were, in 1856, suspended for want of funds. After negotiations for providing additional means, C. & A. found the money for the purchase of the land; and the works were resumed, the money being found by K. and the engineer. An arrangement was then entered into between the plaintiff, K., and C. & A., that C. & A. should transact the conveyancing business of the company for the mutual benefit of themselves, the plaintiff, and K., and that the profits should be divided equally. In obtaining another Act of Parliament for a fresh project in connection with the railway, K. used his own name alone,

and the plaintiff did not transact any portion of the business or find any money. In 1859 the plaintiff pressed the company for payment on account of his share of the costs incurred in obtaining the first Act of Parliament and subsequent professional business, and he made a proposal, which was not accepted; but the company paid to the plaintiff 450*l.* in cash and 740*l.* in paid up shares, and the plaintiff, in May 1859, executed to the company a release of all claims. The plaintiff shortly afterwards received from the company 500*l.* in paid-up shares. After the receipt of the plaintiff's proposal in 1859, the directors ceased to treat him as a solicitor of the company, and in consequence of the plaintiff having pressed for payment, K. would have nothing more to do with him, and he stated that he was not aware that the plaintiff had the slightest claim upon him. In 1860, the plaintiff gave notice to K. to furnish accounts, and that he claimed to be entitled to one moiety of and in all sums due and owing from the company in respect of all professional business transacted by K., either in his own name or in their joint names, on behalf of the company, of which company he and K. were the joint solicitors. K. submitted that all questions as to the interests of the plaintiff and himself in the business transacted between the date of the Act and March 1855 were disposed of by the operation of the memorandum, and that such memorandum of March 1855, coupled with the release of May 1859, and the payments to the plaintiff, had settled all questions between the plaintiff and the defendant K. up to that time, and he denied that a partnership had been constituted:—Held, that the plaintiff was entitled to a declaration that he and K. were entitled to share equally in all profits derived, or to be derived, from all business transacted by them, or either of them, for the company from 1852, to the date of the decree, except that as to all conveyancing business transacted for the company by the plaintiff since May 1857, the plaintiff was entitled to one-third part of the profits to the 30th June 1859. *Hanslip v. Kitten*, 8 Jur., N. S., 835, 1113; 7 L. T., N. S., 291.

1. Two sets of parties having projected a railway on a similar line, agreed to consolidate the project, and appointed, as solicitors of the proposed company, the plaintiff and defendant, whom they had respectively consulted prior to the consolidation. The two solicitors accepted the appointment without making any definite arrangement as to the division of the business, or of the emoluments of the office, and a much larger portion of the work was done by the defendant than by the plaintiff. In a conversation between them about six months after the appointment, and before the principal part of the business was transacted, the plaintiff stated, as the result of his inquiries into the practice in like cases, that the allowance for office expenses and personal trouble in such limited partnerships between solicitors was made by each party retaining, besides his expenses and disbursements, from 10 to 25 per cent. on the amount of the net charges for the business done, and which principle he considered satisfactory; and the defendant, in reply, observed, that there could be no misunderstanding about it between honourable

men. Upon a bill by the plaintiff, claiming an account and division of the profits of the business done by the company, upon the footing of an equal co-partnership, and offering to allow 25 per cent. upon the work done separately to the partner who did it; the Court, under the circumstances, made a decree accordingly. *Webster v. Bray*, 7 Hare 159.

2. A., a person qualified to be admitted, but not admitted, an attorney, having as he alleged projected a railway, and procured the appointment of Messrs. B., solicitors, to be solicitors to the promoters of the undertaking, entered into an agreement in writing with Messrs. B., by which it was agreed that for a certain time after A.'s admission as an attorney the profits of the business done for the promoters, or for the company when created, should be divided in a certain proportion between A. and Messrs. B., with a proviso for an allowance to Messrs. B. in the event of the business being conducted by them with the aid of their establishment to a greater extent than by A. and his establishment, and with another proviso that no participation of profits should be claimable by any partner of A., it being declared to be the intention of the parties to confine the same to A. personally for his life and continuance in professional practice. Afterwards A. was admitted an attorney, but he never practised or had an establishment for purposes of practice:—Held, that a suit by A. for specific performance of the agreement and an account and payment of profits could not be maintained. An agreement relating to solicitors' business to be done for the promoters of the D. railway, and the company when created, was to be applied (according to one of its clauses) to any branch railways that might be joined with and enter into the said main line, and also any collateral lines and undertakings that might emanate from the D. Company; the promoters of the D. Railway were amalgamated by Act of Parliament with the promoters of the L. railway so as to form the G. N. Company:—Held, that the agreement was not to be applied to solicitors' business done for the G. N. Company. *Ord v. Johnstone*, 4 W. R. 37; 1 Jur., N. S., 1063.

IV. DISSOLUTION.

3. Solicitors in partnership cannot dissolve their partnership as against their client without his consent, so as to enable the retiring partner as discharged to act against him. *Cholmondeley (Earl) v. Clinton (Lord)*, 19 Ves. 273.

Practice of solicitors, partners, dividing their business, considering one only as agent to the other, disallowed, the client being entitled to their united exertions. *Id.*

4. A partnership between two solicitors for their joint lives may be dissolved instantaneously, if one of the parties fraudulently sells out trust funds and applies the produce to his own use. *Essell v. Hayward*, 30 Beav. 158; 29 L. J., Ch., 806; 8 W. R. 593.

5. Where a firm of solicitors, having moneys in their hands belonging to a client, dissolve partnership, and he subsequently demands the money of one partner, who, by an arrangement between themselves, had undertaken to pay it, that is not such a dealing as to discharge the

liability of the other partner, assuming that the client knew of the dissolution and arrangement. *Re Hindmarsh*, 8 W. R. 203.

1. One of two solicitors in partnership obtains an order in the name of a client; the partnership is dissolved, and the client and the other partner come as co-petitioners to discharge the order, and for other relief:—Held, that it was a misjoinder for such other partner to unite in it. *Sangar v. Gardiner*, C. P. C. 119.

2. P. and D., in the year 1814, commenced a partnership as solicitors. W. was a client of the firm, and employed D. as his private agent to receive his rents. The partnership was dissolved in 1817, when W. was indebted to the firm for a bill of costs, in a sum of 867*l.*, and D., upon a settlement of the partnership between him and P., was found indebted to P. in a sum of 750*l.*, for which he gave security, and agreed to assign to P. the outstanding partnership debts. Of this settlement, debt, and agreement, notice was given to W. in 1821. During the partnership, and afterwards, D. had received moneys on account of W. beyond the amount of the bill of costs: there was no evidence of any direction given by W. to D. to apply the moneys received by D. on his account to the payment of the bill of costs, nor of any settlement of accounts between W. and D.; but it was in evidence, that, upon one occasion, W. said to D., that he had better keep some money of W.'s which he had in his hands, as he might want it. A bill in equity, filed by P., stating these facts, and that D. had possession of the partnership books, to which P. had not access; that D. had refused to concur with him in suing W. at law, or to permit the use of his name for that purpose; and that, by collusion between W. and D., the moneys of W. received by D. had, as they pretended, been applied to payment of the partnership debt, and praying an account and payment of the debt, was dismissed by the Master of the Rolls; but on appeal to the Lord Chancellor this order was reversed, and a decree for account and payment made against the executors of W., and this decree was affirmed on appeal. *Nottidge v. Pritchard*, 8 Bl. N. S. 493; 2 Cl. & F. 379.

V. LIABILITY FOR ACTS OF CO-PARTNER.

3. Where the tenant for life of settled estates obtained an Act for selling and investing the proceeds in other lands, to be settled to the same uses, but by fraud obtained an order by which part of the proceeds was paid to him. A., B., and C. acted as his solicitors in every proceeding, one only being aware of the fraud:—Held, that the other partners, and all other parties to the transaction, were liable, jointly and severally, to make good the amount in a suit by the remainderman after the death of the tenant for life. *Brydges v. Branfill*, 12 Sim. 369; 11 L. J., N. S., Ch., 249; 6 Jur. 310.

4. Where the name of a partnership firm of solicitors appears upon the records of the court as solicitors for a party to the suit, each individual member of the partnership is, *prima*

facie, liable and responsible for any misconduct. *Norton v. Cooper*, 3 Sm. & G. 375.

5. Q. having a mortgage on lands belonging to H., sells under a power contained in his mortgage deed. R. & Co. act as solicitors for Q. and H.; and all incumbrances prior to and including Q.'s are paid off, there being a surplus in his hands. When the purchase is completed, Q. hands to S., a partner in the firm of R. & Co., such surplus in the form of a cheque, with the direction that S. should act as his solicitor, and that he (Q.) should act on his advice, S. returning for answer that he (Q.) had nothing to do with the disposition of that cheque, but that it was his (S.'s) affair. S. had previously taken two opinions of counsel on the point, whether Q. could safely hand over the surplus to H. by reason of a judgment registered to L., and which had been held valid at law; and one of those opinions was that he could, the other that he could not; and S. communicated to Q. the first opinion, but concealed the second. L. filed a bill against H. on the question, whether his judgment was a charge upon the land, and it was held by V.-Ch. Kindersley that it was; but on appeal to the House of Lords that decision was reversed, and Q. was held liable for the surplus in his hands. S. and Q. being dead, Q.'s representative filed the present bill against R. & Co., as the surviving partners of S., for the recovery of such sum, and the costs in the suit of *L. v. H.*, on the ground of the fraudulent concealment of the second opinion, and that Q. had entrusted him, S., with the conduct of the affair, which S. had accepted:—Held, that R. & Co. were liable, and decree made accordingly with costs. *Ren v. Lane*, 5 W. R. 110; 3 Jur., N. S., 125.

Held, also, that although there might be a good ground of action at law for damages, yet that the fiduciary relation which existed by reason of the handing over the surplus to S. rendered this court the proper and best tribunal to procure relief. *Id.*

6. A. and B., partners, were solicitors to the commission. More than six years back they received various sums of money on account of the estate, having a set-off in respect of their bill of costs, but which bill they did not deliver to the assignee within six years. Beyond the six years, A. and B. (upon an agreement that A. should pay all the debts) dissolved partnership, and the assignee, with knowledge of this fact, continued to employ A. alone as the solicitor to the commission, and no attempt was made to charge B. with the moneys received by A. and B. till very lately, viz., when an official assignee was appointed; nor had B. ever acknowledged any liability to account:—Held, first, that as between B. and the creditors, neither the Statute of Limitations, nor laches, nor other conduct of the assignee would operate as a bar, A. and B. being solicitors to the commission. But, secondly, that as the assignee was able to recoup the estate, he could not, under such circumstances of conduct on his part, call on B. to account. A. had become bankrupt. *Semble*, nevertheless, that he or his assignees were necessary parties. *Exp. Gould, Re Robertson*, 4 Dea. & Ch. 547; 2 Mont. & A. 48; 4 L. J., N. S., Bky., 7.

7. Two solicitors having entered into part-

nership, each of them continued to attend to the business of his former clients, but on the partnership account; and one of the partners having proposed to invest a sum of money belonging to a client in a certain mortgage, the proposal was agreed to by the client, and the money was paid to the joint account of the partnership at their bankers for the purpose of the investment. The negotiations for the mortgage were broken off by the proposed mortgagor, but the partner by whom the proposal had been made to the client untruly represented to the client that the mortgage had been effected, and thenceforward continued to pay the interest as if it had actually been done. Although the banking account was kept in the name of the firm, the moneys standing to the account belonged exclusively to the partner who committed the fraud; he alone attended to and had the control of the account, and the fraud was unknown to the other partner. Five years after the receipt of the money from the client the partnership was dissolved, and ten years after the dissolution of the partnership the partner who committed the fraud became bankrupt, and the client, who from the time of the dissolution until the bankruptcy had continued to employ him as his solicitor, discovered the fraud. The client then filed his bill against the other partner to recover the money:—Held, that the defendant was originally liable to the plaintiff for the money received by the firm; that his original liability was continued as well after as before the dissolution of the partnership by the fraudulent representations of his former partner, and that in equity the limitation in bar of the claim did not begin to run in favour of the defendant until the time when the client discovered the fraud; that the fraud and misrepresentation of one of the partners entitled the client to relief in equity against the other, not only if the case was one in which the client might have recovered in an action at law against such other partner, but also if the remedy at law against the other partner was barred by lapse of time. *Blair v. Bromley*, 5 Hare 542; 16 L. J., N. S., Ch., 105; 11 Jur. 115. Affirmed 2 Ph. 354; 16 L. J., N. S., Ch., 495; 11 Jur. 617.

1. Sums of money were from time to time remitted by a receiver in a cause to a firm of solicitors, A., B., & C., as agents of the receiver, to be paid into court to the credit of the cause. The firm also acted professionally in the cause for the plaintiff, who was beneficially interested in the remittances. A. misappropriated those remittances, and absconded. Upon a petition by the plaintiff, seeking to charge B. and C. with the sums misappropriated by A.:—Held, that he was not entitled, upon such petition, to the relief thereby sought. *Dixon v. Wilkinson*, 5 Jur., N. S., 1063; 4 De G. & J. 508. And see *S. C.* 4 Drew. 614.

The Court has jurisdiction to charge solicitors with losses sustained by their clients from misconduct in the prosecution of suits. *Semble*. *Id.*

2. Where a firm of solicitors received from a client a sum of money for which a receipt was given in the name of the firm, stating that part of the money was in payment of certain costs due to the firm, and that the

residue was to make arrangements with the client's creditors, and the solicitor misappropriated the money:—Held, that the transaction with the client was within the scope of the partnership business, and that the partners in the firm were jointly and severally liable to make good the amount. *Atkinson v. Maohreth*, 2 L. R., Eq., 570; 35 L. J., Ch., 624; 14 W. R. 883; 14 L. T., N. S., 722.

Held, also, that all the partners were necessary parties to a suit for that purpose. *Id.*

3. Where a partner in a firm of solicitors in negotiating a mortgage falsified the abstract of title delivered to the mortgagees for the purpose of concealing prior encumbrances, and substituted in the schedule of the draft of the mortgage deed for an unencumbered farm the name of a farm which he knew to be encumbered:—Held, on a claim by the mortgagees to prove against the estate of one of the other deceased partners for any deficiency in their security, that the profits of the transaction being for the general benefit of the firm, all the partners were liable for the fraudulent act of the partner. *Sawyer v. Goodwin*, 15 W. R. 1008; 36 L. J., Ch., 578; 16 L. T., N. S., 622.

4. Three unmarried women, trustees of a fund of stock, unlawfully associated their solicitor, A., who was partner in the firm of A. & B., as a trustee with them. The four together unlawfully sold out the stock for the purpose of investing it on mortgage in the name of A. alone. The money was paid to the bankers of the firm to the credit of the partnership account, and the trustees consented to and adopted an investment of a sum of the same amount shortly afterwards made by A. in his sole name, and a declaration of trust thereof was subsequently executed by A. In course of time this security was realised, and the money was received by A., and not re-invested. The partnership was dissolved. A. became bankrupt, and it was then first discovered that the money was not invested. Within six years after A.'s bankruptcy, the three women, who had married after the stock was sold out, concurred with their husbands in filing a bill to recover the fund from B., which was dismissed with costs, it being held that the money was for a time in the hands of the partnership only for the purpose of being invested in the name of A., and that having been done, their professional duty was discharged, and that the money had been lost ultimately by a breach of trust of A., and not a breach of his duty as solicitor. *Coomer v. Bromley*, 16 Jur. 609; 5 De G. & Sm. 532.

5. A client of a firm of solicitors was in the habit of writing to B., one of the partners, solely and individually, and of receiving letters from B. in reply, generally written in B.'s name only. Upon one occasion B. wrote asking the client to send a cheque to "us," meaning the firm, for the purpose of payment into court. The client sent the money to B. only. This and other remittances were misapplied by B., and the partnership was afterwards dissolved as to him. Motion, on behalf of the client, that the partners (one of whom was nominal only) might jointly and severally be ordered to pay into court within three days, under the summary jurisdiction of the Court, the sum misapplied by B., though an order of course

against B., refused against the other two partners, but without costs. *Exp. Burdon, Re Lawrence*, 2 W. R. 680; 2 Eq. Rep. 931; 2 Sm. & G. 367; 18 Jur. 742; 23 L. J., Ch., 791.

A solicitor, who allows his name to be used by others, conducting in his name the business of solicitor, incurs the peril of personal responsibility. *Id.*

1. A receiver in a cause, under an order to make payments and hand over the balance to the plaintiffs, remits money to his solicitors, who are also solicitors for the plaintiffs, and the money is lost by the absconding of one of the firm. One of the solicitors, having retired from business and sold his share, allows his name to be used and an annual certificate to be taken out for him. Motion is made for payment into court by the firm (and entitled in the matter of the firm) of the sum lost:—Held, that the Court could not exercise its summary jurisdiction, the receiver having remitted the money to the firm as his own solicitors, and not appearing on the motion; and this reason applied more strongly to the retired partner. Motion dismissed without costs. *Chater v. Maclean*, 3 W. R. 261; 1 Jur., N. S., 175; 3 Eq. Rep. 378.

2. Trust money was sent to A. (one of a firm of solicitors, who was himself one of two trustees) for investment on mortgage. The money was paid into the bankers to the account of the firm, and was afterwards drawn out by A., and never invested:—Held, that the other member of the firm was liable. *Eager v. Barnes*, 31 Beav. 579; 7 L. T., N. S., 408.

3. One of three trustees for sale was also the solicitor employed in the matter, and he alone received the purchase-money, and neglected to apply it. The conveyance was executed, and the receipt signed by all three trustees:—Held, that the solicitor was not the agent of the other trustees, so as to make the receipt by him the receipt of all; and the other trustees having joined merely for the sake of conformity, were not chargeable. *Re Fryer*, 3 Kay & J. 317; 3 Jur., N. S., 485; 26 L. J., Ch., 358.

4. A being entitled to a fund in court, gave the firm of solicitors who had acted for him in the matter a joint and several power of attorney to receive the money from the accountant-general. A. sent the power to B., one of the partners, who received the money, and signed the receipt in his own name. B. paid the money into his own private banking account, and shortly afterwards absconded with it. The letters on the subject of the power of attorney, and the costs of stamping it, were charged for in the bill of costs of the firm. Upon a bill seeking to make S., the other partner, liable to repay the money, but not paying for an account:—Held, that the money must be treated as having come into the hands of the firm in the course of their business as solicitors; and that S. was liable for its repayment with interest. *St. Aubyn v. Smart*, 5 L. R., Eq., 183; 17 L. T., N. S., 439; 16 W. R. 894. Affirmed 3 L. R., Ch., 646; 19 L. T., N. S., 192; 16 W. R. 1095.

Held, also, that the Court had jurisdiction to give relief, though the bill did not pray for an account, both under its general jurisdiction over solicitors and because B. had been guilty of fraud. *Id.*

5. Money received by one member of a firm of solicitors in the course of the management and settlement of the affairs of a client of the firm, is money paid to the firm in the course of their professional business; and, consequently, the members of the firm are liable to make good any loss occasioned by the negligence or dishonesty of their partner by whom such money was received. *Dundonald (Earl) v. Masterman*, 7 L. R., Eq., 504; 38 L. J., Ch., 350; 17 W. R. 548; 20 L. T., N. S., 271.

6. When a client has entrusted a firm of solicitors with moneys for investment on his behalf, he is at liberty, in the event of their misapplication of the moneys, to sue all or any one or more of the members of the firm, their liability being both joint and several. *Plumer v. Gregory*, 43 L. J., Ch., 616; 18 L. R., Eq., 621; 31 L. T., N. S., 80.

In order to render one partner in a firm of solicitors liable for the misapplication of money entrusted by a client of the firm to the other partner, it must be shown that the money was received by that other partner in the ordinary course of business, for the purpose of being invested on a specific security. *S. C.* 43 L. J., Ch., 803.

A mere general statement to the client by the partner who receives the money that the money is to be lent on security to another client is not sufficient to bind the other partner; the receipt of money for the purpose of laying it out generally not being part of a solicitor's business, or within the scope of a solicitor partnership. *Id.*

7. Trustees deposited with a solicitor certain bonds payable to bearer. His partner had no actual knowledge of this, but letters referring to the bonds were charged for in bills of costs delivered by the firm; letters referring to the bonds were also copied into the letter book of the firm; and cheques for money received as interest on the bonds were drawn on the account of the firm. The solicitor made away with the bonds:—Held, that, under the circumstances, his partner was liable. *Dundonald (Earl) v. Masterman* (7 L. R., Eq., 504) referred to. *Cleather v. Twisden*, 24 L. R., Ch. D., 731; 49 L. T. 633; 32 W. R. 198. Reversed 78 L. T. Journ. 148.

8. A solicitor invested the money of one of his clients without his knowledge on an improper mortgage security. The client, believing the security to be insufficient, proved against the estate of a partner of the solicitor, which was being administered in Chancery, for the whole amount of the debt, and, under a compromise, received a dividend out of the estate. Afterwards it turned out that the security was sufficient to pay the client in full:—Held, that the dividend must be repaid to the solicitor's estate, and did not enure for the benefit of the subsequent incumbrancers on the mortgaged property. *Smyther v. Goodwin*, 1 L. R., Ch. D., 351; 45 L. J., Ch., 289; 34 L. T., N. S., 635; 24 W. R. 493.

9. A firm of solicitors received money from R., a client, for the purpose of investment. No investment was made at the time, and the money was applied by them for their own use. After the death of one of the partners his executors commenced a partnership action, in which H., the surviving partner, was ap-

pointed one of two receivers. H., without communicating with his co-receiver, or with R., put certain deeds forming part of the partnership property into a box with R.'s name outside. R. subsequently obtained possession of these deeds, and claimed to retain them as security for the money owing to her by the firm. The articles of partnership contained a clause providing that, on the death of either partner, the surviving partner should, within six months of the next general annual account, pay to the representatives of the deceased partner his share of the profits of the year, and should execute a bond for payment within two years to them of the share of the capital of the deceased partner:—Held, that H. had no power of giving R. a security upon these deeds, which formed part of the partnership property, and that R. must deliver them up to the receivers in the partnership action. *Hills v. Reeves*, 30 W. R. 439. Affirmed 31 W. R. 209.

1. It is no part of a solicitor's business to receive, on behalf of his clients, money coming to them upon payment of a mortgage debt, nor to retain such money for the purposes of investment generally. Therefore, where money had been received by R., one of a firm of solicitors, and misapplied by him after his representation that it had been reinvested on a mortgage security, payments purporting to be in respect of interest being made by him up to his death:—Held, that the surviving partner was not liable to make good the loss, on the several grounds: that the transaction was not within the ordinary business of a solicitor; that he had no knowledge or means of knowledge as to the receipt and appropriation of the money by his partner; and that it did not appear that the guilty partner had received the money upon the faith (at the time) of its being reinvested upon a specific security. *Bourdillon v. Roche*, 6 W. R. 618; 27 L. J., Ch., 681.

2. The practice of the solicitors having the conduct of a sale to pay the deposits into court for the auctioneer is within the ordinary business of a solicitor. An auctioneer sent the deposits received on a sale to the solicitors of the plaintiff who had the conduct of the sale, to be paid into court. This deposit was received by one of the members of the firm, and misappropriated. On the question whether the auctioneer should not have himself paid this deposit into court, and whether he was not therefore liable to pay it over again:—Held, that the receipt and payment into court of the auctioneer's deposit was within the ordinary business of the solicitors to the party having the conduct of the sale, and that the innocent members of the firm were therefore liable for the defalcation of their partner. *Biggs v. Bree*, 51 L. J., Ch., 263; 46 L. T. 8; 30 W. R. 278. Affirming 51 L. J., Ch., 64; 45 L. T. 648; 30 W. R. 132.

3. M., a member of a firm of two solicitors, M. & H., in 1847, without any authority given by B., instituted a suit in B.'s name, as one of several co-plaintiffs, and carried it on for nine years, when B., on being served with a subpoena for payment of costs of unsuccessful exceptions, became for the first time aware of the unauthorised use of his name:—Held, upon petition by B. in the suit, that M. was responsible for the costs of the suit from

beginning to end, and that H., though not personally cognisant of his partner's misconduct, was also liable, at all events, for costs incurred up to the time when upon the dissolution, in 1849, of the partnership between himself and M., his name ceased to appear on the records of the court as one of the solicitors for the co-plaintiffs in the suit. *Re Manby*, 3 Jur., N. S., 259; 26 L. J., Ch., 313.

Semble, that if B. had during the course of the litigation become aware of the use of his name, his subsequently omitting to interfere actively to prevent its continuance would not, *per se*, have been sufficient to relieve the solicitors from liability to him for the costs. *Id.*

Bills of Exchange.] 4. A bill of exchange received by a partner in a solicitor's firm from a client is, *prima facie*, to be deemed to be received on behalf of the firm; and if the solicitors allege the contrary, they are bound to prove it by clear evidence. *Moore v. Smith*, 14 Beav. 393.

By the decree, the plaintiffs' costs (£319l.) had been ordered to be paid to her solicitors, out of a fund in court, in which she was interested; but the plaintiff having, in the course of the proceedings, given to one of the firm of solicitors a bill for 300l., which they had passed away, the order for the payment of the 319l. was stayed. *Id.*

5. L., a partner in a firm carrying on the business of solicitors, gave, without the knowledge of his partners, a promissory note in the joint name of the firm, as security for a sum of money advanced to him by C., and applied the money to his own private use. The partners filed their bill against C. and L. for the delivery up of the note, and, on L. becoming bankrupt, brought his assignees before the Court by supplemental bill. The assignees, by their answer, submitted their interest in the suit to the judgment of the Court:—Held, first, that, under the circumstances of the case, the note was not binding on the partners, either as between them and L., or as between them and B.; secondly, that it was a case in which L.'s assignees ought neither to pay nor to receive costs. *Smith v. Coleman*, 7 Jur. 1053.

XI. Account.

- I. *In What Cases*, 6414.
- II. *How Taken*, 6415.
- III. *Town Agent*. See III. IV. *ante*.
- IV. *Balances due from Solicitor to Client and vice versa and Interest thereon*. See XVI. XXV. and XXVII. *post*.

I. IN WHAT CASES.

6. A demurrer to a bill by a solicitor for payment of his costs and for an account was allowed, there not being those peculiarities in the circumstances of his claim to justify the entertaining such a suit, the remedy being at law. *Allison v. Herring*, 9 Sim. 583; 8 L. J., N. S., Ch., 223.

7. Court refused an order for account for an attorney's bill taxed by prothonotary of the Court of Common Pleas. *Osbaldiston v. Cross*, 2 Com. 612; 2 Eq. Abr., 8 P. L. 21.

8. Bill for general account lies against a

solicitor and agent taking security without a settlement of accounts. *Detillin v. Gale*, 7 Ves. 584.

1. An account of all the dealings and pecuniary transactions of a solicitor not connected with the bills of costs cannot be obtained upon a petition for the taxation of costs. The account directed on petition being limited to moneys paid or duly appropriated towards satisfaction of the bills. *Re Smith*, 4 Beav. 309.

2. Settlement of accounts between attorney and client is not conclusive, the nature of their connection taking their accounts out of the general rule of equity. *Lewes v. Morgan*, 5 Price 42.

3. Demurrer to a bill by a solicitor for an account between himself and his client in respect of moneys received and paid and of loans made by the former for and on behalf of the latter, and of bills of costs due from the former to the latter, allowed, as not amounting to a case of mutual account. *Padwick v. Hurst*, 18 Jur. 763; 23 L. J., Ch., 657; 18 Beav. 575.

Upon demurrer, a general allegation that accounts are of a complicated nature is not sufficient, unless supported by specific allegations of facts showing their complex character. *Id.*

4. A bill or claim for an account filed against a confidential agent cannot be resisted on the ground that the defendant has also been employed as a solicitor in the same matter. *Oddy v. Secker*, 2 Sm. & Gif. 193.

5. A bill was filed by a solicitor against a person employed as his occasional clerk, and in that character receiving and paying moneys for him, and claiming against him a sum for services, the master having paid from time to time moneys to and for the clerk. The bill prayed an injunction to restrain an action brought by the clerk for the balance of the account:—Held, that this was not such an account as to require the interference of equity, and the injunction was refused. *Fluker v. Taylor*, 3 Drew. 183.

6. A party gave a sum of money to a firm of solicitors, to invest upon freehold security. They found a security, and invested the money upon it. The security turned out valueless:—Held, that the giving money to a solicitor for the purpose of general investment does not in itself create the relation of trustee and *cestui que trust*, so as to make the solicitor liable as trustee for a deficiency in the security. *Mare v. Lewis*, 4 Ir. Eq. R. 219.

Held, also, that as this was a single isolated transaction, a bill for an account, as between principal and agent, could not be maintained as against the solicitors. *Id.*

7. An account settled between a client and her solicitor, including arranged bills of costs, decreed to be opened and the bills referred for taxation in an action instituted nearly two years after such settlement, on the grounds of undue influence, and that the charges were improper and excessive, and that much of the business done was unnecessary, and ought not to have been done. *Watson v. Rodwell*, 7 L. R., Ch. D., 625; 47 L. J., Ch. 418; 26 W. R. 524.

Operation of the Statute of Limitations.]

8. Where solicitors of a company, after an

order to wind up, delivered up documents to the official manager, on his undertaking that they should be paid out of the first moneys in their hands, and allowed nine years to elapse before delivering their bill (the official manager having until then had no funds in his hands):—Held, that the claim was not barred by the Statute of Limitations. *Gloucester, Aberystwith, Central Wales Railway Co.*, 2 Giff. 47; 6 Jur., N. S., 116; 29 L. J., Ch., 383.

9. Bills of costs examined after a long period, and even after payments made. *Newman v. Payne*, 2 Ves. J. 202; 4 Bro. C. C. 350.

10. The ordinary relation of a solicitor to his client in questions of account is not of such a fiduciary character as to bar the Statute of Limitations, 21 Jac. 1, c. 16. *Watson v. Woodman*, 24 W. R. 47; 20 L. R., Eq., 721.

II. HOW TAKEN.

11. In taking an account of the pecuniary transactions between an attorney and his client, the production of a bond entered into by the latter is not sufficient evidence of a debt to that amount, and actual payment must be proved. *Lewes v. Morgan*, 3 Y. & J. 230. S. C. *nom. Morgan v. Evans*, 8 Bli. N. S. 777; 3 Cl. & F. 159.

12. Where an account is decreed to be taken of the dealings and transactions between an attorney and his client, in the course of which the attorney has taken securities from the client, the attorney must not only prove the securities, but likewise the consideration for which they were given. Therefore, where a promissory note was given by the client to his attorney under circumstances of great suspicion, but the client was unable for want of witnesses to prove fraud in the attorney, the Court, upon decreeing an account between the parties, directed an inquiry as to whether the attorney could by any, and what affirmative evidence prove the consideration for the note. *Jones v. Thomas*, 2 Y. & Coll. 498.

13. It is the duty of a solicitor to keep clear and distinct accounts. *Re Clark*, 13 Beav. 173. Affirmed 1 De G. M. & G. 43; 15 Jur. 1047; 21 L. J., Ch., 20.

14. There were numerous money transactions between N., a solicitor, and D., his client. Before 1825 they settled their accounts on two or three occasions, whenever it appeared convenient. From 1824 to 1846 there was a sum of 5,000*l.* placed in D.'s hands by N., for which D. gave his bond, and there were other sums secured by D.'s promissory note. D. gave N. moneys as he asked for them in gross sums, nothing being said as to their appropriation. Upon D.'s death, a bill for an account being filed against his executors:—Held, that the account should be taken without appropriating any sum credited to either party in satisfaction of interest; that no balance should be struck before the end of the account; and that every sum credited to either party should carry interest from the date at which it was credited. *Napper v. Dendy*, 5 W. R. 4.

15. Where advances have been made by a solicitor to his client, by way of loan, the client being in distress, a general account will be ordered of such transactions. *Hicks v. Morland*, 1 L. J., N. S., Ch., 206.

1. Solicitor who advanced money to infant for subsistence of his family, and acted as his confidential adviser, is in nature of guardian to him, and an account settled between them within a month after infant became of age, and without latter having any assistance, was opened, notwithstanding vouchers were delivered up. *Revett v. Harvey*, 1 Sim. & S. 602; 2 L. J., Ch., 39.

2. As to the form in which settled accounts between attorney and client should be delivered. *Johnes v. Lloyd*, 10 Price 62.

3. Acknowledgment by consor of judgment, in reply to inquiry by intended assignee, that the sum secured by the judgment is justly due to the consee, shuts out the equitable defence which the consor may have had against the consee, subject, however, to inquiry as to the *bona fides* of the transaction. *Hickson v. Aylward*, 3 Moll. 1.

The general expressions of Lord Redesdale, in *Lewes v. Morgan* (3 Y. & J. 230), are not to be construed to mean that accounts settled between parties standing in the relation of solicitor and client are to be disregarded. It would be absurd that a solicitor, however accurately his accounts were settled, and however plainly his books show *prima facie* that the accounts were regular, should more than any other man be put to vouch his account over again. *Id.* 15.

4. The solicitor of an administratrix receiving money belonging to the estate of the intestate is not a trustee for the estate; and if he makes payments out of it for the use of the administratrix, which are either previously directed, or subsequently adopted by her, he will be charged only with the balance actually in his hands. *Watkins v. Maule*, 1 L. J., Ch., 82.

5. A. placed moneys in the hands of her solicitor, who acted also for her as a money scrivener, undertaking to find securities for her. He placed the moneys out on insufficient securities, misrepresenting to her their character:—Held, that as against him, if living, it would have been, and as against his estate after his death it was not, a matter for an action for negligence, but a matter of account between principal and agent, and the client had a right to reject the charge for disbursements on insufficient securities. *Smith v. Pococke*, 2 Drew. 197; 18 Jur. 478; 23 L. J., Ch., 545.

6. The summary jurisdiction by petition at the Rolls does not exclude the right of a client to file a bill against his solicitor for a general account. *O'Brien v. Lewis*, 9 Jur., N. S., 321.

7. Where directors of a company carry on business unauthorised by the deed of settlement, and moneys have been paid by the company to the solicitors on account of costs generally, the solicitors have no right *post litem motam* to appropriate such payments to the costs incurred in respect of the unauthorised business, but, on the contrary, the Court will appropriate the payments to the costs which the company was liable to pay. *Re Phoenix Life Assurance Co., Ex p. Howard and Dolman*, 1 Hem. & M. 433.

8. H. by agreement with J. became solicitor on the record in certain suits, and an arrangement was made that moneys received by him as such solicitor should be applied to meet

some fees to counsel due from J. The moneys were so received and applied after J.'s death. J.'s estate was insolvent, and a summons was taken out by his executor for payment of these sums:—Held, that as H. had received these moneys as solicitor on the record and by express agreement with J., he was entitled to retain them, subject only to an account. *Jeyes v. Jeyes*, 45 L. J., Ch., 245; 34 L. T., N. S., 167.

Settled Account, Opening, Surcharging, or Falsifying.] See ACCOUNT, II. 2.

XII. Books.

9. The sale of the books of a solicitor who has been adjudicated a bankrupt is not authorised by the 137th section of the 24 & 25 Vict., c. 134; and, therefore, where a sale by auction of the book debts and books of a firm of bankrupt solicitors had been directed by the assignees, it was held to be improper, on the ground that the affairs of the clients of the bankrupts might be made public. *Ex p. Roberts, Re Holden*, 10 Jur., N. S., 28; 33 L. J., Bky., 8.

The ownership of a solicitor in the books relating to his business is subject to his client's right to have them protected from publication. S. C. 12 W. R. 183; 9 L. T., N. S., 469.

10. Where partnership has expired by efflux of time, and in a suit for an account, etc., a receiver has been appointed before decree, the Court will not compel defendant (the former managing partner) to deliver up to receiver, for the purpose of making out bills of costs, partnership books and accounts which have remained in his hands, and title-deeds belonging to a third person which came into possession of co-partners as solicitors, such defendant offering the receiver free access thereto, and to assist in making out such bills. *Davie v. John, McClell.* 206; 15 Price 446.

XIII. Costs and Remuneration.

- I. *Agreements as to Costs*, 6416.
- II. *Security for Past Costs*, 6420.
- III. *Security for Future Costs*, 6422.
- IV. *Assignment of Costs*, 6424.
- V. *Indemnity by, for Costs*, 6424.
- VI. *Lien of, on Costs*, 6424.
- VII. *Lien for, on Property or Documents*. See XIV. and XV. *post*.
- VIII. *Taxation and Recovery of and Interest on*. See XVI. *post*.
- IX. *Personal Liability for*. See IV. IV. 2 and VII. III. *ante*.
- X. *Of Solicitor Trustee*. See TRUSTS.

I. AGREEMENTS AS TO COSTS.

1. *In General*, 6417.
2. *Construction of and Effect of on Taxation*, 6419.

1. In General.

1. An attorney, executor to will, refusing to prove will, unless a large stated allowance was given to him, and which was agreed to, suing for the allowance it was refused him by the Court. *Pomfret v. Murray*, 9 Mod. 230.

2. A petition presented by a member of the provisional committee to compel a solicitor, who had received a gross sum of money under an agreement, in full of all demands, from the acting committee, to deliver a bill, costs, etc., for the purpose of taxation. Ordered, under the circumstances, to stand over without prejudice to any suit, and with liberty to institute one, and generally to apply. *Exp. Bass, Re Stephen*, 4 Rail. Ca. 275.

This was varied by ordering delivery and taxation. *S. C. id.* 723.

3. An agreement by a client residing in Ireland with her solicitor there that, if he would employ a solicitor in London to obtain letters of administration necessary to her obtaining a fund out of Chancery, she would pay him a commission of 10 per cent. on the fund, and also reimburse him the payment to the London solicitor:—Held, to be an agreement against public policy, which the Court would not enforce. *Strange v. Brennan*, 15 Sim. 346; 15 L. J., N. S., Ch., 389; 10 Jur. 649. Affirmed 2 Coop. C. C. 1.

4. In proceeding under the Solicitors Act, the Court is not authorised to interfere with a special agreement between solicitor and client, the legal effect of which is to alter the ordinary relation between solicitor and client, to supersede the authority or discretion of the Court, by giving to either party more or less than is warranted by the rules of the Court, or by providing for the settlement and payment of the bill in a special manner. *Re Eyre*, 2 Ph. 367; 17 L. J., N. S., Ch., 277. Affirming 10 Beav. 569; 17 L. J., N. S., Ch., 62.

5. Messrs. S., solicitors, promised, by letter, to conduct the professional business in which F. might be concerned, "personally or otherwise," upon the terms of receiving agency charges. F. was a solicitor, but he had omitted to take out his certificate; at that time he was interested in a suit which he had procured to be instituted against himself, for the purpose of administering the estate of a testatrix, whose executor he was, and in whose estate he was beneficially interested. Upon the completion of this business, Messrs. S. obtained the whole of the money belonging to F. out of court; they repudiated the letter, and insisted upon their right to costs as between solicitor and client; they also refused all accounts, and never delivered any bill of costs. Upon a bill by F.:—Held, that the letter was a valid agreement; that Messrs. S. were not entitled to higher charges because F. was uncertificated; that his being uncertificated was immaterial, as such an agreement was legal if made with any client; that the transaction was such that it could not be taxed under the common order; and that it was necessary to file a bill and abandon the common order which had been obtained for taxation: and a reference was directed to the taxing master to tax the bill of costs as between principal and agent. *Foley v. Smith*, 0 L. J., N. S., Ch., 621.

F. had also mortgaged his interest to Messrs. S., to secure a sum of 150*l.*, which they were to pay for F.; but though they omitted to make the payment, and retained that, with other money, in their hands, the Court treated it as an ordinary sum of money in hand, and declined to direct the taxing master to allow the plaintiff interest upon those sums, though the mortgage which was to include them was bearing interest. *Id.*

6. An agreement to pay costs is an agreement to pay taxed costs; and a third party paying a solicitor's bill of costs, in order to compromise a suit, stands in the same situation with respect to the right of claiming taxation as the solicitor's client. *Vincent v. Venner*, 1 Myl. & K. 212; 2 L. J., N. S., Ch., 49.

7. The solicitor who had projected, and at his own expense brought forward, a scheme for making a railway, entered into an agreement with the persons who became the provisional committee for prosecuting the undertaking that the costs and expenses should be paid by such solicitor and projector, and that the members of such provisional committee should not be personally liable to him for such costs and disbursements, but that the same should be paid out of the fund to arise from the deposits to be paid on the shares:—Held, that this agreement was not illegal as between the provisional committee and the shareholders, regarded as trustee and *cestui que trust*, inasmuch as the trustee was entitled to be indemnified by his *cestui que trust* in respect of the costs and expenses properly incurred. Whether the contract to pay future costs out of the deposits was illegal as between the solicitor and client, attending to the fact that the client, being a trustee, might properly stipulate that he should not be personally liable for the costs to be incurred, but that the same should be paid exclusively out of the trust fund. *Quere. Parsons v. Spooner*, 5 Hare 102; 15 L. J., N. S., Ch., 155; 10 Jur. 423.

8. A letter from a client, wishing to change his solicitor for another solicitor, stating the amount of property in the suit and his own circumstances, and stating that the client is wholly unable to pay his solicitor's bill, and offering the conduct of the suit to the new solicitor, followed by a letter from the solicitor agreeing to act for the client in the suit, is not sufficient to constitute an agreement by the solicitor to look to the property for satisfaction of his costs, and to exonerate the client from liability. *Bryan v. Twigg*, 3 L. J., N. S., Ch., 114.

A dismissal of a bill in Chancery, at the hearing, affords a presumption that the suit was improperly instituted, but is not a case for a reference to a Master for inquiry. *Id.*

9. An agreement by a solicitor to take a gross sum from his client in lieu of costs is not void, though regarded by the Court with jealousy. *Re Whitcombe*, 8 Beav. 140; 14 L. J., N. S., Ch., 19.

10. The settlement of a solicitor's bill by the client for a fixed sum is valid, and will not be disturbed by the Court when it has been entered into fairly, and with proper knowledge on both sides. Several years after a solicitor had ceased to act for his client, an agreement was entered into between them for the delivery up of the client's papers, in consideration

of a fixed sum to be paid to the solicitor when the Court of Chancery should declare that he was one of the next of kin of E. S., and entitled to a fund in court. No bill was delivered, and five years afterwards the right of the client was established:—Held, that the agreement was valid, there having been no fraud or undue pressure, the client having had the full benefit of the agreement, and it being impossible to replace the parties in their original position. A husband agreed to pay a sum of money on his being held next of kin of A. B., and entitled to his property. The wife was, and claimed to be, such next of kin. The husband having succeeded in right of his wife, the Court held that there was an error and mistake in the agreement, which ought to be rectified, and decreed the husband to make the payment. *Stedman v. Collett*, 17 Beav. 608; 18 Jur. 457.

1. In proceedings to recover an estate, A. became greatly indebted to his solicitor; an agreement was entered into between A. and his brother B., by which A. agreed to relinquish his interest in the estate to B., in consideration of B. undertaking to pay the costs already incurred, with interest:—Held, that solicitor being no party to the agreement, could derive no benefit from it. *Moss v. Bainbridge*, 18 Beav. 478.

In the course of a protracted litigation B. had become indebted to his solicitor in 9,377*l.* (as was alleged), of which 4,696*l.* had been paid out of pocket. The solicitor agreed to accept 3,500*l.* in full for his costs, unless the client recovered the estate, in which case the client agreed to pay the full sum of 9,377*l.* The client did not dispute the validity of the agreement until seven years after, when the litigation had been successful. The Court upheld the agreement. *Ib.*

A client, by letter, undertook to pay his solicitor interest on balance appearing against him from time to time, upon the principle of annual rests:—Held, that the agreement was unilateral and not binding; and that even if it had been duly signed by both parties, it was not such an agreement as could be enforced between solicitor and client, being entered into while that relation was subsisting between them. *Ib.*

A client signed an agreement by which he charged his estate with the bill of costs due to his solicitor, with lawful interest, on the principle of annual rests:—Held, first, that it was voluntary; and, secondly, that having regard to the fiduciary relation between the parties it could not be maintained. *Ib.*

The necessary requisites stated for supporting such an agreement assuming it not to be usurious. *Ib.*

The Court looks with jealousy upon a transaction between a solicitor and his client, and throws the burden of proving that it is proper on the solicitor. *Ib.*

2. A client, when he retained a solicitor, expressed himself dissatisfied with the usual mode of remunerating solicitors, but no definite arrangement was made as to any other mode of remuneration. Subsequently, the solicitor, in a letter to the client, stated that "until I have the pleasure of seeing you, and of finally making some general and well-understood arrangement with you on the sub-

ject of costs, it shall be understood on my part, that, beyond costs out of pocket, I have no claim upon you personally." No arrangement was ever made, though the subject was often alluded to by the solicitor:—Held, that this did not amount to a concluded agreement by the solicitor to claim nothing as of right but costs out of pocket. *Wilson v. Emmett*, 19 Beav. 233.

3. An agreement of the assignee to allow the solicitor interest on the amount of his bill of costs does not bind the bankrupt's estate; nor does the resolution of creditors, at a meeting held for this purpose, bind those who are absent. *Exp. Phillips*, 1 Dea. 368; 2 Mont. & A. 526.

4. An agreement between a solicitor and a client without the intervention of any other solicitor, to allow the solicitor interest on his bill of costs, cannot be maintained independently of subsequent acquiescence, unless it appears that he informed the client that the law allowed no such charge. *Lyddon v. Moss*, 4 De G. & J. 104; 5 Jur., N. S., 637.

But where the relation of solicitor and client had ceased after such an agreement had been made, and the client subsequently (having in the meantime had proper advice upon the subject of the agreement) entered into a second agreement with the solicitor in part founded on the former, which she did not seek to impeach till fourteen years after its date:—Held, that there had been such delay and acquiescence as to preclude any title to relief. *Ib.*

5. Agreement by a solicitor to receive a fixed sum for costs for business hereafter to be done is not binding on the client, who is, notwithstanding payment under it, entitled to an order for the delivery of a bill of costs, and its taxation. *Re Newman*, 30 Beav. 196.

6. By an agreement between a solicitor and his client, it was stipulated that the former should have 5*l.* per cent. commission on the gross amount of property recovered by him for the latter, in addition to his costs:—Held, that the stipulation was contrary to the policy of the law, and that the solicitor must refund the amount received by him for commission, though included in a settled account. *Pinos v. Beattie*, 32 L. J., Ch., 734; 9 Jur., N. S., 1119; 11 W. R. 979.

7. The solicitor of the city of London entered into an agreement with the corporation to transact their legal business at a fixed annual salary, including all emoluments, he being bound to account for all his receipts and payments, and to hand over to the corporation all costs recovered by him in excess of his disbursements and salary. By the agreement, he was also precluded from transacting business for any other client:—Held, that this agreement was not opposed to the 6 & 7 Vict., c. 73, s. 32, or to the policy of the law. *Galloway v. London (Mayor)*, 36 L. J., Ch., 978; 4 L. R., Eq., 90; 15 W. R. 1032; 16 L. T., N. S., 407.

8. An agreement beforehand between a solicitor and his client to pay a specific sum in lieu of costs is illegal. *Re Brady*, 15 W. R. 632.

9. A preliminary agreement between a solicitor and his client on obtaining a loan on mortgage, no bill of costs having been deli-

vered, illegal, and the delivery of the bill and taxation ordered more than twelve months after completion of the transaction and payment of the balance to the client. *Re Camley*, 18 W. R. 1125.

A solicitor lent his client 200*l.* on promissory note. The note was made out for 210*l.*, the addition being alleged to be for costs on the transaction:—Held, that the client was not precluded from requiring a bill of costs, showing how the sum of 10*l.* was made up, by the lapse of nearly three years and subsequent money transactions between the parties. *Ib.*

1. By an agreement between clients and solicitors, it was agreed that, in the event of the solicitors succeeding in recovering certain property for the clients, they should receive 10 per cent. on the value of the property. The agreement was submitted to the Master before the solicitors had taken any steps in the matter, and the Master required the opinion of the Court to be taken thereon under the Attorneys and Solicitors Act 1870, s. 4:—Held, that the opinion of the Court on the validity or fairness of the agreement could not be required under s. 4, before any money was payable under the agreement. *Anon.*, 1 L. R., Ch. D., 573; 45 L. J., Ch., 47; 24 W. R. 38.

Semble, that the agreement in question was champerty, and invalid under s. 11. *Ib.*

2. A document containing the terms of an agreement as to the amount of costs payable by a client to his solicitor, signed by the client only, is not an agreement in writing within s. 4 of the Attorneys and Solicitors Act 1870. *Exp. Pitt, Re Raven*, 45 L. T. 742; 30 W. R. 134.

3. Where an agreement has been made for the remuneration of a solicitor and the solicitor alleges that the remuneration was for non-professional work, the persons chargeable cannot obtain the common *ex parte* order for the delivery and taxation of the bill of costs. The Solicitors' Remuneration Act 1881, s. 8, has made no difference in the practice in this respect. *Re Inderwick*, 25 L. R., Ch. D., 729; 50 L. T. 221; 32 W. R. 541.

Preliminary Expenses on Formation of Joint Stock Company.] See COMPANY, I.

2. Construction of and Effect of on Taxation.

4. The jurisdiction as to taxation given by the Solicitors Act (6 & 7 Vict., c. 73) extends only to the ascertainment by the ordinary rules of practice of the quantum payable by one party to the other. It does not authorise the Court to determine whether a special agreement exists as to the mode of taxation, or the manner in which the costs, charges, and expenses are to be settled and paid. *Re Rhodes*, 8 Beav. 224; 16 L. J., N. S., Ch., 97.

5. Upon a petition for taxation, the Court has no jurisdiction to determine the construction of a disputed special contract as to the costs. *Re Thompson*, 8 Beav. 237; 14 L. J., N. S., Ch., 137; 9 Jur. 169.

6. A solicitor acted for clients under a special agreement as to costs, which was doubtful:—Held, that the Court had no jurisdiction to determine the construction and effect of the

special agreement on petition. *Re Beale*, 11 Beav. 600.

7. The Court has no authority, upon a petition by a client against his solicitor, to give relief founded on a special agreement. *Alexander v. Anderson*, 6 Beav. 405.

8. Messrs S., solicitors, promised, by letter, to conduct the professional business in which F. might be concerned "personally or otherwise," upon the terms of receiving agency charges. F. was a solicitor, but he had omitted to take out his certificate; at that time he was interested in a suit which he had procured to be instituted against himself, for the purpose of administering the estate of a testatrix, whose executor he was, and in whose estate he was beneficially interested. Upon the completion of this business, Messrs S. obtained the whole of the money belonging to F. out of court; they repudiated the letter and insisted upon their right to costs as between solicitor and client; they also refused all accounts, and never delivered any bill of costs. Upon a bill by F.:—Held, that the letter was a valid agreement; that Messrs S. were not entitled to higher charges because F. was uncertificated; that his being uncertificated was immaterial, as such an agreement was legal if made with any client; that the transaction was such that it could not be taxed under the common order; and that it was necessary to file a bill and abandon the common order which had been obtained for taxation; and a reference was directed to the taxing master to tax the bill of costs as between principal and agent. *Foley v. Smith*, 20 L. J., N. S., Ch., 621. Affirmed by the Lords Justices, 25th May 1852.

F. had also mortgaged his interest to Messrs S. to secure a sum of 150*l.*, which they were to pay for F.; but though they omitted to make the payment, and retained that, with other money, in their hands, the Court treated it as an ordinary sum of money in hand, and declined to direct the taxing master to allow the plaintiff interest upon those sums, though the mortgage which was to include them was bearing interest. *Ib.*

9. An agreement was signed between a solicitor and his clients by which the former was to take a sum agreed on, in full of all demands. An order of course afterwards obtained for the taxation of his bill was discharged for irregularity. *Re Mackrill*, 11 Beav. 42.

10. Settlement of a bill of costs between a solicitor and client upon a special agreement precludes an order being made upon petition for taxation; the agreement must first be set aside by suit before the matter can be re-opened. *Re Whitcombe*, 8 Beav. 140; 14 L. J., N. S., Ch., 19.

11. A solicitor entered into a special agreement with his client for interest on his bill, with annual rests, and for a charge on the estate recovered:—Held, that this was not a proper case for an order of course for taxation, and such an order was discharged. *Re Moss*, 17 Beav. 59.

12. An agreement to charge only costs out of pocket does not preclude a taxation. A solicitor in 1849 agreed to charge sums out of pocket only, provided the client was unable to recover the proper costs in the business. A taxation was ordered of a bill for business in 1853 in the usual terms, and without deter-

mining any question as to the agreement. *Re Ransom*, 18 Beav. 220.

1. Where there is an agreement by a solicitor with his client to charge only costs out of pocket, the Master will, under the common order in equity for taxation, have regard to such agreement. *Re Philp*, 2 Giff. 35; 6 Jur., N. S., 1024; 29 L. J., Ch., 866.

2. G., a solicitor, agreed to conduct the defence to a suit of S., a solicitor, upon terms that if the case of S. failed he would accept usual agency fees. The case of S. failed entirely from the two letters which had been subsequently, though not at the time of the agreement, communicated to G., who continued to conduct the defence without observation. G. had sent in his bill of costs, made out as between solicitor and client. Taxation ordered upon the scale of agency charges only. *Re Gedge*, 23 Beav. 347.

3. Where a common order for taxation had been obtained, and an application for its discharge was made on the ground of the existence of a special agreement as to the costs, the Court refused to discharge it, the solicitor having before the order improperly refused a copy of the agreement to the client, who was an illiterate person. *Re Ingle*, 25 L. J., Ch., 169; 1 Jur., N. S., 1059.

See also III. *infra*.

II. SECURITY FOR PAST COSTS.

4. Bond obtained from the infant's grandmother for the amount of bill of fees and disbursements, directed to stand as a security for money justly due on account, and the bill ordered to be taxed. *Brown v. Pring*, 1 Ves. 407.

5. Bill for general account lies against a solicitor and agent taking security without a settlement of accounts. *Detillin v. Gale*, 7 Ves. 584.

6. Securities taken by an attorney from his client during the time of their connection as such for a present, the balance of accounts settled, for money lent and laid out, costs, and business done, and the price of a horse sold, void as to the present; and the plaintiff submitting to pay what should be actually due, the accounts were opened as to the whole; the horse being sold, soon after he was purchased from the attorney, for a price much less than was then stipulated, inquiry into his value directed. *Newman v. Payne*, 2 Ves. J. 199; 4 Bro. C. C. 350.

7. Where a solicitor made an absolute conveyance to himself of 1,000*l.* from the plaintiff's wife, whilst she was parted from her husband, the consideration expressed in the deed being for service done and favours shown; on bill brought to set aside the deed as obtained by fraud, decreed, on all the circumstances of the case, that the deed should stand only as a security for such sum as was justly due to defendant. *Sanderson v. Glass*, 2 Atk. 296.

If an attorney *pendente lite* prevail on a client to agree to an exorbitant reward, the Court will either set it aside entirely, or reduce it to the standard of those fees to which he is properly entitled. *Id.*

8. Mortgage by client to attorney, for costs due, and to become due:—Held, valid security for the costs then due only. *Williams v. Piggott*, Jac. 598. S. P. *Jones v. Tripp*, Jac. 322.

9. Attorney cannot take mortgage from client for amount of future bill; but *scous* for disbursement, and money to be advanced. *Pitcher v. Rigby*, 9 Price 79.

10. An account settled and a security taken by a solicitor from his client, though to be viewed with jealousy, is not to be treated as a nullity. *Jones v. Roberts*, 9 Beav. 419.

11. Principles on which the Court acts in sustaining securities given by a client to his solicitor for bills of costs and moneys advanced. *Hiles v. Moore*, 17 L. J., N. S., Ch., 385.

12. Where the trust deed did not authorise the solicitor to charge costs against his *cestui que trust*, securities obtained by him from his *cestui que trust*, for untaxed costs and advances, were set aside, and ordered to stand as securities for the sum really due, notwithstanding letters from the *cestui que trust* recognising the right of the solicitor to charge such costs; the solicitor not having informed his client that he was entitled to any remuneration for his services in the trust, and the letters having been written under his influence. But the rule being a hard one, and the conduct of the *cestui que trust* exceptional, the relief was given without costs. *Gomley v. Wood*, 3 J. & L. 678; 9 Ir. Eq. R. 418.

13. *Semble*, it is no objection to an equitable mortgage given for costs due, that they were not ascertained or delivered. *Exp. Boville* (2 Mont. & A. 382. n.), observed on. *Bristow v. Warner*, 10 Ir. Eq. R. 246.

14. A solicitor being indebted to A., and having a sum due to himself from a client, prevailed upon the client to give A. a common money bond for 3,000*l.*, such bond to be taken in part satisfaction of the money due from the client. A. not knowing at the time of the bond being given that the costs had not been taxed, a bill by the client against the solicitor and A. to have the costs taxed was dismissed with costs as against A. *Harrison v. Wiltshire*, 9 Sim. 255; 2 Jur. 679.

15. Bonds in penalties payable with interest taken by an attorney from his client, *pendente lite*, for untaxed costs, shall only stand as securities for such sum of money as shall, upon taxation, appear to be due, without interest thereon. *Fowler v. Moore*, 2 Jones 415.

16. C. for many years employed D. as his attorney, and in the course of those years became largely indebted to D., for business done and money lent. From time to time D. delivered accounts to C., but received no payments of any considerable amount from his client. C. afterwards employed other attorneys. Ultimately C., being threatened with an execution by a judgment creditor, applied to D. for his assistance, who procured the money for him by way of mortgage, but stipulated that the mortgage should stand as a security for his own debt, as well as the judgment debt. C., having assented to this arrangement, executed the mortgage deed, and also a deed of trust of even date, which was prepared jointly by D. and the other attorneys of C., by which it was agreed that the mortgage should stand as a security for the amount

of D.'s debt to be settled by arbitration, and that in such settlement no prejudice should arise to D. by reason of the lapse of time:—Held, that this transaction did not amount to the receiving of a gratuity by an attorney from his client, and consequently, in the absence of fraud, was sustainable in a court of equity. *Cheslyn v. Dalby*, 2 Y. & Coll. 170.

A security which has been given to an attorney by his client for a debt really due, or as a reward for services already rendered, will not be set aside in equity. *Id.*

1. Where an attorney had taken a mortgage from his client for his bill of costs in preparing that and another mortgage, and the client, before the attorney's mortgage was executed, assented to the bill, but afterwards, on coming to redeem, questioned its accuracy; the Court directed the Master to examine the bill, with a view to ascertain the reasonableness of the charges, without entering into evidence as to whether the business charged for had been actually done. *Wragg v. Denham*, 2 Y. & Coll. 117; 6 L. J., N. S., Exch. Eq., 38.

2. Where a security is expressed to be given for costs generally, *quære*, can it be sustained to the extent of such costs as have been incurred at the time of the execution of such deed. *Uppington v. Bullen*, 2 Dr. & War. 184; 1 Con. & L. 291.

3. *Quære*, as to the validity of a mortgage for untaxed costs, and the right to charge interest thereon from the date of the mortgage deed. *Lawless v. Mansfield*, 1 Dr. & War. 557; 4 Ir. Eq. R. 113.

4. The plaintiff was solicitor for D., and at the time of his death D. was indebted to him for costs. On D.'s death he became solicitor for his executor, the defendant, who, being indebted to the plaintiff for costs of his testator, and further costs as executor, handed over to him the title deeds of certain leasehold premises of the testator, which had been left on special trusts, together with a letter making an equitable mortgage; there were funds applicable to the costs, which were misapplied:—Held, that the executor having committed a breach of trust in mortgaging, the solicitor dealing with him was affected by it, and could not recover without an inquiry as to the state of the assets, and *semble* was in no better condition than the executor himself would be. *Purcell v. Buckley*, 12 Ir. Eq. R. 55.

5. Bill to set aside a security for a sum therein expressed to be due, but which was in fact the estimated amount of past costs in a suit, executed by a client in favour of his then solicitor pending the suit, and without the intervention of another legal adviser, dismissed with costs; there being no evidence of pressure or improper conduct on the part of the solicitor, and no evidence or averment of any specific error in the bill of costs; and it appearing that the defendant had delivered the bill of costs at the time agreed on between him and the plaintiff, and five years and a half before bill filed, and that the plaintiff had had ample opportunity for discovering errors, if any. *Blagrove v. Routh*, 2 Kay & J. 509. Affirmed 3 Jur., N. S., 399; 26 L. J., Ch., 86; 5 W. R. 95.

The proposition in *Lawless v. Mansfield* (1 Dr. & War. 611), that a general charge is sufficient to open accounts between a solicitor

and his client, is in conflict with the rule of the Court of Chancery in England, which is, that if the party seeking to set aside a security for the amount of a bill of costs relies on fraud, or error amounting to evidence of fraud in the bill of costs, he must aver and prove the specific items upon which he means to rely to be fraudulent or erroneous. *Id.*

6. After a long and unsuccessful litigation to recover an estate, a younger brother of the unsuccessful party, and the next to him in an entail claimed in the estate, entered into an agreement with him to pay what should be due in respect of the solicitor's bills of costs, with interest, on the principle of annual rents, and to commence a new litigation at his own risk in the name of the elder brother, who agreed on these terms to relinquish the estate to the younger brother. Shortly afterwards an agreement was entered into between the solicitor, who was also to conduct the new litigation, and the elder brother, that the solicitor should be paid in respect of the old costs a specified sum, being less than the costs out of pocket, unless the brothers, or one of them, came into possession of the estate, in which event the elder brother agreed that he or the younger brother would pay in respect of the old costs another specified sum, being the full amount of the bills, with interest calculated on the principle of annual rents. The bills had not been taxed, but had been examined, though not minutely, by a friend of the client, who had been a solicitor. The new litigation was conducted by the solicitor with his own capital. It succeeded, and the brothers came into possession of the estate. Seven years after the agreement with the solicitor had been entered into, they sought to set it aside, on the ground of undue influence and insufficient advice:—Held, that the agreement ought to be upheld. *Moss v. Bainbridge*, *Bainbridge v. Moss*, 6 De G. M. & G. 292.

Before the new litigation was completely closed, but after a successful verdict in it, the younger brother, on the eve of making an antenuptial settlement, signed a memorandum of agreement between himself, the elder brother, and the solicitor, whereby the brothers charged the estate with payment of all sums of money and bills of costs owing to the solicitor by both or either of the brothers, with lawful interest, on the principle of annual rents. At that time the relation of solicitor and client, though not dissolved, had been loosened by differences between the solicitor and the brothers, and the influence arising from that relation did not subsist in its full force. The solicitor made no attempt to prevent the brothers from consulting other solicitors; and in fact the solicitor of the intended bride intervened, though not as the solicitor of the intended husband:—Held, first, that the agreement was not usurious. *Id.*

Held, secondly, that it was not merely voluntary, and that whether the term as to annual rents could have been maintained or not, the solicitor was entitled to abandon it, and enforce the rest of the agreement. *Id.*

Held, thirdly, that the former agreement, as to the old costs, was binding on the younger brother under the latter agreement. *Id.*

Held, fourthly, that interest was payable on the old costs for the interval between the dates

of the two agreements, as well as during the rest of the time. *Ib.*

1. A. having paid off a debt secured by mortgage upon real estates, in the equity of redemption, of which his wife was, at the date of their marriage, entitled to a life interest to her separate use; afterwards, without her priority, assigned the mortgage to the solicitor of himself and wife, as security for a debt due to such solicitor for costs principally incurred in a suit in which he acted; first, for the wife before her marriage, and afterwards for both the husband and wife:—Held, that such assignment was a valid security as against the wife's life interest in the hereditaments assigned. *Nelson v. Booth*, 3 Jur., N. S., 951; 27 L. J., Ch., 110; 5 W. R. 722.

The solicitor, having subsequently purchased from the original mortgagee for 40*l.* a debt, for costs, of 175*l.*, which the latter would have been entitled to have added to his mortgage debt, was held entitled as against the wife to the benefit of such purchase, but to the extent only of securing himself in respect of the debt due to him from the husband. *Ib.*

2. Where a solicitor has taken a mortgage from his client to secure the payment of costs, he is entitled to maintain a bill for foreclosure, though an order for taxation has been obtained against him at the Rolls, and no bill of costs has been delivered. *Thomas v. Cross*, 10 Jur., N. S., 1163; 13 W. R. 166; 11 L. T., N. S., 430.

The 37th section of the 7 & 8 Vict., c. 73, is no bar to such a suit. *Ib.*

The client of a solicitor gave him a mortgage to secure previous advances and costs. Having subsequently discharged him from being his solicitor, he obtained an order at the Rolls for delivery and taxation of his bill of costs, whereby the solicitor was prohibited from commencing any suit in respect of the bill pending the reference; but he did not serve it properly on the solicitor, and took no steps to enforce it. Upwards of six months after the order was obtained, the solicitor filed a bill to enforce his security:—Held, that the order was no bar to the suit. S. C. 5 N. R. 148.

A suit to foreclose the equity of redemption in property mortgaged to secure costs is not a suit "for the recovery of fees," within the meaning of the 37th section of the Attorneys and Solicitors Act; and a solicitor is not thereby debarred from commencing such a suit, though he has not delivered his bill of costs; nor will the proceedings be stayed, till the requisites of the Act be complied with, in a case where there are subsequent incumbrancers. *Waugh v. Waddell* (16 Beav. 521), commented on. S. C. 5 N. R. 148.

III. SECURITY FOR FUTURE COSTS.

3. Attorney cannot take a mortgage from client for amount of future bill, but *secus* for disbursements and money to be advanced. *Pitchoe v. Rigby*, 9 Price 79.

4. Generally, a bond, taken by a solicitor from the client in the progress of a cause, is subject to taxation. *Plenderleath v. Fraser*, 3 Ves. & B. 175.

5. Though the Court will open a solicitor's bill, and order taxation, after several years,

and a security given, or even payment, upon gross errors, fraud, or pressure, where nothing appeared but a trifling inaccuracy, and under other favourable circumstances, the Court would not restrain proceedings upon a security obtained while business was depending. *Cooke v. Setree*, 1 Ves. & B. 126.

6. A solicitor having taken a judgment of his client for 400*l.* whilst the cause was depending, also several extraordinary charges appearing in his bill, though adjusted and allowed seventeen years ago, referred to be taxed, and judgment and other securities to be delivered up. *Drapers' Co. v. Davies*, 2 Atk. 295.

7. A security taken by a solicitor for future costs is not valid. *Booth v. Creswicke*, 13 L. J., N. S., Ch., 217; 8 Jur. 323.

8. A deed executed by a client to his solicitor, in which the consideration is untruly stated, will not be permitted to stand. *Uppington v. Bullen*, 2 Dr. & War. 184; 1 Con. & L. 291.

A solicitor will not be permitted to take a security for costs to be incurred; and there is no distinction between advances of money for the purposes of the cause and other costs. *Ib.*

Semble, such a transaction is maintenance. *Ib.*

Semble, that, if the security be taken for cash advances as well as prospective costs, no distinction can be made in favour of the former. *Ib.*

Quere, whether, when a security is given for past and future costs, it can be sustained as to the former, although void as to the latter. *Ib.*

9. Where a client gave to his solicitor a mortgage to secure costs then incurred, and thereafter to be incurred, with interest thereon from the time of taxation; and there were subsequent costs to a large amount, and afterwards the solicitor died; on motion by the client that the personal representative of the late solicitor should be ordered to hand over the title-deeds, etc., to the new solicitor, the client offering to confirm the mortgage as to the subsequent costs:—Held, that a security for costs to be incurred is void, as being against public policy, and therefore incapable of confirmation after the subsequent costs have been incurred, although a valid security for such costs may then be given; and consequently that, in this case, the lien was not avoided; and the papers should not be taken by the client from the personal representative of his late solicitor (who preferred the lien to a new security), until the costs for which no valid security had been taken were paid. *Willons v. Tandy*, 5 Ir. Eq. R. 1.

10. A solicitor cannot receive a deposit of title-deeds as security for future bills. *Exp. Laing, Re Duddridge*, 2 Mont. & A. 381.

11. Mortgage by client to attorney for costs due and to become due:—Held, a valid security for the costs then due only. *Williams v. Piggott*, Jac. 598.

12. Held, that an attorney cannot take a mortgage from his client for securing future costs. *Jones v. Tripp*, Jac. 322.

13. A mortgage was executed by N. to R., at that time N.'s attorney, to receive what was then due to R., and also future advances. This deed was made a first charge on N.'s property, and who had previously been N.'s

attorney obtained against N. a rule absolute for payment of costs found due on the Master's allocatur; he registered this rule, and thus became a second incumbrancer. R. then became largely N.'s creditor for costs subsequently incurred:—Held, on an order allowing S. to redeem R., that these subsequent costs could not be taken into the account. *Shar v. Neale*, 6 H. L. Ca. 581; 4 Jur., N. S., 695; 27 L. J., Ch., 444.

A solicitor, pending his employment, took security for costs from a poor and an illiterate client:—Held, that assuming a judgment creditor of the client had the same rights as the latter, still that, after ten years' acquiescence, the accounts would not be opened. S. C. 20 Beav. 157; 1 Jur., N. S., 666; 24 L. J., Ch., 563.

The plaintiff, a solicitor, obtained from his client securities on his real estate, whilst he wilfully obstructed the defendant (the former solicitor) in obtaining a final order for payment of his taxed costs, which would have enabled him to obtain a charge under the 1 & 2 Vict., c. 110, s. 18:—Held, that the plaintiff was nevertheless entitled to the benefit of his securities. *Id.*

1. A solicitor took a deposit of a policy of assurance from a client to secure costs, but without a memorandum to that effect. Subsequently a mortgage was executed, assigning the policy as a security for sums already advanced and thereafter to be advanced, but it made no mention of the costs:—Held, that the deposit for costs merged in the subsequent mortgage, and that after the payment of the sums advanced by way of loan the solicitor had no further lien on the proceeds of the policy. *Vaughan v. Vanderstegen, Re Annesley*, 2 Eq. Rep. 1257; 2 Drew. 289.

2. A. contracts to sell to B. estates for 17,000*l.*, B. agreeing therewith to pay certain specified debts of A., and among the rest his solicitor's bill, before a certain day, or to hand over to A. the purchase money. B. executes a bond for the payment of the solicitor's bill after the day has elapsed, and a bill is filed by A.'s executrix against B. for the payment of his purchase money into court, and the money is paid in. The solicitor commences an action against B. upon his bond:—Held, that B. cannot have the amount of the bond paid out of court, but the executrix of A. ordered to lend her name to tax. *Williams v. Williams*, 1 Jur. 839.

3. The Court will not set aside a charge given by a client to his solicitor, without the intervention of any other legal adviser, to secure payment of costs in a suit expressed to be due to the solicitor who was acting for him in suits then pending, there being no evidence of any pressure upon the client, nor any averment of fraud or error in the charges, while the client has not filed his bill till six years after executing the charge, and five years and a half after he has had the bills of costs in his possession. *Hooper v. Cooke*, 25 L. J., Ch., 467; 2 Jur., N. S., 527.

4. Decree to set aside a mortgage taken by a solicitor from his client to secure a sum consisting partly of a gross sum agreed to be paid for professional services, and as to the rest of the balance recited to be due, or a settlement of accounts, where it appeared that the client,

from his situation as to ill health, was unable to take an active part in managing his own affairs, and where there was no evidence of any improper statement or examination of the accounts. The mortgage was declared to stand as a security only for what should be found justly due on taxation of the bills of costs, and on an account of all dealings and transactions. *Morgan v. Higgins*, 1 Giff. 270; 5 Jur., N. S., 236.

5. It is not competent for a solicitor to take a security for, or apply a security already taken to, the payment of costs which may be subsequently incurred. *Re Foster, Exp. Walker*, 6 Jur., N. S., 686; 29 L. J., Ch., 625.

6. Property was mortgaged by a client to his solicitor as security for costs incurred and to be incurred. The client became bankrupt, and his assignee applied to set aside the mortgage, and to have the bills taxed. The Vice-Chancellor (13 L. T., N. S., 746) refused the application, on the ground that a solicitor might arrange with his client to accept a stated sum for costs, and so avoid the expense of taxation; but a letter being produced, which was read as a waiver of any objection to a taxation:—Held, on appeal, that the order must be discharged, and a general taxation directed. *Re Thompson*, 14 L. T., N. S., 6.

7. A company employed a solicitor, who was not its ordinary solicitor, in a particular matter, and at his request gave him a mortgage of part of its property to secure the payment of his costs. The mortgage was not registered under the Companies Act 1862, s. 43:—Held, that it was the duty of the solicitor to see that the mortgage was registered, and that as he had not done so, he could not claim the benefit of it in the winding up of the company. *Re Patent Bread Machinery Co., Exp. Valpy*, 7 L. R., Ch., 289; 20 W. R. 347.

8. A debtor filed a petition for liquidation by arrangement or composition. B. was appointed receiver, and took possession of the stock-in-trade of the bankrupt. By an extraordinary resolution, which was duly registered, the creditors accepted a composition of 7*s.* 6*d.* in the pound, to be paid in three instalments. When two instalments had been paid and the third provided for by promissory notes, B., who had previously given up possession of the stock-in-trade, sent in a bill of costs to the debtor for 400*l.* He agreed to the amount, entered into a covenant under seal to pay it, and by the same instrument assigned his stock-in-trade to B. by way of bill of sale. B. subsequently took possession of part of the property under the assignment. Thereupon the debtor moved in the Court of Bankruptcy for an order for B. to bring in a bill of costs to be taxed, to deliver up the property, and that the bill of sale might be delivered up to be cancelled:—Held, that the Court had no jurisdiction to entertain the application. *Exp. & Re Lyon*, 41 L. J., Bk., 41; 7 L. R., Ch., 494; 20 W. R. 566; 26 L. T., N. S., 491.

IV. ASSIGNMENT OF COSTS.

9. A solicitor's lien is a dormant security, in which it differs from a mortgage; but a

solicitor may assign a debt due to him for costs, with the benefit of any lien he may have upon any document for such costs. The claim is equally valid whether the deeds are in the actual possession of the solicitor or of his assignee; and such lien may pass to the solicitor's assignee, if the deeds were handed over in the solicitor's presence, and at his request, to his assignee, without his actually touching them. *Bull v. Faulkner*, 2 De G. & Sm. 772; 13 Jur. 93.

1. A solicitor assigns his claim for costs to W., and becomes bankrupt, and W. gives notice to the London agents of the solicitor of their claim, and the assignees in bankruptcy petition for payment to them, subject to the London agents' claim:—Held, that the notice to the London agents, as far as costs became payable to them, took those costs out of the order and disposition of the bankrupt, the costs being ordered out of the fund in court. Petition refused. *Sharples v. Marsh*, 2 W. R. 400.

2. In June 1854 T., a solicitor, assigned to A., for value, the costs payable to him in an administration suit in which he acted as solicitor for the plaintiff; and gave notice of such assignment to all proper parties. By the order on further directions made in the suit in August 1854 a fund was directed to be paid into court, out of which the plaintiff's costs were thereby also directed to be paid to T. In October 1854 T. became bankrupt, but the fund was not paid into court until January 1855:—Held (contrary to 23 Beav. 391; 3 Jur., N. S., 403; 26 L. J., Ch., 288, but on different facts), that the fund was not in the order and disposition of T. at the time of his bankruptcy, with the consent of the true owner, and that A. was entitled thereto. *Day v. Day*, 1 De G. & J. 144; 3 Jur., N. S., 782; 26 L. J., Ch., 585.

3. Until the Court has made an order for the payment of costs out of a fund in court, the solicitor has no lien on such fund for such costs; therefore, when the solicitor to a party in a suit assigned the costs due and to become due to him in the suit, and subsequently became insolvent, and an order was afterwards made for the payment of the costs out of a fund in court, and the official assignee in insolvency of the solicitor claimed the costs as against the person to whom they had been assigned, as being under the order and disposition clause, on the ground that (though notice had been given to the solicitors for the plaintiff in the suit) no stop order had been obtained on the fund in court:—Held, that it was not necessary to get a stop order on the fund in court, and therefore, that the person taking under the assignment was entitled to the costs. *Lord v. Colvin*, 2 Dr. & Sm. 82; 10 W. R. 420; 6 L. T., N. S., 211.

V. INDEMNITY BY, FOR COSTS.

4. If a solicitor gives a relator an indemnity for costs, or uses his name without authority (although afterwards assented to), the Court will order the information to be taken off the file with costs, to be paid by the relator and attorney. *Att.-Gen. v. Skinners' Co.*, C. P. C. 7.

5. The solicitor for the petitioning creditor, on the commission being superseded, writes to the bankrupt, "I am ready, and hereby offer, to allow and pay the costs" incurred by the bankrupt in petitioning for the supersedeas:—Held, that the solicitor was personally liable on this undertaking, and that the bankrupt might petition for an order on the solicitor to pay these costs, notwithstanding a subsequent commission had issued against him, under which he had not obtained his certificate, his assignees disclaiming all interest in the matter. *Exp. Bentley*, 2 Dea. & Ch. 578; 2 L. J., N. S., Bk., 39. See *Johnson v. Ogilby*, 3 P. W. 277.

6. R. and C., at H. and T.'s request, paid to H. and T.'s country solicitors 350*l.* in part discharge of costs incurred by H. and T. in certain administration suits. Thereupon the country solicitors by indenture assigned to R. and C. certain documents on which they had a lien, and covenanted that they would hold any charging order they might obtain from the Court of Chancery for payment of their costs, in trust to indemnify R. and C. By a subsequent order of the Court the costs were to be taxed and paid out of funds in court to the town agents of the country solicitors:—Held, that the costs must be paid to R. and C. in satisfaction of their claims under the indenture. *Cockayne v. Harrison*, 42 L. J., Ch., 660; 15 L. R., Eq., 298; 21 W. R. 520.

7. Before the 33 & 34 Vict., c. 28, s. 16, it was improper for a solicitor to give his client a guarantee against the costs of a suit, either previously to its institution or during its continuance. *Fielden v. Northern Railway of Buenos Ayres Co.*, 22 L. T. 511; 18 W. R. 729.

But circumstances might be such as to allow of his doing so in the latter case without rendering himself personally liable to the other side. *Id.*

8. A solicitor, who, in order to induce a plaintiff to go on with a suit, agrees to indemnify him against the costs, thereby makes the suit his own, and becomes liable to pay the costs of the defendant; and this notwithstanding that by the abatement of the suit by the death of the plaintiff before the hearing and the non-revivor of his executor, the remedy against the plaintiff's estate may be gone. *Fielden v. Northern Railway of Buenos Ayres Co.*, *Re Jones*, 6 L. R., Ch., 497; 40 L. J., Ch., 113; 19 W. R. 361; 23 L. T., N. S., 655.

VI. LIEN OF, ON COSTS.

9. A solicitor has a lien upon costs ordered to be paid to his client upon a petition in bankruptcy, although there be no fund in court; nor can the client release the benefit of the order to the prejudice of the solicitor. *Exp. Bryant*, 2 Rose 237.

10. Where costs are ordered to be paid to the client, solicitors need not wait the result of process to compel the payment of such costs, but may insist upon the immediate benefit of the lien. *Pounset v. Humphreys*, C. P. C. 142.

11. A solicitor's lien for his costs upon costs ordered to be paid to his client by the opposite

party in the suit remains notwithstanding he has ceased to be the client's solicitor in the suit, and notwithstanding that he has taken the client's body in execution under a judgment against him for the amount of the solicitor's costs. *O'Brien v. Lewis*, 3 De G. J. & S. 606; 4 Giff. 396; 9 Jur., N. S., 764; 32 L. J., Ch., 665; 11 W. R. 973; 8 L. T., N. S., 683; 2 N. R. 536, 156.

Where Set-off Between Debts and Costs.
See PRACTICE (COSTS).

XIV. Lien on Funds in Court and Property Recovered or Preserved.

- I. *What Property Subject to*, 6425.
- II. *For What Costs*, 6430.
- III. *Loss of, and Priorities*, 6431.
- IV. *How Enforced*, 6433.
- V. *Of Town Agent*. See III. III. 2, *ante*.

I. WHAT PROPERTY SUBJECT TO.

1. *In General*, 6425.
2. *Funds in Court*, 6425.
3. *Land before Solicitors Act*, 6426.
4. *Under Solicitors Act*, 6426.
5. *Recovery under Solicitors Act*. *What is*, 6427.
6. *Of Infant*, 6429.
7. *Of Lunatic*, 6429.
8. *Of Married Woman*, 6430.

1. In General.

1. A solicitor's lien for costs is not confined to deeds and papers, but extends to other articles delivered to him for the purpose of being exhibited to witnesses on the trial of an action. *Frimell v. King*, 15 Sim. 191.

2. Chattels personal, not under the control of the Court of Chancery nor in possession of the plaintiff's solicitor, are not subject to a lien for his costs in the suit in which they are recovered. *Savage v. James*, 9 Ir. R., Eq., 357.

3. In equity the costs are arranged according to the equities of the parties, and the solicitor's lien is only upon the balance, under that arrangement. *Taylor v. Popham*, 15 Ves. 72.

4. The solicitor's lien for costs is subordinate, and to be postponed to the equities between the parties. *Gwynn v. Krous*, 7 Ir. Eq. R. 274.

5. The lien of solicitors cannot interfere with the equities between the parties. *Bartree v. Watson*, 2 Keen 713; 7 L. J., N. S., Ch., 183.

6. A solicitor who receives rents in a cause, without the authority of the Court, will be ordered to pay them over to the receiver, and cannot retain them on the ground of lien, or set them off against costs alleged to be due to him from the plaintiff. *Wickens v. Townshend*, 1 Russ. & M. 361.

7. A solicitor, who is in disburse for his client, has a right to be paid out of a duty decreed to an administrator, and has a lien upon it before the bond creditors of the deceased; nor can the administrator controvert this rule, by insisting on applying the assets in a course of administration. *Turvin v. Gibson*, 3 Atk. 720, 727.

8. Solicitor prosecuting to a decree has a lien on the estate recovered, in the hands of the person recovering, for his bill; but not in the hands of the heir. But if the suit be revived, the lien revives. *Barnesley v. Powell*, Ambl. 102.

2. Funds in Court.

9. A solicitor, having declined to act for his client, has no lien for his costs upon a fund in court. *Cresswell v. Byron*, 14 Ves. 271.

10. The general lien of a solicitor for costs due by his client does not extend to a fund which the client can reach without the assistance of the solicitor, or the use of the papers in his possession. *Hodgens v. Kelly*, 1 Hog. 388.

11. A solicitor has no lien on a fund received by his client, for compromising a suit, where it is clear that the result of the suit, if successfully prosecuted, would not have been to realise a fund on which such lien might attach. *Townsend v. Reads*, 4 L. J., N. S., Ch., 233.

12. The fund in court being decreed to the assignees of a party who, in the course of the cause, had become bankrupt, the solicitors employed by him during part of the proceeding have a lien for their costs. *Pounsett v. Humphreys*, C. P. C. 142.

13. The employment of a solicitor in business relating to the trust estate by the authority of the trustee, or of some of several *cestuis que trustent*, gives the solicitor no lien or charge upon the trust estate, or upon the shares of the other *cestuis que trustent*, for costs incurred in relation to the trust. *Hall v. Laver*, 1 Hare 571; 4 Y. & Coll. 218; 5 Jur. 241.

14. The solicitor's lien for costs is subordinate, and to be postponed to the equities between the parties. *Gwynn v. Krous*, 7 Ir. Eq. R. 274.

15. In equity the costs are arranged according to the equities of the parties, and the solicitor's lien is only upon the balance, under that arrangement. *Taylor v. Popham*, 15 Ves. 72.

Solicitor's lien for costs upon a fund of assets appropriated was subject to a debt in respect of which the testator as a surety was creditor of the client to a greater amount. S. C. 13 Ves. 59. Reversed 15 Ves. 72.

16. The lien of solicitors cannot interfere with the equities between the parties. *Bartree v. Watson*, 2 Keen 713; 7 L. J., N. S., Ch., 183.

A sum was found due from the plaintiff to the defendant, and on the other hand the defendant was ordered to pay the costs of suit:—Held, that the lien of the defendant's solicitor for his costs extended only to the ultimate balance due from the plaintiff, after

deducting the costs payable to him by the defendants. *Id.*

1. A solicitor's lien is not a general lien on a fund in court, though brought in by his exertions, but only on what may, on the issue of the suit, be belonging to his client. *Re Downes*, 4 Drew. 427; 28 L. J., Ch., 561.

Therefore, where, by the exertions of a plaintiff's solicitor, a fund was ordered to be brought into court on which the defendant had a primary claim, and afterwards the plaintiff changed his solicitor, and the parties were proceeding without bringing the fund into court to divide it under compromise, without paying the plaintiff's original solicitor:—Held, that he had no lien on the fund; but it was ordered that no order should be made by compromise or otherwise for payment of any money to the plaintiff without notice to the plaintiff's original solicitor. *Id.*

2. Solicitors have no right to look for their costs to a fund in court not belonging to their clients. *Chick v. Nicholls*, 26 W. R. 231.

Where, therefore, in an administration suit the estate in court was exhausted by creditors, so that nothing was left for the testator's representative, and she became insolvent, a motion that her costs of suit might be retained out of the fund in court, so that her solicitors might be paid, was refused. *Id.*

3. Lien before Solicitors Act.

3. An attorney or a solicitor has no lien on an estate recovered for a client in respect of the costs and expenses incurred in recovering it. He has a lien only on the papers in his hands. *Shaw v. Neale*, 6 H. L. Ca. 581; 4 Jur., N. S., 695; 27 L. J., Ch., 444; 6 W. R. 635: Affirming 20 Beav. 157; 1 Jur., N. S., 666; 24 L. J., Ch., 563; 3 W. R. 350.

An attorney held an assignment of two terms to attend the inheritance of an estate recovered by him for his client. On a rule being made to tax his costs, it was part of the rule that the Master should decide whether, and if so upon what terms, the attorney should execute to his client assignments of these terms. The Master having made his allocatur, directed that the attorney should, on payment of what was due, or on security for the same being given to his (the Master's) satisfaction, execute assignments of these terms at the cost of the client:—Held, that this did not constitute a change in the estate so as to give the attorney a priority from the date of the allocatur, or that the Master had no power to direct that these terms should stand as a security for the amount of the costs. *Id.*

The taxing master's certificate is not an order for the payment of money within the 1 & 2 Vict., c. 110, s. 18. *Id.*

An agreement, pending a litigation, that a solicitor shall be entitled to compound interest on his demand, cannot be supported. In 1851 A. and B. agreed to charge their real estates, with the amount of costs due to their solicitor, with annual rests. The solicitor instituted a suit to enforce the lien, and the client presented a petition for taxation. The Court made the usual order for taxation, with a direction to the Master to ascertain the amount due in 1851, but held itself incom-

petent, on this occasion, to deal with the question of lien. *Re Moss*, 17 Beav. 346.

4. Under Solicitors Act.

4. The lien of a solicitor, upon property preserved in a suit, is not affected by the fact that when the accounts are taken, it appears that nothing is due to his client. *Bailey v. Berchall*, *Barnes v. Ratcliffe*, *Bailey v. Ratcliffe*, 5 N. R. 237; 2 Hem. & M. 371; 11 Jur., N. S., 57.

5. The charge for costs to which a solicitor is entitled under 23 & 24 Vict., c. 127, s. 23, extends to the property of his own client only, and not to that of other persons. *Berrie v. Howitt*, 9 L. R., Eq., 1; 21 L. T., N. S., 414; 39 L. J., Ch., 119.

By a settlement, real estate was assured to the use of A. for life, with remainder to his children, as he should by deed or will appoint, and in default of appointment to the use of his children as tenants in common in tail, with cross remainders in tail between them. In a suit to which B. was a defendant, an appointment by A. was set aside, so that the property was left to devolve according to the limitations of the settlement in default of appointment, and B. became thereby entitled to an estate tail in certain undivided shares of the property. B. afterwards died a bachelor, and without having executed a disentailing deed; and the shares to which he was entitled devolved, under the settlement, upon the plaintiff and two defendants to the suit as tenants in common in tail:—Held, that under these circumstances, B.'s solicitor was not entitled to a charge for costs under 23 & 24 Vict., c. 127, s. 28, on B.'s shares of the settled property. *Id.*

6. Under s. 28 of the Act 23 & 24 Vict., c. 127, the Court can declare a solicitor entitled to a charge for costs on the whole of the property recovered or preserved through his instrumentality, and not merely on his client's interest in that property. *Berrie v. Howitt* (9 L. R., Eq., 1) not followed. *Charlton v. Charlton*, 52 L. J., Ch., 971; 49 L. T. 267; 32 W. R. 90.

7. The charge declared in pursuance of the 28th section of the Solicitors Act 1860, on the property recovered or preserved in favour of the solicitor employed, is in the nature of salvage, and may be made on the interest of persons who did not employ the solicitor and who were not parties to the suit, if they adopt the benefit obtained in the suit. It makes no difference that the persons whose interests are charged are infants, but the Court will not make the order until the infants have an opportunity of being heard on it. *Greer v. Young*, 24 L. R., Ch. D., 545; 52 L. J., Ch., 915; 49 L. T. 224; 31 W. R. 930.

P. and Y. were trustees under the will of G. P. misapplied some of the trust funds and died. The suit of *M. v. P.* was brought for the administration of P.'s estate, and a proof was carried in by Y. on behalf of the trust in respect of the breaches of trust by P. Afterwards the action of *G. v. Y.* was brought by some of the *cestuis que trustent* under G.'s will to establish the liability of Y. and to appoint new trustees, in which a small dividend was

recovered from Y.'s estate. The solicitor who acted for the plaintiffs in *G. v. Y.* applied for a charging order for his costs on the dividend recovered from P.'s and Y.'s estates, which was opposed by the new trustees on behalf of the infant *cestuis que trustent*:—Held, that the solicitor was entitled to a charge upon the dividend recovered in the action from Y.'s estate, as against the infant *cestuis que trustent*, but not on the dividend recovered from P.'s estate, as it was not recovered in the action. *Id.*

1. An action was brought by a husband against his wife and another person for a sum of money invested in a building society, which the husband alleged to have been fraudulently transferred by his wife to the other person. The building society were also made defendants to the action and appeared. Judgment was given for the defendants. Upon petition presented under the Attorneys and Solicitors Act 1860 by the solicitor to the defendants other than the building society:—Held, that he was entitled to a charge upon the whole sum invested, as being the amount "recovered or preserved" to them. *Porter v. West*, 50 L. J., Ch., 231; 43 L. T. 569; 29 W. R. 236.

2. A firm of solicitors were employed throughout the proceedings in an action for partition and sale of certain hereditaments of which the defendants were in possession, and for an account of the rents and profits of one-third part thereof for six years prior to the issue of the writ. By the decree the plaintiffs were declared entitled to one-third part of the hereditaments, and to an account and payment by the defendants of one-third of the said rents and profits, and the premises were ordered to be sold, and the plaintiffs' costs up to and including the hearing were ordered to be costs in the action. The account was not completed and the property was not sold when the plaintiffs threatened to change their solicitors and to compromise the action. The share of the plaintiffs in the property and rents was insufficient to pay the plaintiffs' costs. On a petition by the plaintiffs' solicitors asking for a declaration that they were entitled to a charge on the whole property in respect of the plaintiffs' costs, as such costs had been made costs in the action:—Held, that no order having been made for payment of the costs of the action out of the proceeds of sale, the Court could not anticipate such order, and that the solicitors could only be treated as having a lien on the plaintiffs' share recovered by them in the action. An injunction was granted to prevent the plaintiffs from receiving any money in the action, or by way of compromise, without notice to the solicitors. *Lloyd v. Jones*, 27 W. R. 665; 40 L. T. 514.

3. An undischarged bankrupt, without the knowledge of the trustee in his bankruptcy, brought an action, claiming (*inter alia*) remuneration for services rendered by him as an architect to the defendant, and damages for wrongful dismissal. The defendant, without admitting any legal liability to the plaintiff, paid 360*l.* into court. The plaintiff took out a summons to have the money paid out to him, but before the summons was heard the action came to the knowledge of the trustee, and he obtained an order joining him as co-plaintiff in the action, on the ground that the remunera-

tion and damages claimed were his property. The bankrupt's solicitor then applied for a charging order on the 360*l.* in respect of his costs, charges, and expenses, of or in reference to the action:—Held, that the bankrupt's solicitor was entitled to a charging order for his costs up to the time of the intervention of the trustee. *Emden v. Carter*, 19 L. R., Ch. D., 311; 51 L. J., Ch., 371; 45 L. T. 328; 30 W. R. 17. Reversing 44 L. T. 840; 29 W. R. 840.

Money paid into court by a defendant, although accompanied by a defence denying legal liability, may be taken out of court by the plaintiff; and is, therefore, property "recovered or preserved" within the 28th section of the Solicitors Act. *Berdan v. Greenwood* (3 L. R., Exch. D., 251) followed. *Id.*

4. The principle of 23 & 24 Vict., c. 127, s. 28, is analogous to the principles of salvage, and gives a charge on the property preserved, irrespectively of any question as to who is the owner of it; and the fact that the client by whom the solicitor was retained is not the beneficial owner of the whole property is immaterial. *Bulley v. Bulley*, 38 L. T., N. S., 401; 26 W. R. 638; 47 L. J., Ch., 841; 8 L. R., Ch. D., 479. Affirming 38 L. T., N. S., 95; 26 W. R. 310.

Therefore, when a solicitor has been retained by a person interested in an estate, as to two-fifths in his own right, and as to three-fifths as a trustee for others, and the whole estate has been preserved, the Court will make an order as against the *cestuis que trustent* charging the whole property preserved; and this charge will not be incumbered or affected with any equities that may exist between such trustee and his *cestuis que trustent*, even though the trustee were a defaulting trustee or bankrupt. *Id.*

5. A plaintiff in a suit instituted to set aside a conveyance of real estate sold his interest in the property, and the suit was compromised, and a conveyance of the property made to the purchaser, who obtained an order dismissing the bill:—Held, that the plaintiffs' solicitor was entitled to a charge for his costs upon the property as against the purchaser. *Jones v. Frost, Re Fiddey*, 42 L. J., Ch., 47; 7 L. R., Ch., 773; 27 L. T. 465; 20 W. R. 1025.

6. The creditors of a debtor having agreed to accept a composition secured by sureties, the debtor and one of the sureties placed funds in the hands of the debtor's solicitor, for the purpose of paying the composition. The solicitor sent round a circular to the creditors informing them they could be paid at his office on a certain day. Before that day the debtor absconded, leaving the solicitor's bill of costs unpaid:—Held, that the solicitor held the funds as trustee for the creditors, and that he was not entitled to any lien on them for his costs. *Re Clark, Exp. Newland*, 25 W. R. 275; 4 L. R., Ch. D., 515; 35 L. T., N. S., 916.

See also Following Subdivisions.

5. Recovery under Solicitors Act. What is.

7. A bill was filed alleging that the defendant had built so as to obstruct the plaintiffs' ancient lights, and was proceeding to build so as further to obstruct them, and asking for an injunction against further building, and a

mandatory injunction to pull down part of what had been built. An interlocutory injunction was granted against building higher, and the suit was afterwards compromised on the terms that the building should remain of its then height. The defendant having become bankrupt, his solicitor petitioned to have his costs made a charge on his property to which the suit related:—Held, that no property had been recovered or preserved within the meaning of 23 & 24 Vict., c. 127, s. 28. *Foxon v. Gascoigne*, 9 L. R., Ch., 654; 43 L. J., Ch., 729; 22 W. R. 989; 31 L. T., N. S., 289. Affirming S. C. *sub. nom. Fox v. Gascoigne*, 30 L. T., N. S., 743.

A suit which only relates to an easement is not a suit in which it can be said that property is recovered or preserved, even though a mandatory injunction for pulling down buildings is refused. *Ib.*

1. When a suit is instituted for the preservation of property, and a receiver is appointed, there is a preservation of property within the 23 & 24 Vict., c. 127, s. 28, and the solicitors are entitled to a charge upon their client's interest in the property. *Twynham v. Porter*, 19 W. R. 151; 23 L. T., N. S., 551.

In a suit by a *cestui que trust* against a trustee of landed estate, praying for an account and a reconveyance, a receiver was ordered to be, and afterwards was, appointed, adversely to the defendant. Notice of motion for decree was served, but before the time for closing evidence had arrived, the plaintiff, without consulting her solicitor, and without his knowledge, entered into an agreement with the defendant for a compromise of the suit on the terms, first that a sum of cash should be paid to the plaintiff, then that the mortgages on the property should be paid off, and then that the costs of all parties, estimated at a fixed sum, should be paid. Upon hearing of the compromise, the plaintiff's solicitor applied to the plaintiff and to the defendant's solicitor for the terms of it, but was refused all information:—Held, that the solicitor was entitled to a first charge for the amount of his taxed costs as between solicitor and client, upon the property of the plaintiff, as having been recovered and preserved through his instrumentality. S. C. 11 L. R., Eq., 181; 40 L. J., Ch., 30.

2. A solicitor instituted an administration suit on behalf of a *cestui que trust* against a sole trustee, obtained a common decree with a direction for the appointment of a new trustee, and procured an account to be brought into chambers by the defendant. The plaintiff then abandoned the suit. On a petition by the solicitor that his costs might be made a charge on the plaintiff's interest in the trust estate, under 23 & 24 Vict., c. 127, s. 28:—Held, that no property had been preserved or recovered on which the costs could be made a charge. *Pinkerton v. Easton, Re Pinkerton*, 42 L. J., Ch., 878; 16 L. R., Eq., 490; 21 W. R. 943; 29 L. T., N. S., 364.

3. A defendant in a foreclosure suit established his right to a second mortgage on certain property:—Held, that it was property recovered or preserved by the instrumentality of a solicitor to which the solicitor was entitled to a declaration of charge under 23 & 24 Vict., c. 127, s. 28. *Scofield v. Lockwood*,

17 W. R. 184; 38 L. J., Ch., 232; 7 L. R., Eq., 83.

4. A reference to arbitration having been made in an action, the arbitrator awarded that a certain sum should be paid by the plaintiff to the defendant, and the award was confirmed by the Court. An order was made, on the application of the defendant's solicitor, under the 3rd section of the Act 39 & 40 Vict., c. 44, declaring him entitled to a lien for the costs of the defendant in the action upon the amount awarded, as property recovered or preserved for the defendant through the instrumentality of the solicitor, and directing the plaintiff to pay thereout to the solicitor the amount of such costs when taxed. *M'Alahey v. M'Alahey*, 9 L. R., Ir., 165.

5. A solicitor is entitled to a charge for his costs on property the subject of a successful suit conducted by him against an incumbrancer, although the incumbrance is entirely valueless, provided it formed a cloud upon the title. It is no objection to an application for such a charge that it is made in a suit which is no longer pending, and which was never brought to a hearing, nor that the property had been sold before the application of the solicitor. *Jones v. Frost, Re Fidley*, 7 L. R., Ch., 773; 20 W. R. 1025; 27 L. T., N. S., 465. Affirming 20 W. R. 793.

6. A solicitor for a party in an administration suit who cannot otherwise obtain payment of his bill may apply by petition to have his costs taxed, and for a charge for them on dividends payable to his client under an order made in the suit, although there may have been no real question at issue between the parties to the suit, or although, so far as there has been any such question, the decision in the suit may have been given wholly or in part in favour of the opposite party. *Smith v. Winter, Exp. Hartley*, 18 W. R. 447.

7. An undischarged bankrupt commenced an action for the purpose of recovering moneys alleged to be due to him for remuneration for his personal services as an architect, rendered since the bankruptcy, and for damages for wrongful dismissal since that date, and also for further relief of a personal character which it was possible, but not probable, that he might obtain. The defendant denied the whole claim, but paid money into court. The plaintiff took out a summons to withdraw the money so paid in. The trustee in his bankruptcy took out another summons to withdraw the money, and also, before this case came on for hearing, a further summons, upon which being heard, the trustee was added as a co-plaintiff, and given the conduct of the action on the ground that the bulk, if not the whole, of the money which might be recovered in the action, would, if recovered, pass to the trustee for the benefit of the creditors. The solicitor acting for the bankrupt took out a summons under the Solicitors Act 1860 (23 & 24 Vict., c. 127), s. 28, by which he asked for an order charging upon the fund in court his costs of or in reference to the action:—Held, that the fund paid into court had been "recovered or preserved" through the instrumentality of the solicitor, within the meaning of s. 28 of the Solicitors Act 1860, and that such solicitor was entitled to a charging order on the money in respect of his costs down to the time when the trustee intervened,

but not as to his costs incurred in opposing the trustee's claim to intervene. *Emden v. Carter*, 45 L. T. 328; 30 W. R. 17; 19 L. R., Ch. D., 311; 51 L. J., Ch., 371. Reversing 44 L. T. 840; 29 W. R. 840.

Money paid into court by a defendant, although accompanied by a defence denying legal liability, may be taken out of court by the plaintiff; and is, therefore, property "recovered or preserved" within the 28th section of the Solicitors Act. *Berdan v. Greenwood* (3 L. R., Exch. D., 251) followed. *Id.*

6. Of Infant.

1. A suit was instituted in equity by a next friend on behalf of an infant to recover real estate and a fund in court. The costs were directed to be paid by the defendant, but in consequence of his insolvency they could not be recovered from him. The Court, on petition for that purpose, directed that the fund in court should be applied in payment of the costs *pro tanto*, the proceedings taken by the next friend being for the benefit of the infant, but refused to make an order declaring that the residue of the costs were, under the 28th section of the 23 & 24 Vict., c. 127, a charge on the real estate recovered, as that Act applied only to suits instituted by persons *sui juris*. *Bonser v. Bradshaw*, 7 Jur., N. S., 231; 30 L. J., Ch., 159; 9 W. R. 229; 3 L. T., N. S., 545.

2. The Court will not hear an application by a solicitor for an order to charge the real estate of an infant with the costs of a suit instituted for its recovery, unless the application is substantially opposed on behalf of the infant. *Bonser v. Bradshaw*, 10 W. R. 481.

3. Where a solicitor was employed by the next friend in establishing an infant's title to land, the infant having attained his majority, the Court, under 23 & 24 Vict., c. 127, s. 28, declared on petition so much of the costs as remained unpaid a charge on the land recovered. *Bonser v. Bradshaw*, 4 Giff. 260; 9 Jur., N. S., 1048; 9 L. T., N. S., 194.

4. Lien on fund recovered of costs of proceedings under the Declaration of Titles Act (25 & 26 Vict., c. 67), on behalf of an infant. *Pritchard v. Roberts*, 17 L. R., Eq., 222; 43 L. J., Ch., 129; 22 W. R. 259; 29 L. T., N. S., 883.

5. It is not merely when there is an adverse claim to property recovered or preserved in a suit through the instrumentality of a solicitor for his client that the solicitor is entitled to a charge on the property for his costs, under 23 & 24 Vict., c. 127, s. 28; but he may also obtain such a declaration where the suit is a friendly one and instituted on behalf of an infant. *Baile v. Baile*, 41 L. J., Ch., 300; 13 L. R., Eq., 497; 20 W. R. 534; 26 L. T., N. S., 283.

A bill was filed by the maternal grandmother of an infant tenant in tail, as his next friend, praying the appointment of a guardian to him and his brothers and sisters; directions for his maintenance and education, having regard to the circumstances of the family, accounts, and a receiver. The solicitor employed by the next friend died

pending the suit, and within six years from the presentation of the petition a petition was presented by the personal representative of the solicitor for a declaration as to, and a charge for, his costs:—Held, that the solicitor was employed for the infant; that the property was preserved for the infant through the instrumentality of the solicitor; that the infant had, as a matter of fact, adopted the suit after attaining his majority; that the Statute of Limitations was not a bar to the petition; that it was well presented by the legal personal representative; and that the petitioner was entitled to the relief for which she prayed. *Id.*

6. The charge declared in pursuance of the 28th section of the Solicitors Act 1860, on the property recovered or preserved in favour of the solicitor employed is in the nature of salvage, and may be made on the interest of persons who did not employ the solicitor and were not parties to the suit, if they adopt the benefit obtained in the suit. It makes no difference that the persons whose interests are charged are infants, but the Court will not make the order until the infants have an opportunity of being heard on it. *Greer v. Young*, 24 L. R., Ch. D., 545; 52 L. J., Ch., 915; 49 L. T. 224; 31 W. R. 930.

7. Of Lunatic.

7. Committee of a lunatic has a lien on the lunatic's estate: the solicitor employed by the committee declared to stand in his place. *Barnesley v. Powell*, Amb. 102.

8. Solicitor has a lien on funds of a lunatic. *Exp. Price*, 2 Ves. 407.

9. A solicitor, who had been employed in prosecuting a commission in lunacy, presented a petition in 1860, applying, under 23 & 24 Vict., c. 127, s. 29, for an order charging his costs on the real estates of the lunatic, who had died in 1853. An order had been obtained for taxation in February 1854; the taxation was completed in 1855, and in 1857 his bill had been delivered to the persons at whose instance the commission had been prosecuted:—Held, that the right to recover such costs having accrued at latest when the order for taxation was made, the solicitor's claim as against the lunatic's estate was barred by lapse of time, and that he could only recover from certain subsequent rents of which he was mortgagee. *Re Cumming, Exp. Turner*, 6 Jur., N. S., 1129; 30 L. J., Ch., 29; 9 W. R. 213; 2 De G. F. & J. 376.

10. Where C. B., the first tenant in tail in possession, was a lunatic, the second tenant in tail in remainder an infant, and E. C., the third tenant in tail in remainder, being made a party to the suit, by her answer did not disclaim, but said that she made out the interest which she claimed by referring to the statements in the plaintiffs' bill in which such interests were stated to be correctly set forth, and the prayer of the bill was for a conveyance of the shares, when allotted, to the parties nominatim, including E. C., the Court held that E. C. was not an unnecessary party; but inasmuch as E. C. could not derive any present benefit from the suit, her costs up to the hearing were decreed to be a charge upon the

fourth part which should be allotted to the lunatic, in respect of which E. C. was interested. The costs of C. B., the lunatic, and of the infant tenant in tail in remainder, were also decreed to be a charge upon the lunatic's fourth part of the estates. *Singleton v. Hopkins*, 1 Jur., N. S., 1199.

Quere, whether a Vice-Chancellor has in such a case jurisdiction to make an order charging a lunatic's estate with costs. *Id.*

8. Of Married Woman.

1. Pending a reference for the taxation of a solicitor's bill against a married woman, the solicitor cannot maintain a suit to enforce a lien for his bill of costs on her separate estate. *Waugh v. Waddell*, 16 Beav. 521.

2. A solicitor was retained by a wife in the successful defence of a suit instituted by her husband to set aside a settlement, whereby he covenanted to pay her an annuity for her separate use without power of anticipation, and assigned property to trustees to secure the annuity. Upon a petition by the solicitor to charge under 22 & 23 Vict., c. 127, s. 28, the annuity with his costs incurred on her behalf:—Held, that the married woman was competent to employ a solicitor for the purpose of defending such a suit; that the right of a solicitor under the Act to a charge upon the property preserved by his exertions was paramount to the restraint on anticipation. *Re Keane, Lumley v. Desborough*, 40 L. J., Ch., 617; 12 L. R., Eq., 115; 24 L. T., N. S., 780; 19 W. R. 1025.

Held, also, that the charge was limited to the annuity and did not extend to the trust fund upon which it was secured. (Varying 19 W. R. 498; 24 L. T., N. S., 57.) *Id.*

Liability of Separate Estate of Married Woman for Costs generally.] See HUSBAND AND WIFE, XI, XI. 6.

II. FOR WHAT COSTS.

1. *In General*, 6430.
2. *Under Solicitors Act*, 6430.

1. In General.

3. The solicitor's lien on a fund recovered applies in equity to the defendant's solicitor as well as the plaintiffs. *Townsend v. Reade*, 4 L. J., N. S., Ch., 233.

4. Solicitor has no lien on fund decreed to be paid to his client beyond his costs in that suit. *Lann v. Church*, 4 Madd. 391.

5. Whether a solicitor's lien for his costs on a fund in court is general; or is confined to costs of the particular suit, *quere*. Solicitor having in his possession the instrument on which his client's right to the fund rests, he has a general lien on the fund. *Worrall v. Johnson*, 2 Jac. & Walk. 214.

Solicitor's lien does not extend to debts that are not due to him in his professional character. *Id.*

6. When a pauper obtains a decree for debt and costs, his solicitor has a lien on the sum recovered for divers costs, though the sum is

deficient for payment of plaintiff's demands. *Quin v. Bodkin*, 2 Hog. 240.

7. A solicitor's lien upon the fund is not a general lien; it extends only to costs in the cause, and costs immediately connected with costs in the cause; as, for instance, the costs of successfully protecting a solicitor's right to the costs in a cause. *Lucas v. Peacock*, 9 Beav. 177.

8. The lien of a solicitor upon a fund recovered in a suit which he has conducted is confined to the costs of that particular suit, and therefore, *semble*, a solicitor who, in relation to the same estate in which the same parties are interested, has brought an ejectment and a suit in equity, has no lien upon the fund recovered in the suit for his costs of the ejectment. *Hall v. Laver*, 1 Hare 571; 4 Y. & Coll. 218; 5 Jur. 241.

9. A solicitor has a lien for his costs on a fund in court, produced by his exertions; and, therefore, where on a bill for discovery in aid of a defence at law an injunction was granted on terms, one of which was the payment of money into court, and an answer was afterwards filed, and the action at law being subsequently tried, a verdict was found for the defendant, it was:—Held, that the solicitor for the defendant in equity had a lien on the fund for the costs of the discovery. But where the solicitor putting in the answer was removed, and his demand paid, and another solicitor employed, it was considered that the fund was exonerated to that extent, and the latter solicitor had not any lien for the costs of the former solicitor, though paid by him. *Irving v. Viana*, 2 Y. & J. 70.

10. Although the solicitor of a defaulting receiver cannot have the costs of his proceedings until the sum found to be due from the receiver, with interest, shall have been paid in; yet, when at his own proper costs, and under the orders of the Court, the solicitor of the receiver brought certain actions at law against defaulting tenants and their sureties, etc.:—Held, that the solicitor was entitled to be paid the costs of such proceedings out of the funds in court. *M'Bride v. Clarke*, 1 Ir. Eq. R. 203.

11. Where a security is realised in a suit by means of the production of a document, upon which a solicitor, then acting as such, has a lien, his lien upon the fund realised is confined to the costs of that suit. It is the same too when the document is voluntarily produced by a solicitor not at the time acting as a solicitor to the party; but in such a case he might if he chose have made his own terms with his former client before producing the deed. *Boxon v. Bolland*, 4 Myl. & C. 354; 9 L. J., N. S., Ch., 123; 3 Jur. 884; 4 Jur. 763.

Such a lien can be enforced actively. *Secus*, as to his general lien upon his client's papers which applies to all his bills of costs, but is merely a right to retain the papers and cannot be actively enforced. *Id.*

2. Under Solicitors Act.

12. Under the 23 & 24 Vict., c. 127, s. 28, an attorney can only have a charge upon property recovered or preserved by him for his client in respect of the costs in the particular suit,

matter, or proceeding in which they were incurred and not for general costs. *Exp. Thompson*, 3 L. T., N. S., 317.

1. Where costs were incurred for proceedings in a foreclosure suit, and for proceedings in actions of ejectment, and on indictments in reference to the mortgaged property, the Court, on a petition by the solicitor for the plaintiff, under 23 & 24 Vict., c. 127, s. 28, refused to make a charging order for more costs than those incurred in the proceedings for foreclosure. *Wilson v. Round*, 4 Giff. 416; 10 Jur., N. S., 34; 12 W. R. 402; 9 L. T., N. S., 675; 3 N. R. 288.

2. When the Court makes an order under the Solicitors Act (23 & 24 Vict., c. 127), s. 28, declaring a solicitor entitled to a charge upon the property recovered or preserved in an action, it is the duty of the judge to limit the order to costs properly incurred in recovering or preserving the property. An undischarged bankrupt, without the knowledge of the trustee in his bankruptcy, brought an action, claiming, *inter alia*, remuneration for services rendered by him as an architect to the defendant, and damages for wrongful dismissal. The defendant, without admitting any legal liability to the plaintiff, paid 360*l.* into court. The plaintiff took out a summons to have the money paid out to him, but before the summons was heard the action came to the knowledge of the trustee, and he obtained an order joining him as co-plaintiff in the action, on the ground that the remuneration and damages claimed were his property. The bankrupt's solicitor then applied for a charging order on the 360*l.* in respect of his costs, charges, and expenses of or in reference to the action:—Held, that the bankrupt's solicitor was entitled to a charging order for his costs up to the time of the intervention of the trustee. *Emden v. Carte*, 19 L. R., Ch. D., 311; 51 L. J., Ch., 371; 45 L. T. 328; 30 W. R. 17. Reversing 44 L. T. 840; 29 W. R. 840.

3. The Attorneys and Solicitors Act 1860 is intended for the benefit and protection of solicitors only, and the Court will not sanction the use of it for the purpose of enabling parties to an action to charge the property recovered or preserved in the action with the payment of costs for which they themselves are liable, and which they are able to pay. *Harrison v. Cornwall Minerals Railway Co.*, 53 L. J., Ch., 596; 50 L. T. 452; 32 W. R. 748.

4. The costs of proceedings under the Declaration of Titles Act (25 & 26 Vict., c. 67), on behalf of an infant, together with the costs of a partition suit and of suit to obtain a declaration of lien, are costs for which the solicitor has a lien on the fund recovered. *Pritchard v. Roberts*, 17 L. R., Eq., 222; 43 L. J., Ch., 129; 22 W. R. 259; 29 L. T., N. S., 883.

5. Solicitors who had obtained a charging order for costs due to them were not allowed the costs of appearing by counsel at the hearing on further consideration. *Mildmay v. Quicke*, 25 W. R. 788.

III. LOSS OF AND PRIORITIES.

1. *In General*, 6431.

2. *By Execution*, 6432.

3. *Under Solicitors Act*, 6432.

1. In General.

6. Voluntary release by a party to his adversary, not to defeat the clerk in court for his lien for costs. If the suit had ended on a *bonâ fide* compromise for a reasonable consideration paid, it would have been otherwise. *Anon.*, 2 Ves. 25.

7. An attorney who claims a lien for his costs upon the title deeds of a freehold estate decreed to be sold, which lien was acquired by him prior to the institution of the suit, will be ordered to deposit them in court, without prejudice to his lien, or to his making it available against the purchase money of the lands; and having established his claim, he is entitled to be paid it out of the purchase money of the estate. Is he so entitled to be paid in priority to the demand of a judgment creditor, whose judgment was acknowledged prior to the acquisition of the lien by the attorney, *quære*. *Little v. Little*, 2 Jones 270.

8. Though order be made on petition in bankruptcy directing costs to be paid to the petitioner personally, solicitor does not lose his lien for his costs. *Exp. Bryant*, 1 Madd. 49.

9. Payment by an executor, under an order, of money into court, does not deprive him of his lien on it for costs. *Blenkinsop v. Forster*, 3 Y. & Coll. 205; 8 L. J., N. S., Exch. Eq., 8.

10. Lien of solicitor upon fund in court, which is the result of the proceedings, cannot be defeated by the subsequent insolvency of the client. *Exp. Moule*, 6 Madd. 462.

11. *Semble*, that where a solicitor has a lien for costs on a fund in the hands of a third party, a notice of such lien is not alone sufficient to make the third party responsible for paying over the fund, without providing for the costs, if the solicitor has had an opportunity of taking other proceedings to secure the fund, and has neglected to do so. *Townsend v. Reade*, 4 L. J., N. S., Ch., 233.

12. The lien of a solicitor for his costs on a fund recovered by his exertions cannot be affected by an assignment of the fund by the client, nor by a stop order obtained by the assignee. *Haymes v. Cooper*, *Cooper v. Jenkins*, 33 Beav. 431.

A solicitor's lien for costs upon a fund in court, recovered by his exertions, is independent of the 23 & 24 Vict., c. 127; and he is entitled to priority in respect thereof over a judgment creditor who has obtained a charging order before the solicitor. S. C. 10 Jur., N. S., 303; 33 L. J., Ch., 488; 12 W. R. 539; 10 L. T., N. S., 87; 3 N. R. 627.

13. An order obtained under the 61st section of the 17 & 18 Vict., c. 125, attaching a fund in the hands of a garnishee to answer a judgment debt, will not displace the prior lien for costs of a solicitor who has given notice to the garnishee. *Simpson v. Prothero*, 3 Jur., N. S., 711; 26 L. J., Ch., 671.

By an order made in a suit 600*l.* is ordered to be paid by C. D. to E. F. A. B., who has acted as solicitor in the suit for E. F., claims a lien upon this money for his costs, and serves C. D. with notice not to part with it. Subsequently to this notice an order is obtained at common law directing C. D., as garnishee, to pay the 600*l.* to G. H., as judgment creditor, towards satisfying a judgment

debt due from E. F.:—Held, that A. B. did not thereby lose his lien. S. C. 5 W. R. 814.

1. On the 10th March F. commenced an action against H. On the 13th it was agreed that H. should deposit in the hands of R., H.'s attorney, a cheque for the full amount claimed, such cheque to be a security for any amount which F. might recover in any proceeding on that claim, H. undertaking that there should be assets to meet it whenever presented, and that he would not under any circumstance stop the cheque. On the 26th May judgment was signed by F. for 103*l.* and costs, but the amount of costs was not then ascertained. On the 28th May H. commenced an action against F. on a bill for 92*l.*, to which he pleaded a set-off of the larger amount of 103*l.* On the 14th November F. became bankrupt. On the 17th December the amount of costs was taxed, and the amount recoverable on the judgment fixed at 108*l.*, which was afterwards reduced by payments to 88*l.* On the 18th December H. applied to prove under F.'s bankruptcy for the 92*l.*, and on the 15th January following the commissioner directed a set-off of the 88*l.* against the 92*l.*, and admitted H. to prove for the balance. R. had been throughout the solicitor of F., and afterwards of his assignees, and went straight from the court to the bank and cashed the cheque, on which he claimed to have a lien for his costs in F.'s action to the extent of the 88*l.*:—Held, on a bill in equity by H. to have the whole amount of the cheque brought back by F., that F. had not lost his lien; and the bill was dismissed with costs. *Hanson v. Reece*, 3 Jur., N. S., 1204; 27 L. J., Ch., 118; 6 W. R. 46.

Semble, that after an arrangement pending litigation, by which a fund or a security is placed in the hands of an attorney of either party to attend the result, and a *bond fide* compromise of that litigation takes place between the parties without the intervention of the attorney, the latter does not lose his lien for his costs upon such fund or security. *Id.*

2. The creditors of a debtor who had filed a liquidation petition resolved to accept a composition, payable in two instalments, the second instalment being secured by the joint and several promissory note of two sureties. No trustee was appointed. The debtor's solicitor registered the resolution, and he, by means of money supplied to him by the debtor, paid the creditors the first instalment. A sum sufficient to provide for the payment of the second instalment was placed in the solicitor's hands, partly by the debtor, but mainly by one of the sureties. The debtor gave the surety a bill of sale as security for the amount which he advanced. The solicitor sent a circular to the creditors, stating that he should be prepared on a specified day to pay them the second instalment at his office. He after this paid some of the creditors, but most of them were left unpaid. One of the latter applied to the Court for an order that the solicitor should pay him. The solicitor claimed a lien on the moneys in his hands for costs due to him by the debtor, who had absconded:—Held, that he had constituted himself a trustee of the money for the creditors, and that the Court had jurisdiction to order him to pay the applicant his proportion of the second

instalment, which he was accordingly ordered to pay, with costs. *Re Clarke, Ex p. Newland*, 4 L. R., Ch. D., 515; 35 L. T. 916; 25 W. R. 275.

Where Set-off between Debts and Costs.] See PRACTICE (COSTS).

2. By Execution.

3. The solicitor is not deprived of his lien on the funds in court, for his costs in the cause, by having issued an attachment against his client, and committed him to gaol for non-payment of his bill; but the costs which he may receive in the cause are to be taken in discharge of the attachment, *pro tanto*. *Davies v. Bush*, Younge 353.

4. The stat. 1 & 2 Vict., c. 110, ss. 16, 18, does not deprive a solicitor, who has attached his client for non-payment of costs, of his lien upon the fund which the solicitor has recovered. An attachment of the client for the non-payment of costs is not a waiver of the lien of the solicitor on the fund which he has recovered in the suit in which the costs were incurred. The solicitor, after the death of his client, retains his lien on the fund which he has recovered, and is not left merely to his rights as a general creditor on the estate of his client. The lien of a solicitor on the fund is not impeded by the fact that the order of the Court directs the fund to be paid to the client without reserving the right of the solicitor. *Lloyd v. Mason*, 4 Hare 132; 14 L. J., N. S., Ch., 257; 9 Jur. 772.

5. The execution of a writ of attachment for costs does not deprive the party issuing it of any lien or right of set-off he may possess for the payment of such costs. *Bantree v. Watson*, 2 Keen 713; 7 L. J., N. S., Ch., 183.

6. A solicitor does not lose his lien on costs ordered to be paid to his client by taking the client in execution under a *ca. sa.* for non-payment of costs. *O'Brien v. Lewis*, 9 Jur., N. S., 764; 32 L. J., Ch., 665; 11 W. R. 973; 8 L. T., N. S., 683; 4 Giff. 396; 3 De G. J. & S. 606; 2 N. R. 536, 156.

3. Under Solicitors Act.

7. Where a solicitor had obtained a right to charge his costs under 23 & 24 Vict., c. 127, s. 28, upon certain real property:—Held, that his right was paramount to that of the creditors of the client (who was dead), under a decree for sale made in a suit to administer his real and personal estate. *Wilson v. Round*, 3 N. R. 288; 4 Giff. 416; 10 Jur., N. S., 34; 12 W. R. 402; 9 L. T., N. S., 675.

8. The plaintiffs in a suit mortgaged their interests in the estate, the subject of the suit, to two of the defendants. This mortgage was sent to the solicitor of the plaintiffs for his perusal and approval on their behalf, and he sanctioned their executing it. Nothing was said by either party about any claim by the plaintiffs' solicitor for the costs of suit. The solicitor afterwards obtained a charging order for them under 23 & 24 Vict., c. 127, s. 28, on the interests of the plaintiffs:—Held, that as

mortgagees had notice of the suit, they must be presumed to have known the rights of the solicitor of the plaintiffs, and that his charge ought not to be postponed to the mortgage, he not having been guilty of any misrepresentation or concealment. *Faithfull v. Evans*, 7 L. R., Ch. D., 495; 47 L. J., Ch., 457; 26 W. R. 270; 37 L. T., N. S., 805.

1. Salvage actions were brought against an Italian vessel, and she was sold by order of the Court. After the salvors had been remunerated, the balance of the fund in court was insufficient to satisfy the costs of the solicitors who had appeared in the above actions for the parties interested in the ship, and who sought to enforce their claim for such costs by virtue of 23 & 24 Vict., c. 127, s. 28, as well as the claim of the Italian consul in respect of the expenses of sending the crew back to Italy. It was proved that by the law of Italy such expenses and the keep of the master and crew ranked next to the salvage payments:—Held, that the claim of the Italian consul had priority to that of the solicitors. *The Livietta* (No. 2), 8 L. R., P. D., 209; 52 L. J. P. 81; 49 L. T. 411; 5 Asp. M. C. 151.

2. In a suit for the administration of a testator's estate, an order was made for the taxation of the costs and payment to the plaintiff's solicitor personally of the plaintiff's costs out of a fund set apart for that purpose. The plaintiff sold his life interest in the estate with the knowledge of his solicitor, who did not then raise any claim upon it for his costs. The plaintiff subsequently, and before any of the costs were taxed, changed his solicitor. The solicitor then took out a summons for a charging order, under 23 & 24 Vict., c. 127, s. 28, upon the plaintiff's interest in the funds in court. It was not the practice for the masters to give a warrant for taxation to any solicitor not acting for a party to the cause:—Held, that the solicitor was entitled to a charging order, with liberty to apply to the judge as to enforcing it by sale or otherwise. *Pilcher v. Arden, Re Brook*, 47 L. J., Ch. D., 479; 7 L. R., Ch. D., 317; 38 L. T., N. S., 111; 26 W. R. 273. Affirming 26 W. R. 163.

3. In a suit by a *cestui que trust* against a trustee of landed estate, praying for an account and a reconveyance, a receiver was ordered to be, and afterwards was, appointed, adversely to the defendant. Notice of motion for decree was served, but before the time for closing evidence had arrived, the plaintiff, without consulting her solicitor, and without his knowledge, entered into an agreement with the defendant for a compromise of the suit on the terms, first, that a sum of cash should be paid to the plaintiff, then that the mortgages on the property should be paid off, and then that the costs of all parties, estimated at a fixed sum, should be paid. Upon hearing of the compromise, the plaintiff's solicitor applied to the plaintiff and to the defendant's solicitor for the terms of it, but was refused all information:—Held, that the solicitor was entitled to a first charge for the amount of his taxed costs, as between solicitor and client, upon the property of the plaintiff, as having been recovered and preserved through his instrumentality. *Thynnam v. Porter*, 11 L. R., Eq., 181; 49 L. J., Ch., 30.

4. A solicitor's lien for costs upon a fund in

court, recovered by his exertions, is independent of the 23 & 24 Vict., c. 127; and he is entitled to priority in respect thereof over a judgment creditor who has obtained a charging order before the solicitor. *Haynes v. Cooper*; *Cooper v. Jenkins*, 10 Jur., N. S., 303; 33 L. J., Ch., 488; 12 W. R. 539; 10 L. T., N. S., 87.

5. A judgment creditor of the defendant in a partnership action obtained a garnishee order *nisi* to attach all moneys in the hands of the receiver in the action appearing to be due to the defendant on taking the accounts. On the following day, and before service of the order *nisi*, the defendant's solicitors obtained, on a summons served on the receiver, a charging order intitled in the action, declaring that they were entitled to a charge for their costs upon all moneys coming to the defendant under the action. On the next day the garnishee order *nisi* was served on the receiver, and was subsequently made absolute:—Held, that the solicitors were entitled to their costs in priority to the claim of the creditor under the garnishee order both under the Solicitors Act and independently of it. *Hamer v. Giles*, 11 L. R., Ch. D., 942; 48 L. J., Ch., 508; 27 W. R. 834.

6. Where in a partnership action a receiver who was appointed at the instance of the plaintiff realised the assets and paid into court a fund representing the proceeds of such realisation:—Held, that the solicitors of the plaintiff were entitled to a lien on the fund for their costs in priority to the creditors of the partnership. *Hamer v. Giles* (11 L. R., Ch. D., 942) explained. *Jackson v. Smith, Ex p. Digby*, 53 L. J., Ch., 972; 51 L. T. 72.

In the absence of evidence that the plaintiff was himself unable to pay the costs, the order ought not to direct the costs to be raised out of the fund, but should merely give liberty to the solicitors to apply as to raising them. *Id.*

Semble, the Court in such a case would not make an order declaring the lien in the absence of the creditors. But where one of the creditors was present, and the case was argued on his behalf, the Court appointed him to represent all the creditors. *Id.*

IV. HOW ENFORCED.

1. *Time for Application to the Court*, 6433.
2. *Order under Solicitors Act. How Obtained*, 6434.
3. *Other Remedies*, 6434.

1. Time for Application to the Court.

7. The attorney for the plaintiff died during the progress of the suit, and a new attorney was thereupon appointed. More than six years afterwards, funds were brought into court by the receiver in the cause:—Held, that the personal representative of the deceased attorney had a lien on the funds for the costs of the suit due to the attorney at the time of his decease. *Kellett v. Kelly*, 5 Ir. Eq. R. 31.

8. Where costs are ordered to be paid to the client, solicitors need not wait the result of process to compel the payment of such costs,

but may insist upon the immediate benefit of their lien. *Pounset v. Humphreys*, C. P. C. 142.

1. A lunatic died in June 1853. In February 1854 an order in lunacy was made, by which it was declared that the costs incurred in prosecuting the commission had been incurred for the benefit of the lunatic, and the bill was directed to be taxed. The taxation was completed in February 1855, and after this the solicitor who had been employed in prosecuting the commission delivered for the first time a signed bill of costs. In October 1860 the solicitor presented a petition to have his costs raised out of property of which the lunatic, who left issue, had been tenant in tail:—Held, that under the proviso contained in 23 & 24 Vict., c. 127, s. 29, the application was too late. *Re Cumming, Ex p. Turner*, 2 De G. F. & J. 376; 6 Jur., N. S., 1129; 30 L. J., Ch., 29; 9 W. R. 213.

2. Order under Solicitors Act. How Obtained.

2. When a solicitor applied to the Court of Chancery to have it declared that he is entitled to a charge upon property which has been recovered or preserved by him for his client in a suit in which he has been employed, he must make the application to the judge to whose court the suit is attached, and it must be entitled in that suit as well as in the matter of the solicitor. *Heinrich v. Sutton, Re Fidley*, 25 L. T., N. S., 643; 6 L. R., Ch., 865; 19 W. R. 1075.

3. Upon a petition by a solicitor for a charging order under 23 & 24 Vict., c. 127, s. 28, upon property preserved in an action instituted in the Chancery Division in the Liverpool District Registry, and attached to the court of the V.-Ch. Hall, but which had been tried by a judge and jury at Liverpool:—Held, that the judge before whom the action had been tried, and who had dealt with the substantial question in the case, was the judge to whom the application ought to be made, the judge of the Chancery Division to whose court the action was attached having no jurisdiction to hear the petition. *Owen v. Henshaw*, 7 L. R., Ch. D., 385; 47 L. R., Ch., 267; 26 W. R. 188.

4. A declaration giving a solicitor a charge for his costs upon property recovered or preserved in a suit may be made upon a petition presented in the suit after an order has been made dismissing the bill upon a compromise. *Jones v. Frost, Re Fidley*, 42 L. J., Ch., 47; 7 L. R., Ch., 773; 27 L. T. 465; 20 W. R. 1025.

5. A petition for the purpose of obtaining a declaration under the statute 23 & 24 Vict., c. 127, must be entitled in the suit, notwithstanding that the bill has been dismissed, and that the parties to the suit, whom it will become necessary to serve, are numerous. *Re Keane*, 19 W. R. 429.

6. Under the Judicature Act, Order LI., Rule 1a, a judge, to whom an action has been transferred for trial, has authority to hear a petition by a solicitor under the Attorneys and Solicitors Act 1860, for costs incurred in recovering property in the action. *Porter v. West*, 50 L. J., Ch., 231; 43 L. T. 569; 29 W. R. 236.

7. An order giving a solicitor a charge under

section 28 of the Attorneys and Solicitors Act 1860, for his costs as between solicitor and client, on property recovered by him for his client in an action, is sufficient if intitled in the action; it may be obtained either on summons or petition, and need not be intitled either in the matter of the Act or of the solicitor. *Hamer v. Giles*, 11 L. R., Ch. D., 942; 48 L. J., Ch., 508; 27 W. R. 834.

8. An application by a solicitor, under section 28 of the Solicitors Act of 1860, for an order charging his costs upon the interest of a party to an action in a fund in court, is, notwithstanding section 39 of the Judicature Act 1873, properly made by a petition in the action. But the other parties to the action ought not to be served with the petition. *Brown v. Trotman*, 12 L. R., Ch. D., 88; 48 L. J., Ch., 862; 28 W. R. 164.

9. An order had been made for the payment of the costs, charges, and expenses of all parties to a petition to appoint new trustees in the room of others who had disclaimed, such costs to be paid out of the trust estate to the London agent of the petitioner's solicitor. On an application that the amount of these costs (which had been taxed but not paid in consequence of the trust estate not having been realised) should be declared to be a charge on the trust property:—Held, that the petitioner having already obtained an order for these costs, the Court could not, under 23 & 24 Vict., c. 127, s. 28, declare the amount to be a charge on the estate. *Re Viney*, 18 L. T., N. S., 851.

3. Other Remedies.

10. Practice as to attorneys applying to be paid their costs out of the funds decreed to their clients. *Anon.*, 5 Ir. Eq. R. 38.

11. Lien of a solicitor upon a fund in court for his costs of suit protected by a stop order. *Hobson v. Shearwood*, 8 Beav. 486.

12. Interpleader on an attorney's claim of lien upon a sum awarded as damages under a judgment obtained by the client against the plaintiff. — *v. Bolton*, 18 Ves. 292.

13. Where an administrator has recovered a chattel interest in lands, by a decree in equity declaring his costs to be duly charged on the estate, his solicitor cannot file a petition in his own name to realise his own portion of those costs. *Re M'Allister*, 16 Ir. Ch. R. 134.

14. An attorney has a lien for his costs on a judgment recovered by his client, and the Court will lay hold of the fund where it exists, and when it does not thereby set aside any arrangement of the parties. *Slator v. Sunderland (Mayor)*, 9 L. T., N. S., 422.

15. A solicitor who had established in a suit the claim of his client to a sum of money, and was unable to obtain payment of his taxed costs or to serve a writ upon his client for that purpose:—Held, upon application *ex parte*, to be entitled to an interim order to restrain the payment to the client by the accountant-general of a dividend in the suit until a petition to establish a lien for costs could be served and heard, the solicitor giving the usual undertaking as to damages. *Gerrard v. Daves, Re Daves*, 18 W. R. 32; 21 L. T., N. S., 322.

16. Where costs are ordered to be paid to the

client, his solicitor need not wait the result of proceedings to compel the payment of such costs, but may insist upon the immediate benefit of his lien. *Pownsett v. Humphreys*, C. P. C. 142.

1. Where an attorney applies to be paid his costs out of a fund allocated to his client, he ought to state, in his affidavit, that he distinctly informed his client of his intention so to apply. *Redmond v. Gormley*, 4 Ir. Eq. R. 698.

2. By the decree, the plaintiff's costs (319*l.*) had been ordered to be paid to her solicitors, out of a fund in court, in which she was interested; but the plaintiff having in the course of the proceedings given to one of the firm of solicitors a bill for 300*l.*, which they had passed away, the order for the payment of the 319*l.* was stayed. *Moon v. Smith*, 14 Beav. 393.

XV. Documents of Client and Lien Thereon.

- I. *Lien and Delivery up of Documents*, 6435.
- II. *Deposit in Court*, 6452.
- III. *Right to Letters of Client and Copies*, 6452.
- IV. *Of Town Agent*. See III. II. 1, *ante*.
- V. *Privilege from Production on Ground of Professional Confidence*. See PRACTICE (DISCOVERY, PRODUCTION, AND INSPECTION).

I. LIEN AND DELIVERY UP OF DOCUMENTS.

1. *Lien. Whether General or Limited*, 6435.
2. *What Documents*, 6435.
3. *On Change or Discharge of Solicitor*, 6439.
4. *Production of Documents as Evidence or for Benefit of Third Parties*, 6443.
5. *Production to Assignees or Trustees in Bankruptcy*, 6444.
6. *Delivery up to Client on Payment of or Giving Security for Costs*, 6445.
7. *Production of Orders or Decrees*, 6446.
8. *Order on Executors of Deceased Solicitor*, 6447.
9. *Mortgage Transactions*, 6447.
10. *Priorities*, 6548.
11. *Discharge of Lien*, 6450.
12. *Lien. How Enforced*, 6451.
13. *Delivery or Production. How Enforced*, 6451.

1. Lien. Whether General or Limited.

3. Deeds deposited with a solicitor for a particular purpose, and, after that had failed, permitted to remain with him, are subject to the general lien. *Exp. Pemberton*, 18 Ves. 282.

4. Attorney's lien generally on papers in his possession not limited to the occasion on which they were delivered, without special agreement. *Exp. Sterling*, 16 Ves. 258.

5. A solicitor is entitled to a general lien for costs on papers deposited with him by his client for a particular purpose only, unless that general lien is excluded by a special

agreement. *Colmer v. Edo*, 40 L. J., Ch., 185; 19 W. R. 318; 23 L. T., N. S., 884.

6. A client wrote a letter to her solicitors authorising them to sell the property of hers of which they were legal mortgagees by transfer, and to pay off the money due thereon and on the transfer to them, and "all expenses due to you":—Held, that this memorandum gave the solicitors no charge in respect of their general bill of costs not relating to the mortgage. *Champney v. Burland*, 19 W. R. 913.

7. An attorney holding deeds of a bankrupt in his custody, at the date of the adjudication, has a general lien thereon for professional services. *Re May*, 1 N. R. 243.

A bankrupt's attorney, holding title deeds of the bankrupt without any written memorandum, cannot sustain a claim as equitable mortgagee in respect of such deeds, against the oath of the bankrupt. *Id.*

Solicitor claims lien for costs, and failing to sustain his case as equitable mortgagee, entitled to costs of proceedings to substantiate his claim without apportionment. *Id.*

8. A solicitor was instructed to prepare a mortgage, and the title deeds of the property were deposited with him for this purpose by the mortgagor. He was also acting as solicitor for the mortgagee, and when the mortgage was executed he continued to hold the deeds on behalf of the mortgagee. The mortgagor filed a liquidation petition, and the solicitor was employed on behalf of the trustee. The trustee sold the equity of redemption and the solicitor received the purchase money:—Held, that the solicitor had a lien on the deeds against the mortgagor, and was entitled to retain out of the purchase money the amount of costs due to him from the mortgagor. *Re Messenger, Exp. Calvert*, 3 L. R., Ch. D., 317; 45 L. J., Bk., 134.

9. On a lease being granted, the lessee deposited it with the lessor's solicitor (who acted for the lessor and lessee), together with a bill of exchange as a security for the costs of preparing the lease, which the lessee was to pay. The lessee afterwards mortgaged the term, and the defendants (who were his solicitors on that occasion), in order to obtain the lease, paid the bill of costs of the lessor's solicitors, and received from them, without any authority from the lessee, the lease and the bill of exchange:—Held, first, that without express contract the defendants acquired no lien on the bill of exchange beyond the amount which they had paid to the lessor's solicitors. Secondly, that evidence of an express contract would not support such a lien without proof that the defendants had explained to their client, the lessee, his rights, independently of express contract. *Gibson v. May*, 4 De G. M. & G. 512.

2. What Documents.

- (a) *In General*, 6436.
- (b) *When not Held by Solicitor as such*, 6436.
- (c) *Documents Held by Solicitor of Executors or Administrators*, 6436.
- (d) *Documents belonging to Joint Stock or Limited Companies*, 6437.
- (e) *Documents Relating to Mortgage Transactions*. See 9 *infra*.

(a) In General.

1. Solicitor has lien on papers delivered to him as such, but not on those delivered to him as steward. *Champernown v. Scott*, 6 Madd. 93.

2. Whether the proceedings under a commission of bankruptcy, that has been superseded, are subject to the solicitor's lien, *quære*. *Exp. Shaw*, Jac. 270; 1 G. & J. 124.

3. A solicitor has no lien upon the will of his client, and cannot refuse to produce a deed executed by the client in his favour, containing a reservation of a life interest, and a power of revocation. *Balch v. Symes*, T. & R. 87. And see *Tyler v. Drayton*, 2 Sim. & S. 309.

4. Whether an attorney's lien upon papers extends to the original will of his client, *quære*. Ordered to produce it before the examiner, and for the hearing of the cause, without prejudice. *Georges v. Georges*, 18 Ves. 294.

5. An attorney has a lien on all the papers of a bankrupt client received by him before the bankruptcy; and he may prove the debt, though he holds the papers. *Exp. Bush*, 7 Vin. Abr. 74, pl. 8.

6. The lien of a solicitor in the cause:—Held, not to entitle him to withhold an original order of the Court, in which there was accidental error that required correction. *Bird v. Heath*, 6 Hare 236.

7. A clerk in court has a lien upon the fund in court, and also upon the decree and other documents in the cause in respect of his fees and disbursements. *Potter v. Hyatt*, 5 Y. & Coll. 112; 6 L. J., N. S., Exch. Eq., 37.

8. Upon an Act of Bankruptcy, by lying two months in prison, joint and separate commissions issued; the former being established, and the latter superseded, the attorney employed by the bankrupt in sustaining the latter against the former, has no lien upon papers delivered to him by the bankrupt, after the arrest; and upon petition of the joint creditors, he was ordered to deliver them up. *Exp. Lee*, 2 Ves. J. 285.

9. A solicitor has a lien for his costs on all papers that come into his hands for the purpose of business, though not papers in the cause in which he makes the demand. *Exp. Nesbitt*, 2 Sch. & Lef. 279.

10. An infant tenant in tail filed a bill by his next friend against his trustee, who was in possession of the title deeds of the estate. The defendant deposited the deeds in court for the inspection of the plaintiff. No decree was made, and when the infant came of age he repudiated the suit. The defendant then moved to have the deeds delivered up to him:—Held, that the defendant was entitled to the order, notwithstanding the opposition of the next friend. In the same case the defendant, having obtained possession of the deeds, gave them up to the plaintiff, who immediately mortgaged them. After they had been delivered to the mortgagee, the plaintiff's solicitor on the record presented a petition claiming a lien on the deeds for the costs incurred in the suit on behalf of the plaintiff:—Held, that he had no such lien. *Dunn v. Dunn*, 3 Drew. 17; 18 Jur. 1068; 3 Eq. Rep. 129. Affirmed 3

W. R. 199; 1 Jur., N. S., 122; 24 L. J., Ch., 581; 7 De G. M. & G. 635.

Lien, how far Limited by Extent of Client's Interest.] See 9 *infra*.

(b) When not Held by Solicitor as such.

11. A. and B., solicitors in partnership, had a bill of costs against C. On their dissolution of partnership, those costs were transferred to A. Afterwards A., at the request of the client, paid a debt for which she had deposited title deeds, and took possession of and afterwards retained the title deeds. He afterwards continued to act as her solicitor, and costs were incurred:—Held, that as to the joint bill of costs, there could be no lien in favour of A., if otherwise, there would have been lien; and as to his separate bill of costs, he had taken the deeds as mortgagee and not as solicitor, and therefore had no lien for costs. *Vaughan v. Vanderstegen*, 2 Drew. 409.

12. On a lease being granted, the lessee deposited it with the lessor's solicitor (who acted for the lessor and lessee), together with a bill of exchange as a security for the costs of preparing the lease, which the lessee was to pay. The lessee afterwards mortgaged the term, and the defendants (who were his solicitors on that occasion), in order to obtain the lease, paid the bill of costs of the lessor's solicitors, and received from them, without any authority from the lessee, the lease and the bill of exchange:—Held, first, that without express contract the defendants acquired no lien on the bill of exchange beyond the amount which they had paid to the lessor's solicitors. Secondly, that evidence of an express contract would not support such a lien without proof that the defendants had explained to their client, the lessee, his rights, independently of express contract. *Gibson v. May*, 4 De G. M. & G. 512.

13. Solicitor has not a lien on papers delivered to him as a steward. *Champernown v. Scott*, 6 Madd. 93.

(c) Documents Held by Solicitor of Executors or Administrators.

14. The solicitor of the executrix and devisee paying a sum of money in exoneration of an adverse claim on part of the testator's estate, does not, as against creditors of the testator, necessarily, and by force of the transaction alone, acquire a lien upon the estate or on the title deeds for the sum which he so paid. *Christian v. Field*, or *Chambers*, 2 Hare 177; 11 L. J., N. S., Ch., 97; 5 Jur. 1130.

The solicitor of the executrix having paid a sum which was due to a third party, who had a lien on title deeds belonging to the testator's estate for the amount, gave a receipt for the deeds in the name of the executrix, and as her solicitor carried into the Master's office her examination, in which the sum he had so paid was stated to have been paid by the executrix, and was allowed accordingly:—Held, that the solicitor must in such circumstances be presumed to have made the payment on the behalf and on the personal security of his

client, and that he could not claim a lien upon the deeds for the amount. *Id.*

1. A solicitor employed by an administrator in the affairs of the administration, and also on his own account, having in the course of that employment obtained possession of documents relating to the intestate's leasehold estate, and having, by his client's directions, deposited deeds relating to part of that property with the executor of a deceased party, who was entitled to a distributive share of the intestate's estate, claimed, for his bill of costs due from the administrator, a lien on other documents in his possession relating to the same property as that to which the deeds related which were so deposited:—Held, that the security having been effected by the agency of the solicitor, without any reservation on his part in favour of his lien, he had no lien against the party entitled to the benefit of the security. *Hicks v. Keate*, 3 Jur. 1024.

2. Where papers had come into the hands of a solicitor prior to the institution of the suit (which was for an administration of a testator's estate), and he claimed a lien on them for other business relating to the administration, besides that done in the suit, a motion by a creditor for a reference, as to whether the solicitor had a lien on the papers, and that he might deliver them up to the receiver, or deposit them in court, was dismissed. *Warburton v. Edge*, 9 Sim. 508; 8 L. J., N. S., Ch., 111; 3 Jur. 166.

A solicitor who had acquired the possession of deeds, etc., relating to the estate of a party deceased, for general purposes, was held, on the petition of the plaintiff in a creditors' suit, to have a general lien (beyond costs in the suit) on the documents prior to any general creditor of the estate; and the Court cannot, on petition in the suit by the plaintiff or receiver, order any taxation of the solicitors' costs. *Id.*

3. In an administration suit, instituted by an infant *cestui que trust* under a will against the executors, one of the executors admitted that part of certain sums advanced by him on mortgage formed part of the trust estate. An order was made in the suit for the completion of contracts for sales of the mortgaged property which had been entered into by the executor. Under this order the purchase moneys were paid into court to the credit of the cause. The order directed the executor to execute the conveyances, and deliver the title deeds to the petitioners; but the executor's solicitors refused to give up the deeds, claiming a lien upon them for costs due from the executor and advances made for the maintenance of the plaintiff:—Held, that the Court had jurisdiction on petition to order the solicitors to deliver up the deeds. *Francois v. Francois*, 2 De G. M. & G. 73. And see S. C. 3 De G. M. & G. 108.

4. An administration suit was instituted against an executrix, who was also tenant for life, by parties entitled in remainder. The executrix died during the suit, intestate. The suit was revived against the administrator *de bonis non* of the testator, and a common administration decree taken against him, but it was not revived against the personal representative of the executrix. The executrix had placed in the hands of her solicitor deeds and

papers relating to the estate, and he claimed a lien upon them for costs incurred in relation to the suit. Upon bill filed by the administrator *de bonis non* for delivery of the documents to him:—Held, by the Master of the Rolls (1 Jur., N. S., 486; 3 W. R. 352; 20 Beav. 185) that the solicitor had no lien upon them, and must deliver them up. Held, on appeal, that it could not be decided whether any lien existed until it had been ascertained whether the executrix was a debtor to the estate, which could not be ascertained in the present suit, nor in any proceeding to which the personal representative of the executrix was not a party. *Turner v. Lettis*, 1 Jur., N. S., 1057; 24 L. J., Ch., 688; 3 Eq. Rep. 846; 3 W. R. 494.

Held, also, that unless the estate of the executrix was indebted to that of the testator, her estate was entitled to a lien on the deeds for her costs, and that the solicitor had a lien to that extent. S. C. 7 De G. M. & G. 243.

(d) *Documents belonging to Joint Stock or Limited Companies.*

5. The directors of a provisionally registered railway company paid to solicitors employed by the company a sum of money in respect of their bill of costs, which was not then delivered, and which when delivered fell short of the sum paid. The balance was claimed by the assignees of another solicitor, who had acted jointly with the former, in respect of certain extra costs not included in the bill; and the first-mentioned solicitors also claimed a lien in respect of subsequent costs:—Held, irrespectively of these claims, that the balance was not in the hands of the solicitors as "agents or trustees" for the company, so as to give jurisdiction to the Master, under the 66th section of the Winding-up Act of 1848, to direct it to be paid to the official manager. *Hollinsworth's case, Re Direct London & Exeter Railway Co.*, 3 De G. & Sm. 102.

6. Although the Winding-up Act authorises the Master to require every person to produce documents relating to the company in his possession, without any express reservation of the rights of the lien, this Court cannot interfere to destroy or injure the lien of the solicitors, nor advisedly order the production of documents on which they have a lien. *Potter's case, Re Oxford and Worcester Extension and Chester Junction Railway Co.*, 1 De G. & Sm. 728; 18 L. J., N. S., Ch., 247; 13 Jur. 691.

The Master made an order for delivery up of certain papers, deeds, etc., on which the solicitors of the company claimed a lien for costs. Order of the Master discharged:—Held, that the words of the 28th and 66th sections of the Winding-up Act 1848 are controlled by those of the 58th. S. C. 5 Rail. Ca. 628.

7. Where the directors of a company carry on a business not authorised by the deed of settlement, and costs are thereby increased, the solicitors of the company have no lien for their costs on the papers of the company. *Re Phoenix Life Assurance Co., Ex p. Howard and Dollman*, 1 Hem. & M. 433; 11 W. R. 984; 8 L. T., N. S., 728.

Where, in such a case, moneys have been recovered in any of the actions, although the solicitors would have a lien for their costs on such moneys while in their hands, yet after they have paid over such moneys to the company, and allowed them to be incorporated with the general assets, they have no lien on those assets in respect of such costs. *Id.*

1. The general principle that an official liquidator can retain no part of the company's estate without an order of the Court applies equally to the lien of his solicitors for costs on the company's moneys recovered by his exertions. Such moneys must, in the first instance, be paid into court. *Re Union Cement & Brick Co.*, 26 L. T., N. S., 240.

A liquidator is not entitled to make any payment to his solicitor without the sanction of the Court; nor may such solicitor set off his costs against funds recovered through his own exertions. All moneys must, in the first instance, be paid into court. S. C. 20 W. R. 361; 26 L. T., N. S., 240.

2. An official liquidator cannot, by contract or otherwise, give to his solicitor any lien for costs in the winding-up upon any of the documents relating to the winding-up which are included in Rule 58 of the General Order under the Companies Act 1862. *Exp. Pulbrook, Re Union Brick & Cement Co.*, 17 W. R. 758; 20 L. T., N. S., 649. Affirmed 21 L. T., N. S., 46; 17 W. R. 946; 4 L. R., Ch., 627.

An official liquidator discharged his solicitor. At that time the solicitor had in his custody documents relating to the winding-up of the company, and included in Rule 58 of the General Order under the Companies Act 1862:—Held, that the solicitor had no lien for costs upon these documents, and that he must deliver them up to the official liquidator. *Id.*

3. The Court has jurisdiction, under the Companies Act 1862, s. 115, to order, at the instance of the official liquidator, production of documents relating to a company in process of liquidation, which are in the possession of the solicitor to the company, notwithstanding the claim of the solicitor to a lien which may be prejudiced by such production. *Re South Essex Estuary Reclamation Co., Exp. Payne*, 38 L. J., Ch., 305; 17 W. R. 275.

4. In winding up a company the costs of the petition are the first charge on the estate, and next to them are the costs of the winding-up, including the bill of costs of the solicitor employed, which bill must be paid before any payment is made by way of remuneration to the official liquidator. *Re Freehold Land and Brickmaking Co., Exp. Massey*, 21 L. T., N. S., 195; 39 L. J., Ch., 492.

5. A. was appointed solicitor of a company. B. entered into partnership with him, and they acted as joint solicitors for the company until it was wound up, when they acted for the liquidators. After the dissolution of their partnership, B. acted separately for the liquidators:—Held, that B. had no lien for costs on the documents of the company in his possession. *Re County Life Assurance Co.*, 38 L. J., Ch., 231.

6. Solicitors of a company who, upon the occasion of the directors conveying all the property of the company to two of their body upon trusts to secure the repayment of moneys borrowed upon debentures, prepare a mortgage

deed and act for the company and the trustees, have no right of lien for the payment of their costs. *Re Mason and Taylor*, 10 L. R., Ch. D., 729; 48 L. J., Ch., 193; 27 W. R. 811.

7. The liquidators of a company brought an action against S., in which he obtained judgment with costs. S. was indebted to the company in a larger amount on a bill of exchange. The costs of S.'s attorney in the action being unpaid, they proceeded in his name to levy execution. The execution was stayed under an interim order in the winding-up, a sum being retained by the liquidators sufficient to meet the costs for which the judgment had been signed. Stuart, V.-Ch., held that the solicitors' lien could not prevail against the right of set-off, and granted an injunction to restrain S. from proceeding with the execution, and discharged the liquidators from retaining the sum set apart:—Held, on appeal, that, apart from the Companies Act 1862, s. 163, there was at common law no right to set off the debt on the bill of exchange against the judgment; that the solicitors had a lien on what could be recovered by the execution, and that they had the same right against the sum set apart which represented the proceeds of the execution. *Re Bank of Hindustan, China, and Japan, Exp. Mackrill Smith*, 3 L. R., Ch., 125; 37 L. J., Ch., 186; 16 W. R. 170; 17 L. T., N. S., 339.

Held, also, that if the Companies Act 1862, s. 163, applied to such a case and made the execution void, the Court would put the defendant and his solicitors in the same position as if the execution was not so restrained; and, therefore, that the solicitors must be paid their costs out of the sum set apart. *Id.*

8. An order having been made for winding-up a company, applications were made by the official liquidator against B., a solicitor employed by the company before the winding-up, that B. might be ordered to deliver up the following documents: (1), The share register and minute book, which were in B.'s hands before the commencement of the winding-up; (2), other documents which came to B.'s hands after the presentation of the winding-up petition, but before the winding-up order; (3), documents relating to allotments of shares which had come to B.'s hands before the presentation of the petition. B. resisted the applications on the ground that he claimed a lien. Chitty, J., ordered that all the documents should be delivered to the liquidator, subject to the lien, if any, of B.:—Held, on appeal, that the order was right as regarded the share register and minute book, for that the directors had no power to create any lien on them which could interfere with their being used for the purposes of the company:—Held, also, that the order was right as to class 2; for that a solicitor could not assert against documents which came to his hands pending the winding-up any such lien as would interfere with the prosecution of the winding-up:—But held, that the order for delivery of class 3 must be discharged, for that the winding-up order could not defeat any valid lien existing at the time when the winding-up petition was presented. *Belamy v. Krench* (8 L. R., Ch., 918) and *Boughton v. Boughton* (23 L. R., Ch. D., 169) distinguished. *Re Capital*

Fire Insurance Association, 24 L. R., Ch. D., 408; 53 L. J., Ch., 71; 49 L. T. 697; 32 W. R. 260.

3. On Change or Discharge of Solicitor.

- (a) *On Discharge of Solicitor by Client*, 6439.
- (b) *On Solicitor Discharging Himself or Becoming Incapacitated from Acting*, 6440.
- (c) *On Change of Solicitor by Order of Court*, 6442.
- (d) *On Change in or Dissolution of Partnership*, 6442.

(a) *On Discharge of Solicitor by Client.*

1. A party changing his solicitor, the former solicitor has a lien for his costs upon papers in his hands, but cannot otherwise stop the progress of the cause till he is paid. *Morreweather v. Mellish*, 13 Ves. 161.

2. Party may discharge his solicitor; but he has a lien for his costs upon papers in his possession, but cannot, except by retaining them, prevent the progress of the cause until he is paid. *Thort v. Dayrell*, 13 Ves. 195.

3. If a solicitor, whom his client had ceased to employ, by the production of a deed in his hands belonging to the client, and upon which he claims a lien as solicitor, enables the client to recover a fund in a suit, his lien over the fund so realised is confined to the costs of that suit, but is a lien which he is entitled actively to enforce. *Secus*, as to his general lien upon his client's papers, which applies to all his bills of costs, but is merely a right to retain the papers, and cannot be actively enforced. *Boxon v. Bolland*, 4 Myl. & C. 354; 9 L. J., N. S., Ch., 123; 3 Jur. 884; 4 *id.* 763.

4. Solicitor in a suit, who had been discharged by the client, but had not delivered his bill of costs within the proper time, ordered, under the circumstances of the case, to deliver the papers and documents in his possession, relating to the suit (without prejudice to his lien), to the new solicitor. *Cooper v. Hewson*, 2 Y. & Coll. C. C. 515; 12 L. J., N. S., Ch., 446; 7 Jur. 760.

5. If a client by his conduct makes it impossible for his solicitor to continue any longer connected with him, and the solicitor in consequence refuses to continue the connection, he will be considered as if discharged by his client, and will not be ordered to give up the client's deeds and papers until his costs are paid, but he must produce them to be used at the hearing, and for inspection. *Steele v. Scott*, 2 Hog. 141.

6. A solicitor, discharged by his client or his representatives, is not bound to produce the papers in his possession for the purposes of the cause, his bill of costs not being paid. *Lord v. Wormleighton*, Jac. 580.

7. When the majority of several parties who have employed the same solicitor substitute another solicitor, they are entitled to the custody of the papers. *Janson v. Davison*, 1 Jur. 352.

8. By the direction of A., a bill was filed for the administration of a testator's assets, in which A. and his infant brother and sister, by A. as their next friend, were plaintiffs; D.,

their elder brother, who had an interest adverse to theirs, and was one of the defendants, acted as solicitor in the country for the plaintiffs, and the suit was conducted by his town agents. After the sister had attained her full age, D. died, having appointed her his executrix. A. gave notice to the persons who had been the town agents of D., not to take any proceedings in his name, and the sister appointed them to act as solicitors for her:—Held, that A. was not entitled to have the papers connected with the cause delivered over to him, though he offered to satisfy any lien which might be claimed against them. The sister filed a bill of revivor after the death of D., and made A. and his infant brother defendants. A. and the brother, after notice of that bill, filed another bill of revivor; this second bill was ordered to be taken off the file, and the Court held that an alleged defect of parties, in the frame of the first bill of revivor, afforded no reason for allowing the second bill of revivor to remain on the file. *Livesey v. Livesey*, 1 Russ. & M. 10.

9. Where a solicitor, whom his client has ceased to employ, produces a deed of the client, upon which the solicitor claims a lien for antecedent costs, and thereby enables the client to recover a fund in a suit in which the solicitor has acted, his lien upon that fund is confined to the costs due to him in the suit in which the fund was so recovered. *Re Bayly, Exp. Humphrey*, 12 Ir. Ch. R. 315.

10. Messrs. G., solicitors, having been requested by P., another solicitor, on behalf of a client for whom they had hitherto acted, to deliver up all deeds belonging to the client on the usual terms, sent the deeds to a relative of the client, who held a power of attorney from him, with the bill of costs, the amount of which they retained out of moneys in their hands belonging to the client, and they then informed P. that they had no deeds in their possession, and no bill of costs against the client. An order of course was then taken out by P., on behalf of the client, for taxation and delivery up of deeds and papers, but it was not complied with, and a writ of attachment was issued against Messrs. G.:—Held, that they were not justified in refusing to deliver up the papers, or to give in their bill for taxation. *Re Gregg, and Re Prance*, 9 L. R. 137.

11. The trustee of a bankrupt's estate appointed a solicitor, whose appointment was duly confirmed, and who transacted considerable professional business for the trustee as such. After several years the trustee was removed by the creditors, and a new trustee appointed, who called upon the solicitor to hand over all documents relating to the estate to himself or to his solicitor. The solicitor of the old trustee opposed this application on the ground that he had a lien on them for his costs:—Held, that he had a lien upon all documents the fruits of his own labour or expense. *Exp. Yalden, Re Austin*, 4 L. R., Ch. D., 129; 46 L. J., Bky., 59; 35 L. T., N. S., 720; 25 W. R. 134.

12. Upon an application for delivery over of all documents in a discharged solicitor's possession made by clients undertaking to pay into court a sum amply sufficient to secure the solicitor in respect of all demands, the Court

will make the order asked for provided that circumstances of pressing necessity are shown. *Re South Essex Equitable Investment and Advance Co.*, 46 L. T. 280.

1. Where a solicitor agrees with his client to carry on a suit in Chancery without requiring to be supplied with funds up to the hearing, that means the original hearing; and subsequently to that period he has a right to refuse to proceed without funds; but he has no right to withhold the papers from another solicitor to conduct an appeal. *Webster v. Le Hunt*, 9 W. R. 804.

2. A solicitor for a plaintiff in a cause obtained an order, which he passed; he was then discharged by the plaintiff, and a new solicitor appointed in his stead. The discharged solicitor refused to produce the order to be entered, on the ground that he had a lien for his costs in the same suit, and other costs. Upon motion by plaintiff for production, that the order might be entered:—Held, that lien cannot be allowed to intercept the completion of an order of the Court which has been passed, and the discharged solicitor was directed to produce the order for entry, upon payment of 20s. costs. *Clifford v. Turrill*, 2 De G. & Sm. 1; 12 Jur. 428.

3. After a suit was instituted the plaintiff became bankrupt. His assignees continued the suit, employing a different solicitor. A decree was taken by consent. On drawing up the decree the registrar required production of certain documents which were referred to in the decree, and which, being in the hands of the solicitor to the original plaintiff, had not been produced at the hearing. The solicitor refused to produce them, claiming a lien for costs:—Held, that he was bound to produce them. *Simmonds v. Great Eastern Railway Co.*, 38 L. J., Ch., 87; 3 L. R., Ch., 797; 16 W. R. 1100; 19 L. T., N. S., 235.

4. A solicitor, who has been employed in a suit for the administration of an estate, and is discharged during the course of the suit, cannot, on the ground of lien, retain documents belonging to the estate, so as to embarrass the proceedings in the suit. *Balaney v. French or Efrench*, 43 L. J., Ch., 312; 22 W. R. 177; 29 L. T., N. S., 706; 8 L. R., Ch., 918; 28 L. T., N. S., 618.

5. Traders, before their bankruptcy, deposited their books with a solicitor, with a view to his effecting for them a compromise with their creditors. Terms were arranged, but the bankrupts were unable to comply with them, and the solicitor refused to act further in the matter. Adjudication in the bankruptcy followed, and the solicitor, although ordered to deliver up to the official assignee the books of the bankrupts in his hands, refused to do so, alleging a lien on them for costs. A commissioner in bankruptcy ordered him to be committed for contempt:—Held, on appeal, that the solicitor was entitled to the lien which he claimed. *Re Leah, Exp. Jabet*, 6 Jur., N. S., 387.

6. The solicitor for the parties to an administration action will not, on a change of solicitor, be allowed to assert his lien for costs on papers in his possession in such a way as to embarrass the proceedings in the action. On the contrary, he must produce the papers when they are required for the carrying on of the

proceedings. *Re Boughton, Boughton v. Boughton*, 23 L. R., Ch. D., 169; 48 L. T. 413; 31 W. R. 517.

7. A demand for papers must be made by one duly authorised to give a receipt for them. *Re Dias*, 9 L. J., Ch., 183.

8. The Court will, before the completion of the taxation, order the delivery up of papers by a solicitor to his client, either upon payment into court of the amount claimed, or in case it appears from the solicitor's own account that a balance is due from him to his client. *Re Bevan and Whitting*, 33 Beav. 439.

(b) *On Solicitor Discharging Himself or Becoming Incapacitated from Acting.*

9. A solicitor declining to be farther concerned in a cause is not entitled to compel payment of his costs, by refusing to permit such inspection of the papers in his hands, or such production of them before the Court or the Master, as may be necessary in the conduct of the cause. *Commerell v. Poynton*, 1 Swan. 1.

10. If a solicitor withdraws from the conduct of a suit he cannot claim to retain the papers necessary for the prosecution of it, till his costs are paid, but will be ordered to deliver them up, without prejudice to his lien, to the new solicitor of the party. *Colegrave v. Manley*, T. & R. 400. S. C. nom. *Colegrave v. —*, 2 L. J., Ch., 39.

A solicitor who has declined to proceed with a cause, will be ordered, though his bill of costs is not paid, to deliver up the papers to the present solicitor of the party, the latter undertaking to hold them, subject to the former solicitor's lien, for what shall be found due to him on the taxation of the bills. An offer on the part of the former solicitor, after the motion made, to proceed with the cause, will not prevent the Court from ordering him to deliver up the papers on the terms mentioned above. *Id.*

11. After demurrer allowed, the plaintiff's solicitor refused to proceed until the payment of his bill:—Held, that he was bound to deliver over the papers to the new solicitor of the plaintiff, on the usual undertaking as to lien and redelivery, but that the party ought, under the circumstances, to undertake to prosecute the case with due diligence. *Cane v. Martin*, 2 Beav. 584; 4 Jur. 500.

12. Solicitor refusing to act longer in cause, ordered to permit client to inspect papers in his possession at all reasonable times, without any undertaking on his part to proceed to taxation of bill. *Moir v. Mudie*, 1 Sim. & S. 282; 1 L. J., Ch., 218.

13. A solicitor, having declined to act for his client, has no lien for his costs upon a fund in court. *Cresswell v. Byron*, 14 Ves. 271.

14. An attorney who refused either to proceed with a case, unless furnished by the plaintiff with the necessary funds for that purpose, or to hand over the papers to another attorney, unless repaid the costs out of the pocket, ordered, upon the petition of the plaintiff (his former client), to hand over to the new attorney such papers and documents connected with the cause, as, upon inspection, the latter might deem necessary to enable him effectually

to prosecute the suit; the petitioner consenting that the respondent should have a lien upon any funds that might be thereby realised; and the new attorney undertaking to proceed without delay to bring the cause to a termination, unless counsel should otherwise advise, and in such case undertaking to hand back to the respondent all deeds and papers, immediately on receiving such advice. *Strangways v. Harman*, 1 Ir. Eq. R. 467.

1. Order made on a solicitor, who withdrew from the conduct of the plaintiff's cause, that he should deliver up to the plaintiff's new solicitor the briefs of the pleadings, counsel's opinions thereon, office copies of the several answers, and all such other papers and documents, connected with the cause, as, upon inspection, such new solicitor might deem necessary for the hearing; without prejudice to any right of lien for costs, and upon an undertaking to return them undefaced within ten days after the hearing. *Heslop v. Metcalfe*, 3 Myl. & C. 183; 7 L. J., N. S., Ch., 49; 1 Jur. 816.

A solicitor, who has so acted as, in the opinion of the Court, to have discharged himself, will be ordered, though his bills of costs are not paid, to deliver up the papers in the cause to the present solicitor of the client; such solicitor, and also the client, undertaking to hold them subject to the former solicitor's lien for his costs. An offer, on the part of the former solicitor, after proceedings had been taken in the cause by the new solicitor, to proceed with the cause, will not prevent the Court from ordering him to deliver up the papers on the terms above mentioned. S. C. 8 Sim. 622.

2. Agent of a solicitor held by the irregularity of his conduct to have discharged himself, and ordered, before taxation on payment of his bills to deliver up all papers, etc., on an undertaking of the principal to redeliver them as the Court should order. *Re Smith*, 4 Beav. 309.

3. A solicitor who withdraws from the conduct of a suit, because his client will not furnish him with the funds necessary for carrying it on, has no such a lien for costs already incurred, as will entitle him to withhold from his client and his new solicitor such of the client's papers as are necessary for the effectual prosecution of the cause. *Heslop v. Metcalfe* (3 Myl. & C. 183) considered, and similar order made. *Rutledge v. Rutledge*, 2 Ir. Eq. R. 290.

4. A dispute having arisen as to the mode and extent of a solicitor's remuneration, he refused to proceed in the cause until it had been settled. The solicitor was ordered to deliver up the papers in the cause to the new solicitor, upon his undertaking to proceed with due diligence, and to hold them subject to existing lien thereon. *Wilson v. Emmett*, 19 Beav. 233.

A solicitor having discharged himself must give up the papers to the new solicitor without his lien thereon being discharged by payment, and only without prejudice to it, and according to the terms of the order in *Heslop v. Metcalfe* (3 Myl. & C. 183). *Id.*

5. Where a solicitor discharged himself from acting as solicitor to a party to a cause, and retained the papers for the purpose of having his bill of costs taxed, and his former client refused to pay the bill of costs, the

common order for delivery was made subject to lien, and on the undertaking to return them; but the order was made without costs on account of the former client's refusal to pay the bill of costs. *Walker v. Beanlands*; *Beanlands v. Walker*, 15 W. R. 168.

6. Where a solicitor agrees with his client to carry on a suit in Chancery without requiring to be supplied with funds up to the hearing, that means the original hearing; and subsequently to that period he has a right to refuse to proceed without funds; but he has no right to withhold the papers from another solicitor to conduct an appeal. *Webster v. Le Hunt*, 9 W. R. 804.

7. When a solicitor applied to his client for funds to carry on a suit, and upon the client not furnishing any, declined to continue to conduct the litigation, and the client appointed fresh solicitors.—Held, that this was a discharge by the solicitor, and that he might be called upon to deliver to the new solicitors the papers relating to the matters in the suit, on their undertaking to hold them without prejudice to his lien, and to return them undefaced within twelve days after the conclusion of the suit, and to allow the former solicitor access to them for the purpose of carrying on an action for his costs. *Robins v. Goldingham*, 13 L. R., Eq., 440; 41 L. J., Ch., 813; 25 L. T., N. S., 900.

8. Although a solicitor who discharges himself cannot set up a lien for costs as a reason for not delivering up papers necessary to enable his client to proceed with pending matters in litigation to which they relate, yet a solicitor who has been discharged by the client may set up such lien, and will not be ordered to produce or to deliver up to the client the papers on which he claims the lien, although his not doing so will embarrass the client in prosecuting or defending his claim. Such lien is a general one, and extends to all costs due from the client to the solicitor. *Re Faithfull*, 6 L. R., Eq., 325; 18 L. T., N. S., 502.

When Incapacitated from Practising. 9. A solicitor, who had been the solicitor of the plaintiff in the cause, being detained in prison for debt, ordered to deliver up to another solicitor appointed by the plaintiff the proceedings in the cause, notwithstanding he had become a mortgagee of three-fourths of the fund in question in the suit. *Scott v. Fleming*, 9 Jur. 1085. S. C. *nom. Scott v. Fenning*, 15 L. J., N. S., Ch., 88.

10. A solicitor, in custody for debt, being by the 6 & 7 Vict., c. 73, s. 31, incapacitated from practising, was ordered to deliver up his client's papers in pending suits, without payment of his costs, but to be held subject to his lien. *Re Williams*, 28 Beav. 465.

A solicitor allowed himself to be arrested for debt and detained in prison. A client, for whom he was acting in a suit, presented a petition for delivery up of her papers, upon which he claimed to have a lien for costs:—Held, that he was not entitled to any such lien, although he alleged, and there was reason to believe, that his imprisonment had arisen from the default of the client to pay expenses out of pocket, which she had agreed to do. S. C., 6 Jur., N. S., 908.

11. The non-delivery of documents left by

an insolvent solicitor with counsel and law stationers, and retained by them for non-payment of fees and charges:—Held, not a breach of an order upon the solicitor to deliver up to a new solicitor all deeds and documents in his possession or power, relating to the affairs of his client in the suit. *Re Williams*, 3 De G. F. & J. 104; 7 Jur., N. S., 323; 30 L. J., Ch., 610; 9 W. R. 393; 4 L. T., N. S., 103.

1. Where a solicitor fairly carries on a suit, and there is no proof of misconduct or refusal on his part to proceed, although he becomes embarrassed and is changed, before final decree, that does not disentitle him to his lien for costs. *Re Smith*, 9 W. R. 396; 4 L. T., N. S., 43.

Lien. 2. A. was a partner in a mercantile firm, and was also a partner in a firm of solicitors. The mercantile firm alone was made bankrupt:—Held, that the assignees were not entitled to the delivery to them, by the firm of solicitors, of the papers of the mercantile firm, until their lien on them had been satisfied. *Re Moss*, 35 Beav. 526; 2 L. R., Eq., 345; 12 Jur., N. S., 557; 35 L. J., Ch., 554; 14 W. R. 814; 14 L. T., N. S., 536.

A solicitor was also a partner in a mercantile firm, which became bankrupt:—Held, that the bankruptcy of the mercantile firm operated as a discharge of the solicitor's clients, so as to entitle them to the delivery of their papers upon terms, before the satisfaction of the lien. *Id.*

See also (d) infra.

(c) *On Change of Solicitor by Order of Court.*

3. A solicitor, from whom the conduct of a cause has been taken by the Court, must give the new solicitor an opportunity of making himself acquainted with the documents common to the cause, and the free use of such as are required for its prosecution. *Bennett v. Baator*, 9 L. J., N. S., Ch., 137; 4 Jur. 50.

4. Order made on a solicitor, who had been by an order of the Court discharged from acting as the plaintiff's solicitor in the suit, to deliver up to the plaintiff's new solicitor all abbreviated and office copies of pleadings, and all other papers and documents, and copies of papers and documents, and also all letters and copies of letters relating to or concerning the suit, or which may or might have been used in relation thereto, etc., without prejudice to any question of lien for costs, and upon an undertaking by the plaintiff and his new solicitor not to part with any of them without the consent of the discharged solicitor or the order of the Court, and to abide by such order as the Court might make in respect thereto. *Nainby v. Solomons*, 7 Jur. 527.

5. An assigned solicitor of a pauper, in consequence of delay in the prosecution of proceedings in the suit, was ordered to be discharged and to deliver up to the new solicitors all the papers, subject to his lien for what might be found due to him for costs upon taxation. *Hannaford v. Hannaford*, 19 W. R. 429; 24 L. T., N. S. 86.

(d) *On Change in or Dissolution of Partnership.*

6. A solicitor's right of lien will not be

affected by the circumstance of his taking a partner. *Pelly v. Watham*, 7 Hare 351; 18 L. J., N. S., Ch., 281; 14 Jur. 9.

7. After A. had employed Messrs. B. and C. as his solicitors, they took D. into partnership with them, and A. employed the new firm; in the course of that employment papers belonging to him came into their possession:—Held, that B. and C. had no lien on the papers for costs which A. owed them before they took D. into partnership. *Re Forshaw*, 16 Sim. 121; 17 L. J., N. S., Ch., 61.

8. One of two solicitors who were partners became bankrupt; the assignees excluded the other from interfering with the affairs of the partnership: the Court, nevertheless, refused to order the assignees to deliver to him the papers belonging to the clients of the firm, without consent of his clients. *Davidson v. Napier*, 1 Sim. 297.

9. M., one of the partners in a trading firm, also carried on business as a solicitor in co-partnership with L. The solicitor's firm was employed by the trading firm. The trading partners became bankrupt, but the business of the solicitors' firm was continued by L. alone. The assignees of the bankrupts employed fresh solicitors. Before the bankruptcy, one of the partners in the trading firm retired:—Held, first, that the bankruptcy of the trading firm was a discharge of the solicitors by their clients, and that the solicitors were entitled to their lien. *Re Moss*, 2 L. R., Eq., 345; 12 Jur., N. S., 557; 35 L. J., Ch., 554; 14 W. R. 814; 14 L. T., N. S., 536; 35 Beav. 526.

Held, secondly, that the retiring partner in the trading firm was discharged by the dissolution of the solicitors' partnership, caused by the bankruptcy of the trading solicitor, and was entitled, on the usual undertaking as to payment of the solicitors' costs, to have all papers which belonged to him alone delivered up to him. *Id.*

10. Where a party has employed as his solicitors in a cause a firm of two solicitors in partnership, the retirement from the business of one of such partners, under an arrangement with the other, operates as a discharge of the client by the solicitors, and the client is thereupon entitled to require that the papers in the cause, necessary for its prosecution, shall be delivered up to his new solicitor, upon the usual undertaking for saving the lien of the discharged solicitors. *Griffiths v. Griffiths*, 2 Hare 587; 12 L. J., N. S., Ch., 397; 7 Jur. 573.

11. A firm of solicitors having declined to act for their client during the continuance of a suit, and refused to give up the deeds, etc., in their possession, alleging that they had a lien for costs incurred to them, and also to their predecessors in the firm before the commencement of the suit, these costs having been previously taxed, an order was made upon motion for the deposit of the deeds in the Master's office. *Gregory v. Crosswell*, 14 L. J., N. S., Ch., 300.

12. A dissolution of a firm of solicitors amounts to a discharge of the client. *Ramlinson v. Moss*, 7 Jur., N. S., 1053; 30 L. J., Ch., 797; 9 W. R. 733; 4 L. T., N. S., 619.

If a solicitor discharging a client has a lien on the papers relating to a matter in progress such papers must nevertheless be given up to

his successor, the lien reviving on the completion of the business. *Ib.*

A client employing a firm of solicitors is entitled to the services of all the members of the firm, and a dissolution of partnership amounts to the discharge of the client. For the purpose of completing any business in hand at the time of discharging a client, the papers must be given up to his new solicitor, the lien of the former solicitor reviving on the completion of the business. The former solicitor is entitled to have a schedule of the documents so handed over, and the expense of preparing such schedule must fall upon the person requiring the papers. S. C. 80 L. J., Ch., 797.

4. Production of Documents as Evidence or for Benefit of Third Parties.

1. Whenever a client is bound to produce a deed for the benefit of a third person, so also is his solicitor, though the latter may have a lien on it for costs against his clients. *Furlong v. Howard*, 2 Sch. & Lef. 115.

2. A defendant was decreed to deliver up certain deeds to the plaintiff; the deeds were in the possession of the defendant's solicitor, who claimed a lien on them for costs; but the Court, on motion, ordered him to deliver them up, and to pay the costs of the motion. *Bell v. Taylor*, 8 Sim. 216.

3. Solicitor refusing to allow deed in his possession to be proved on behalf of plaintiff, because he had lien on it for costs due from defendant; ordered to produce deed at his own expense, and pay all costs consequential on his refusal. *Brassington v. Brassington*, 1 Sim. & S. 455.

4. Where a party, claiming by title paramount to client, enforces the production of the papers, *semble*, the benefit thereby incidentally accruing to parties deriving under the client cannot be taken from them, and the solicitor's lien is lost. *Blunden v. Desart*, 2 Dr. & War. 405; 2 Con. & L. 111; 5 Ir. Eq. R. 261. Reversing Fl. & K. 572; 5 Ir. Eq. R. 52.

5. A solicitor who obtained possession of a lease from a client which was claimed by a third party, cannot refuse to answer a bill, filed against him upon an allegation that the information respecting the matters inquired into was obtained either in the character of solicitor, or as a creditor of his client, neither will his claim to be a purchaser for value without notice, in respect of a lien claimed upon the lease for a debt incurred by his client, prevent his being required to answer the bill. *Thomas v. Rawlings*, 28 L. J., Ch., 829.

6. Solicitor employed in the sale of an estate knew that the title deeds were in the possession of an adverse party; he however proceeded to prepare and obtain the execution of the conveyance and memorial. The sale went off in consequence of the absence of the title deeds. He was disallowed the costs of the proceeding, and, the deed being a cloud on the title, he was also ordered to deliver it without being paid the costs thereof. *Potts v. Dutton*, 8 Beav. 493.

7. A party ordered to produce papers which are in the hands of his solicitor, must pay his

bill of costs if he cannot otherwise procure them. *Exp. Shaw*, Jac. 272.

8. A defendant before answer became bankrupt. He put in his answer stating that certain books and letters were in the possession of his solicitor, who claimed a lien on them, and that he could not obtain possession thereof. The Court ordered the defendant to produce them, with liberty to apply in case of need. *Rodick v. Gandell*, 10 Beav. 270.

9. A defendant, by his answer, stated that a certain deed was in the possession of the personal representative of a solicitor who claimed a lien on it. The Court ordered him to produce it, with liberty to apply, if production or inspection of the deed was refused by the party who had it. *Monsel v. Lindsay*, 13 Ir. Eq. R. 144.

10. Two defendants, one of whom was a solicitor, admitted by their answer that documents were in their power; their solicitor, with his partner, claimed a lien upon them for costs; and on a motion that the defendants should pay the costs in order to facilitate the production of the documents, the Court declined to make the order. *Wroughton v. Barolay*, 11 Jur. 274.

11. Where documents belonging to a trust are in the hands of the solicitor to the trust, who claims a lien upon them, a trustee defendant cannot by answer refuse to disclose the deeds on the ground that the solicitor claims his lien, and will not produce them. The course is for the trustee to obtain an extension of time to put in his answer, which extension of time will be from time to time prolonged, until the trustee can pay off or procure a waiver of the lien. *Goodchap v. Wearings*, 16 Jur. 586.

12. Claim of lien by solicitor for professional charges held to be no ground of objection to an order upon him to produce deeds in possession before the examiner, with a view to their being used as evidence between third parties. *Hope v. Liddell*, 1 Jur., N. S., 665; 24 L. J., Ch., 691; 3 W. R. 581; 3 Eq. Rep. 790. Affirming 20 Beav. 438; 1 Jur., N. S., 665; 24 L. J., Ch., 691.

Quære, whether the solicitor can object to production under such an order, on the ground of want of service upon, or of notice to the person or persons to whom, subject to his lien, the deeds required to be produced belong. *Ib.*

A deed containing a recital alleged to be material to the case of the defendants in a suit was in the custody of the solicitor of some of the parties to the deed, and he claimed a lien on it in respect of the costs of its preparation. On his being called as a witness by the defendants, who were not his clients or parties to the deed, to produce it:—Held, that he could not refuse to do so by reason of his lien. S. C. 7 De G. M. & G. 331.

13. A solicitor a defendant in a suit cannot refuse to produce documents belonging to his client, on the ground that he has a lien upon them, and that the party seeking inspection claims under his client. *Lockett v. Cary*, 10 Jur., N. S., 144.

14. A witness is bound to produce a document in order that it may be given in evidence, notwithstanding he may have a lien on it. *Re Cameron's Coalbrook Railway Co.*, 25 Beav. 1.

Distinction between the production of documents at the instance of the party who created the lien, and of a stranger, and between production and parting with the possession. *Id.*

1. A defendant was committed for the non-production of documents admitted by him to be in his possession or power. It afterwards appearing that prior to the suit they had been deposited with a third party, who claimed a lien thereon which the defendant was unable to satisfy, he was discharged from custody without producing them. *North v. Huber*, 29 Beav. 437.

2. Solicitors employed by the husband to prepare a marriage settlement:—Held, not bound to produce it to the trustees until their bill had been paid. *Re Gregson*, 26 Beav. 87.

3. Documents in the possession of a former solicitor of a plaintiff who claimed a lien for costs upon them will not be ordered to be produced for the defendant's inspection. *Kettlemell v. Barston*, 20 W. R. 621.

4. In an action by a married woman against her husband and the trustees of her marriage settlement, the solicitor who prepared the settlement was called as a witness for the plaintiff, and required to produce the settlement under a *subpoena duces tecum*. The solicitor objected to produce it on the ground that it had not been paid for, and asserted a general lien on it. The settlement was prepared on the instructions of the wife in contemplation of her marriage in 1873; *i.e.*, between the dates of the Married Women's Property Act 1870 and the Amendment Act 1874:—Held, that the solicitor was bound to produce it. *Fowler v. Fowler*, 50 L. J., Ch., 686; 44 L. T. 799; 29 W. R. 800.

5. The solicitors for the trustees of an estate which is under the administration of the Court have not, after their discharge, such a lien for costs and for money advanced in the suit as will enable them to refuse the production of documents which are required by the receiver for the management of the estate. *Belaney v. French or French*, 8 L. R., Ch., 918; 28 L. T., N. S., 618; 43 L. J., Ch., 312; 22 W. R. 177; 29 L. T., N. S., 706.

6. A defendant, shortly after filing an affidavit as to documents, entered into liquidation of his affairs by arrangement. Some time afterwards he changed his solicitors. The plaintiff applied for production of the documents, which the defendant resisted on the ground that they were in the possession of his former solicitors, who claimed a lien on them:—Held, that an order for production must be made, with liberty to apply in case the defendant found it impossible to produce the documents, the plaintiff not to attach the defendant without leave of the Court. *Vale v. Oppert*, 10 L. R., Ch., 340; 44 L. J., Ch., 579; 23 W. R. 780; 33 L. T., N. S., 41. Affirming 44 L. J., Ch., 258; 32 L. T., N. S., 86.

A solicitor cannot set up a lien acquired in a cause as against the right of other parties in the cause to production. *Id.*

5. Production to Assignees or Trustees in Bankruptcy.

7. If a solicitor refuses to deliver the proceedings to the assignee, the order is of course

with costs. *Re Crome, Re Wharton*, Mont. & Bli. 90.

8. Solicitor is bound to produce papers of his client for him, or in bankruptcy for his assignees, though not employed by them in the cause, for the purposes of which he received them; but not bound to deliver them up, or produce them in any other business, without payment. *Ross v. Laughton*, 1 Ves. & B. 849.

9. The Court has jurisdiction in bankruptcy to order the papers deposited by the bankrupt with his attorney, in actions commenced before the bankruptcy, to be delivered up to the assignees, provided they are necessary to the administration of the estate. But where assignees wanted such papers for the purpose of instituting criminal proceedings against the bankrupt, the Court refused to make the order and dismissed the petition with costs. *Exp. Innes*, Buck 337.

10. The right of assignees to inspect or take a copy of a title deed of the bankrupt's property in the hands of his solicitor is no higher than the right of the bankrupt himself; and therefore, where the assignees petitioned that the solicitor might produce or give an attested copy of such document, on being paid only the portion of his costs relating thereto, and the costs of the production or copy, the petition was dismissed with costs. *Exp. Underwood, Re Hemsworth*, 1 De G. 190; 9 Jur. 632.

11. Traders, before their bankruptcy, deposited their books with a solicitor, with a view to his effecting for them a compromise with their creditors. Terms were arranged, but the bankrupts were unable to comply with them, and the solicitor refused to act further in the matter. Adjudication followed, and the solicitor, although ordered to deliver up to the official assignees the books of the bankrupts in his hands, refused to do so, alleging a lien on them for costs. A commissioner ordered him to be committed for contempt:—Held, that the solicitor was entitled to the lien which he claimed. *Exp. Jabet*, 6 Jur., N. S., 387.

12. An attorney holding deeds of a bankrupt in his custody at the date of the adjudication, has a general lien thereon for professional services. *Re May*, 1 F. N. R. 243.

13. A solicitor, claiming to have a lien on a deed of the bankrupt for professional business done for him, was summoned to attend before the commissioner acting in the prosecution of the fiat, to be examined touching the estate of the bankrupt, and to produce the deed. The solicitor obeyed the summons and produced the deed when the commissioner, being of opinion that he had no lien, ordered him to deliver up the deed to the solicitor of the fiat, and, on his declining to do so, unless his lien was first discharged, directed an officer of the court to seize the deed:—Held, that the commissioner, in making such order, exceeded his jurisdiction. *Exp. Llewellyn, Re Wright*, 8 Jur. 816.

Where the claim of a solicitor to a lien on a deed of the bankrupt is disputed, the remedy of the assignees for recovering the deed is by an action of trover. *Id.*

14. A bankrupt, upon consulting his solicitor before his bankruptcy, but after an act of bankruptcy committed, of which the solicitor had no notice as to the state of his affairs, told

him that his cash-book contained all his receipts and payments, and that anything else he wanted would be found in the office. He afterwards sent by post the key of a drawer in the office to his solicitor, who subsequently removed the papers and documents in the drawer, and also a tin box containing papers, etc., from the bankrupt's office to his own. The bankruptcy occurred a few days after the removal, whereupon the solicitor claimed a lien upon the papers and documents for his bill of costs:—Held, that he was entitled to such lien for his taxed costs, down to the date of the filing of the petition. *Re Markby*, 11 L. T., N. S., 250.

1. A solicitor is not, on the ground of his lien on documents of a bankrupt in respect of professional services before the bankruptcy, entitled to refuse to produce such documents for examination by the trustee. *Re Toleman and England, Exp. Bramble*, 13 L. R., Ch. D., 885; 42 L. T. 413; 28 W. R. 676.

2. S. and M., solicitors, obtained possession in the course of business of certain deeds and documents the property of W., whose solicitors they were, and retained possession of same, subject to a lien for costs due by W. to them. W. was subsequently adjudicated a bankrupt, and his assignees applied for an order that S. and M. should deliver up to them the deeds and documents so in their possession. The Court refused the application. *Re Watters*, 7 L. R., Ir., 531.

3. A trustee was removed from his office and a new trustee appointed. The old trustee's solicitor, on being applied to, gave up all the account books of the estate, but refused to deliver up certain documents and papers on which he had expended labour as solicitor, and upon which he claimed a lien for costs. Thereupon the new trustee applied to the Court for an order upon the old trustee and his solicitor to deliver up all documents relating to his office as trustee:—Held, that the solicitor was entitled to a lien on the documents which he had retained, and that the old trustee was not bound to discharge that lien by paying the costs out of his own pocket. *Exp. Falden, Re Austin*, 4 L. R., Ch. D., 129; 46 L. J., Bky., 59; 35 L. T. 720; 25 W. R. 134.

6. Delivery up to Client on Payment of or Giving Security for Costs.

4. Order, without cause in court, upon general jurisdiction over solicitor, that he shall deliver his bill for purposes of getting from him title deeds deposited with him for suffering recoveries, etc. *Exp. Uabridge (Earl)*, 6 Ves. 425.

5. A solicitor, having a lien upon a deed for his costs, will not be ordered to furnish them, nor deliver up the deed without getting an express undertaking that his costs will be paid when taxed. *McKenny v. Chambers, Jon. & C.* 105.

6. Where a solicitor has in his possession deeds and papers belonging to his client, which he refuses to part with, the Court has jurisdiction to order the solicitor to deliver the deeds and papers, and also his bill of costs, the party offering to pay what the Master shall find to be due to him, though there is no

cause pending, and though no part of the costs has been incurred in respect of any action or suit in law or equity. *Re Murray*, 1 Russ. 519.

7. Where a party has a pressing necessity for papers in the hands of his solicitor, the Court will order them to be delivered up, upon a deposit being made, sufficient to cover the amount of the solicitor's bill and the costs of the taxation. *Clutton v. Pardon*, T. & R. 304.

8. A solicitor, who had by deposit of his client a lien on deeds for costs and other moneys, was ordered to deliver them up to his client on payment into court by the latter of a sum sufficient to cover the demand, and the usual taxation was directed. *Mills v. Finlay*, 1 Beav. 560.

9. Where the committees of a lunatic had been authorised by the Court to raise money by a mortgage of his estate, but were unable to do so, in consequence of some of title deeds being in the hands of solicitors, who claimed a lien upon them, but the items of their accounts were disputed, the Court ordered that the mortgages should be at liberty to pay to the committees a sufficient sum to discharge the lien on the title deeds, without prejudice to their right to have the accounts investigated. *Re Davies*, 12 L. J., N. S., Ch., 456; 7 Jur. 584.

10. In a suit instituted against a solicitor, who had also acted in the capacity of steward for an account, and for delivery of title deeds, the Court upon motion ordered the deeds to be delivered up to the plaintiff, upon payment into court of so much of the balance claimed by the answer, as was not covered by any security. *Baleh v. Symes*, T. & R. 87. See *Tyler v. Drayton*, 2 Sim. & S. 309.

Where a deed is sought to be impeached, the plaintiff is entitled to have it produced, and the defendant cannot resist the production upon the ground of lien. *Id.*

11. A solicitor prepared and obtained the execution of a conveyance, knowing the title deeds were in the possession of an adverse party. The sale went off in consequence of absence of title deeds, and the conveyance, being a cloud on the title, was ordered to be delivered up by the solicitor without payment of his costs. *Potts v. Dutton*, 8 Beav. 493.

12. Solicitor is bound to produce papers of his client for him, or in bankruptcy for his assignees, though not employed by them in the cause, for the purposes for which he received them, but not bound to deliver them up or produce them in any other business without payment. *Ross v. Laughton*, 1 Ves. & B. 349.

13. An order of course to tax directed, that, on payment, all the papers, etc., of the client should be delivered up. The solicitor claimed a special lien on some of the papers beyond the costs. A motion to discharge the order was refused, because, if the solicitor had such special lien, he would be protected when application was made to the Court, for the delivery of the papers. *Re Teague*, 11 Beav. 318.

14. Though there is no cause pending, the Court will order a solicitor to deliver up deeds and writings in his possession, the party undertaking to pay him the costs justly due to him; and, as incident to that jurisdiction, it will order the costs to be taxed, though

no part of the costs relates to suits or actions. *Re —*, 4 L. J., Ch., 207.

1. Where a solicitor refuses to deliver up deeds and papers in his possession, except upon payment of his bill of costs, the Court has jurisdiction to order taxation of such bill, and the delivery up of the deeds and papers, upon payment of the taxed costs, though the costs have been incurred in respect of conveyancing and other general business, and not in respect of the prosecution or defence of any suit or action. *Re Rice*, 2 Keen 181; 6 L. J., N. S., Ch., 291; 1 Jur. 351.

2. The lien of a solicitor on the papers of his client for the amount of his bill is equivalent to a contract; and, therefore, a solicitor will not be ordered to deliver up such papers until he is actually paid; and, *semble*, that payment into court of a sum of money is not sufficient to entitle the client to demand the papers; but *semble* also, that, if the solicitor's withholding a document would occasion the loss of the property to which it relates, the Court will make such an order as, without prejudicing the solicitor's lien, will allow of the documents being made available for the purpose of securing the property. *Richards v. Platel*, Cr. & Ph. 79; 10 L. J., N. S., Ch., 375; Jur. 884.

3. It requires a strong case to induce the Court to take the papers from a solicitor; still this Court has authority to compel the production of the deeds upon the money being brought into court. *Blunden v. Desart*, 2 Con. & L. 111; 2 Dr. & War. 405; 5 Ir. Eq. R. 221. Reversing Fl. & K. 572; 5 Ir. Eq. R. 57.

4. The omission by a client to file a certificate of taxation of a solicitor's bill within the four days prescribed by the order of 29th October 1692, does not render the order a nullity, but the client's representatives, after his death, may, notwithstanding the omission, obtain an order under the summary jurisdiction, for the delivering up of the client's papers on payment of the amount of the bill as taxed; and an action by the solicitor on the bill, after such taxation, is a contempt, and will be restrained by injunction at the instance of the representatives. *Re Campbell*, 3 De G. M. & G. 585; 17 Jur. 1171; 22 L. J., Ch., 865.

5. The Court will, before the completion of a taxation, order the delivery up of papers by a solicitor to his client, either upon payment into court of the amount claimed, or in case it appears from the solicitor's own account that a balance is due from him to his client. *Re Bevan*, 33 Beav. 439.

6. A solicitor ordered, pending a taxation of his bill, to deliver over his client's papers, on the client undertaking to produce them, and giving security for the amount claimed. *Re Jewitt*, 34 Beav. 22.

7. Upon an application for delivery over of all documents in a discharged solicitor's possession made by clients undertaking to pay into court a sum amply sufficient to secure the solicitor in respect of all demands, the Court will make the order asked for provided that circumstances of pressing necessity are shown. *Re South Essex Equitable Investment and Advance Co.*, 46 L. T. 280.

8. Where a solicitor had been appointed clerk to a local board, with a salary, for conducting the legal as well as the ordinary

business of the board, it was held by the Vice-Chancellor, upon an interlocutory motion—in an action for mandamus to compel production of papers, that, whatever claim the clerk might have against the board for payment of costs in respect of professional services, he had no right, being in the relation of servant to the board, to refuse production of the legal papers or other documents claimed by the board as belonging to them:—But held, by the Court of Appeal, that as such an order would prejudice the clerk's lien, it could not be made before the trial of the action without payment into court of a sum sufficient to meet the amount claimed by the clerk, upon which he was to have the same lien as upon the papers; and the Court ordered that upon that being done the clerk should deliver up to the plaintiffs all books and papers claimed in the action. *Newington Local Board v. Eldridge*, 12 L. R., Ch. D., 349.

9. In making an order for taxation under the Solicitors Act, 6 & 7 Vict., c. 73, s. 38, it is discretionary with the Court whether or not to add the order for the delivery up of papers. *Exp. Jarman*, 4 L. R., Ch. D., 835; 46 L. J., Ch., 485.

A solicitor delivered to his client a bill of costs incurred in pending suits, in which he afterwards, with his client's knowledge, incurred further costs. While the suits were still pending, the client obtained an order of course for taxation and delivery up of papers, whereupon the client delivered a bill for the further costs. On a motion to discharge the order on the ground that the solicitor had a lien on the papers for further costs:—Held, that the order should be amended so as to include both bills. *Id.*

Semble, that the proper form of order in such a case would be a simple order for taxation, without ordering the papers to be delivered up. *Id.*

10. By an order for taxation, the solicitor was ordered, on payment, to deliver over the papers. Having made default, he was ordered to pay the costs of a motion to compel him, though he had delivered them up after the notice of motion, but before it had been heard. *Re Minter*, 19 Beav. 33.

7. Production of Orders or Decrees.

11. A clerk in court and solicitor refusing to continue the conduct of a cause until his fees are paid; ordered to produce an office copy of the bill to be marked by the six clerk, so that an answer might be called for. *Mayne v. Hawkey*, 3 Swan. 93.

12. The solicitor in a cause will be ordered to produce an original order of the Court, for the purpose of correcting an accidental error, notwithstanding that he claims a lien on the papers in the cause. *Bird v. Heath*, 12 Jur. 861.

13. An order was made for the payment out of court of a sum of money to a married woman for her separate use. The solicitor who had the charge and carriage of the order refused to produce it to the registrar, to enable him to countersign the cheque of the accountant-general, except upon condition of his being paid thereout a sum of money which,

he alleged, he had advanced to the lady, or become security for, upon the faith of his being repaid out of the money. Upon motion, he was directed to produce the order, and to pay the costs of the motion. *Benyon v. Aspllett, Re Sidney*, 8 Jur., N. S., 759.

1. A plaintiff in a suit became bankrupt, and the suit was revived by his assignee, who employed a different solicitor. A decree was afterwards made:—Held, that the solicitor of the original plaintiff must produce the documents in his possession which were necessary for drawing up the decree, notwithstanding his lien on them for costs, even though the documents were not strictly in evidence in the cause. *Simmons v. Great Eastern Railway Co.*, 3 L. R., Ch., 797; 16 W. R. 1100; 19 L. T., N. S., 235; 38 L. J., Ch., 87.

[Of Proceedings in Bankruptcy.] See BANKRUPTCY, II. vii. 3.

8. Order on Executors of Deceased Solicitor.

2. This Court has not jurisdiction to order the personal representatives of a deceased solicitor to deliver up title deeds on which they claim a lien. *Allen v. Jervoise*, 11 Ir. Eq. R. 583.

3. The Court will not order the personal representative of a deceased solicitor to deliver the papers in the cause of another solicitor, without payment or security for payment of the solicitor's bill. It seems that the summary jurisdiction of the Court extends to the representatives of a solicitor. *Redfearn v. Sowerby*, 1 Swan. 84; 1 Wils. 96.

4. A client cannot compel the executor of his attorney to produce his papers, etc., in court, though only for the purpose of using them there, unless the testator's bill of costs be paid or secured. *Magrath v. Musherry*, 1 Ridgw. P. C. 477; Vern. & Scriv. 171.

5. Except against the personal representative of the solicitor, the Court has no summary jurisdiction to take the client's deeds, lodged with the solicitor, out of his hands, upon an offer to pay all his costs due; as such an order can be only made upon a person with whom the Court can settle. If any other person has the deeds, the client must file a bill against him. *Ashley v. Busteed*, 2 Moll. 489.

9. Mortgage Transactions.

6. The attorney of the mortgagor, to whom, pending a suit to foreclose the mortgage, the title deeds of the mortgaged premises have been delivered by the mortgagor, for the purpose of procuring a loan of money, has no lien upon them for his costs in that transaction as against the mortgagee. *Hutchinson v. Joyce*, 2 Jones 122.

7. The owner of lands, subject to a mortgage of the year 1777, and to judgments confessed in and subsequently to the year 1820, deposited, in March 1819, the title deeds with his solicitor. In a suit instituted by the judgment creditors, it was decreed that those lands should be sold to pay off the mortgage,

and that the title deeds should be lodged in the office without prejudice to any lien which the solicitor might have thereon for costs, which was done accordingly. The lands were sold and the deeds handed to the purchaser:—Held, that the solicitor had no lien on the deeds, having no right to retain them as against the mortgagee. *Taylor v. Gorman*, 6 Ir. Eq. R. 330. Affirmed 7 Ir. Eq. R. 259.

Held, also, that his lien on the deeds was not transferred to the surplus funds of the sale, remaining after payment of the mortgage. *Id.*

8. A mortgagor, who had borrowed the title deeds from an equitable mortgagee, to enable him to sell the property, handed them to his solicitor in order to complete. The mortgagee acquiesced in the sale:—Held, that the solicitor had a lien on the deeds for his costs of the transaction only, but not for his other claims for costs against the mortgagor. *Young v. English*, 7 Beav. 10; 13 L. J., N. S., Ch., 76.

9. Where the committees of a lunatic had been authorised by the Court to raise money by a mortgage of his estate, but were unable to do so, in consequence of some of the title deeds being in the hands of solicitors, who claimed a lien upon them, but the items of their accounts were disputed, the Court ordered that the mortgagee should be at liberty to pay to the committees a sufficient sum to discharge the lien on the title deeds, without prejudice to their right to have the accounts investigated. *Re Davies*, 12 L. J., N. S., Ch., 456; 7 Jur. 584.

10. A solicitor, who was employed by an administrator, as well in the affairs of the administration as on his private account, having in the course of that employment, obtained possession of several documents relating to the intestate's leasehold estate, and having, by the direction of his client, deposited certain deeds relating to a portion of such property with the executor of a deceased party, who was entitled to a distributive share of the intestate's estate (for the purpose of securing the payment of certain legacies given by her will), claimed for his bill of costs, due from the administrator, a lien on other documents in his possession, relating to the same property as that to which the deeds related which were so deposited:—Held, that the security having been affected through the agency of the solicitor, without any reservation on his part in favour of his lien, he had no right to derogate from that security by withholding any document necessary to give effect to it, and that therefore he had no lien on the documents in his possession as against the party entitled to the benefit of the security. *Hicks v. Keate*, 3 Jur. 1024.

11. A., being seised in quasi fee of an estate *pur autre vie*, granted a mortgage thereof in 1814. In 1824 A. obtained a renewal from the head landlord, and deposited the indenture of renewal with his solicitor, who, in a foreclosure suit by a mortgagee, insisted upon retaining the indenture by virtue of a lien thereupon for costs incurred since 1814:—Held, that he was not entitled to that lien as against the right of the mortgagee. *Smith v. Chichester*, 2 Dr. & War. 393; 1 Con. & L. 486; 4 Ir. Eq. R. 580.

12. A mortgagor instructed his solicitor, to whom he was indebted in a bill of costs, to

prepare a conveyance of the mortgaged property. They did so, and sent the engrossment to the mortgagee's solicitors, with an intimation that they had a lien on it, and a request that the mortgagee's solicitors would hold it on account of the mortgagor's solicitors. The engrossment was executed by the mortgagees. The mortgage money was not paid, but the mortgagor sold the property to purchasers, who agreed to pay it:—Held, that the mortgagor's solicitors had a lien on the engrossment, and that such lien was not prejudiced by their having parted with the engrossment under the above circumstances, nor by the execution of it as a deed, nor by a promissory note delivered to the solicitors not covering their whole demand, and that the purchaser had been properly restrained by injunction from proceeding at law to recover the deed. *Watson v. Lyon*, 7 De G. M. & G. 288; 24 L. J., Ch., 754; 3 W. R. 543.

1. A bill of costs for preparing a mortgage security delivered to a mortgagor by a firm of solicitors, one of whom was the mortgagee:—Held, not to be mortgagee's costs. *Gregg v. Slater*, 2 Jur., N. S., 246; 25 L. J., Ch., 440.

2. A solicitor acting for a mortgagee must deliver up the title deeds of the mortgagor which he holds for the mortgagee on payment of the mortgage debt and mortgagee's costs, and cannot claim a general lien on such deeds for costs due to him from the mortgagor, in respect of business previously done by him as solicitor for the mortgagor. *Re Moseley*, 15 W. R. 975.

3. A solicitor acting for mortgagee as well as mortgagor in the preparation of a mortgage thereby loses his lien on the title deeds in his possession for costs due to him from the mortgagor, even though the costs were incurred prior to the mortgage and the title deeds never left the solicitor's office. *Exp. Quinn, Re Nicholson*, 53 L. J., Ch., 302; 49 L. T. 811; 32 W. R. 296.

4. A solicitor who acts for both parties to a mortgage cannot, after the execution of the mortgage, claim a lien on the title deeds of the property for any costs due from the mortgagor. *Re Snell*, 25 W. R. 823; 46 L. J., Ch., 627; 6 L. R., Ch. D., 105; 37 L. T., N. S., 350.

A company having issued a debenture loan, a deed was prepared by their solicitor mortgaging their property to two of the directors as trustees for the debenture holders, the same solicitor acting also for the trustees. The mortgage contained a power of sale and the usual covenant against incumbrances. The company afterwards passed a resolution for a voluntary winding-up, whereupon the trustees, acting under their power of sale, contracted to sell the mortgaged property to a purchaser, and applied to the solicitor for the company's title deeds, which were in his possession. He however refused to give them up, claiming a lien upon them for costs incurred by the company prior to the mortgage. Upon a petition by the trustees and a debenture holder praying that the solicitor might be ordered to deliver up the title deeds to them:—Held, that the solicitor was not entitled to a lien on the deeds, and that they must be delivered up to them. *Id.*

A solicitor acting for mortgagee as well

as mortgagor in the preparation of a mortgage thereby loses his lien on the title deeds in his possession for costs due to him from the mortgagor, unless such lien is expressly reserved, even though the mortgagee may have known that the solicitor had such lien as against the mortgagor. *Id.*

5. A mortgage deed and the title deeds to the mortgaged property were deposited by the mortgagees with their solicitors for safe custody. Afterwards the mortgagor instructed the same solicitors to sell the property, and they employed an auctioneer for the purpose, and made use of the deeds in preparing particulars and conditions of sale. The property was put up for sale, but was not sold. The mortgagor then filed a liquidation petition, and the trustee contracted to sell the mortgaged property:—Held, that the solicitors had no lien on the deeds as against the trustee in respect of their costs of the abortive sale. *Exp. Fuller, Re Long*, 16 L. R., Ch. D., 617; 50 L. J., Ch., 448; 44 L. T. 63; 29 W. R. 448.

6. A solicitor was instructed to prepare a mortgage, and the title deeds of the property were deposited with him for the purpose by the mortgagor. He was also acting as solicitor for the mortgagee, and when the mortgage was executed he continued to hold the deeds on behalf of the mortgagee. The mortgagor filed a liquidation petition, and the solicitor was employed on behalf of the trustee. The trustee sold the equity of redemption and the solicitor received the purchase money:—Held, that the solicitor had a lien on the deeds against the mortgagor, and was entitled to retain out of the purchase money the amount of costs due to him from the mortgagor. *Re Messenger, Exp. Calvert*, 3 L. R., Ch. D., 317; 45 L. J., Bky., 134; 34 L. T. 920.

Lien on Mortgage Deed given by Client to his Solicitor. 7. A client mortgaged property, which was at the time subject to a first mortgage, to his solicitors, who prepared the mortgage deed. Afterwards the mortgagor made a third mortgage to another person:—Held, in an action by the solicitors against the first and third mortgagees and the mortgagor, that they were entitled only to their ordinary costs as mortgagees, and that they had no lien on the mortgage deed for the costs of its preparation or other costs due to them from the mortgagor. *Sheffield v. Eden*, 10 L. R., Ch. D., 291; 27 W. R. 477; 40 L. T. 283.

8. A solicitor obtained from his client, who had no other professional assistance, a mortgage deed, under circumstances which, as the client alleged, amounted to pressure and surprise. The deed was prepared by the solicitor at the expense of his client:—Held, that, under the circumstances, he could not be permitted to stand upon his rights as mortgagee for the purpose of resisting production of the instrument in question. *Davis v. Parry*, 6 W. R. 174; 27 L. J., Ch., 294; 4 Jur., N. S., 431.

10. Priorities.

9. A solicitor may detain title deeds as against client till payment of his bill, but not

against persons who have antecedent rights. *Marsh v. Bathoe*, Ridgw. P. C. 256.

1. Solicitor has no lien against remainderman on deeds put into his hands by tenant for life. *Exp. Nesbitt*, 2 Sch. & Lef. 279.

2. A solicitor cannot, by his lien, have a better right to the client's title deeds than the client himself had at the time of the costs being incurred. *Smith v. Chichester*, 2 Dr. & War. 393; 1 Con. & L. 486; 4 Ir. Eq. R. 580.

3. By settlement a sum of 2,500*l.* was charged on an estate for lives renewable for ever for the issue of the marriage, subject to appointment, part of which was appointed to one of the children on her marriage, and then settled; the residue was never appointed. After the death of the first settlor, A., the solicitor of B., the other child of the marriage, acting under a power of attorney, obtained a renewal, and instituted a suit in his name to raise his portion of the unappointed charge, but did not prosecute it. On the death of B., A. obtained limited administration to him, and, with the parties entitled to the daughter's share of the charge, filed a bill to raise the charge, when a receiver was appointed and funds got in. The lands being sold in a creditors' suit, and the settlements lodged in the office by order, without prejudice to A.'s lien:—Held, that A. had no lien for costs on the deeds, as B., through whom he got them, had no exclusive right to them, and that there could not be any lien transferred to the funds. *Molesworth v. Robbins*, 8 Ir. Eq. R. 1; 2 J. & L. 358. Affirmed 8 Ir. Eq. R. 223.

4. A solicitor, without notice of an incumbrance, either legal or equitable, prior to his possession of the title deeds of the property affected by it, has no right of lien on the deeds as against the incumbrancer. *Polly v. Wathen*, 7 Hare 351; 18 L. J., N. S., Ch., 281; 14 Jur. 9.

Where a solicitor, under such circumstances, is also mortgagee of the property, with priority of another incumbrancer, the right of lien does not extend beyond his claim as mortgagee. *Id.*

A. was an equitable mortgagee of lands, the legal estate being at the time of the mortgage outstanding in a third person. The title deeds of the estate, subsequently to the equitable mortgage, came into the custody of solicitors for carrying out a sale for the mortgagor of the property comprised in the equitable mortgage, and who claimed a lien upon them for costs incurred by the mortgagor before and after the sale:—Held, upon appeal, affirming the decision of the Vice-Chancellor, that the solicitor could have no lien of a higher nature on deeds in his possession belonging to his client than the interest which the client himself had, and that the solicitor could not claim any greater right as against third parties, and that the right of the solicitor could be only to retain the deed, subject to all the rights, legal and equitable, affecting them in the hands of the mortgagor, and that that right was subject to a prior right in the equitable mortgagee. 8 C. 1 De G. M. & G. 16; 21 L. J., N. S., Ch., 105; 16 Jur. 47. Affirming 7 Hare 351; 18 L. J., N. S., Ch., 281; 14 Jur. 9.

5. When a judgment was obtained against a client subsequently to the deposit of his title deeds with his solicitor, and costs had become due for professional services rendered

to the client both before and after the date of the entry of the judgment:—Held, that the solicitor's lien could not prevail against the judgment creditor for any portion of the costs incurred after the date of the judgment. *Blunden v. Desart*, 2 Dr. & War. 405; 2 Con. & L. 111; 5 Ir. Eq. R. 221. Reversing Fl. & K. 572; 5 Ir. Eq. R. 53.

A solicitor's lien for his costs upon his client's deeds and papers, prevails generally for all costs, and is binding upon the representatives of the client. *Id.*

The character of an incumbrance, the result of contract, does not belong to the solicitor's lien. *Id.*

6. A. is employed for some time by Messrs. B., as their attorney, and in the course of such employment, a considerable debt becomes due to him; Messrs. B. contract to sell an estate to C., who pays to them a part of the purchase money, and A. is employed in preparing the contract, and making out the title. The solicitor of C. prepares the draft of the conveyance, which is sent to A., and approved by him on behalf of Messrs. B., and the engrossment is afterwards executed by Messrs. B., and delivered by them to A., for the purpose of being handed over to C., on payment of the remainder of the purchase money; before this is done, Messrs. B. become bankrupts, and the contract is rescinded:—Held, that A. has no lien on the deeds for the debt due to him from Messrs. B., but that C. is entitled to have the deeds delivered to him. The rules with respect to lien are the same in equity as at law. *Owenham v. Esdaile*, 2 Y. & J. 493.

7. The solicitor of the plaintiff in a foreclosure suit, in which a decree for sale before the Master was made by consent, prosecuted the suit to the settlement of the particulars and conditions, and appointment of the day of sale, when the plaintiff and the defendant (by his solicitor), having notice of the claim of the plaintiff's solicitor for the costs of the suit, compromised the suit on the terms of paying the plaintiff a certain sum in discharge of the debt and costs, part of which sum was immediately paid to the plaintiff. Upon the petition of the plaintiff's solicitor, the Court ordered the costs of the plaintiff's solicitor in the suit to be taxed, and paid by the plaintiff and defendant, or one of them. *White v. Pearce*, 7 Hare 276; 18 L. J., N. S., Ch., 462; 13 Jur. 999.

8. P. was entitled under a will to a life interest in 10,000*l.* He retained a solicitor to institute a suit for administration of the testator's estate. Orders had been made in the suit directing the costs of all parties to be taxed and paid out of funds in court amounting together to about 100,000*l.*, but this had not been done. P.'s life interest in the 10,000*l.* was transferred to a society, with notice that P.'s costs due to the solicitor had not been paid. More than two years had elapsed since the first order to tax and pay costs, but the solicitor's bill had not been delivered:—Held, that the solicitor was entitled to a charging order under 23 & 24 Vict., c. 127, s. 28, upon the life interest in the 10,000*l.*, and also to retain the papers in the suit until he was paid. *Pulcher v. Adren, Exp. Brook*, 26 W. R. 163; 47 L. J., Ch., 479; 7 L. R., Ch., 318; 38 L. T., N. S., 111.

1. A solicitor's lien on a policy of assurance is not lost by want of notice to the assurance company against assignees who give notice. *West of England Bank v. Batchelor*, 51 L. J., Ch., 199; 46 L. T. 132; 30 W. R. 364.

2. A trustee under a will committed a breach of trust by lending trust moneys to his co-trustee upon a mortgage for a term of years. An administration suit was instituted, and he was ordered to pay the money into court. He sold part of the mortgaged property under a power of sale in the mortgage, and on the application of two of the *cestuis que trustent* the proceeds were paid into court, subject to an order that they were not to be paid out without the consent of the purchaser. The trustees' solicitors refused to give up the mortgage deeds unless upon payment of their bill of costs:—Held, that the circumstances of the realisation of the trust fund by the trustees' solicitors, and of the *cestuis que trustent* availing themselves of that realisation, did not entitle the trustees' solicitors to a lien on the deeds or on the fund in court, as against the *cestuis que trustent*, but that they could have no higher claim against the deeds or the fund than that of their client, the trustee. *Francois v. Francois*, 3 De G. M. & G. 108. And see S. C. 2 De G. M. & G. 73.

3. R. S. devised his real estate, subject to his debts and legacies, to his only son, J. S., in tail, and died in 1773. In 1802 J. S. deposited the title deeds with his solicitor, and prior to the year 1813 incurred costs to a large amount, in suffering a recovery, and in the causes of A., B., and C. (the testator's younger children), instituted to raise charges to which they were entitled under the will, etc. In 1813 M., a specialty creditor of the testator on whose debt J. S. paid interest until 1811, filed his bill against J. S. and A., B., and C., etc., praying for the execution of the trust for payment of debts, and that his demand might be deemed charged on the testator's real estate. J. S. suffered the bill to be taken *pro confesso*, against him, and died insolvent before the final decree. Some time before, the solicitor of J. S. became concerned in this cause for the representatives of B., and now refused to bring in the deeds for a sale under the decree, until J. S.'s costs incurred between the years 1802 and 1813 should be first paid. A., B., and C. were reported in priority to M., for whose demand the residue of the fund would be insufficient:—Held, that the costs now demanded, if rendered necessary by the will, should have been claimed upon the hearing of the cause, and provided for by the decree; and that, therefore, the claim could not now be entertained:—Held, also, that as it did not appear that any of the costs had been incurred before the title deeds came into the solicitor's possession, and as he had full notice of the will when the costs were incurred, he was bound by the trust, and had not any lien upon the deeds as against M., the specialty creditor of the testator, who had proceeded *bonâ fide* and with due diligence. *Morgan v. Scott*, 2 Ir. Eq. R. 128.

11. Discharge of Lien.

(a) *In General*, 6450.

(b) *By taking Other Securities*, 6450.

(a) *In General.*

4. When a party claiming by title paramount to the client, enforces the production of the paper, *semble*, the benefit, thereby incidentally accruing to parties deriving under the client, cannot be taken from them, and the solicitor's lien is lost. *Blunden v. Desart*, 2 Dr. & War. 405; 2 Con. & L. 111; 5 Ir. Eq. R. 221. Reversing Fl. & K. 572; 5 Ir. Eq. R. 53.

5. By the decree in the cause, certain of the defendant's estates were directed to be sold to meet the plaintiff's claim. Pending the preliminaries for a sale, the plaintiff's solicitor gave notice to the defendant that they claimed a lien against the plaintiff in respect of their costs. The suit was afterwards compromised, the defendant paying a certain sum to the plaintiff:—Held, upon petition of the plaintiff's solicitors, that they were entitled to be paid their taxed costs of suit, and of the petition, by the plaintiff and defendant, or one of them, not exceeding in the whole the sum paid by the defendant upon the compromise. *White v. Pearce*, 7 Hare 276; 18 L. J., N. S., Ch., 462; 13 Jur. 999.

6. A solicitor to whom a judgment has been assigned in trust for his client, afterwards assigning to a trustee of a settlement upon the marriage of his client's grandson, parts with his lien upon all documents relating to the title to the judgment of those claiming under the settlement. *Fitzgerald v. Birmingham*, 1 Con. & L. 405.

7. On payment of his costs, a solicitor's lien on documents of his client in his possession ceases; he is then bound to deliver them up on his client's demand, and cannot refuse delivery because third persons claim an interest in them. *Re Emma Silver Mining Co., Re Turner*, 24 W. R. 54.

8. The plaintiffs were solicitors employed by S. to sell a house belonging to him, which was mortgaged together with other property to L. and R. The mortgagees agreed to release the house from their mortgage, in order to facilitate the sale, on receiving 398*l*. The plaintiffs prepared the engrossments of the deeds of reconveyance, which they sent to the solicitors of the mortgagees for execution, with a letter stating that they claimed a lien on them for costs due from S., and desiring that the deeds might be held on their account. The mortgagees executed the deeds, which were retained in the hands of their solicitors as security for the 398*l*. till it should be paid. S. afterwards became bankrupt:—Held, in a suit against his assignees—first, that the plaintiffs had not a mere dormant lien on the deeds, but a lien coupled with an agreement; secondly, that their lien on the engrossments was not lost by sending them to the mortgagees' solicitors, nor by their execution. *Watson v. Lyon*, 3 W. R. 543; 7 De G. M. & G. 288; 24 L. J., Ch., 754.

(b) *By taking Other Securities.*

9. Solicitor's lien is superseded by taking a security. *Balch v. Symes*, T. & R. 92. See *Tyler v. Drayton*, 2 Sim. & S. 309.

10. Solicitor's lien on papers superseded by taking security. *Conell v. Simpson*, 16 Ves. 275.

11. If a solicitor takes a promissory note for

his costs payable on demand, he loses his lien. *Roberts v. Jefferys*, 8 L. J., Ch., 136.

1. A solicitor, having a lien for costs on title deeds, took from the client a bond conditioned for the amount of the costs, with interest at 5 per cent., and regularly received the interest for several years afterwards, but still retained the deeds. In a general creditors' suit subsequently instituted, it appeared that the entire estate of the client would be insufficient for creditors whose securities were prior to the bond, but should have been postponed to the lien. The solicitor stated on oath that he accepted the bond only as a collateral security, and never intended to give up his lien:—Held, that having taken a security for the amount of the costs, with interest, the lien was gone. *Quære*, whether the mere taking a security for the amount of costs, without more, extinguishes the lien. *Brownlow v. Keatings*, 2 Ir. Eq. R. 243.

2. A firm of solicitors prepared and engrossed a reconveyance from a mortgagee to their client, the mortgagor in consideration, stated in the deed, of 3984. This deed was sent by the firm to the mortgagee's solicitors, with a letter desiring that it might be held by them on the account of the senders, who had a lien upon it for costs. The 3984. was not paid, and the mortgagee's solicitors retained the deed. The firm of solicitors received a promissory note, upon which part of the costs were paid. The land was sold, subject to the mortgage. The firm of solicitors filed a bill against the mortgagee and the purchaser for the delivery up of the deed:—Held, that they were entitled to hold the deed against the mortgagor; and that the taking of the promissory note for part of the debt due to them did not affect their lien for the money not covered by it. *Watson v. Lyon*, 24 L. J., Ch., 754; 7 De G. M. & G. 288; 3 W. R. 543.

12. Lien. How Enforced.

3. If a solicitor, whom his client has ceased to employ, by the production of a deed in his hands belonging to the client, and upon which he claims a lien as solicitor, enables the client to recover a fund in a suit, his lien over the fund so realised is confined to the costs of that suit, but is a lien which he is entitled actively to enforce. *Scous*, as to his general lien upon his client's papers, which applies to all his bills of costs, but is merely a right to retain the papers, and cannot be actively enforced. *Brown v. Bolland*, 4 Myl. & C. 354; 9 L. J., N. S., Ch., 123; 3 Jur. 884; 4 Jur. 763.

4. The Court will entertain a bill by a solicitor, seeking to enforce a lien against certain title deeds in respect of his bills of costs, a decree for an account having been made in a suit instituted by the client against the solicitor, but under which decree the Master was not at liberty to take into the general account what was due to the solicitor in respect of his bills of costs. *Hector v. Jolliffe*, 6 Jur. 120.

5. On a bill filed by a solicitor, seeking to establish a lien for costs upon a policy of assurance which a client had placed in his hands professionally, and upon which the Court had, in another cause, directed an action to be brought, a special injunction was ob-

tained, restraining all proceedings upon the policy; but this injunction was dissolved, upon appeal, the Lord Chancellor holding that the plaintiff's proper course was to make an application in the other cause. Whether such a lien could be enforced by suit, and if so, to what extent, *quære*. *Stedman v. Webb*, 4 Myl. & C. 346; 8 L. J., N. S., Ch., 193; 3 Jur. 213.

13. Delivery or Production. How Enforced.

6. Where, upon an application for taxation under the Solicitors Act, it appears probable that, upon grounds not determinable under that jurisdiction, payment ought not to be made without further investigation, this Court may properly abstain from ordering payment, or from ordering the delivery up of deeds, till the questions which cannot be determined under that jurisdiction have been properly investigated and determined elsewhere. *Re Dalby*, 8 Beav. 469.

7. Order, without cause in court, upon general jurisdiction over solicitor, that he shall deliver his bill for purposes of getting from him title deeds, deposited with him for suffering recoveries, etc. *Exp. Unbridge (Earl)*, 6 Ves. 425.

8. Solicitor claiming lien on deed cannot be compelled to produce it at hearing of cause, without *subpoena duces tecum*. *Busk v. Lewis*, 6 Madd. 29.

9. Where a solicitor has in his possession deeds and papers belonging to his client, which he refuses to part with, the Court has jurisdiction to order the solicitor to deliver the deeds and papers, and also his bill of costs, the party offering to pay what the Master shall find to be due to him, though there is no cause pending, and though no part of the costs has been incurred in respect of any action or suit in law or equity. *Re Murray*, 1 Russ. 519.

10. In an administration suit instituted by an infant *cestui que trust* under a will against the executors, one of the executors admitted that part of certain sums advanced by him on mortgage formed part of the trust estate. An order was made in the suit for the completion of contracts for sales of the mortgaged property, which had been entered into by the executor. Under this order the purchase moneys were paid into court to the credit of the cause. The order directed the executor to execute the conveyances, and deliver the title deeds to the petitioners, but the executor's solicitors refused to give up the deeds, claiming a lien upon them for costs due from the executor, and advances made for the maintenance of the plaintiff:—Held, that the Court had jurisdiction, on petition, to order the solicitors to deliver up the deeds. *Francis v. Francis*, 2 De G. M. & G. 73. And see S. C. 3 De G. M. & G. 108.

11. The old practice must be followed to compel a solicitor to deliver over documents to his client, where the application is "in the matter;" and the 12th Order of August 1841 is inapplicable to such a case. *Re Taylor*, 10 Beav. 221.

12. Summary order made upon petition under 6 & 7 Vict., c. 73, for delivery by the assignees of a bankrupt solicitor who had employed a

London agent of papers belonging to the petitioner before payment of the agent's costs. Such a petition should be entitled in the matter of the agent as well as of the country solicitor, but does not require to be entitled in the matter of the Act. *Re Walton*, 4 Kay & J. 78.

1. Where a Court orders a solicitor to deliver up papers to be afterwards returned to him, the time for delivery is within three days, and the time for return of them ten days after the purpose is answered for which they were delivered up. *Webster v. Le Hunt*, 9 W. R. 827.

2. Where a solicitor's bill of costs or the delivery of documents in his possession, is required on other grounds than those relating to taxation, the application may be made by way of petition, notwithstanding the General Order of the 17th April 1867. *Re Justice*, 16 W. R. 821.

Costs of Application. 3. After the usual order for taxation of a solicitor's bill and for delivery up of papers on payment, and the bill having been taxed and paid, a demand was made for the papers. Default having been made, and notice of a motion to compel delivery by a given day having been given, the motion stood over, and the papers were in the meantime delivered:—Held, nevertheless, that the solicitor must pay the costs of the motion. *Re Minter*, 19 Beav. 33.

II. DEPOSIT IN COURT.

4. A solicitor will not be ordered to bring into court the deeds of his client. *M'Cann v. Beere*, 1 Hog. 129.

5. Where a solicitor receives in his professional character muniments of title from his client, the Court has jurisdiction, under a decree binding the client, to order his solicitor to bring in the deeds of his client in his possession, although he never appeared in the cause, and it is uncertain what time the deeds came into his possession. *Hargrave v. Holland*, 2 Ir. Eq. R. 137.

6. The plaintiff was trustee for sale of real estates. The decree directed the estates to be sold, and the title deeds (which were in the possession of the plaintiff's solicitor for the purpose of the suit) to be deposited. The solicitor refused to produce them, and claimed a lien on them for his costs of the suit; but the Court ordered him to deposit them. *Baker v. Henderson*, 4 Sim. 27.

7. After a decree for a sale, the solicitor of one of the defendants, a mortgagee, who had been paid off, but had not reconveyed, having the mortgage deed in his possession, being made a party by supplemental bill, and having admitted by his answer that he held the deed, having a lien thereon for costs incurred by the mortgagee, his client; on motion against the solicitor by plaintiff, ordered, that he should bring in the deed without prejudice to any claim he might have against his own client. *Plumtre v. O'Dell*, 1 Ir. Eq. R. 113.

8. An attorney who claims a lien for his costs upon the title deeds of a freehold estate decreed to be sold, which lien was acquired by him prior to the institution of the suit, will be ordered to deposit them in court, without prejudice to his lien, or to his making it available against the purchase money of the lands;

and having established his claim, he is entitled to be paid it out of the purchase money of the estate. Is he so entitled to be paid in priority to the demand of a judgment creditor, whose judgment was acknowledged prior to the acquisition of the lien by the attorney, *quære*. *Little v. Little*, 2 Jones 270.

9. On a petition, that certain bills of costs of a solicitor might be taxed after the amount had been paid and the papers had been delivered up:—Held, that the papers (which had been delivered up on the faith of a settlement), being necessary for the purpose of enabling the solicitor to support the bill of costs, must be placed in the Master's office for a limited time for inspection, and be subject to the solicitor's right of lien; but that the bill of costs be then taxed. *Re Downes*, 5 Jur. 984.

10. An executrix, who was also tenant for life under the will, died pending a suit for the administration of the testator's estate. The solicitor who had acted for her in the suit claimed a lien for his costs on deeds belonging to the estate. The suit was prosecuted against the administrator *de bonis non* of the testator in the absence of any representative of the deceased executrix:—Held, that the solicitor must bring the deeds into court, but subject and without prejudice to his claim of lien against the remainderman. *Turner v. Lotts*, 3 W. R. 352; 1 Jur., N. S., 486; 20 Beav. 185. And see S. C. on appeal, 3 W. R. 494; 1 Jur., N. S., 1057; 24 L. J., Ch., 638; 3 Eq. Rep. 846; 3 W. R. 494; 7 De G. M. & G. 243.

III. RIGHT TO LETTERS OF CLIENT, AND COPIES.

11. On payment of a solicitor's bill, the client is entitled to the possession of letters written to the solicitor by third parties, relating exclusively to his client's business, but not to copies of letters written by the solicitor to third parties, unless they are paid for by the client. *Re Thompson*, 20 Beav. 545; 1 Jur., N. S., 718; 24 L. J., Ch., 599; 3 W. R. 474.

Semble, that a solicitor is entitled to retain the original letters written to him by his client. *Id.*

12. Letters received by a solicitor from his client, and copies of letters addressed by a solicitor to his client, are the property of the solicitor. *Re Wheatcroft*, 46 L. J., Ch., 669; 6 L. R., Ch. D., 97; 26 W. R. 69.

13. Where the solicitor of a company writes a letter apparently on behalf of the company, he has no such property in it as to entitle him to prevent its publication, although he swears that it was written in his private capacity. *Howard v. Gunn*, 32 Beav. 462.

XVI. Costs, Taxation and Recovery of.

— *In Bankruptcy*. See BANKRUPTCY.

See also PRACTICE (COSTS).

I. *Statute 5 & 6 Vict., c. 73. Retrospective Effect*, 6453.

II. *Jurisdiction of Court of Chancery*, 6453.

III. *In District Registry*, 6454.

IV. *What Bills are Taxable*, 6454.

- v. *Bill of Costs, Delivery of*, 6455.
- vi. *Agency Bills*, 6458.
- vii. *Where Several Bills*, 6459.
- viii. *Order to Tax*, 6460.
- ix. *Who may Apply for Taxation*, 6462.
- x. *Under Third Party Clauses*, 6464.
- xi. *By or Against Representatives*, 6467.
- xii. *After Twelve Months*, 6468.
- xiii. *After Payment*, 6471.
- xiv. *After Action Brought*, 6480.
- xv. *Order to Tax as between Party and Party*, 6481.
- xvi. *Order to Tax as between Solicitor and Client*, 6481.
- xvii. *Jurisdiction of the Master*, 6482.
- xviii. *Special Allowances*, 6485.
- xix. *Scale*, 6502.
- xx. *Practice on Taxation*, 6503.
- xxi. *Payment into Court Pending*, 6504.
- xxii. *Review of*, 6505.
- xxiii. *Costs of Taxation*, 6507.
- xxiv. *Recovery of Costs*, 6511.
- xxv. *Recovery of Balances due from Solicitor to Client and vice versa*, 6516.
- xxvi. *Interest on Costs*, 6516.
- xxvii. *Interest on Balances and Advances*, 6517.
- xxviii. *Waiver of Taxation*, 6518.

I. STATUTE 5 & 6 VICT., C. 73. RETROSPECTIVE EFFECT.

1. Retrospective operation of the Solicitors Act, 5 & 6 Vict., c. 73, to make taxable bills not previously liable to taxation incurred before, but remaining unsettled at, the time of the passing of the Act. *Re Rhodes*, 8 Beav. 224; 14 L. J., N. S., Ch., 97.

2. The 5 & 6 Vict., c. 73, applies to bills of costs, although incurred prior to the Act, and although no part would have been before the Act taxable; where a special agreement covers only part of the bill, it is competent to the Master to proceed with the taxation, and without a special order; if the agreement is valid, and goes to the whole, as it would preclude taxation, the validity must first be decided, and *quære*, if the Master is authorised to decide as to the validity, and whether, if to be brought before the Court, upon petition, or by bill. *Re Eyre*, 2 Ph. 367; 17 L. J., N. S., Ch., 277. Affirming S. C. 10 Beav. 569.

3. The 6 & 7 Vict., c. 73, as regards taxation, is retrospective with respect to bill previously taxable, and also as to bills thereby made taxable, provided the latter remain unpaid at the passing of the Act. *Re Lees*, 5 Beav. 410; 13 L. J., N. S., Ch., 151.

Payment, before the Act came into operation, of a previously taxable bill, would not preclude taxation under the Act upon a proper application made in due time. But payment before the Act came into operation of a bill not previously taxable, precludes taxation. *Id.*

II. JURISDICTION OF COURT OF CHANCERY.

4. Court refused to order account of attorney's bill taxed by prothonotary of Common Pleas. *Osbaldiston v. Cross*, 2 Com. 612.

5. Order directing taxation of a solicitor's

bill for business done in the Court of Great Sessions, discharged; the Court not assuming jurisdiction for that purpose alone. *Esp. Partridge*, 3 Swan. 398.

The Court has no jurisdiction to order the taxation of a solicitor's bill of costs, for business done in a cause in the Court of Great Sessions in Wales, where there is no detention of title-deeds, nor any other matter besides costs in dispute. S. C. 2 Meriv. 500.

6. The Vice-Chancellors have jurisdiction, under Lord Langdale's Act, upon petitions for delivery and taxation of bills of costs. *Re Mole*, 1 Coop. C. C. 53.

7. The Master has no jurisdiction to tax costs under the 201st General Order, except with the consent of both solicitor and client. *Massey v. Millar*, Sau. & Sc. 425.

8. The Master's office is the proper place for the taxation of a bill of costs, etc., and a party acting adversely has no right to object to taxation by a clerk in court. *Bricknell v. Stanford*, 2 Jur. 1010.

9. Parties agreed to compromise a suit, and the trustee's costs were to be deducted out of a fund in his hands. By an order of the Vice-Chancellor, of England, the compromise was confirmed. It appeared to be the agreement between the parties that costs should be taxed in the cause. An application to the Master of the Rolls for taxation under the statute was refused with costs. *Re Howard*, 8 Beav. 424.

Jurisdiction of the Vice-Chancellor, under the 6 & 7 Vict., c. 75, to order the taxation of bills of costs. *Id.*

10. Under the Solicitors Act, 6 & 7 Vict., c. 73, references for taxation may be made by the Vice-Chancellors as well as by the Lord Chancellor, and Master of the Rolls. *Re Carew*, 8 Beav. 128.

11. When the common order for taxation has been obtained, not made in a suit or matter, but under the 6 & 7 Vict., c. 73, s. 37, all special applications connected therewith must be made to the Master of the Rolls, even though the Chancery proceedings in respect of which the order has been made may have been depending in some other branch of the Court, and orders may have been made therein. *Re Bell*, 2 Hem. & M. 501.

A Vice-Chancellor has no jurisdiction to discharge or vary a common order for taxation made by the Master of the Rolls, on a petition of course, merely intitled "In the matter of C. B., a solicitor," although the bill to be taxed relates to suits laid before the Vice-Chancellor. *Secus*, if the petition of course had been intitled in the suits. S. C. 12 W. R. 1076.

12. Charges in a solicitor's bill for obtaining an order from a judge at chambers for leave to enter satisfaction in the Common Pleas Office upon a bond given by the client to the Crown for malt duties:—Held, not to be for "business transacted in a Court of law," so as to oust the jurisdiction of the Lord Chancellor or the Master of the Rolls to order taxation of such bills; for that purpose, the business must be some proceeding either in a suit or with a view to a suit. Whether proceedings for the purpose of entering satisfaction on a judgment, with a view to the sale of an estate, would come within that description, *quære*. *Re Gaitkell*, 1 Ph. 576; 14 L. J., N. S., Ch., 450; 9 Jur. 909.

1. An application in a cause by a client, to tax a solicitor's bill, is not within the General Orders of May 1837. *Robins v. Mills*, 1 Beav. 227; *Bingham v. Hallam*, 9 L. J., N. S., Ch., 104.

2. The decision in *Robins v. Mills* (1 Beav. 227) is inapplicable where the merits of the cause must enter into the discussion. *Webb v. Grace, Re Vines & Hobbs*, 12 Beav. 489.

3. Two suits, attached to the V.-Ch. E., were compromised; in one there was an order to dismiss on the payment of costs, and the other was stayed only. The costs of both were paid under pressure, and there were overcharges:—Held, that the Master of the Rolls had jurisdiction to order a taxation. *Re Elmalie*, 12 Beav. 538.

4. The Court will not interfere with the taxation of costs in an action on the ground that a party is charging for costs which he has never incurred. Such a matter is solely within the exclusive jurisdiction of the Court of common law. *Elborough v. Ayres*, 18 W. R. 913; 39 L. J., Ch., 601; 23 L. T., N. S., 68.

5. By the combined operation of the Attorneys and Solicitors Act 1843 (6 & 7 Vict., c. 73, s. 37), and the Judicature Act 1873, s. 16, as modified by the County Courts Act 1856, s. 36, the costs as between solicitor and client in a county court action in which the claim exceeds 20*l.* may be taxed in the High Court of Justice; consequently, the costs as between solicitor and client in a county court administration action may be taxed in the Chancery Division. *Re Worth*, 18 L. R., Ch. D., 521; 50 L. J., Ch., 262; 44 L. T. 462; 29 W. R. 371.

III. IN DISTRICT REGISTRY.

6. When an administration decree directed accounts and inquiries to be taken in the district registry, and ordered that upon the result being reported the action should be heard in London on further consideration, the Court refused to allow the costs of the action to be taxed in the district registry. *Irlam v. Irlam*, 24 W. R. 949.

7. Except under very special circumstances the costs of actions commenced and carried on in a district registry ought to be taxed in London. *Day v. Whittaker*, 25 W. R. 767.

IV. WHAT BILLS ARE TAXABLE.

1. *In General*, 6454.

2. *Parliamentary and Electioneering Business*, 6455.

1. In General.

8. Proceeding before Lord Chancellor as exercising the visitatorial power upon a royal foundation, is not within 2 Geo. 2, c. 23, s. 23, to taxation of bill of costs. *Exp. Dann*, 9 Ves. 547.

9. The fees of the steward of a manor, who is a solicitor, but acts in the character of steward only, are not taxable under the 6 & 7 Vict., c. 73. *Allen v. Aldridge*, 5 Beav. 401; 13 L. J., N. S., Ch., 155; 8 Jur. 435.

This statute does not authorise the taxation of every pecuniary demand or bill of solicitor, for every species of employment, in which he may happen to be engaged. *Id.*

A bill may be taxed, though no part of the business was transacted in any court of law or equity: but such business must be connected with the profession of an attorney or solicitor, business in which the attorney or solicitor was employed, because he was an attorney or solicitor, or in which he would not have been employed if he had not been an attorney or solicitor, or if the relation of attorney or solicitor and client had not subsisted between him and his employer. *Id.*

10. The Court has jurisdiction to order taxation of solicitor's bill and delivery up of papers, upon payment of the costs so taxed, although no part of such costs has been incurred in respect of any suit, but are for conveyancing and other general business. *Re Rice*, 2 Keen 181; 6 L. J., N. S., Ch., 291; 1 Jur. 351.

11. A railway company having taken lands occupied by D.'s tenant, and the parties not agreeing to the compensation offered, steps were taken for holding an inquisition, in which one solicitor acted for D. and the tenants, but the company afterwards acceded to the valuation made for the tenant. A verdict was taken by consent for D., and the company gave a written undertaking to pay any sum to which the solicitor was entitled as solicitor for D. and his tenants, on same being ascertained by the proper officer under their act of incorporation. They took a conveyance from D., the costs of which and of making title were taxable in Chancery under their Act. The costs of ascertaining the compensation for the tenants should properly, under it, have been settled with their claim by justices of the peace, and the costs of an inquisition were taxable in a law court. The solicitor, having furnished a separate bill of costs for D. and the tenants, to which the company objected, petitioned for taxation, and to enforce payment:—Held, that the costs of D. only could be taxed or enforced in this court, and that the undertaking gave no jurisdiction as to the costs of the tenants. *Drogheda (Marquis) v. Great South & Western Railway*, 12 Ir. Eq. R. 103.

12. The bill of costs of a mortgagee's solicitor, for business done in relation to the mortgage, and the sale of the mortgaged estate, is taxable at the instance of the mortgagor, under the 6 & 7 Vict., c. 73, though no part of the business may have been transacted in any court of law or equity. *Re Lees*, 5 Beav. 410; 13 L. J., N. S., Ch., 151.

13. The costs incurred by trustees in paying money into court under the Trustees Relief Act, and also the costs of their appearing on paying it out, are subject to taxation. *Re Hue*, 5 Jur., N. S., 1235; 28 L. J., Ch., 893; 27 Beav. 337.

14. Costs in a cause must be submitted to taxation. *King v. King*, 1 Jur., N. S., 972.

15. When one solicitor asks another to look up some old deeds in his possession, and offers to pay his costs, the bill for these costs is taxable. *Re Bowen*, 41 L. J., Ch., 327; 20 W. R. 395.

16. Costs of a sequestration as between solicitor and client will not be taxed. *Re Shapland, Eep. Hunt*, 23 W. R. 40.

1. Bills of costs assumed to be taxable in equity where the solicitor had retained them in his possession, and declined to produce them. *Re Loughborough*, 23 Beav. 439.

2. Parliamentary and Electioneering Business.

2. No jurisdiction for taxing a solicitor's bill of costs for obtaining an Act of Parliament. *Exp. Whorler*, 3 Ves. & B. 21.

Taxation of a solicitor's bill in the House of Lords, only through the recognisance. *Id.* 22.

3. A bill by solicitors employed by a committee in soliciting and opposing bills in Parliament, procuring evidence, and employing surveyors, and receiving moneys only on account of their bill of costs, praying an account and payment of the balance due to him:—Held, to amount to a bill for taxation and payment, and demurrer allowed. *Allison v. Herring*, 9 Sim. 593.

4. In a bill of 344l., only 3l. 3s. 7d. was for business not connected with soliciting a new bill in Parliament:—Held, that notwithstanding the 10 & 11 Vict., c. 69, and 12 & 13 Vict., c. 78, for regulating the taxation of parliamentary bills of costs, and referring them to an officer of the Houses, a court of equity was not deprived of its jurisdiction to order taxation. *Re Strother*, 3 Kay & J. 518; 3 Jur., N. S., 736; 26 L. J., Ch., 695.

5. Candidates at a general election for members of Parliament employed a firm of solicitors as their election agents:—Held, that the employment was professional, and that their bill of costs was subject to taxation, within the provisions of the 6 & 7 Vict., c. 73. *Re Osborne*, 4 Jur., N. S., 296; 27 L. J., Ch., 532; 25 Beav. 353; 6 W. R. 401.

6. Where, for a parliamentary election, a solicitor was employed as canvassing agent, other persons being employed as legal agents:—Held, that his bills were not liable to taxation under 6 & 7 Vict., c. 73, s. 37. *Re Oliver*, 15 W. R. 331; 36 L. J., Ch., 261.

7. The court of a revising barrister for the registration of voters under the 6 & 7 Vict., c. 18, is not a "court" of law within the meaning of the 6 & 7 Vict., c. 73, s. 37, and therefore the jurisdiction of the Court of Chancery to tax a solicitor's bill of costs for electioneering business is not ousted if the bill contains an item for business done in such a court. *Re Andrews*, 17 Jur. 1145; 17 Beav. 510; 23 L. J., Ch., 129; 2 W. R. 46.

A bill of costs having been made out by a solicitor in the expectation that it would not be taxed, leave was given to present a petition to amend. *Id.*

8. A solicitor, who was appointed returning officer for the election of a school board under the Elementary Education Act 1870, sent in a bill of his charges in the form of a solicitor's bill of costs, including both the election charges proper and attendance at the board after the election was over:—Held, that, as he had by the form of his bill of costs constituted himself solicitor to the board, the bill was liable to taxation. *Re Jones*, 13 L. R., Eq., 336; 41 L. J., Ch., 367; 20 W. R. 895.

V. BILL OF COSTS, DELIVERY OF.

1. *Form and Signature*, 6455.
2. *Amendment*, 6456.
3. *Delivery. To Whom*, 6456.
4. *Order for Delivery*, 6456.
5. *Other Matters*, 6457.

1. Form and Signature.

9. Solicitor brings a bill for his fees. Plea of statute, 3 Jac., that the plaintiff had not signed his bill, good plea. *Norris v. Bacon*, 1 Vern. 312.

10. Delivery of a bill of costs unsigned, but accompanied by a letter signed by the solicitor, and referring to the bills, held a sufficient compliance with the 6 & 7 Vict., c. 73, s. 37. *Re Bush*, 8 Beav. 66; 14 L. J., N. S., Ch., 6.

11. The provisions of the thirty-seventh clause of the 6 & 7 Vict., c. 73, for the authentication by signature of a solicitor's bill of costs, are intended for the protection of the client only; and therefore where a bill has been delivered without such authentication, that circumstance is no objection to an application by the client for its taxation. *Re Pender*, 2 Ph. 69; 16 L. J., N. S., Ch., 25; 10 Jur. 891. Affirming 8 Beav. 299; 14 L. J., N. S., Ch., 277; 9 Jur. 339.

In general it is an objection to an order of course for taxation, that it contains a direction, on payment of the bill, which the order itself directs to be taxed, to give up more papers than the solicitor is bound to give up. But under the peculiar circumstances of this case, such an order was held not irregular. *Id.*

12. A solicitor and agent of a company retained parliamentary agents on behalf of the company. The bill of costs was delivered to the solicitor, but the directors of the company obtained an order for taxation:—Held, that such order was irregular. *Re Sudlow, Exp. Dover & Deal Railway Co.*, 11 Beav. 400; 18 L. J., N. S., Ch., 182.

13. A bill containing entries of various attendances, charges, and disbursements, but with a lump sum only charged at the end of the bill, is not a sufficient signed bill on which to found an action within 6 & 7 Vict., c. 73, s. 37. *Wilkinson v. Smart*, 24 W. B. 42; 33 L. T., N. S., 573.

14. The solicitor of a railway company in his bill charged 500 guineas, in a lump sum, for attendances and correspondences for a period of above one year. The bill was ordered to be taxed:—Held, that the solicitor might supply a detailed statement of the items comprised in the general charge exceeding that amount, but he could not increase his demand beyond 500 guineas. *Re Tilleard*, 32 Beav. 476.

15. A bill of costs for professional work done in part by one firm of solicitors and in part by another firm who have succeeded to the practice of the first firm is properly signed and delivered so as to enable the new firm to sue for and recover the whole costs, if, though itself unsigned, it is delivered together with a letter signed by the new firm referring to the bill. Professional work was done by a firm, which consisted at first of R. & P., and afterwards of P. & G., practising under the name

of R., P., & G., the business and debts of R. & P. having been transferred to R., P., & G. Bills for the costs of the whole work were delivered unsigned, but enclosed with a letter signed by R., P., & G. referring to the bills:—Held, that the bills were properly signed and delivered to enable R., P., & G. to sue for and recover the whole amount—as to the earlier items, as assignees of R. & P.; as to the later items, in their own right. *Penley v. Anstruther*, 52 L. J., Ch., 367; 48 L. T. 664.

2. Amendment.

1. A solicitor, having delivered his bill, is bound by it, and the taxation must be on that bill; he is not entitled as of course to reduce his demand, or to reserve the power of adding to the charges. *Re Curcen*, 8 Beav. 436; 14 L. J., N. S., Ch., 372.

2. A solicitor having knowingly, in his bill of costs, fixed the rate of his charges for business, cannot afterwards, on a taxation, be allowed to increase it. *Re Watters*, 9 Beav. 299.

Pending a taxation, leave given, upon special application, to carry in an additional bill for specified items of under-charge and omission, arising from error and mistake. *Id.* And see *id.* 302. n.

3. No alteration allowed in a bill of costs after the service of the copy thereof, without the permission of the Remembrancer, and notice to the other party. *Bourne v. Farran*, 6 Ir. Eq. R. 659.

4. Upon an application to tax a paid bill, the solicitor will not be permitted to add to any under-charges contained therein, but the taxation must be had on the bill as delivered and paid. *Re Wells*, 8 Beav. 416; 14 L. J., N. S., Ch., 215; 9 Jur. 820.

5. A solicitor cannot make nor has the taxing master any jurisdiction to permit any alteration or amendment to be made in a delivered bill, except by consent. *Re Catlin*, 18 Beav. 519.

6. By error and mistake, some items were omitted from, and others undercharged and overcharged in a bill of costs referred for taxation. On petition to the Master of the Rolls by the executor of the solicitor, liberty was given to insert the omitted items, and increase those undercharged; but he was not allowed to decrease the overcharges, and the costs of the application were ordered to be paid by the petitioner. *Re Whalley*, 20 Beav. 676.

7. Application of a solicitor, after an order for taxation, to withdraw a non-taxable item from his bill, refused. *Re Blakesley and Beswick*, 32 Beav. 379.

8. A solicitor, after delivering his bill of costs, may, before being served with an order for taxation, withdraw it, and substitute another bill of a reduced amount. *Re Chambers*, 34 Beav. 177; 5 N. R. 298.

A solicitor delivered his bill, which was objected to as excessive. He admitted that he had charged more than the Master would allow, and stated the circumstances under which he made the charges. Before service of the warrant to tax, and without knowing that any order had been obtained, he withdrew the bill and substituted a reduced bill. The Court

allowed the second bill to be substituted for taxation, on payment of the costs incurred up to the delivery of the substituted bill. 8 C. 11 Jur., N. S., 230; 34 L. J., Ch., 292; 13 W. R. 375; 11 L. T., N. S., 726.

9. Upon a taxation between party and party in equity, the bill of costs may be added to or varied after it has been brought into the office, at any time before the taxation is concluded; but the practice is different upon a taxation under the Attorney and Solicitors Act, 6 & 7 Vict., c. 73. *Davis v. Dysart (Earl)*, 21 Beav. 124; 1 Jur., N. S., 1153; 25 L. J., Ch., 122; 4 W. R. 41. Affirmed 25 L. J., Ch., 322; 8 De G. M. & G. 33.

10. The solicitor of a railway company in his bill charged 500 guineas, in a lump sum, for attendances and correspondences for a period of above one year. The bill was ordered to be taxed:—Held, that the solicitor might supply a detailed statement of the items comprised in the general charge exceeding that amount, but he could not increase his demand beyond 500 guineas. *Re Tilleard*, 32 Beav. 476; 9 Jur., N. S., 1217; 32 L. J., Ch., 765; 11 W. R. 476; 8 L. T., N. S., 142.

11. A solicitor who has delivered his bill to the person chargeable therewith cannot afterwards avoid taxation by withdrawing it and delivering an amended bill, even though the person chargeable sent back the original bill, with suggested alterations, which were partly acquiesced in. *Re Heather*, 5 L. R., Ch., 694; 39 L. J., Ch., 781; 18 W. R. 1079.

12. A solicitor cannot, upon objection being taken to the charges made in a bill of costs delivered by him, withdraw it and substitute another, unless the charges objected to were inserted upon misrepresentation or by mistake or accident, and unless such circumstances can be proved, the original and not the substituted bill must stand for taxation. *Re Heather* (5 L. R., Ch., 694) followed. *Re Chambers* (34 Beav. 177) explained. *Re Holroyde and Smith*, 43 L. T. 722; 29 W. R. 599.

13. An order was made to amend a bill of costs referred but not lodged for taxation, by striking out an item inserted in it by mistake. *Re Abbott*, 17 Ir. Ch. R. 200.

3. Delivery. To Whom.

14. Delivery of a bill of costs to an agent of the client, appointed for that purpose, held sufficient. *Re Bush*, 8 Beav. 66; 14 L. J., N. S., Ch., 6.

15. The delivery of a solicitor's bill of costs, on which to found a taxation of it, must be a delivery to the party chargeable with the payment of it; that is, to the client. *Re Abbott*, 4 L. T., N. S., 576.

Where, therefore, a bill of a mortgagee's solicitor was delivered to the solicitor of the mortgagor for taxation:—Held, to have been an improper delivery for the purpose. *Id.*

4. Order for Delivery.

16. A solicitor will be compelled to make out his costs, and furnish an account of credits to his client, though insolvent; but if he swears that a balance is due to him, he will not be

compelled to tax his costs, until a week after his client shall deposit the necessary stamp duty for the taxation. *Mutany v. Dillon*, 1 Hog. 292.

1. A solicitor, on payment of his costs, undertook to deliver his bill, but he neglected. On a petition presented more than twelve months after, the Court, under its general jurisdiction, ordered the delivery with costs. *Re Foljambe*, 9 Beav. 402.

2. A gross sum was paid to a solicitor in discharge of his claim, but no bill of costs was delivered:—Held, that the client was entitled to have a bill of costs delivered. *Re Blackmore*, 13 Beav. 154; 15 Jur. 784.

The solicitor of trustees and executors received payment of his bill of costs out of the estate:—Held, that a residuary legatee was entitled to have a copy of the bill delivered on payment of the costs of it. *Ib.*

The Court, notwithstanding there was not such pressure or such allegations and proof of overcharges as have been usually relied on in such cases, ordered the taxation of a solicitor's bill after payment. *Ib.*

3. Order, without cause in court, upon general jurisdiction over solicitor, that he shall deliver his bill for purposes of getting from him title deeds deposited with him for suffering recoveries, etc. *Exp. Uzbridge (Earl)*, 6 Ves. 425.

4. An *ex parte* order for the delivery of a bill of costs discharged with costs; the allegation of the professional employment being denied by the solicitor. *Re Eldridge*, 12 Beav. 387.

5. A solicitor was ordered to deliver his bill for taxation. Upon a motion to commit for the non-delivery, he swore he had no documents nor memoranda from which he could make out his bill. The Court made no order on the motion. *Re Ker*, 12 Beav. 390.

6. The proper mode of enforcing the delivery of a solicitor's bill is to serve the order with a proper indorsement, under the 23rd Consolidated Order, r. 10; and upon default, an attachment will issue as of course. *Re Bowen*, 9 Jur., N. S., 612; 11 W. R. 607.

7. To obtain a four-day order against a solicitor for the non-delivery of his bill, it must appear that the previous order has been personally served. *Re Wisemold*, 16 Beav. 357.

8. A party in a cause, who has obtained and served, according to the 12th Amended Order of August 1841, an order that his solicitor shall deliver his bill of costs within a month, which is disobeyed, is entitled, under the 15th Order of August 1841, to enforce obedience by the writ of attachment. *Lane v. Oliver*, 2 Hare 97; 12 L. J., N. S., Ch., 144; 6 Jur. 1080.

9. The proper mode of enforcing the delivery of a solicitor's bill is to serve the order with a proper indorsement under the 12th Amended Order of the 11th April 1842, and upon default being made, an attachment will go as of course. *Re Belton*, 25 Beav. 368.

10. An order on a solicitor to deliver his bill requires personal service. *Re Catlin*, 18 Beav. 510.

11. An order was made upon a solicitor for delivery of his bill within fourteen days. He was unable to comply, and on a motion for the second order, he asked for further time.

It was given, but he was ordered to pay the costs of the motion. *Re Dendy*, 21 Beav. 565.

12. Summary order upon a petition under the 6 & 7 Vict., c. 73, s. 37, against assignees in bankruptcy of a country solicitor, who had employed a land agent to deliver their bills of costs, and against the agent to deliver his bill of costs and petitioner's papers in his possession. *Re Walton*, 4 Kay & J. 78.

Such petitions should be intitled, in the matter of both solicitors; but a petition in the matter of a solicitor need not be intitled, in the matter of the Act. *Ib.*

13. Variation in common form of the order of course to deliver and tax a solicitor's bill. *Re Smith*, 19 Beav. 329.

14. A solicitor of a mortgagor ordered, upon petition, to deliver to a mortgagee a copy of his bill of costs, in pursuance of his undertaking. *Re Bailey*, 34 Beav. 392.

15. An order to deliver a bill of costs within fourteen days after notice was served, on June 30th, without the indorsement as to liability to attachment. The order was again served, properly indorsed, on July 19th:—Held, that an attachment might issue for disobedience to it. *Re Gregg*, and *Re Prance*, 39 L. J., Ch., 107; 9 L. R., Eq., 137; 18 W. R. 589.

16. Where a solicitor's bill of costs, or the delivery of documents in his possession, is required on other grounds than those relating to taxation, the application may be made by way of petition, notwithstanding the General Order of 17th April 1867. *Re Justice*, 16 W. R. 821.

17. A bill by a country solicitor against a London solicitor, alleging that he had made a special agreement with the plaintiff to transact certain business for him on agency terms, and charging that the defendant falsely pretended that the agreement was one not for agency but for partnership in the particular business. The bill charged that, on either construction of the agreement, the plaintiff was entitled to an account, and prayed that the defendant might deliver his bills of costs as the plaintiff's agent, and also for a general account of all dealings and transactions between them. The defendant demurred, on the ground that the proper remedy of the plaintiff was by petition under 6 & 7 Vict., c. 73, s. 37:—Held, that the demurrer ought to be overruled. *Ward v. Lawson*, 8 L. R., Ch., 65; 42 L. J., Ch., 273; 21 W. R. 88.

18. An order of course requiring a solicitor to deliver his bill of costs within fourteen days, not being obeyed, the next order is, that he may deliver it within four days or stand committed. *Re Baxter*, 11 Beav. 37.

5. Other Matters.

19. A solicitor who delivers an unsigned bill of costs is bound by it; but his client may either treat it as a nullity or waive the want of signature, and adopt it; though after such waiver, the client cannot treat the bill as non-delivered. *Re Gedye*, 14 Beav. 56; 20 L. J., N. S., Ch., 410; 15 Jur. 851.

20. In a suit instituted by a solicitor for payment of costs due to him from a client, it appeared by the answer that he had not

delivered a signed bill, conformably to the Act of Parliament. A bill duly signed was subsequently delivered, and that fact was put in issue by a supplemental bill. *Semble*, the defect in title of the plaintiff, as it stood at the institution of the suit, was not cured; but held, that the objection, not having been urged at the original hearing, could not be taken at the hearing on further directions. *Pritchard v. Draper*, 1 Russ. & M. 191; Taml. 332.

1. Before the New Orders, where an order directed that a Master should tax costs, in case the parties differed about the same, the party claiming the costs was at liberty to proceed, in the first instance, to have the costs taxed before the Master, without previously delivering a bill to the party required to pay the same, or to his solicitor. *Audrey v. Hoper*, 5 Russ. 1.

2. Where a solicitor has been retained for and undertaken a particular business his bill of costs for carrying that business, through to its conclusion is but one bill. *Stokes v. Trumper*, 2 Kay & J. 232.

VI. AGENCY BILLS.

3. Statute of Taxation does not apply to country agency. *Binsted v. Barefoot*, Dick. 112.

4. Order on the application of a solicitor to tax his own agent's bill. *Cornor v. Hake* (2 Cox 173) overruled. Beam. Costs 308.

5. The Court has jurisdiction to order an agent's bill of costs to be referred for taxation, on the application of the solicitor who employed him; and in a case where the amount of the bill exceeded the amount of moneys received by the agents in that character, and retained by them, by a sum of 1*l.* 10*s.* 10*d.* only, the taxation of the bill was ordered, upon payment or tender of that sum to the solicitor of the agents. *Jones v. Roberts*, 8 Sim. 397; 7 L. J., N. S., Ch., 156; 2 Jur. 30.

6. This Court has authority to refer for taxation the bill of costs of a solicitor who acts as agent for another. *Toghill v. Grant*, 2 Beav. 261; 9 L. J., N. S., Ch., 298.

7. The taxation of the bill of costs of the agent of a solicitor, upon the footing of a special agreement requiring the Master to depart from the ordinary rules of taxation, cannot be obtained upon petition. *Re Smith*, 4 Beav. 309.

In general, a solicitor cannot obtain the taxation of his agent's costs, without bringing the amount into court; but, under special circumstances, that condition will be dispensed with or the amount limited. *Id.*

8. An order for the taxation of an agent's bill cannot be obtained as of course by a solicitor, nor can the rule for bringing the amount of the agent's bill into court upon such application be dispensed with, except under special circumstances. *Lees v. Nuttall*, 2 Myl. & K. 284; 3 L. J., N. S., Ch., 124.

9. A solicitor cannot obtain the taxation of his agent's bill, without bringing the amount into court. *Osile v. Christian*, T. & R. 324.

10. The bill of town agent of attorney cannot be ordered to be taxed on motion of client. *Wildbore v. Bryan*, 8 Price 677.

11. A, a solicitor, being one of three mortgagees, arranged with another solicitor, B., to "act as his agent" in the matter of the mortgage, on agency terms. B. accordingly acted, and sent in his bill prepared as between solicitor and client, which was paid by the mortgagees. B. allowed A. 100*l.* as his share of the profits. After this, on the application of second incumbrancers, the bill was taxed:—Held, that the taxing master was right in taxing it on the principle of solicitor and agent, for the agreement between A. and B. was valid, though it inured to the benefit of the mortgagees; and that the bill was properly taxable, at the instance of the second incumbrancers, as between them and B. *Re Taylor*, 18 Beav. 165; 18 Jur. 666; 23 L. J., Ch., 857; 2 W. R. 249.

12. A bill was filed by a country solicitor against his town agents for an account of cash transactions between them:—Held, that as the account might have been obtained under the common order for taxation, the bill must be dismissed. *Harvey v. Mayhem*, 2 W. R. 128.

13. A solicitor agreed to undertake the defence of another solicitor upon agency charges. On special petition, a taxation of his bill was ordered "having regard to the agreement." *Re Gedye*, 23 Beav. 347.

A solicitor agreed to conduct the defence of another solicitor upon agency terms, in case of the defence being unsuccessful. On entering into the agreement, the latter suppressed from the former the existence of a material correspondence, which was a principal ground of a decree being made against him. But the solicitor, after the discovery, still continued the defence without objection:—Held, that he was not released from the contract. *Id.*

14. Messrs. S., solicitors, promised, by letter, to conduct the professional business in which F. might be concerned, "personally or otherwise," upon the terms of receiving agency charges. F. was a solicitor, but he had omitted to take out his certificate. At that time he was interested in a suit which he had procured to be instituted against himself, for the purpose of administering the estate of a testatrix, whose executor he was, and in whose estate he was beneficially interested. Upon the completion of this business, Messrs. S. obtained the whole of the money belonging to F. out of court; they repudiated the letter, and insisted upon their right to costs as between solicitor and client; they also refused all accounts, and never delivered any bill of costs. Upon a bill by F.:—Held, that the letter was a valid agreement; that Messrs. S. were not entitled to higher charges because F. was uncertificated; that his being uncertificated was immaterial, as such an agreement was legal if made with any client; that the transaction was such that it could not be taxed under the common order; and that it was necessary to file a bill and abandon the common order which had been obtained for taxation: and a reference was directed to the taxing master to tax the bill of costs as between principal and agent. *Foley v. Smith*, 20 L. J., N. S., Ch., 621.

F. had also mortgaged his interest to Messrs. S., to secure a sum of 150*l.*, which they were to pay for F., but though they omitted to make the payment, and retained that with

other money in their hands, the Court treated it as an ordinary sum of money in hand, and declined to direct the taxing master to allow the plaintiff interest upon those sums, though the mortgage which was to include them was bearing interest. *Id.*

1. The solicitor of a defendant in the cause, and who is himself a defendant in the same cause, and appears by a second solicitor, cannot be allowed more than one bill of costs, if it appears that the second solicitor has, either before or after his retainer, agreed to allow his client, the first solicitor, a portion of the profits of his costs in the cause. If, in the judgment of the taxing master, there be ground to suspect that an arrangement has been made between solicitors in the cause, by which a portion of the profits of the bill of costs is to be paid to another, it is in the discretion of the taxing master to require affidavits from the solicitors as evidence of the facts; and, if such an arrangement should appear, the bills of costs ought to be taxed as in case of agency. A., B., and C. were defendants in the cause, against whom the bill was dismissed with costs. B. and C. acted as the solicitors of A., and appointed D. to act as their own solicitor in the same cause. After the retainer, an agreement was entered into between B. and D., whereby D. agreed to allow B. and C. a portion of the profits of his bill of costs:—Held, that the agreement constituted D., in substance, an agent for B. and C., and that the separate bills of costs of B. and of C. and D. were properly taxed as a joint bill, and that all such costs as would not have been allowed in a case of agency were properly disallowed. *Deere v. Robinson*, 7 Hare 283; 19 L. J., N. S., Ch., 405.

2. A. employed B., a writer to the signet, as his law agent in Scotland; and on the recommendation of B., he employed C. as his solicitor in England. By a private agreement between B. and C., the latter arranged to allow the former half the profits of the business transacted by him for A. Upon a taxation of C.'s bill, A. presented a petition, claiming the benefit of the agreement between B. and C., but it was dismissed with costs. *Gordon v. Daltell*, 15 Beav. 351; 16 Jur. 186; 21 L. J., Ch., 206.

3. A bill in equity alleged a particular contract as to agency, but charged that the defendant pretended that the contract was one of partnership, and that upon either construction he was liable to account, and prayed for discovery of all matters of business relating to the agency; that he might deliver his bills of costs for taxation, and for an account. *Demurrer overruled. Ward v. Lawson*, 8 L. R., Ch., 65; 42 L. J., Ch., 273; 21 W. R. 88.

When there is an agreement as to costs, which only goes to the extent of the charges to be paid, the Master may take that into consideration, and a bill in equity is not the proper remedy; but where the agreement goes farther, and there is, on the face of the bill, a dispute as to whether the agreement was one of agency or of partnership, a bill will be sustained. *Id.*

4. When one solicitor asks another to look up some old deeds in his possession, and offers to pay his costs, the bill for these costs is taxable. *Re Boren*, 41 L. J., Ch., 327; 20 W. R. 395.

5. Notwithstanding the definition of the word "client" in s. 3 of the Attorneys and Solicitors Act 1870, that Act does not apply to accounts between country solicitors and town agents. *Ward v. Eyre*, 15 L. R., Ch. D., 130; 49 L. J., Ch., 657; 43 L. T. 525; 28 W. R. 712.

VII. WHERE SEVERAL BILLS.

6. A solicitor was employed by a testator in his lifetime, and by his executors and trustees after his death; the latter having applied for a taxation of the bills subsequent to the death:—Held, that the solicitor was, on this application, entitled to have a taxation of all the bills. *Re Dalby*, 8 Beav. 469.

7. An order for the taxation of a solicitor's bill, on the undertaking of A. to pay the same, does not extend to a bill of costs, for which A. is liable jointly with B. *Collins v. Price*, 1 L. J., N. S., Ch., 94.

A. was individually indebted to a solicitor for costs in a cause, and A. and B. were jointly indebted to the same solicitor for costs relating to other business. A. obtained an order for the taxation of the solicitor's bill of costs in the cause, and all other suits, causes, and matters wherein he had been employed by A.; and it was ordered, that all proceedings against A. should be stayed. The solicitor afterwards arrested A. and B. for their joint account:—Held, that such proceeding was not a breach of the order. *Id.*

8. If A. employs B. as solicitor in business, the bill for which is not taxable, and also requires B. to strike a docket, and B., because he is not admitted as a solicitor in bankruptcy, employs C., a solicitor of the court, for that purpose, B. cannot divide his bill so as to exclude from taxation the otherwise untaxable items by procuring C.'s bill of costs to be taxed separately; but B.'s own bill and C.'s must form one bill, so that all may be taxed. *Exp. Cass*, 4 Dea. & Ch. 718; 2 Mont. & A. 170.

9. A client, who had employed a solicitor in several matters, obtained an order of course for the taxation of the costs of one matter only, with a direction that, on payment, the solicitor should deliver all the papers belonging to the client. It was discharged with costs for irregularity. *Holland v. Gwynne*, 8 Beav. 124.

10. Solicitor employed in a suit, and a prosecution arising thereout, delivered two bills. The surviving plaintiffs obtained an order for the taxation of the bills, submitting to pay what was due. On the taxation of their said bills before the taxing master, they disputed their retainer in the prosecution. The Master having completed the taxation, they presented a petition praying that they might be ordered to pay the first bill only, and that, if necessary, the Master's certificate, and the order for taxation, might be varied. The petition was dismissed with costs. *Re Springall*, 8 Beav. 63; 14 L. J., N. S., Ch., 12.

11. A solicitor delivered four bills, the last of which and the cash account showed upon the whole a large balance due to him. He brought an action to recover the balance, whereupon the client obtained an order of course to tax the last bill and to stay the action in the meantime. The order was held irregular, and

was discharged with costs. *Re Yetts*, 33 Beav. 412; 3 N. R. 598.

1. A solicitor claimed five bills of costs against his client. The client obtained an order of course to tax two only. It was discharged with costs. *Re Law*, 21 Beav. 481.

2. An order for taxation of two out of four bills of costs, and the delivery up of the papers, discharged, but without costs, the solicitor having attended the Master without having objected, and not having applied to discharge the order until six weeks after notice of it. *Re Wavell*, 22 Beav. 634.

See also XII. 2 *infra*.

VIII. ORDER TO TAX.

1. *How Obtained*, 6460.
2. *Petition or Summons. Form and Contents*, 6461.
3. *Suppression of Material Facts*, 6461.
4. *Within One Year*, 6462.
5. *Other Cases*, 6462.

1. How Obtained.

3. Order for taxing a bill of costs, entitled in the cause, if obtained by the party to the cause, regular under the general jurisdiction. But a person not a party in the cause, must apply *ex parte* under the stat. 2 Geo. 2, c. 25, s. 22. Such an irregularity would be waived by proceeding under the order. *Bignol v. Bignol*, 11 Ves. 328.

4. An irregular order for taxation may be waived, but it must be done in some clear and unequivocal manner. *Re Mackrill*, 11 Beav. 42.

5. Bills of costs will be ordered to be taxed upon petition, and a bill is not necessary, unless it be to set aside securities obtained from the client. *Hamilton v. Bremster*, 2 Moll. 407.

6. A motion on behalf of a person who had obtained an order for the taxation of his solicitor's bill of costs, to discharge that order, and to have it declared that his solicitor was incapable of acting as such under the 39 Geo. 3, c. 90, and consequently not entitled to claim his bill of costs, was held to be open to objection (if properly taken) for irregularity; the Court considering that such an application ought to have been made by petition. *Ex p. Chambers, Re Wilton*, 2 Keen 497; 9 L. J., N. S., Ch., 200; 2 Jur. 489.

7. In an action by a person against his solicitor, who pleaded a set off for a bill of costs, part of which was incurred in the Courts of Westminster, all matters in difference were referred to an arbitrator; "but no question of liability was to be raised." The solicitor had not been admitted in the courts of Westminster, and so much of the costs as had been incurred therein were disallowed by the arbitrator. The Court of Exchequer set aside the award on the application of the solicitor, on the client refusing to go again before the arbitrator, and afterwards stayed proceedings in the action, with liberty for the plaintiff to go before the arbitrator, with directions that the costs should be allowed. The plaintiff declined to proceed in the arbitration, and obtained a

common order in Chancery, for the taxation of the costs and delivery over of the papers:—Held, that as the proceeding at law had failed, the client was entitled to the taxation; but that the order ought not to have been obtained *ex parte*. *Jones v. James*, 2 Keen 184; 6 L. J., N. S., Ch., 293.

8. The taxation of the bill of costs of the agent of a solicitor, upon the footing of a special agreement requiring the Master to depart from the ordinary rules of taxation, cannot be obtained upon petition. *Re Smith*, 4 Beav. 309.

9. An order referring a solicitor's bill for taxation may be made without notice in either of the two first classes of cases provided by 6 & 7 Vict., c. 73, s. 37. *Re Gaitskell*, 1 Ph. 576; 14 L. J., N. S., Ch., 450; 9 Jur. 909.

10. The decision in *Re Gaitskell* (1 Ph. 576), in which it was held that applications for the taxation of bills in the second class of cases, provided for by the 37th section of the statute 6 & 7 Vict., c. 73, do not require notice confirmed. *Re Pender*, 2 Ph. 69; 16 L. J., N. S., Ch., 25; 10 Jur. 891. Affirming 8 Beav. 299; 14 L. J., N. S., Ch., 277; 9 Jur. 339.

11. Where an order for taxation had been obtained as of course, for which a special application ought to have been made, the Lord Chancellor discharged the order with costs. *Harris v. Start*, 4 Myl. & C. 261.

12. Where the common order for the taxation of a solicitor's bill of costs has been obtained *ex parte*, and the solicitor applies to discharge it, on the ground that the order ought to have been obtained on special application, the Court will not enter into the merits, further than to decide on the regularity of the order; and will not, even if the facts warrant it, then make a special order for taxation: such order must be the subject of another application by the client. *Gragg v. Taylor*, 1 Beav. 123; 8 L. J., N. S., Ch., 98.

13. An order of course for taxation cannot be supported on merits as a special order, upon the occasion of a motion to discharge it. *Grove v. Sansom*, 1 Beav. 297.

14. C., with others, guaranteed payment to the extent of their respective subscriptions of the expenses of an application for an Act of Parliament. T., who acted as the solicitor in the matter, brought an action against C. for the amount of his bill of costs. C. paid into court the amount subscribed by him, and pleaded to the action. Subsequently C. presented a petition, and obtained an order of course for taxation. The petition did not contain a submission to pay, nor the order any direction to the taxing master to state the amount due from C. to T. On a motion to discharge this order with costs:—Held, that an order on a petition presented under such circumstances was not of course; that where taxation was asked and the retainer disputed a special application and order were necessary. Such an order was now offered to the petitioner, and if rejected, the order of course to be discharged, but without costs, on the ground that such order of course was in accordance with the practice in the offices. *Re Thurgood*, 2 Eq. Rep. 1152; 2 W. R. 682; 19 Beav. 541; 18 Jur. 821; 23 L. J., Ch., 952.

15. A client may obtain an order of course

to tax his solicitor's bill, although some of the items are included in an existing order to tax in a suit. *Re Fluker*, 20 Beav. 143.

1. A solicitor delivered a bill of costs with a cash account at the foot, which showed a balance due to him larger than the amount of the bill, and then brought an action for the whole amount:—Held, that, under the circumstances, the common order to tax was improper, and that a special application must be made. *Re Yetts*, 3 N. R. 598; 33 Beav. 412.

2. A client presented a special petition for the taxation of his solicitor's bill, complaining that he had taken reckless proceedings, and praying that the costs of them might be wholly disallowed on taxation. A special petition was held to be unnecessary, and the petitioner was ordered to pay the costs of it. *Re Atkinson*, 26 Beav. 151.

3. Where a solicitor retains money, received for his client, in payment of costs alleged to be due to the solicitor, an application for the delivery and taxation of the bill, and for payment of the amount retained in excess, is an application under the 6 & 7 Vict., c. 73; and therefore, since the General Order of the 2nd August 1864, such an application must be made by summons in chambers, not by petition. *Re May*, 5 N. R. 297.

4. Special applications for delivery and taxation of a bill, and for payment over to the applicant of the balance of the cash account, must be made by summons, and not by petition. *Re Edmonds*, 19 W. R. 1048; 25 L. T., N. S., 152.

See also X. 1—XIII. 2 *infra*.

2. Petition or Summons. Form and Contents.

5. It is no objection to a petition to tax the solicitor's bill, that it contains allegations reflecting on the conduct of the solicitor; for, if such allegations are improper, they may be referred for scandal. *Exp. Wells*, 1 Dea. 69.

6. A petition for the taxation of a bill of costs, which sufficiently sets forth special circumstances for taxation, need not mention the specific items which are objected to. *Exp. Andrews*, 13 L. J., N. S., Ch., 222; 8 Jur. 827.

7. In a petition to tax, it is not necessary to specify all the items objected to. *Re Dawson*, 28 Beav. 605.

8. In a proceeding by summons for taxation, it is not necessary to specify palpable overcharges by affidavit. *Re Brady*, 15 W. R. 632.

3. Suppression of Material Facts.

9. A solicitor was employed by two persons, A. and B.; an order of course for taxation was obtained by A. alone, on the allegation that the solicitor was employed by A. It was discharged for irregularity. *Re Perkins*, 8 Beav. 241; 14 L. J., N. S., Ch., 168; 9 Jur. 220.

10. A. B., who claimed some property, conveyed it to trustees, upon trust for carrying on the litigation and payment of the costs, etc. The trustees employed a solicitor, and they raised a sum of money upon A. B.'s notes, drawn for the purpose, which they placed in

the solicitor's hands. A. B. alone obtained an *ex parte* order for taxation; it was discharged for irregularity. *Exp. Mobbs*, 8 Beav. 499.

11. A. agreed to take a lease and to pay the expenses. The lease was prepared by the lessor's solicitor, who delivered his bill, made out as against the lessee. The lessee obtained an order to tax the bill on an allegation that he, the lessee, had employed the solicitor, which, being contrary to the fact, the order was discharged, but without costs, the matter in difference being very small. *Re Gabriel*, 10 Beav. 45.

12. An original cause and cross-cause for discovery were attached to Vice-Chancellor Knight Bruce's Court. The original cause was heard before an answer to the cross-cause had been obtained. The defendant to the bill of discovery then put in his answer, and obtained at the Rolls an order of course for his costs, suppressing the fact that the bill of discovery was a cross-bill. It was discharged for irregularity. *Watts v. Penny*, 11 Beav. 435; 18 L. J., N. S., Ch., 150; 13 Jur. 578.

13. An *ex parte* order for the delivery of a bill of costs discharged with costs; the allegation of the professional employment being denied by the solicitor. *Re Eldridge*, 12 Beav. 387.

14. Order of course for taxation discharged, on the ground of the case being misstated upon the petition for the order. *Re Carvon*, 8 Beav. 436; 14 L. J., N. S., Ch., 372.

15. A client agreed to pay his solicitor three guineas a day, in addition to the usual charges of a solicitor, for his travelling and other expenses. The Court, being of opinion that, under the common order of taxation, the Master would take the agreement into consideration:—Held, that its suppression, in obtaining an *ex parte* order, was not irregular. *Re Eyre*, 10 Beav. 569; 2 Ph. 367; 17 L. J., N. S., Ch., 277.

16. Order of course for taxation discharged on the ground of the suppression of an alleged previous reference to arbitration, though the fact was disputed. *De Feuchères v. Daves*, 11 Beav. 46.

17. Order for taxation, made upon affidavit of service, discharged with costs; the petition having misrepresented the case, and the real facts being found not to warrant the order. *Re Rees*, 12 Beav. 256.

18. A. B. employed a solicitor in the matter of a mortgage, and there was a dispute between them whether he was not also liable for the costs of legal proceedings taken in the name of a third party. A. B. obtained *ex parte* at the Rolls an order for taxation. He stated, however, the mortgage transaction alone, and suppressed the other matters. It was discharged on the ground of the suppression. *Re Walker*, 14 Beav. 227.

19. An order of course for taxation discharged on the ground of the suppression of the fact that there had been a previous order of the Queen's Bench for taxation, upon terms which had not been complied with, and a subsequent application to the Exchequer for taxation, which had been refused. *Re Gedye*, 15 Beav. 254; 21 L. J., N. S., Ch., 430.

20. Upon an arbitration between A. and B., A.'s costs were directed to be paid by B., and were moderated by the arbitrator, and paid.

A. afterwards obtained an order of course to tax his solicitor's bills of costs, suppressing these facts. The order was discharged. *Re Winterbottom*, 15 Beav. 80.

The rule, that on application for orders of course all material facts must be stated, is to be strictly adhered to. *Id.*

1. An order of course was obtained for the taxation of two bills of costs. One had been paid, and the fact had been suppressed. The Court discharged the order altogether. *Re Hinton*, 15 Beav. 192.

2. In December an account was signed by a client, one item of which was the amount of a bill of costs previously delivered. The balance was paid over a month after. Four months afterwards the client, suppressing settlement, obtained an order of course to tax. It was discharged. *Re Holland*, 19 Beav. 315; 2 W. R. 514.

3. A client applying for the common order to tax a bill of costs ought to disclose the existence of an agreement respecting its payment, although the contents may not be known. *Re Ingle*, 21 Beav. 275; 1 Jur., N. S., 1059; 25 L. J., Ch., 169.

A client obtained an order of course for the taxation of his solicitor's bill. A special agreement existed between them, which ought to have been mentioned on the application; but this was in the possession of the solicitor, who refused to furnish a copy. The Court declined to discharge the order, though irregular. *Id.*

4. A., the next friend of infants in a suit, employed B. as solicitor therein and in other matters. An order was made, in the suit, for the taxation and payment to B. of his costs of suit. Before this had been done, A. obtained, *ex parte*, an order to tax B.'s bill in all the matters in which he had been employed for A.:—Held, that the order was regular. *Re Fluker*, 20 Beav. 143.

5. In an action by a client against his solicitor, the latter pleaded his bill by way of set off. The client obtained an order for the delivery of the bill, and suffered himself to be nonprossed:—Held, that it was not necessary to state these circumstances in an *ex parte* application in Chancery for taxation. *Re David*, 30 Beav. 278.

6. Circumstances under which a court of equity will discharge an order for taxation of a solicitor's bill. *Re Abel*, 15 W. R. 730.

7. C. acted as solicitor for X., and before his bill was paid he took P. into partnership. X. then paid the bill by cheque to the order of C. and P., and received an acknowledgment in their joint names, but in P.'s handwriting. He then took out an order to tax the bill as against C. and P. They then wrote to him informing him that C. alone was interested in the bill, and requested him to get the order altered so as to be against C. alone, but this he declined to do:—Held, that the order must be discharged, C. consenting to an order against himself alone. *Re Curnot*, 40 L. J., Ch., 608.

4. Within One Year.

8. Under the 6 & 7 Vict., c. 73, any party entitled to the order may obtain it as of course, and without special directions, within one month after delivery; and with such special directions,

as the Court may order to be imposed, after the expiration of one month from the delivery, but not after verdict, writ of inquiry, or payment. In those cases a special order made upon special circumstances, to be proved to the satisfaction of the Court, is required. *Re Beaka*, 5 Beav. 406; 13 L. J., N. S., Ch., 157; 8 Jur. 505.

9. After the expiration of a month from the delivery of a bill of costs, and before the expiration of twelve months, an order of course may be obtained for its taxation. *Holland v. Gwynne*, 8 Beav. 124.

10. Terms of taxation, after the expiration of one month from the delivery of the bill. *Re Bromley*, 7 Beav. 487; 13 L. J., N. S., Ch., 320.

11. An application to tax a bill within a year of its delivery should be made by common order, and not by special summons, although a payment may have been made on account. *Re Woodard*, 18 W. R. 87.

See also 1 *supra*.

5. Other Cases.

12. The order of course for taxation is to refer to business in which the solicitor "has been employed," not to fees, etc., which "he claims to be due." *Re Smith*, 19 Beav. 329.

13. Upon a petition for taxation, the solicitor offered to repay the matters of overcharge therein specified. The offer was not accepted. Taxation ordered treating the specified items of overcharge (upon their repayment by the solicitor), as omitted from the bill. *Re Cattlin*, 23 Beav. 412.

14. Where an order of course made at the Rolls for the taxation of a solicitor's bill of costs of a suit is not made in such suit, an application to vary or discharge the order ought to be made at the Rolls. *Re Bell*, 4 N. R. 497.

15. A fiat was sued out on the 7th June, by an attorney against his debtor, for the amount of his bill of costs, and the bankrupt was shortly afterwards discharged under the Insolvent Act, having inserted the amount of the attorney's bill in his schedule. The bankrupt passes his last examination, and on the 4th December petitions for an order to tax the attorney's bill, with a view of superseding the fiat, on the ground of the insufficiency of the petitioning creditor's debt:—Held, that the bankrupt could not, after lying by so long, and after his previous admission of the debt, apply for such an order. *Exp. & Re Gingell*, 2 Dea. & Ch. 546; 2 L. J., N. S., Bky., 22.

IX. WHO MAY APPLY FOR TAXATION.

1. *Solicitor*, 6462.
2. *Married Woman*, 6463.
3. *Trustees in Bankruptcy*, 6463.
4. *Persons Jointly Liable*, 6463.
5. *Other Persons*, 6463.

1. Solicitor.

16. Taxation of costs not ordered on application of solicitor himself. *Sayers v. Walond*, 1 Sim. & S. 97.

1. A solicitor has no statutory right to have the amount of his charges ascertained by taxation only. *Exp. Ditton, Re Woods*, 13 L. R., Ch. D., 318; 42 L. T. 161; 28 W. R. 402.

A solicitor who tenders a proof in the bankruptcy of his client, in respect of costs due to him by the client, is not entitled to insist on having his bill referred for taxation to the taxing master, but the registrar has jurisdiction to determine the amount due, availing himself, if necessary, of the advice of the taxing master. *Id.*

2. Married Woman.

2. In every case where a married woman seeks to tax a solicitor's bill, for business in respect of her separate estate, she must apply by her next friend. *Re Waugh*, 15 Beav. 508; 22 L. J., Ch., 612; 21 L. J., Ch., 567.

The next friend will be liable for the costs of the order and taxation, but not for the amount of the bill. *Id.*

A married woman, having obtained an order to tax without the intervention of a next friend, was ordered to give security, and in default the order was to be discharged. *Id.*

3. Where a married woman employs a solicitor, and makes her separate estate liable, she is, though not personally liable, a "party chargeable," within the meaning of the 37th section of the 6 & 7 Vict., c. 73. *Waugh v. Waddell*, 16 Beav. 521; 1 W. R. 206.

3. Trustee in Bankruptcy.

4. When the client of a solicitor becomes bankrupt, and the solicitor does not prove for the amount of his bill in the bankruptcy, the assignee cannot obtain an order to tax without giving an undertaking to pay the whole amount of the bill. *Re Elmstie*, 9 L. R., Eq., 72.

5. Order for taxation obtained by an insolvent debtor of a bill of costs incurred prior to his insolvency, discharged with costs. *Re Halsall*, 11 Beav. 163.

4. Persons Jointly Liable.

6. Where any part of solicitor's bill relates to business done in this Court, the whole may be taxed, although part of the business was for other persons jointly with the person applying. *Margerum v. Sandiford*, 3 Bro. C. C. 233.

7. A bill of costs having been incurred by A. and B. jointly, and an action having been brought against them for the recovery of the amount, the Court refused to direct a taxation, and to stay the proceedings at law, on the undertaking of A. alone to pay what might be found due. *Re Chilcote*, 1 Beav. 421.

8. Bill of costs incurred by two persons, ordered to be taxed on the application, and upon the undertaking of one. *Lockhart v. Hardy*, 4 Beav. 224.

9. A solicitor was employed by two persons, A. and B.; an order of course for taxation was obtained by A. alone, on the allegation that the solicitor was employed by A. It was discharged for irregularity. *Re Perkins*, 8 Beav. 241; 14 L. J., N. S., Ch., 168; 9 Jur. 220.

10. A solicitor was employed by three partners. He brought an action against them for his bill of costs, and, representing one, he obtained judgment against him by default:—Held, that this did not prevent the others from obtaining an order for taxation: held, also, that an application for taxation by the two was regular, the third not concurring, but that he ought to be served with the petition. The taxing masters have jurisdiction to determine questions of retainer. *Re Hair*, 10 Beav. 187; 16 L. J., N. S., Ch., 163; 11 Jur. 139; 1 W. R. 269.

11. Where a solicitor is retained by two persons jointly, an application for taxation by one, in the absence of the other, should not be made as of course. *Re Levin*, 16 Beav. 608.

12. Upon an application by one of several persons interested, for the taxation of a bill of costs of considerable amount, the Court, in determining his right to taxation, will not regard the amount of his interest. *Re Dawson*, 28 Beav. 605.

13. An order of course to tax a solicitor's bill incurred by three persons, obtained on application of two of them, is irregular. *Re Iderton*, 33 Beav. 201.

14. Taxation ordered where a solicitor was retained by more than one defendant to a suit, and the application to tax the solicitor's bill of costs was made by one of such defendants. *Exp. Ford*, 23 L. J., Ch., 515; 5 De G. M. & G. 35.

5. Other Persons.

15. A., the next friend of infants in a suit, employed B. as solicitor therein and in other matters. An order was made, in the suit, for the taxation and payment to B. of his costs of suit. Before this had been done, A. obtained, *ex parte*, an order to tax B.'s bill in all the matters in which he had been employed for A.:—Held, that the order was regular. *Re Flucker*, 20 Beav. 143.

16. A person who signs an authority for the use of his name as next friend to an infant, becomes *primâ facie* liable to pay the infant's solicitor's bill of costs, as well as those of the other side. *Re Flower*, 19 W. R. 578.

If for any cause he disputes this liability, the solicitor may nevertheless obtain the common order for taxation against him without mentioning that fact, for the defence cannot be raised in the process of taxation, but requires independent proceedings to be taken to enforce it. *Id.*

17. A bankruptcy is not during the bankruptcy a party interested in the estate in the hands of the trustee in bankruptcy so as to entitle him after his discharge, and although his creditors have been paid in full, to demand delivery and taxation of a bill of costs paid by the trustee out of the estate, under 6 & 7 Vict., c. 73 (The Solicitors Act 1843), ss. 39, 40. *Re Leadbitter and Harvey*, 39 L. T., N. S., 12; 26 W. R. 853. Affirmed 39 L. T., N. S., 286; 10 L. R., Ch. D., 388; 48 L. J., Ch., 242; 27 W. R. 267.

18. Order for taxation obtained by an insolvent debtor of a bill of costs incurred prior to his insolvency, discharged with costs. *Re Halsall*, 11 Beav. 163.

19. A party to whom costs are awarded may proceed in the taxation, notwithstanding

he may be in contempt. *Newton v. Richetts*, 11 Beav. 67.

UNDER THIRD PARTY CLAUSES.

1. *Order. How Obtained*, 6464.
2. *Cestui que Trust*, 6464.
3. *Mortgagor and Mortgagee*, 6465.
4. *Person Paying the Bill*, 6465.
5. *Other Third Parties*, 6466.
6. *Rights of Third Party*, 6466

1. Order. How Obtained.

1. Under ordinary circumstances, an order for taxation may be obtained as of course by third parties "liable to pay." *Re Bracey*, 8 Beav. 338.

2. The taxation under the 38th section of the Act 6 & 7 Vict., c. 73, or the "third party liable clause," is by order of course; but under the 39th section, or third party interested clause, the application is special. *Re Straford*, 16 Beav. 27.

3. In taking a transfer of two mortgages, there was included in the amount secured on the estate a sum for costs incurred by the mortgagor and mortgagees on account of the estate:—Held, that the transferee could not have the bill for these costs taxed on an ordinary summons. *Re Forsyth*, 34 Beav. 140; 11 Jur., N. S., 615; 13 W. R. 932; 12 L. T., N. S., 687; 2 De G. J. & S. 509.

Semble, that the general jurisdiction of the Court over a solicitor will not be exercised on an ordinary summons for taxation. *Id.*

4. A petition for taxation under the "third-party clause" of the 6 & 7 Vict., c. 73, must be served upon the "party chargeable" in a case where the bill of costs is not taxable as between the party chargeable and the solicitor. *Re Baker*, 2 N. R. 151.

5. On a petition for taxation under the third-party clause of the Solicitors Act, where the party immediately chargeable has paid the solicitor, and the third party liable has repaid him, it is not necessary to prove pressure. *Re Turner*, *Exp. Burton*, 4 W. R. 805.

2. Cestui que Trust.

6. Reference of a solicitor's bill of costs, to be taxed upon the application of one of two trustees and executors, by whom he had been employed in the conduct of the cause, and in other matters relating to the executorship; the executor making the application not having acted, and his co-executor refusing to consent to the application, the bill having been long since paid by the acting executor, but unknown to the parties beneficially interested, and no settlement of the executorship accounts having been made, notwithstanding repeated applications, until lately, and the *cestuis que trustent* (one of them a married woman) having executed a release to the executor: motion, on behalf of the solicitor, to discharge the order of reference, refused; the *cestui que trust* having a right to use the name of his trustee for the purpose of taxation, and the release to the executors not operating to pre-

vent him from prosecuting against the solicitor the remedy given him by the statute. *Hazard v. Lane*, 3 Meriv. 285.

7. The words "any such bill," in the 41st section, do not mean the bill mentioned in the section immediately preceding, viz., any bill "previously taxed and settled;" nor are they limited to such bills as under the provisions of the Act are sought to be taxed by a party directly chargeable. *Re Downes*, 5 Beav. 425; 13 L. J., N. S., Ch., 159.

Where a *cestui que trust* applies for taxation, then, if there has been no payment, the rules under which taxation is to be directed are such as are pointed out by the 37th section of the 6 & 7 Vict., c. 73, and if there has been payment by the 41st section. *Id.*

Whenever the 6 & 7 Vict., c. 73, applies, the Court cannot, in any case whatever, send a bill for taxation as against the solicitor, if it has been paid more than twelve months; but the Court may, after that period, direct a taxation as between a trustee and his *cestui que trust*, to justify the payments of the former. *Id.*

Application by *cestui que trust* for the taxation of a bill of costs paid by his trustees more than twelve calendar months, refused. *Id.* And see *Re Press*, 35 Beav. 34.

8. A. B., who claimed some property, conveyed it to trustees, upon trust for carrying on the litigation and payment of the costs, etc. The trustees employed a solicitor, and they raised a sum of money upon A. B.'s notes, drawn for the purpose, which they placed in the solicitor's hands. A. B. alone obtained an *ex parte* order for taxation; it was discharged for irregularity. *Exp. Mobbs*, 8 Beav. 499.

9. The taxation under the 38th section of the Act 6 & 7 Vict., c. 73, or the "third party liable clause," is by order of course; but under the 39th section, or third party interested clause, the application is special. *Re Straford*, 16 Beav. 27.

10. A trustee is not a proper party to a petition presented by a *cestui que trust* for the delivery and taxation of bills of costs paid by a trustee. *Re Mole*, 22 L. J., Ch., 455.

11. Taxation ordered, at the instance of *cestuis que trustent*, of a bill incurred in respect of a trust estate by trustees, both being now dead; but any balance due from the solicitor was ordered to be paid into court, to a separate account, and not to the petitioners. *Re Hallett*, 21 Beav. 250.

12. Whether the taxation, at the instance of a *cestui que trust*, of a bill of costs which has been long since settled and paid by trustees out of a trust fund, ought to take place as against the solicitor, or as against the trustees for the purpose of justifying their payment, *quære*. *Grove v. Sansom*, 1 Beav. 297.

13. Where a *cestui que trust* seeks to tax the solicitor's bill paid by his trustee, on the ground of overcharge, he must allege and prove specific items. *Re Bennett*, 8 Beav. 467; 14 L. J., N. S., Ch., 403.

14. Application by residuary legatee, more than twelve months after payment, for the taxation of a solicitor's bill against the executor, refused; notwithstanding there had been some agreement between the legatee and solicitor, and that payment had afterwards been made behind the back of the legatee. *Re Rees*, 12 Beav. 256.

1. It is not necessary where a *cestui que trust* applies for taxation of bills paid by trustees or executors, to show that there are fraudulent overcharges. *Re Drake*, 22 Beav. 438.

2. Where a bill of costs against executors contained charges to a considerable extent beyond what would have been allowed them in their accounts with the testator's estate:—Held, that it was a proper case of taxation at the instance of the persons beneficially interested, after payment by the executors. *Exp. Dickson*, 8 De G. M. & G. 655.

3. An action will not lie by a *cestui que trust* against the solicitor of his trustees for taxation of a bill of costs paid by the trustees, the proper remedy being by application, under s. 29 of the Solicitors Act 1843. *Re Spencer, Spencer v. Hart*, 51 L. J., Ch., 271; 45 L. T. 645; 30 W. R. 296.

4. The rule that under the third party clause in the 6 & 7 Vict., c. 73, s. 38, taxation is to be made as between the solicitor and person who is immediately liable to pay him, is to be taken with the exception that a trustee is to be personally responsible to the solicitor for the payment of items not necessary for the execution of the trust, and such items will be disallowed on taxation by a third party. *Re Brown*, 36 L. J., Ch., 842; 4 L. R., Eq., 464; 15 W. R. 1080; 16 L. T., N. S., 729.

Therefore the Master having, in taxing a paid bill of costs at the instance of a *cestui que trust*, disallowed certain items as not chargeable against the trust estate:—Held, that though such items would have been allowed as between the solicitor and his client, the trustee, the Court would not in that case interfere with the discretion of the Master. *Id.*

5. A bankrupt is not during the bankruptcy a party interested in the estate in the hands of the trustee in bankruptcy so as to entitle him after his discharge, and although his creditors have been paid in full, to demand delivery and taxation of a bill of costs paid by the trustee out of the estate, under 6 & 7 Vict., c. 73 (The Solicitors Act 1843), ss. 39, 40. *Re Leadbitter and Harvey*, 39 L. T., N. S., 12; 26 W. R. 853; Affirmed 39 L. T., N. S., 286; 10 L. R., Ch. D., 388; 48 L. J., Ch., 242; 27 W. R. 267.

3. Mortgagor or Mortgagee.

6. After payment, an *ex parte* order for taxation is irregular; and the same rule applies where the payment is made by a mortgagee, and the taxation is at the instance of the mortgagor, as the party ultimately liable to pay. *Re Carey*, 8 Beav. 160; 14 L. J., N. S., Ch., 100.

7. A., a solicitor, being one of three mortgagees, arranged with another solicitor, B., to "act as his agent" in the matter of the mortgage, on agency terms. B. accordingly acted, and sent in his bill prepared as between solicitor and client, which was paid by the mortgagees. B. allowed A. 100% as his share of the profits. After this, on the application of second incumbrancers, the bill was taxed:—Held, that the taxing master was right in taxing it on the principle of solicitor and agent, for the agreement between A. and B. was valid, though it

inured to the benefit of the mortgagees; and that the bill was properly taxable, at the instance of the second incumbrancers, as between them and B. *Re Taylor*, 18 Beav. 165; 18 Jur. 666; 23 L. J., Ch., 857.

8. Upon a petition by a mortgagor to tax the bill of the mortgagee's solicitor, after payment, the mortgagee must be served. *Re Baker*, 32 Beav. 526; 11 W. R. 792; 8 L. T., N. S., 566.

A mortgagor seeking to tax the bill of the mortgagee's solicitor, as against the solicitor, stands in the position of the mortgagee himself, and if the mortgagee cannot tax it, neither can the mortgagor; but the mortgagor may tax it as against the mortgagee for the purpose of diminishing the amount of his claim. *Id.*

9. A second mortgagee presented a petition to tax the bill of costs of the first mortgagee's solicitor, which had been paid out of the produce of the sale of the mortgaged estate:—Held, that the first mortgagees must be served with the petition. *Re Jessop*, 32 Beav. 406.

10. Where on transfer of a mortgage the transferee has paid the amount claimed and accepted a deed, which recites that a certain sum is due to the original mortgagee for costs, and contains an assignment of that sum as well as of the principal and interest, he cannot afterwards obtain an order for taxation of the mortgagee's solicitor's bill. *Re Gold*, 24 L. T. 9; 19 W. R. 343.

11. When once a mortgagor has paid the bill of costs, he cannot, as between himself and the solicitor of the mortgagee, have it taxed, except under special circumstances; but, as between himself and the mortgagee, he may have it taxed, under the third-party clause in 6 & 7 Vict., c. 73, s. 38. *Re Abbott*, 4 L. T., N. S., 576.

4. Person Paying the Bill.

12. A party who by agreement has paid the bill of costs of another party, cannot apply for a taxation. *Langford v. Nott*, 1 Jac. & Walk. 291.

13. A party liable under a bond of indemnity for the costs of another, having, on a compromise, paid what the solicitor stated to be the amount of them, is entitled afterwards to have the bill taxed. *Balme v. Paver*, Jac. 305.

Semble, it cannot be made one of the terms of the compromise of a suit, that the solicitor's bill should be paid without taxation. *Id.* 307.

14. An agreement to pay costs is an agreement to pay taxed costs, and a third party paying a solicitor's bill of costs, in order to compromise a suit, stands in the same situation with respect to the right of claiming taxation as the solicitor's client. *Vincent v. Venner*, 1 Myl. & K. 212; 2 L. J., N. S., Ch., 49.

15. A mere volunteer under no previous liability does not, by paying a solicitor's bill, acquire a right to tax it. *Re Booke*, 5 Beav. 406; 13 L. J., N. S., Ch., 187; 8 Jur. 505.

16. A. and B. compromised a suit, B. agreeing to pay A.'s costs, and any question on this was to be referred to an arbitrator, who was

named. A's solicitor delivered his bill of costs to B.:—Held, that B. was entitled to a taxation by an order of course. *Re Hartley*, 30 Beav. 620.

1. Where one party is chargeable with a solicitor's bill, and another party, for reasons of his own, pays the bill, the party paying the bill has, under 6 & 7 Vict., c. 73, s. 38, the same right to taxation which the party originally chargeable would otherwise have had; and this right of taxation is not limited to any transaction which may have occurred in the premises between himself and the solicitor; but the bill which he has paid is the bill which he has a right to have taxed. *Re Newman*, 2 L. R., Ch., 707; 15 W. R. 1189; 17 L. T., N. S., 128.

2. A solicitor to a railway company provisionally registered brought an action against three of the managing directors for the amount of his bill of costs, and recovered judgment. An order was afterwards obtained for winding up the company under the Act, and a petition was then presented by the official manager for taxing the solicitor's bill, under the stat. 6 & 7 Vict., c. 73, on the ground of excessive charges:—Held, that the Court could not be called upon to examine the items of a bill to ascertain their correctness, and that an allegation of excessive charges was not such a special circumstance as to bring the case within the 38th section of the Act. Petition dismissed with costs. *Re Vardy*, 20 L. J., N. S., Ch., 325.

3. A creditor's petition to wind up a company having been withdrawn on payment of the debt, the solicitors for the company undertook by letter with the petitioning creditor's solicitors "to pay all proper costs and charges incident to and recoverable under such petition, such costs, in case of difference, to be taxed." The amount of the costs not being agreed upon, the company obtained, *ex parte*, an order to tax under the third-party clause (s. 38) of the Attorneys and Solicitors Act, and served it on the solicitors of the petitioning creditors:—Held, on motion to discharge the order, that the undertaking was a personal undertaking to pay the costs, such costs being costs as between party and party; that the 38th section of the Act had reference only to the taxation of costs as between solicitor and client; that the order, therefore, was irregular, and must be discharged with costs to be paid by the company. *Re Hartley* (30 Beav. 620), considered and explained. *Re Grundy, Kershaw, & Co.*, 17 L. R., Ch. D., 108; 50 L. J., Ch., 467; 44 L. T. 541; 29 W. R. 581.

5. Other Third Parties.

4. A husband became liable for bills of costs due from his wife *dum sola*, and from her former husband, to a solicitor:—Held, that, though the relation of solicitor and client did not exist between the solicitor and the second husband, yet that the latter was entitled to a taxation of the bills of costs. *Waring v. Williams*, 2 Beav. 1.

5. A shareholder and member of the managing committee of a provisionally registered railway company:—Held, entitled to an order, on petition, for delivery and taxation, after payment of the bills of the solicitors employed

by such committee. *Re Stephen*, 2 Ph. 562. Varying 10 Jur. 585.

6. An administrator employed a solicitor to recover debts due to his intestate, and gave him a power of attorney, under which he received moneys, and acted generally; out of the moneys so received he retained sufficient to pay his costs, which had never been furnished to the administrator nor taxed, but after his death they were furnished to his executor, who approved of them:—Held, on petition, that the administrator *de bonis non* of the intestate was entitled to have the bill of costs referred for taxation, and would have been equally entitled had there been actual payment to, instead of retention by, the solicitor. *Semble*, *scus*, if she had refused the offer of taxation previously, where the question properly arose. *Langford v. Mahony*, 2 Con. & L. 317; 4 Dr. & War. 81; 5 Ir. Eq. R. 569.

7. A person liable to pay costs as between party and party is not entitled to a reference for taxation under the third-party clause (s. 38) of the Attorneys Act 1843. *Re Comdell*, 52 L. J., Ch., 246; 31 W. R. 335.

8. The Court will make an order for taxation under the third-party clause, contained in s. 39 of the 6 & 7 Vict., c. 73, although the petitioners may be actuated by personal feelings to present the petition, and their interest in the matter is very small. *Re Dawson*, 6 Jur., N. S., 878.

9. A bankrupt who has obtained his discharge and who has become entitled to the surplus of his estate, all the creditors having been paid in full, is not entitled, under the 39th section of the Solicitors Act (6 & 7 Vict., c. 73), to obtain the taxation of a bill of costs paid by the trustee in the bankruptcy. The trustee in bankruptcy does not stand in the position of a trustee for the bankrupt. *Re Leadbitter and Harvey*, 10 L. R., Ch. D., 888; 48 L. J., Ch., 242; 27 W. R. 267; 39 L. T. 286. Affirming 39 L. T. 12; 26 W. R. 853.

Where a solicitor's bill of costs has been paid by a trustee in bankruptcy, the bankrupt, when discharged, even though all the creditors have been paid in full and there is a surplus, is not "a party interested" within 6 & 7 Vict., c. 73, at the time when the bill of costs was paid. *Id.*

6. Rights of Third Party.

10. The taxation (under the 6 & 7 Vict., c. 73) of a solicitor's bill, at the instance of a third party "liable to pay," is regulated by the relations existing between the solicitor and his client, and not as between the solicitor and such third party. *Re Fyson*, 9 Beav. 117.

11. Under 6 & 7 Vict., c. 73, s. 38, the third party stands in the position of the client; and if the client is not entitled to a taxation against the solicitor, neither is the third party entitled to a taxation, either as against the solicitor or as against the client. But he may be entitled to have a taxation as against the client in a suit. *Re Massey*, 34 Beav. 463; 11 Jur., N. S., 594; 34 L. J., Ch., 492; 13 W. R. 797; 12 L. T., N. S., 519; 6 N. R. 195.

The proper course is to file a bill. *Id.*

12. A mortgagor who has paid his mortgagee's solicitor's bill, may yet tax it, in the same way

as the mortgagee might have done. If the latter has, as between the solicitor and himself, bound himself, then the mortgagor cannot tax the bill as against the solicitor, but only in diminution of the amount due to the mortgagee; who must in that case be before the Court. But if the case is one in which the bill can be taxed by the mortgagee as against the solicitor, the mortgagee need not be before the Court. *Re Baker*, 11 W. R. 792; 8 L. T., N. S., 566; 32 Beav. 526. And see *Re Jessop*, 32 Beav. 406.

1. The rule that under the third-party clause in the 6 & 7 Vict., c. 73, s. 38, taxation is to be made as between the solicitor and person who is immediately liable to pay him, is to be taken with the exception that a trustee is to be personally responsible to the solicitor for the payment of items not necessary for the execution of the trust, and such items will be disallowed on taxation by a third party. *Re Brown*, 36 L. J., Ch., 842; 4 L. R., Eq., 464; 15 W. R. 1030; 16 L. T., N. S., 729.

Therefore the Master having, in taxing a paid bill of costs at the instance of a *cestui que trust*, disallowed certain items as not chargeable against the trust estate:—Held, that though such items would have been allowed as between the solicitor and his client, the trustee, the Court would not in that case interfere with the discretion of the Master. *Id.*

2. The third-party clause in the 6 & 7 Vict., c. 73, s. 38, only entitles a third person to tax in the same manner as the client might have done, notwithstanding that the bill contains items which such third party would not be under any liability to pay. *Re Newman*, 36 L. J., Ch., 843. Affirmed 15 W. R. 1189; 17 L. T., N. S., 128; 2 L. R., Ch., 707.

A. entered into a special agreement with B. as to granting a lease to him, and B. agreed to pay the costs of "this agreement and the lease and counterpart and incidental thereto." On the completion of the matter, A.'s solicitors delivered to B. a bill of costs, which contained every charge which they were entitled to make to their client A. in the matter, including therefore charges which B. under the agreement might not be obliged to pay:—Held, on B.'s application to tax the bill, that the order must be to tax the bill as between the solicitors and their client A. *Id.*

XI. BY OR AGAINST REPRESENTATIVES.

1. *In What Cases*, 6467.
2. *Revisor of Order to Tax*, 6468.
3. *Revisor for Costs*. See PRACTICE (COSTS).

1. In What Cases.

3. In a suit for an account by the assignees of a bankrupt, against the executor of the solicitor to the commission, bills of costs, for which the executor takes credit, as against the sum due from his testator to the bankrupt's estate, will, on motion, be referred for taxation. *Stephens v. Davis*, 6 L. J., Ch., 66.

4. This Court has no authority to order the personal representatives of a deceased solicitor to have his costs taxed, even though they are

in possession of the client's deeds. *Turkington v. Kiernan*, 9 Ir. Eq. R. 447.

5. The Court has no authority, under the 2 Geo. 2, c. 23, to make an order against the personal representatives of a deceased solicitor, that the solicitor's bills of costs shall be taxed. *Muddeford v. Austwick*, 3 Myl. & C. 423; 7 L. J., N. S., Ch., 304; 3 Jur. 668.

6. An attorney, having delivered up deeds to an executor, which he was not obliged to do till his bill was paid, and these deeds being of great use to the executor in several suits which were then carrying on; this is a sufficient consideration to make the executor liable to the attorney's whole demand, whether there be assets or not. Order of the Exchequer, refusing an injunction to stay proceedings in a judgment at law, affirmed. *Hamilton v. Inceledon*, 4 Bro. P. C. 4.

7. Plaintiff's demand in a suit for the administration of assets, being on foot of costs untaxed, but the bill delivered agreeably to the stat. 2 Geo. 2, c. 23, the decree directed the costs to be taxed, to ascertain what was due to the plaintiff; the administratrix being held not to be concluded, so as to establish, as the debt due, the full amount of the bills delivered. The general submission to pay the costs, when taxed in such case, is out of assets, but a personal undertaking was required of her to pay the expenses of taxation, if less than a sixth was reduced. *Hartford v. Humphreys*, 1 Moll. 142.

8. A solicitor acted as receiver of rents on behalf of his client, the accounts by him in that character being settled periodically. He was also engaged on various occasions in raising money for his client by means of mortgages, and his bills of costs with respect to these transactions were generally settled by means of deductions from what he received for the client on the completion of each transaction. He was also employed in the transaction of general professional business for his client. The rent account was treated as an entirely separate matter from the account for general business, and in 1854 a settlement of the general account was come to, on which occasion the client paid the solicitor upwards of 1,000*l.* The solicitor kept no proper accounts of sums received by him on behalf of his client. Upon the solicitor's death in 1859 his executors sent in a further bill of costs against the client for general business:—Held, that the omission to keep accounts was not a reason for depriving the solicitor of his proper taxed costs for the business done. *Re Lee*, 17 W. R. 108; 19 L. T., N. S., 435; 4 L. R., Ch., 43.

9. A solicitor, who was one of the executors of a testator, paid himself out of the assets a bill for business done for the testator. Twenty-six years after the death of the testator, and ten years after the death of the solicitor, a decree was made directing the usual accounts of the testator's personal estate. The executor of the solicitor, in bringing in his accounts under the decree, inserted the bill of costs as one of his items of discharge:—Held, that although as between solicitor and client the bill was no longer subject to taxation, yet, as against the executor, the persons beneficially interested were entitled to question its amount as an item of discharge, but that an order referring it for taxation was not proper, the right course

being to direct the taxing master to state whether any items objected to were fair and proper to be allowed, and to what amount. *Allen v. Jarvis*, 4 L. R., Ch., 616; 17 W. R. 943.

1. J. was solicitor of A. for many years before his death, and was appointed one of his executors. He delivered his bills to the widow, an executrix, and the amount was paid by a cheque drawn by J. himself upon the bankers of the executors, who were three in number. This was in June 1843, soon after which J. died; and in 1865, a suit to execute the trusts of the will was instituted, and accounts of moneys received by the executors were directed. J.'s executor carried in the bills as items of discharge of his testator's estate, and the Master of the Rolls, in chambers, without being attended by counsel, directed the taxing master "to tax and settle the bills" in respect of items which the persons beneficially interested in the estate questioned:—Held, on appeal, that as the Cons. Order XL., r. 35, provided that the judge may direct the Master to assist him in settling the costs, the order was erroneous, and it was varied by substituting a direction to the Master to inquire and state whether any, and which, of the disputed items were fair and proper to be allowed, and to what amounts respectively. *Allen v. Jarvis*, 21 L. T., N. S., 280.

Where, under the above circumstances, a judge has made an order, it is irregular for him to give leave to appeal against it, and application for such leave must be made to the Court of Appeal. *Id.*

2. Revivor of Order to Tax.

2. A representative of a person who had obtained an order to tax a bill, can revive it only on an undertaking to pay. *Murphy v. Balderton*, 2 Atk. 114.

3. Where there was a decree with costs against three persons, and during the progress of the taxation one of them died, it was held, the Master was regular in proceeding with the taxation and making his certificate, notwithstanding the two survivors objected that the suit was abated. *Meredith v. Hughes*, 3 Y. & J. 188.

4. Pending a taxation, both the solicitor and client died, the reference was revived, and the taxation continued between the representatives. *Re Whalley*, 20 Beav. 576.

5. Pending a taxation, the solicitor died:—Held, that his executors might revive the proceeding against their client by an *ex parte* order. *Re Waugh*, 29 Beav. 666; 30 L. J., Ch., 796; 9 W. R. 775.

6. A client may apply *ex parte* against an executrix of a solicitor deceased, to revive an order for the taxation of the solicitor's bill of costs. *Re Nicholson*, 30 L. J., Ch., 796; 9 W. R. 774; 20 Beav. 665.

An order to revive an order to tax will be made, though the order for taxation was made specially by the Lords Justices, and though they reserved to themselves a right to deal with such special circumstances as might be certified by the Master. *Id.*

XII. AFTER TWELVE MONTHS.

1. *Special Circumstances*, 6468.
2. *Successive Bills*, 6469.
3. *Other Matters*, 6470.

1. Special Circumstances.

7. Where neither a case of pressure is proved against a solicitor, nor improper items of charge shown by a third party applying for an order to tax the bill, the application will be refused, with costs. *Re Evans*, 15 L. J., N. S., Ch., 115.

8. After more than twelve months from the delivery of unsigned bills, the client applied for their taxation:—Held, that he was not entitled, except on showing sufficient "special circumstances." *Re Gedye*, 14 Beav. 56; 20 L. J., N. S., Ch., 410; 15 Jur. 851.

The possession of the papers in a cause is not a sufficient special circumstance to warrant the taxation of a bill delivered more than twelve months. *Id.*

9. In October 1839 a client obtained an order to tax his solicitor's bill: he commenced the taxation in January 1840, and proceeded therein to a very considerable extent. A year and a half after, and before the report, the client applied to vary the order:—Held, that after his acquiescence he came too late to alter the order, and too early to correct any erroneous principle acted upon by the Master. *Tarbut v. Tarbut*, 4 Beav. 149.

Quare, whether, after the taxation of a particular bill of costs, as between solicitor and client, a general taxation is directed, a solicitor can include items included in the former taxation, but not allowed; or ought, for the purpose of explanation, to introduce items taxed and paid on the former taxation. *Id.*

10. An application for taxation of a bill made fourteen months after its delivery and before payment refused, there being no sufficient "special circumstances." *Re Harper*, 10 Beav. 284.

11. J. S. was the sole solicitor employed by a railway company to obtain an Act of Parliament, and he was to employ, on his own responsibility, a local agent. J. S. employed A. B., another solicitor, as his agent for collecting evidence. In November 1846 J. S. delivered his bill of costs to the company, but it did not include A. B.'s costs, and the company declined to consider the bill until those costs were included. In December 1847 J. S. brought an action for his costs, and the company, in January 1848, presented a petition for the taxation of his bill:—The Court held, that, under the circumstances, the petitioners, notwithstanding that twelve months had elapsed since the delivery of the bill, were entitled to have the bill taxed. *Re Bagshawe*, 2 De G. & Sm. 205; 12 Jur. 510.

12. Taxation of a solicitor's bill for parliamentary business ordered, under the 37th section of the 6 & 7 Vict., c. 73, upon a petition presented more than twelve months from the delivery of the bill, on the ground of gross overcharges, amounting to what the Court designates as fraud, coupled with misrepresentation by him in accounting for one of the items overcharged, notwithstanding the client

knew of the circumstances, and had another legal adviser within a month of the delivery of the bill, and might reasonably have availed himself of these circumstances to present his petition within the twelve months. *Re Strother*, 3 Kay & J. 518; 3 Jur., N. S., 736; 26 L. J., Ch., 695; 5 W. R. 797.

To entitle a client to an order for taxation of his solicitor's bill of costs after the expiration of twelve months from its delivery, he must show either pressure, or gross overcharge, amounting to what a court of equity designates as fraud, but it is not necessary to show both. *Ib.*

1. Charges in a bill apparently excessive, and alleged to be overcharges:—Held, special circumstances sufficient to authorise the Court, under the 6 & 7 Vict., c. 73, s. 37, to direct the bills to be taxed more than twelve months after delivery, although one item complained of was sworn to be a mistake. *Re Hook*, 3 Giff. 372; 8 Jur., N. S., 875; 10 W. R. 116; 5 L. T., N. S., 502.

2. N. acted as solicitor of I. from 1833 to 1857, and during that period received and paid large sums of money as his account. In November 1853 N. delivered to I. his account current from 1833 to that time, and in it took credit for twenty-seven bills of costs, which he delivered at the same time. N. afterwards, in February 1857, and June 1857, delivered continuations of his accounts, taking credit in them for subsequent bills of costs, which were delivered along with the accounts in which they were included. None of the accounts were ever settled. In July 1857 the relation of solicitor and client was determined, and I. placed the matter in the hands of a fresh solicitor. In March 1858 the last account was delivered, with another bill of costs. In April 1858 I. presented a petition for taxation of all the bills, showing considerable items of overcharge:—Held, that a taxation of all the bills ought to be directed, though most of them had been delivered more than twelve months before the petition was presented. *Re Nicholson, Exp. Johnson*, 3 De G. F. & J. 93; 7 Jur., N. S., 434; 30 L. J., Ch., 585; 9 W. R. 441; 4 L. T., N. S., 167.

3. Where special circumstances are relied upon as a ground for taxation after the prescribed time they must be such as the client could not have reasonably availed himself of sooner. *Semble*, that mere overcharge is not a special circumstance within the meaning of the Solicitors Act. *Re Barnard*, 2 De G. M. & G. 359; 17 Jur. 53.

4. Taxation ordered of an unpaid bill of costs, eighteen months after its delivery, the "special circumstances" being, that it was delivered long after application for it, on the eve of the client going abroad, and contained substantial overcharges not acquiesced in. *Re Williams*, 15 Beav. 417.

5. Where an action has been brought by an attorney for 68*l.*, balance of untaxed costs, more than twelve months after the delivery of the bill thereof, and it appeared that before action the attorney had offered to take 40*l.* in full:—Held, that it was a proper case for a reference for taxation, and the special circumstances were sufficient. *Hughes v. Murray*, 9 L. T., N. S., 93.

6. A petition for taxation (presented more

than twelve months after the bill of costs was furnished) by one of two trustees, behind the back of his co-trustee, was refused, although the solicitor had commenced an action against the petitioner alone. *Re McCay*, 15 L. T., N. S., 101.

7. Taxation ordered upon an application made after the expiration of twelve months after delivery of a bill of costs, on the ground of the continuance of the relation of solicitor and client subsequently to the delivery of the bill. *Anon.*, 16 W. R. 749.

8. A country solicitor, with an office in town, conducting personally the business which would ordinarily be transacted by a London agent, is not entitled to charge for letters passing between the two offices, but such charges are not "overcharges amounting to fraud," so as to induce the Court to refer the bill more than twelve months after delivery. *Re Harle*, 19 L. T., N. S., 305; 17 W. R. 21.

9. The continuation of the relationship of solicitor and client is not of itself such a special circumstance that the Court will on account of it order the taxation of a bill of costs twelve months after it has been delivered. *Re Elmalie, Exp. Tower Subway Co.*, 42 L. J., Ch., 570; 16 L. R., Eq., 326; 22 W. R. 54; 28 L. T., N. S., 731.

The Court will not after a lapse of twelve months go into questions of excessive charge, unless it can be proved that there are items of gross overcharge amounting to fraud. *Ib.*

2. Successive Bills.

10. A petition was presented for taxation of forty-six bills of costs delivered by a solicitor to his client at intervals between 1833 and 1857, and comprising items of unsettled accounts between them. The petition contained allegations of improper charges, and was presented more than twelve months after the delivery of the last bill:—Held, that the improper charges being proved, the delay in presenting the petition was no bar to an order for taxation, especially when the relationship of solicitor and client existed up to a period within twelve months preceding the presentation of the petition. *Re Nicholson, Exp. Johnson*, 7 Jur., N. S., 434; 30 L. J., Ch., 585; 9 W. R. 441; 4 L. T., N. S., 167; 3 De G. F. & J. 93.

11. Three months after a solicitor to a company had delivered his bill the company was ordered to be wound up. Subsequently he delivered a further bill to the official liquidator. More than twelve months elapsed, and the solicitor carried in a claim for payment of both bills:—Held, that both bills must be referred for taxation before they could be paid. *Re Marseilles Extension Railway and Land Co., Exp. Evans*, 11 L. R., Eq., 151; 40 L. J., Ch., 197; 19 W. R. 379; 23 L. T., N. S., 647.

12. A solicitor having delivered successive bills of costs relating to the same suit and on the same retainer, and having received from his client payments on account, though not in discharge of any one bill, sent a signed letter to the client, stating that he should increase some of his former charges, and containing a

list of additions to certain items in his previous bills:—Held, that, under the circumstances of the case, the latter, being a correction of the earlier bills, must be treated as bringing them down as one entire bill to that date, and that taxation of the whole must be directed, though most of them had been delivered more than twelve months before the application. *Re Cartwright*, 16 L. R., Eq., 469; 42 L. J., Ch., 735; 21 W. R. 891; 28 L. T., N. S., 891.

1. The retainer and employment of a solicitor in such a matter as a bankruptcy, an administration, or a winding up, do not constitute an entire contract so as to deprive the solicitor of his right to payment, except for costs out of pocket, till the whole matter is completed, and successive bills of costs in such a matter are not necessarily to be treated as one bill brought down to the date of the latest delivery. *Re Hall & Barker*, 9 L. R., Ch. D., 538; 47 L. J., Ch., 621; 26 W. R. 501.

Therefore, where solicitors had been retained to act for a trustee in bankruptcy, and also to protect the interests of a creditor, who subsequently by arrangement with the other creditors took over the bankrupt's estate, and they delivered a bill of costs up to a certain date, with an intimation that there were then and would still be some further items, and delivered a second bill of costs incurred after the date to which the first bill came down: on an application by the creditors to tax both bills, more than twelve months after the delivery of the first:—Held, that they must be treated as separate bills, and that the second bill only could be taxed. *Ib.*

2. A solicitor delivered to the directors of an abortive railway company his bill of costs, No. 1. It was perused by an experienced solicitor, named by the solicitor retained, at the request of the directors, and items were taxed off, leaving 275*l.* 5*s.* 5*d.* as the amount due. The directors paid 200*l.* on account, leaving a balance of 75*l.* 5*s.* 5*d.* due. An order to wind up the company under the Winding-up Acts was obtained, and the solicitor claimed a lien on the papers for his costs. He delivered a bill of costs, No. 2, commencing with the balance of 75*l.* 5*s.* 5*d.*, amounting to 233*l.* 9*s.* 10*d.* On the petition of the official manager, seeking the taxation of the solicitor's bills of costs, No. 1 and No. 2, it appeared that the bill of costs No. 1 had been duly delivered more than twelve months before the date of the petition to tax:—Held, that bill No. 1 could not be taxed, except under special circumstances, which did not exist in this case; and the Court ordered bill No. 2 to be taxed, directing the Master not to investigate the accuracy of the balance of bill No. 1, with which bill No. 2 commenced, further than to ascertain that that balance had not in fact been paid. *Eap. Quilter*, 4 De G. & Sm. 183.

3. Other Matters.

3. Where an attorney has been seven years without getting his bills taxed, after an order so to do, and they are lost in the meantime to the Master's office, the Court will not allow it to go again to the Master. *Yea v. Yea*, 2 Anstr. 494.

4. Within twelve months after payment of a bill of costs a client presented a petition for its taxation; but the petition having specified no items of overcharge, no order could be made. The twelve months having then expired, the Court refused to allow the petition to stand over for the purpose of amendment, by specifying the items. *Barnwell v. Brooks*, 7 Beav. 345.

5. A petition being presented for the taxation of a solicitor's bill:—Held, that the application was to be considered as to be made at the latest at the time of answering the petition, and not at the time of service of the petition, or the day appointed for hearing. In case of accidental delay in the office, the period may be carried further back. *Sayer v. Wagstaff*, 5 Beav. 415; 13 L. J., N. S., Ch., 161. Affirmed 14 L. J., N. S., Ch., 116; 8 Jur. 1083.

A solicitor delivered his bill of costs on the 14th October 1842, for which the client, on the 3rd November 1842, gave his promissory note, which was paid on the 17th November 1842. On the 15th November 1843 the client presented a petition for the taxation of the bill, which was answered on the 16th, and was served on the 21st. The day appointed for hearing was the 24th:—Held, first, that the bill must be considered as paid on the 17th November 1842; and, secondly, that the application for taxation must be considered as made at the latest on the 16th November 1843; and consequently, that the application for taxation had been made within twelve months, according to the 41st section of the 6 & 7 Vict., c. 73. *Ib.*

6. A preliminary agreement between a solicitor and his client on obtaining a loan on mortgage, no bill of costs having been delivered, is illegal, and the delivery of the bill and taxation ordered more than twelve months after completion of the transaction and payment of the balance to the client. *Re Casely*, 18 W. R. 1125.

A solicitor lent his client 200*l.* on a promissory note. The note was made out for 210*l.*, the addition being alleged to be for costs on the transaction:—Held, that the client was not precluded from requiring a bill of costs, showing how the sum of 10*l.* was made up, by the lapse of nearly three years and subsequent money transactions between the parties. *Ib.*

7. If a fund on which a solicitor has a lien for costs is paid into court within a year after his bill has been delivered, on payment of the fund out of court the owner of the fund has a right to have the bill taxed, although more than a year may have elapsed since it was delivered. *De Bay v. Griffin*, 10 L. R., Ch., 291; 23 W. R. 737.

B. acted as attorney for G. in an action which resulted in G.'s recovering a large sum. A bill was filed by persons claiming through G. to establish their equitable title to that sum, and in February 1871 the defendant in the action paid the sum recovered into court to the credit of the cause in which B. was a defendant in respect of his lien. In March 1871 B. delivered his bill of costs in the action to G. In December 1873 the suit was compromised and the fund distributed, except a sum kept in court to answer B.'s claims:—Held, that B. was not entitled to have his bill

of costs paid out of the fund without taxation, however the case might have stood, if his bill had been delivered at such a time that G.'s right to tax it would have been lost before the fund was paid into court. *Id.*

XIII. AFTER PAYMENT.

1. *General Principles*, 6471.
2. *Order. How Obtained*, 6471.
3. *Time and Delay*, 6472.
4. *What Bills*, 6474.
5. *Payment, what is*, 6474.
6. *Payment to Recover Papers or Complete Transactions*, 6475.
7. *Protest*, 6477.
8. *Pressure or Overcharge*, 6478.
9. *Undue Influence*, 6480.

1. General Principles.

1. The cases of taxation after payment are not to be extended. *Re Browne*, 15 Beav. 61. Affirmed 1 De G. M. & G. 322; 21 L. J., Ch., 442.

2. Several bills were delivered in, settled, and paid, in the course of a long cause, and a receipt in full given; at the end of the cause the client moved to refer them all for taxation. The order was discharged. *Pistor v. Dumbas*, 1 Anstr. 186.

3. After a bill of costs paid, and a receipt in full taken, the client is not entitled to an order to tax the costs, merely swearing they never had been taxed; he must show specific error. *Mahon v. Scanlon*, 2 Moll. 388.

4. A bill of costs, settled and paid after examination, discussion, and abatement made by the solicitor, referred for taxation under the circumstances, but on the terms of the client admitting the cash payments contained in the settled account. *Nokes v. Warton*, 5 Beav. 448.

5. Though the Court will open a solicitor's bill, and order taxation, after several years and a security given, or even payment upon gross errors, fraud, or undue pressure, yet where nothing appeared but a trifling inaccuracy, and under other favourable circumstances, the Court would not restrain proceedings upon a security obtained while business was depending. *Cooke v. Settee*, 1 Ves. & B. 126.

6. Costs settled and paid, or after judgment in action for them, not referred for taxation. Otherwise, on a special case of fraud or improper charges. *Langstaffe v. Taylor*, 14 Ves. 262.

7. Proof of overcharge alone is insufficient to obtain the taxation of a paid bill; but it is a necessary ingredient. *Re Stirke*, 11 Beav. 304.

8. Payment of a bill of costs is *prima facie* an admission of its correctness, and the client is bound to prove "special circumstances" to authorise its taxation; such special circumstances are usually pressure, as where an immediate payment is required at a time when it would be very inconvenient to the party paying that any delay should occur in the completion of the business; and secondly, error or overcharge in the bill; if the overcharges evidence fraud, very slight, if any,

circumstances are necessary to induce the Court to order a taxation. *Re Harding*, 10 Beav. 250; 16 L. J., N. S., Ch., 288.

9. The principle of taxation after payment is not to be extended. *Re Mash*, 15 Beav. 83.

10. The rule of the Court is, that to obtain a taxation after payment there must either be both overcharge and pressure, or overcharge so gross as to amount to fraud. *Re Hubbard*, 15 Beav. 251. And see *Re Browne*, *Earp. Jefferies*, 1 De G. M. & G. 322; 21 L. J., Ch., 442.

A solicitor is not bound to do that on the undertaking of the opposite solicitor, which the latter is not entitled to as of right. *Id.*

The cases of taxation, after payment on the ground of pressure, are not to be extended. *Id.*

11. To obtain an order for taxation of a bill of costs which has been paid, it must be shown that there has been undue pressure and overcharge, or overcharge amounting to fraud. *Re Foster*, *Earp. Walker*, 6 Jur., N. S., 687; 29 L. J., Ch., 625; 2 De G. F. & J. 105.

12. After a solicitor's bill has been paid, an order for the taxation of it will not be made, unless special circumstances—as overcharges such as amount to fraud, or which are accompanied by pressure—can be shown, which, in the opinion of the judge, appear to make in proper that the bill should be taxed. *Re Munns and Longden*, 50 L. T. 356.

13. It requires a very special case to induce the Court to order taxation after payment, the Court being reluctant to open a matter deliberately settled. The rule is, that there must be both pressure and overcharges or items in the bill itself of such a nature as to amount to what is vaguely called fraud. Definition of the term "fraudulent items." *Re Barrow*, 17 Beav. 547; 18 Jur. 181; 2 W. R. 109.

The doctrine of pressure in cases of taxation after payment is not to be extended, and the application for taxation should be made speedily. *Id.*

Where a mortgagor seeks the taxation of the bill of the mortgagee's solicitor, it must be looked at, not as between the mortgagor and the solicitor, but as between the solicitor and his client, the mortgagee. *Id.*

Where a considerable portion of a bill of costs is for business which, in the exercise of an honest and fair discretion, ought never to have been transacted, the Court, although there be no serious amount of pressure, will order a taxation after payment. *Id.*

14. *Semble*, a third party who applies under the 38th and 39th sections of 6 & 7 Vict., c. 73, for taxation of a bill after payment, must show such special circumstances as would support an order for taxation on the application of the person originally chargeable. *Re Dickson*, 5 W. R. 108; 26 L. J., Ch., 89; 3 Jur., N. S., 29.

2. Order. How Obtained.

15. Where a bill of costs has been paid, the client ought not to obtain an order of taxation as of course. *Honell v. Edmunds*, 6 L. J., Ch., 29; 4 Russ. 67.

But where a bill had been paid pending the suit, and under some degree of pressure prac-

tised by the solicitor towards the client, the Court refused to discharge an order for taxation, obtained subsequently, as of course. *Ib.*

1. An order of course, obtained by a client for the taxation of his solicitor's bill of costs after payment thereof, discharged. *Sayer v. Wagstaff*, 12 L. J., N. S., Ch., 496.

2. After payment of a bill, an order for taxation is not to be obtained as of course, even by a party liable to pay the same. *Re Becke*, 5 Beav. 406; 13 L. J., N. S., Ch., 157; 8 Jur. 505.

Under the 6 & 7 Vict., c. 73, any party entitled to the order may obtain it, as of course and without special directions, within one month after delivery, and with such special directions as the Court may order to be imposed, after the expiration of one month from the delivery, but not after verdict, writ of inquiry, or payment. In those cases a special order made upon special circumstances, to be proved to the satisfaction of the Court, is required. *Ib.*

3. A solicitor's bill having been partly taxed and paid, an order, obtained as of course, referring the bill generally for taxation, was discharged with costs. The conduct of the solicitor cannot be adduced in support of such an order; and the costs of affidavits upon that subject were ordered to be paid as between solicitor and client. *Clutton v. Pardon*, T. & R. 301. And see *Gretton v. Leyburne*, id. 407.

4. After payment, an *ex parte* order for taxation is irregular; and the same rule applies where the payment is made by a mortgagee, and the taxation is at the instance of the mortgagor, as the party ultimately liable to pay. *Re Carey*, 8 Beav. 150; 14 L. J., N. S., Ch., 100.

5. After payment, an order of course for taxation is irregular. *Re Winterbottom*, 15 Beav. 80. And see *Re Catlin*, 8 Beav. 121.

The rule, in these matters, that on application for orders of course all material facts must be stated, is to be strictly adhered to. *Ib.*

Upon an arbitration between A. and B., A.'s costs were directed to be paid by B., and were moderated by the arbitrator and paid. A. afterwards obtained an order of course to tax his solicitor's bills of costs, suppressing these facts. The order was discharged. *Ib.*

6. Application for taxation of a solicitor's bill of costs, on the ground that the solicitor has improperly retained in account a sum of money in satisfaction of his bill, must be made by summons in chambers. *Re May*, 34 Beav. 132; 11 Jur., N. S., 149; 34 L. J., Ch., 236; 13 W. R. 777; 11 L. T., N. S., 658.

7. The solicitor to the fiat having delivered his bill of costs, and retained the amount of it before the end of 1850, was discharged in July 1851. No application for taxation was made before October 1852:—Held, that it was not consistent with safety or propriety to direct taxation in a summary way, even if the Court had jurisdiction to do so. But *semble* per Lord Cranworth, that the Court had no such jurisdiction. *Exp. Pemberton*, 2 De G. M. & G. 960; 22 L. J., Bky., 76.

8. A summons taken out to tax a bill paid eight years ago is not the proper course; a person wishing to tax such a bill must show

a special case and proceed by petition. *Re Woodard*, 17 W. R. 1006.

9. An order for the taxation of the costs of conveyances under s. 83 of the Lands Clauses Consolidation Act 1845, cannot be obtained where the costs have been paid. Such an order for taxation cannot be sustained as an order of course under the Attorneys Act. *Exp. Somerville, South Eastern Railway Co.*, 23 L. R., Ch. D., 167; 52 L. J., Ch., 438; 48 L. T. 416; 31 W. R. 518.

3. Time and Delay.

10. Bills of costs examined after a long period, and even after payments made. *Newman v. Payne*, 2 Ves. J. 202; 4 Bro. C. C. 350.

11. Taxation of solicitor's bill, after payment and lapse of several years, refused. *Waters v. Smith*, 1 Jur. 375.

12. Petition to tax a bill of costs, paid without pressure nine days after its delivery, dismissed with costs. *Re Drew*, 10 Beav. 368.

13. Solicitor having taken a judgment of his client for 400*l.* whilst cause was depending, also several extraordinary charges appearing in his bill, bill though adjusted and allowed seventeen years ago, referred to be taxed, and judgment and other securities to be delivered up. *Drapers' Co. v. Davis*, 2 Atk. 295.

14. *Semble*, a procuracy-fee charged by mortgagee's solicitor is improper; but eleven months having elapsed since payment, taxation refused. *Re Bayley*, 2 W. R. 404.

15. An unexplained delay of nine months after payment in the presentation of a petition for taxation on such grounds:—Held, fatal to the application. *Exp. Jefferies, Re Browne*, 1 De G. M. & G. 322; 21 L. J., N. S., Ch., 442.

To constitute a case for taxation of costs after payment on the ground of undue pressure, the pressure must have been of such a kind as to have rendered it impossible or difficult to have the costs taxed before payment in the ordinary course. *Ib.*

16. Where a bond and warrant of attorney, on which judgment was entered, were given twenty-seven years ago for costs due to a solicitor, the Court, upon an allegation that these costs had never been taxed or settled, refused to refer them for taxation at the instance of the surety of the client, and against the executor of the executor of the solicitor, who had died twenty years before. *Masmell v. O'Dell*, San. & Sc. 194.

17. A client executed a mortgage to his solicitor for a specified sum, being the amount at which past costs in a suit had been estimated, without the bills having been delivered, the solicitor undertaking to deliver the bills by a certain time, which he did. Four years afterwards the client changed his solicitor, and obtained an order for taxation of subsequent costs, but declined the offer of the solicitor to have the costs secured by the mortgage included in the taxation, and obtained the order without prejudice to any question as to those costs. Two years afterwards, the client filed a bill against the solicitor, to have the latter costs investigated and the account between the parties re-opened, but did not allege any specific overcharge or error:—Held, that the sum was precluded by length of time and

acquiescence. *Blagrove v. Routh*, 8 De G. M. & G. 620.

1. A bill of costs was delivered by the solicitor in 1809, and shortly afterwards paid by the client: between that time and March 1817 four other bills were delivered, and various payments were made on account. In November 1817 a sixth bill was delivered, when the client paid the general balance due on the bills of costs, at the same time stating that he would insist on having the bills taxed. An application for taxation to a judge at law in 1818, and an application to the Court of King's Bench in 1819, failed, from circumstances not involving the merits of the question. Some attempts at a compromise were made from time to time, and the client was obliged, on three or four occasions, to leave England, in order to attend to urgent business in foreign countries; but at length, in 1824, a motion was made to have the bills referred for taxation, supported by evidence that some of the items of charge were improper. The Court ordered that the bill last delivered should be taxed generally, and that the five antecedent bills should be referred to the Master, with a direction that the client should deliver to the solicitor a schedule of the items complained of, and that the Master should exercise as large a discretion as he might think fit, with respect to the evidence on which he should proceed in forming his judgment concerning these items. *Scougall v. Campbell*, 3 Russ. 545.

2. Costs ordered to be taxed fourteen years after security given for the payment of them, it appearing that the costs had not been paid, although payments had been made on account of them; that the security had been given *pendente lite*, and while the relation of attorney and client existed between the parties; no account having been then settled between them, the client being then in embarrassed circumstances, some oppression having been used towards him by the attorney; but the vouchers having been given up to the client, it was ordered that the bills of costs should be *prima facie* evidence of the business done, and the reasonableness of the charge, with liberty to the client to surcharge and falsify. *Fowler v. Moore*, 2 Jones 415.

3. A *cetui que trust* agreed that her trustee, if he acted as solicitor in a suit, should receive full costs. A bill was delivered on the 18th February, and on the 8th March the solicitor ceased to act. After discussion as to the amount, and having received other professional advice, the client paid the bill on the 22nd May, a deduction being made therein. On an application being made within twelve months, the Court refused to order a taxation. *Re Wyche*, 11 Beav. 209.

4. Petition by mortgagor for taxation of the mortgagee's solicitor's bill, presented five months after it had been discharged by retainer, dismissed with costs, on the ground that it neither alleged any circumstances of pressure nor any specific item of overcharge. *Dunt v. Dunt*, 9 Beav. 146.

5. The lapse of twelve months between the payment of a bill of costs and the presentation of a petition for its taxation precludes taxation under the Act. *Re Harper*, 10 Beav. 284.

6. *Quære*, by Lord Cranworth, whether a bill can be ordered to be taxed above a year

after payment unless fraud can be shown. *Pemberton v. Tyther*, 1 W. R. 86.

7. Refusal to order the taxation of a solicitor's bills of costs, the amount of which had been secured by a deed in the year 1819, although the suit was then pending; the client's affairs having, since the year 1822 (when that solicitor died), been in the hands of another solicitor, and there being no proof of such dealings between the solicitor and client, or of such errors or improper charges in the bill, as could amount to evidence of fraud. *Waters v. Taylor*, 2 Myl. & C. 526; 6 L. J., N. S., Ch., 245; 1 Jur. 375. Reversing 6 L. J., N. S., Ch., 20.

8. A solicitor, acting on behalf of mortgagees, sold the mortgaged premises, and on the 27th June 1850 he retained the amount of his bill of costs out of the proceeds of the sale. On the 29th June 1850 he sent a copy of the bill to the solicitor of the mortgagor, and, on the 27th June 1851 the mortgagor applied for an order for taxation:—Held, that the taxation might have been had upon the common order; that the petition was presented in time; that it could scarcely be considered a payment of the bill of costs until the petitioner had the means of knowing the amount of the surplus, and that he was entitled to taxation, but that he must pay the costs beyond the costs of the common order. *Re Steele*, 20 L. J., N. S., Ch., 562.

9. When the bill was delivered on the 14th October 1842, for which the client gave his note on the 3rd November, and which was paid on the 17th in the same year, and, on the 15th November, in the following year, a petition for taxation was presented, which was answered on the 16th and served on the 21st; the day of hearing was the 24th:—Held, that the bill was to be considered as paid on the 17th November 1842, and the application for taxation as made at the latest on the 16th November, 1843, and therefore made within the twelve months, according to s. 41 of the statute. *Sayer v. Wagstaff*, 5 Beav. 415; 13 L. J., N. S., Ch., 161. Affirmed 14 L. J., N. S., Ch., 116; 8 Jur. 1083.

10. Where a bill of costs was delivered on the completion of a purchase, to which the solicitor was a party and he refused to complete the purchase without payment:—Held, that the circumstances were evidence of pressure, and justified taxation after payment, notwithstanding five months had elapsed before the presentation of the petition. *Re Pugh, Exp. Briscoe*, 11 W. R. 762; 8 L. T., N. S., 586; 1 De G. J. & S. 673. Affirming 32 Beav. 173.

11. A solicitor delivered a general estimate of costs due to him, without specifying the particulars. The client signed a memorandum agreeing to the statement, and requesting A. (to whom he had given his acceptance) to pay the amount. A bill filed by the client more than three years afterwards, to obtain a delivery and taxation of the bill of costs, was dismissed with costs. *Turner v. Hand*, 27 Beav. 561.

12. A solicitor, who was the chief acting executor of a client, retained the amounts of his bills of costs, as solicitor of the testator and of the executors, out of the assets received by him, and died. A suit was instituted for the administration of his estate. Twelve years after his death, and twenty years after the solicitor had ceased to act professionally for

the executors of the testator, the testator's representative sought against the representatives of the deceased solicitor an order for the delivery and taxation of the solicitor's bills, under the 6 & 7 Vict., c. 73:—Held, that whether the Act gave jurisdiction to make such an order or not, such an order ought not to be made. *Exp. Shackell*, 2 De G. M. & G. 842; 17 Jur. 793.

Executors retained the son of one of them to act as their solicitor in the administration of the estate, and the solicitor's bills, or some of them, were paid by credit being given to the son in accounts between him and his father:—Held, that this fact was not such a special circumstance as would warrant an order for the delivery and taxation of the son's bills of costs, upon a petition presented under the 6 & 7 Vict., c. 73, ten years after the payment, even if that interval did not exclude the jurisdiction to make such an order. *Id.*

1. A client having withdrawn from a litigation, his solicitor agreed to take one-third of his bill in full discharge, if the suit (which was to be carried on for the benefit of another party) failed; and the client agreed to pay the remaining two-thirds, if it succeeded. The Court refused, eight years afterwards, when the suit had succeeded, to open the transaction by ordering a taxation of the bill. *Re Moss*, 17 Beav. 340.

2. When a client has paid his solicitor's bill under pressure before the delivery of the bill he is entitled to have it taxed, at any time before the expiration of a year. *Re Fielder*, *Exp Bailey*, 40 L. J., Ch., 615; 25 L. T., N. S., 55.

3. An account settled between a client and her solicitor, including arranged bills of costs, decreed to be opened and the bills referred for taxation in an action instituted nearly two years after such settlement, on the grounds of undue influence, and that the charges were improper and excessive, and that much of the business done was unnecessary, and ought not to have been done. *Watson v. Rodwell*, 7 L. R., Ch. D., 625; 47 L. J., Ch., 418; 26 W. R. 524. Affirmed 11 L. R., Ch. D., 150; 27 W. R. 265; 48 L. J., Ch., 209; 39 L. T. 614.

In Case of Third Parties. 4. Where a solicitor's bill has been paid by a trustee, the *cestui que trust* cannot, after the expiration of twelve months from payment, obtain a taxation as against the solicitor, although he had no notice of the payment until after the twelve months had expired, *semble*. *Re Donnes*, 5 Beav. 425; 13 L. J., N. S., Ch., 159.

5. The lapse of twelve calendar months after payment of a bill of costs precludes taxation under the Solicitors Act. This rule applies where payment is made by trustees, etc., and the application for taxation is made, under the 38th section of the 6 & 7 Vict., c. 75, by a party "liable to pay." *Re Massey*, 8 Beav. 458.

6. Twelve months after payment of a bill of costs by trustees to their solicitor it cannot be taxed, upon the application of their *cestui que trust*. *Re Press*, 35 Beav. 34.

4. What Bills.

7. Upon an application to tax a paid bill, the solicitor will not be permitted to add to

any under-charges contained therein, but the taxation must be had on the bill as delivered and paid. *Re Wells*, 8 Beav. 416; 14 L. J., N. S., Ch., 215; 9 Jur. 820.

8. A bill of costs was settled by retainer; a second and subsequent bill was also settled in the same way:—Held, on an application to tax the second bill only, that the solicitor could not insist on having both taxed. *Re Gregg*, 30 Beav. 259; 31 L. J., Ch., 632; 10 W. R. 127.

9. W., on the 31st May 1865, agreed in writing to take a lease from G. to T., and to pay their costs of the agreement and of the lease and counterpart, and incidental thereto. W. paid the bill, and afterwards applied for taxation against the solicitors. An order was made to tax the bill, "upon the terms of the agreement dated the 31st May 1865":—Held, that this reference to the agreement was erroneous, for that the order must be to tax the bill which W. had paid, without anything to limit the bill to that which would be the proper bill as between G. and T. and W. *Re Newman*, 2 L. R., Ch., 707; 15 W. R. 1189; 17 L. T., N. S., 128.

5. Payment. What is.

10. Bill may be taxed after bond and mortgage given as security for same. *Aubrey v. Popkin*, Dick. 403.

11. Court will order attorney's bill to be taxed, though he has a mortgage to secure payment. *Walmesley v. Booth*, 2 Atk. 29.

12. A solicitor being indebted to A. and having a demand against B., a client, prevailed on B. to give A. a bond for 3,000*l.*, as part satisfaction of the costs due from B. A. knew that the sum claimed from B. was due for costs, but had no notice that the costs had not been taxed. Taxation decreed. *Harrison v. Wiltshire*, 9 Sim. 255; 2 Jur. 679.

13. A settlement of a bill of costs during the continuance of the suit, while the client has no professional adviser, except the solicitor himself, is not a bar to its taxation. *Crossley v. Parker*, 1 Jac. & Walk. 460.

14. Where a bill of costs has been delivered and security given for the amount, that is equivalent to payment, for the purpose of precluding taxation without special circumstances. *Exp. Turner*, 5 De G. M. & G. 540; 24 L. J., Ch., 71.

A solicitor delivered his bill to his client, and by letter informed him that payment might be postponed if taxation were intended. After the delivery of the bill of costs, and on the occasion of a purchase by the client, and of a mortgage to raise part of the purchase money, which the client required in order to complete the purchase, the client executed a mortgage to the solicitor for a round sum, which included and exceeded by a small amount the bill of costs and the amount of advances made formerly by the solicitor to the client. Some time afterwards, the client applied for and received the excess, and subsequently the mortgage was transferred, with the client's concurrence:—Held, that this amounted to payment of the bill, so as to preclude taxation without further special circumstances than the above. *Id.*

15. Taxation ordered at the instance of a

legatee, of a bill of the executor's solicitor, for the amount of which a mortgage had been given by them. *Re Drake*, 22 Beav. 438.

1. Upon paying off a mortgage, the bill of the mortgagees' solicitor, though objected to, was paid in full, the solicitor undertaking "to refund" so much of "the mortgagees' law charges" as might be "found to be in excess of what they were entitled to receive":—Held, that the Court would enforce the undertaking, upon petition, by ordering a taxation, and that it was to be as between the mortgagor and mortgagees. *Re Fisher*, 18 Beav. 183.

2. The amount of a bill of costs was included in a settled account between a solicitor and client, and retained by the solicitor out of moneys in his hands:—Held, that the Court had not jurisdiction upon petition under the 6 & 7 Vict., c. 73, to open the account and order taxation, and that it could not be done by bill. *Barrell v. Brooks*, 8 Beav. 121.

3. A mortgagee's solicitor retained the amount of his bill of costs out of the produce of the sale of the mortgaged estate, and he charged the amount in an account delivered to the mortgagor:—Held, that an order for taxation within twelve months might be obtained as of course; and a special petition having been presented for that object, the order was made, but the petitioner was ordered to pay the costs. *Re Bignold*, 9 Beav. 269.

4. A solicitor delivered to his client a bill of costs together with a cash account, showing in favour of the client a balance of 1*l.* 18*s.* 1*d.* The client, upon applying for such balance, was by inadvertence paid 1*l.* 16*s.* only:—Held, that there had been no payment of the bill, and that the client was entitled to the common order for taxation. *Re Angove*, 46 L. T. 280. Reversed 26 S. J. 417.

5. A solicitor, acting on behalf of mortgagees, sold the mortgaged premises, and on the 27th June 1850 he retained the amount of his bill of costs out of the proceeds of the sale. On the 29th June 1850 he sent a copy of the bill to the solicitor of the mortgagor, and on the 27th June 1851 the mortgagor applied for an order for taxation:—Held, that the taxation might have been had upon the common order; that the petition was presented in time; that it could scarcely be considered a payment of the bill of costs until the petitioner had the means of knowing the amount of the surplus; and that he was entitled to taxation; but that he must pay the costs beyond the costs of the common order. *Re Steele*, 20 L. J., N. S., Ch., 562.

6. A solicitor retained the amount of his bill out of moneys in his hands belonging to the client, and the client, on receiving the balance of the moneys, but before the bill had been delivered, signed an account in which the total amount of the costs was an item, and gave a receipt for the balance:—Held, that there had been no payment of the bill within the meaning of 6 & 7 Vict., c. 73, s. 41; and that the client was entitled to have the bill taxed more than a year after the retainer of the costs and the signature of the account. *Re Street*, 10 L. R., Eq., 165; 39 L. J., Ch., 495; 22 L. T., N. S., 429.

Held, also, that a special application was necessary under the circumstances. *Id.*

7. A client gave his solicitor a promissory note, and signed a memorandum of settlement; the Court was strongly inclined to think that under the circumstances it ought to be deemed to amount to payment. The lapse of twelve months between the payment of a bill of costs and the presentation of a petition for its taxation precludes taxation under the act. *Re Harper*, 10 Beav. 284.

8. A retainer of a sum of money by a solicitor out of moneys received for his client, is not a payment of his bill by the client. *Re Brady*, 15 W. R. 632.

9. When, on the transfer of a mortgage, the transferee has paid the amount claimed and accepted a deed, which recites that a certain sum is due to the original mortgagee for costs, and contains an assignment of that sum as well as of the principal and interest, he cannot afterwards obtain an order for taxation of the mortgagee's solicitor's bill. *Re Gold*, 19 W. R. 343; 24 L. T., N. S., 9.

6. Payment to Recover Papers on Complete Transactions.

10. Bill may be taxed after payment made for purpose of getting papers from solicitor's hands. *Audrey v. Popkin*, Dick 404.

11. Taxation ordered after payment under protest, the payment being insisted on, as a condition for parting with a deed necessary to complete a purchase. *Re Tryon*, 7 Beav. 496.

12. It is a "special circumstance" within the meaning of the 6 & 7 Vict., c. 7, where a solicitor produces his bill at the time appointed for the settlement of a transaction, and refuses to complete except on payment thereof. *Re Bennett*, 8 Beav. 467; 14 L. J., N. S., Ch., 403.

13. It is a "special circumstance," within the 6 & 7 Vict., c. 75, where, on paying off a mortgage, a solicitor produces his bill and insists on payment as a condition for immediate completion, though items are objected to, and a taxation will be directed after payment, if there are apparent overcharges. *Re Wells*, 8 Beav. 416; 14 L. J., N. S., Ch., 215; 9 Jur. 820.

14. If a solicitor has refused to allow certain deeds to be executed until his bill of costs is paid, and the bill is paid under protest, and the deeds executed, this may constitute such a "special circumstance" as to induce the Court to tax the bill under 6 & 7 Vict., c. 73. *Exp Andrews, Re Clement*, 13 L. J., N. S., Ch., 222; 8 Jur. 327.

15. As to the legal effect of a payment of a bill of costs "under protest." Mortgagee's solicitor delivered his bill to the mortgagor nearly three weeks before the day of settlement. At the meeting the bill was objected to; but the solicitor refused to complete without full payment, and the mortgagor paid it under protest:—Held, that this was not sufficient to authorise a taxation, although there might be some overcharges. *Re Harrison*, 10 Beav. 57; 16 L. J., N. S., Ch., 170; 11 Jur. 197.

16. Taxation of a bill paid under protest, on the ground of overcharges, and that the solicitor had refused to part with the title-deeds until payment, refused with costs, it not appearing how long the bill had been.

delivered before payment. *Re Mash*, 15 Beav. 83.

The principle of taxation after payment is not to be extended. *Id.*

1. Payment of a solicitor's bill, delivered at the last moment of settling a mortgage, being insisted on without any opportunity of examination being afforded, is a "special circumstance" within the meaning of the Solicitors' Act. *Re Jones*, 8 Beav. 479.

A mortgagee's solicitor would not part with the deeds until payment of his bill of costs, which had been delivered to the mortgagor's solicitor a month previously:—Held, that this was not a sufficient case of pressure to induce the Court to order a taxation. *Id.*

A mortgagor has not a right to have the bills of the mortgagee's solicitor taxed upon different principles from those which would be applied to the taxation of the same bill upon the petition of the mortgagee. *Id.*

2. The single fact that, upon a transfer of a mortgage, a mere draft bill of costs of the mortgagee's solicitor is, for the first time, produced and then paid, is not of itself, without proof of pressure or fraud, a sufficient "special circumstance" to authorise taxation after payment; nor is that fact sufficient, coupled with overcharges which are not so gross as to evidence fraud. *Re Fyson*, 9 Beav. 117.

3. A meeting was appointed to settle important matters on the 23rd August, and the costs were to be paid by A. B. The bill of costs was delivered the evening before, and payment was then insisted on, though the bill was objected to. Upon evidence of overcharge, taxation was ordered after payment. *Re Elmshie*, 12 Beav. 538.

4. Order made for taxation of bills of costs after payment, where the solicitor had produced them, on the execution of a mortgage, out of the produce of which they had been paid, but had taken them back immediately, and afterwards refused to produce them. *Re Loughborough*, 23 Beav. 439.

It is not necessary to specify items of overcharge upon a petition for taxation after payment, in a case in which the solicitor, by retaining the bill of costs, and refusing to produce them, prevents the client pointing out the overcharges. *Id.*

5. Where the alleged pressure consisted in the refusal to allow the execution of a reconveyance, which was required without delay to make a good title to a purchaser, except on payment of the bill of the mortgagee's solicitor—taxation after payment refused. *Re Dolman*, 2 W. R. 447.

6. Where a client intends to pay a bill of costs at the meeting to complete a matter, the mere fact of the bill being then delivered, and of his paying it, without having had an opportunity of examining it, will not alone be sufficient to entitle the client to a taxation, but such a circumstance forms a material consideration. *Re Abbott*, 18 Beav. 393; 23 L. J., Ch., 955; 2 W. R. 379.

Items of overcharge must be shown to warrant a taxation after payment. *Id.*

A mortgagor and her solicitor met the mortgagee's solicitor to complete, when the money was paid in three cheques, one of which was handed to the mortgagor's solicitor, who

retained it for his costs. His bill was delivered at the time in a sealed packet. Items of overcharge being afterwards proved, a taxation was directed. *Id.*

7. A., the mortgagee's solicitor, sent a reconveyance to B., the mortgagor's solicitor, for execution, unstamped. On the 23rd August B. delivered his bill of costs, which was objected to; and on the 10th September A. applied to B. for the loan of the deed to get it stamped, on his undertaking to return it, which was refused; and on the 18th September the mortgage and bill were paid. The mortgagee afterwards applied for a taxation, and the pressure relied on was, that he had been compelled to pay the bill, in order to get the reconveyance stamped, and avoid the penalties; and, secondly, that no taxation could be had in the long vacation. He also alleged overcharges, which were not clearly made out. The application was refused, with costs. *Re Hubbard*, 15 Beav. 251.

8. A mortgagor, without giving six months' notice, requested the mortgagee to accept payment and to transfer the mortgage. The transfer being executed, the mortgagee's solicitors refused to deliver it or the title-deeds to the mortgagor without payment of their bill of costs. The mortgagor's solicitor objected to items amounting to less than 9% in all, but paid the full amount, in order to obtain the deeds:—Held, that the above were not such special circumstances as to subject the bill to taxation after payment. *Rep. Barton*, 4 De G. M. & G. 108; 22 L. J., Ch., 670.

Semble, that one of the special circumstances required is overcharge, and that an item objected to, not because the business was not done or because the charge was excessive, but because the liability to pay it is disputed, is not such an overcharge as to be sufficient ground for taxing a paid bill. *Id.*

9. On the day appointed for "paying off" a mortgage the solicitor of the mortgagee refused to part with the title-deeds until payment of his bill of 18%, which had been delivered two days previously. It was paid under protest. The Court refused a taxation, no pressing necessity for the title-deeds appearing, and no items of overcharge being distinctly shown. *Re Finch*, 16 Beav. 585; 1 Eq. Rep. 109.

10. A bill of costs was delivered on the day appointed to complete the transfer of a mortgage. It was objected to, but the solicitor of the mortgagee refused to complete until payment. The mortgagor paid it, but it was afterwards ordered to be taxed. *Re Phillpotts*, 18 Beav. 84; 2 W. R. 3.

11. A mortgagee's solicitor's bill was delivered at the completion of the mortgage transaction, and the amount retained, after objection. A petition, presented eleven months afterwards, for taxation, was refused, although the bill contained an objectionable item of 20% for procuration money. *Re Bayley*, 18 Beav. 415.

12. A mortgagor presented a petition, praying that certain bills of costs, which had been paid under certain special circumstances, might be taxed. The petition stated that a meeting was appointed for the completion of a transfer of mortgages and payment of the money, and that the solicitor of the mortgagees presented four bills of costs, two

of which were agreed upon, and the others, which related to matters between the mortgagees and their solicitor, not; but as a postponement of the settlement might be serious to the mortgagor, it was agreed that they should be paid by him. The bills contained improper and exorbitant charges, and the petition specified items of overcharge:—Held, that as the statements and evidence showed a case of great and unnecessary pressure, and as the bills, which were between the solicitor and other parties, contained items which could not be duly examined at the time, there was sufficient reason on either ground to induce the Court to make the order. *Re Kinair, Exp. Price*, 5 Jur., N. S., 423.

If payment be made under pressure, the circumstance of pressure alone is enough to induce the Court to order a taxation. *Id.*

Even without pressure, items of overcharge are enough to render the circumstances special, under s. 41 of the 6 & 7 Vict., c. 73. *Id.*

It is not sufficient, in order to exclude taxation, to show that no objection was made at the time to the payment either of particular items or of the whole bill. *Id.*

1. On the day fixed for the completion, at a solicitor's office, of the sale of a mortgaged property belonging to a former client, the solicitor delivered to the former client, who was in somewhat embarrassed circumstances, his bill of costs. The client and his new solicitor attended, and in order to prevent the postponement of the completion, allowed the solicitor to retain the amount of his bill, but under protest. The bill contained overcharges to a considerable amount:—Held, that the bill was paid under circumstances of pressure, and that it must be taxed. *Re Pugh, Exp. Briscoe*, 1 De G. J. & S. 673; 11 W. R. 762; 8 L. T., N. S., 586. Affirming 32 Beav. 173.

2. A tenant having an option of purchase of the fee at a given price on the terms of his paying all the vendor's costs, gave notice in December 1882 of his exercise of the option, and stated that he should not require an abstract of title. The time for completion was the 25th March 1883, but it was arranged for the tenant's convenience that the completion should be six weeks earlier, and that the property should be conveyed in two lots. He sent his draft conveyances for perusal before the end of December. On the 2nd February 1883 the vendor's solicitors sent in their bill of costs, in which they charged 30s. per cent. on the purchase money of each lot. The purchaser's solicitors objected to these charges, but the vendor's solicitors refused to allow completion unless they were paid, and on the 14th February the purchaser paid them under protest, and completed the purchase. After this he applied for taxation of the bill:—Held, that, having regard to the dates, there was no pressure, and that there was no overcharge amounting to fraud, and that there were therefore no special circumstances to authorise taxation after payment. *Re Laocy & Son*, 25 L. R., Ch. D., 301; 53 L. J., Ch., 287; 49 L. T. 755; 32 W. R. 233. Reversing S. C. *sub. nom. Parker to George*, 49 L. T. 553; 32 W. R. 222.

3. A solicitor delivered his bill of costs to his client, made out in double columns, one

being the amount allowed on taxation, which he refused to accept when tendered. The client then paid the larger sum to obtain his papers:—Held, notwithstanding the payment, that he was entitled to an order to tax the bill, as he had been constrained to pay the larger sum by the refusal of the solicitor to accept what he himself had stated that he was legally entitled to. *Exp. Tisland, Re Letts*, 31 Beav. 488; 32 L. J., Ch., 100; 1 N. R. 8.

An order was made for repayment of the difference, and the costs of the petition. S. C. 8 Jur., N. S., 1119; 11 W. R. 15; 7 L. T., N. S., 303.

4. There is no general rule as to how much pressure will entitle a party to have a solicitor's bill taxed after payment. But if reasonable facilities for taxation have been refused at the last moment, when it has become imperative to the party to obtain immediately the papers to which the solicitor's lien applied, and the party has consequently paid the bill, that is a special circumstance which, coupled with items of apparent overcharge, will justify the Court in directing taxation after payment. *Re Newman*, 15 W. R. 1189; 17 L. T., N. S., 128; 2 L. R., Ch., 707.

It is no argument against taxation in such a case that the effect produced upon the party by the pressure arises out of his own conduct or private affairs. *Id.*

7. Protest.

5. A solicitor's bill of costs paid under pressure, and protested against, referred for taxation. Protest, combined with other circumstances, may be a ground of reference of a bill of costs for taxation. Where there is evidence of pressure, the Court will, if necessary, direct a general reference for taxation, although in the petition for taxation some only of the items of the bill of costs may be objected to. *Exp. Wilkinson, Re Alcock*, 2 Colly. 92; 9 Jur. 720.

6. The bill of trustees was delivered on the 27th November, and on the 10th December paid, after some deductions, by the solicitor of the *cestui que trust*, as he alleged, under protest. A petition for taxation, presented by the *cestui que trust* in January following, was dismissed with costs. The general rule is, that a paid bill is not to be referred for taxation, and special circumstances and grounds are required to take a case out of this rule. *Re Neate*, 10 Beav. 181.

7. In March 1847 a railway company agreed to purchase some property, and to pay the vendor's costs. In May 1847 possession was delivered. The bill of costs of the vendor's solicitor was delivered on the 13th June 1848, and a meeting, to complete the purchase, took place between the solicitors on the 20th June, when objections were then made to the bill. It was then paid, under protest, and with an intimation that it would be taxed, and a petition for taxation was presented a few days after:—Held, that there was not sufficient evidence of pressure to open the matter by ordering a taxation. *Re Welohman*, 11 Beav. 319.

1. Taxation of a bill paid under protest, on the ground of overcharges, and that the solicitor had refused to part with the title-deeds until payment, refused with costs, it not appearing how long the bill had been delivered before payment. *Re Mash*, 15 Beav. 83.

2. A protest upon payment of a bill of costs has no effect. *Re Browne*, 15 Beav. 61. Affirmed 1 De G. M. & G. 322; 21 L. J., Ch., 442.

The cases of taxation after payment are not to be extended. *Ib.*

A bill was delivered, and, after dispute, paid under protest, about seven weeks after, in order to release a fund and pay a creditor, who threatened execution. A petition was presented for taxation nearly twelve months after the delivery, alleging no specific items of overcharge. It was dismissed. *Ib.*

3. W. employed F. as his solicitor from 1855 to 1859, and became indebted to him for costs and cash advances. In 1858 W. gave to F. a security upon his furniture, farming stock, etc., to secure all moneys due or to become due, with an immediate power of sale. In January 1859 F. sent in to W. an unsigned bill of costs and cash account, and in March pressed for payment, and threatened to enforce his security. W. then employed another solicitor, and a correspondence went on till May. F., on 17th May, gave notice that if the money were not paid on that day he should take possession under his security, and he accordingly did so. W. then paid the amount under protest. The bill of costs contained items to a considerable amount subsequently in date to the security, and overcharges were shown. Many of the vouchers for the items in the cash account, though applied for, had not been produced till the day of payment:—Held, that W. was entitled to an order for taxation. *Re Foster, Esq. Walker*, 2 De G. F. & J. 106; 6 Jur., N. S., 687; 29 L. J., Ch., 625.

See also Preceding Subdivision.

8. Pressure or Overcharge.

4. After bill of costs paid, and a receipt in full taken, the client is not entitled to an order to tax the costs, merely swearing they never had been taxed; he must show specific error. *Mahon v. Scanlan*, 2 Moll. 388.

5. Though the Court will open a solicitor's bill, and order taxation after several years, and a security given, or even payment, upon gross errors, fraud, or undue pressure, where nothing appeared but a trifling inaccuracy and under other favourable circumstances, the Court would not restrain proceedings upon a security obtained while business was depending. *Cook v. Setree*, 1 Ves. & B. 126.

6. Order for taxation of a solicitor's bill under the circumstances, after a settlement, upon the common petition, without stating the objectionable items. *Jones v. Poyys*, 10 L. J., N. S., Exch. Eq., 49.

7. Taxation of a solicitor's bill refused, after a security given, payment, and acquiescence; some charges, though improper, not being so gross as to amount to fraud. *Plenderleath v. Fraser*, 3 Ves. & B. 174.

Generally a bond, taken by a solicitor from the client in the progress of a cause, subject to taxation. *Id.* 175.

8. An attorney's bill of costs settled and paid, or after judgment in action, not to be referred for taxation of course; as it may be upon a special case of fraud, or improper charges, notwithstanding payment, a release, judgment, or other security. *Langstaffe v. Taylor*, 14 Ves. 262.

9. A solicitor's bill of costs had been delivered, after the death of the client, to the solicitors employed by his representatives, and paid by them after investigation; and some, but not all, of the papers of the deceased client were delivered up. An application, made three years after, for the taxation of the bill, without referring to any specific errors, but alleging generally that the bill contained exorbitant charges, was refused. *Horlock v. Smith*, 2 Myl. & C. 495; 6 L. J., N. S., Ch., 236; 1 Jur. 302.

Where a client has paid his solicitor's bill without pressure, and with full means of examining it before payment, and afterwards seeks to open the bill and refer it for taxation, he must state, in his petition, and prove to the satisfaction of the Court, specific errors of such a character as amount to evidence of fraud. A general allegation of improper charges will not be sufficient. *Ib.*

A mere *prima facie* error in such a bill will not authorise the Court to refer it for taxation. *Ib.*

The circumstance, that a solicitor has omitted to give his client credit for certain items with which he ought to have been credited, will be a ground for a distinct inquiry what sums the solicitor has received which ought to be set off against the amount of the bill; but will not, of itself, be a ground for referring the whole bill for taxation. *Ib.*

Principles of the Court with respect to the taxation of a solicitor's bill after payment. *Ib.*

10. A petition for the taxation of a bill of costs set forth special circumstances sufficient in themselves to obtain an order for taxation, but the affidavits in support of it mentioned some of the items which were objected to, all of which were explained by the solicitors to the satisfaction of the Court. The petition was dismissed with costs. *Esq. Andrews, Re Clement*, 13 L. J., N. S., Ch., 222; 8 Jur. 327.

11. Petition to tax a bill of costs after payment, on the ground of trifling overcharges, dismissed with costs. *Re Drake*, 8 Beav. 123.

12. To obtain the taxation of a bill of costs after payment, the petitioner must allege and prove specific items of overcharge, even if the payment has been made under protest and upon pressure. Upon a petition for taxation, the Court has no jurisdiction to determine the construction of a disputed special contract as to the costs. The Court, though it refuses the prayer of a petition for taxation, does not always give the costs. *Re Thompson*, 8 Beav. 237; 14 L. J., N. S., Ch., 37; 9 Jur. 169.

13. Where an account, comprising bills of costs, is settled and paid as between a solicitor and client, and no surprise or fraud is practised, the Court will not direct a taxation of the bill, though it appears to contain items which would

be disallowed or reduced on taxation, unless it appears that the overcharges are in themselves so extravagant and improper, as under the circumstances to be considered fraudulent. *Massie v. Drake*, 4 Beav. 433.

Upon the settlement of an account between a solicitor and his client, a sum of 75*l.* was retained by the solicitor, by consent, to answer particular costs not then ascertained. The Court limited the taxation to such particular costs. *Ib.*

1. A solicitor, pending a suit to administer the assets of a deceased client, brought an action against the executrix, and obtained judgment of the entire amount of very heavy untaxed bills of costs, relating, for the most part, to proceedings at law and an arbitration. He afterwards came in and filed a charge under the decree to account in the administration suit, insisting on his demand on foot of the judgment; and it appearing that the bills of costs contained several extraordinary and apparently excessive charges, the Court, on the motion of the defendant in the cause, grounded on an affidavit specifying the objectionable items, referred it to the Master to tax the costs for which the judgment had been obtained, with liberty to the Master, as to the costs of proceedings in other courts, to refer to the taxing officers of those courts. *Gower v. Donovan*, 5 Ir. Eq. R. 329.

2. To constitute a case for taxation of costs after payment, on the ground of undue pressure, the pressure must have been of such a kind as to have rendered it impossible or difficult to have the costs taxed before payment in the ordinary course. *Re Browne*, *Exp. Jeffries*, 1 De G. M. & G. 322; 21 L. J., N. S., Ch., 442.

To support such a petition on the ground of extravagant and improper charges, the allegations directed to that point must be specific, and must be such as to amount to evidence of fraud. *Ib.*

3. Where payment of a bill of costs has been obtained by undue pressure, a taxation may be directed on proof of overcharge, without showing that such overcharges are so gross as to amount to fraud. *Re Wells*, 8 Beav. 416; 14 L. J., N. S., Ch., 215; 9 Jur. 820.

4. Where the client being desirous of raising a sum his solicitors agreed to obtain it, if the amount of their bills might be included and settled, which the client consented to on condition of their taking his acceptance for the bills, on being furnished with all of them, and which had not been delivered, and the acceptance was sworn to have been received in lieu of payment:—Held, that in the absence of any circumvention or oppression, the acceptance of payment under such circumstances was not such a special circumstance as to entitle the client to taxation after payment. The overcharges complained of and explained not being proved to such an extent as to amount to fraud, it was not sufficient that there were some overcharges which might have been disallowed on taxation. *Re Currie*, 9 Beav. 602; 10 Jur. 976.

5. A compromise of a solicitor's claim for costs, if effected under circumstances of pressure upon the client, does not oust the jurisdiction of the Court to tax the bills upon

petition. *Re Stephen*, 2 Ph. 562. Varying 10 Jur. 585.

6. Taxation after payment ordered, on proof of pressure, and on showing grounds for thinking that the bill would be considerably reduced on taxation. *Re Sladden*, 10 Beav. 488.

7. Where a solicitor pressed for the amount of his bill, but offered an opportunity of taxation, and apprised his client that it would be difficult to have the bill taxed after payment, and the client chose to pay without taxation, and afterwards applied to have the bill taxed without showing overcharges amounting to fraud:—Held, that the application ought to have been dismissed with costs. *Exp. Turner*, 24 L. J., Ch., 71; 5 De G. M. & G. 540; 2 W. R. 617.

The client joined in the transfer of the security so given, and in the commencement of other matters employed the same solicitor, and in their completion employed another solicitor, and paid the second bill of costs:—Held, that these were not special circumstances to justify the taxation of the bill of costs. *Ib.*

Unless overcharge amount to fraud the Court will not refer bills of costs for taxation after payment. *Ib.*

8. Taxation ordered of a paid bill of a mortgagee's solicitor in a mixed case of pressure and of improper items. *Re Rance*, 22 Beav. 177.

9. A mortgagee took legal proceedings against the mortgagor whereby expenses were being incurred. The mortgagee's solicitor delivered his bill on the 25th December, and the parties met to complete a transfer on the 29th December. The bill contained a charge for an abstract, which was more than double what it ought to have been, but the solicitor refused to reduce it, and the bill was paid. It did not appear that any proposal had been made to settle the matter, and postpone the question of costs. The Court, considering that there had been both pressure and overcharge, ordered a taxation. *Ib.*

10. On application by a residuary legatee to tax a bill of costs of the solicitors of the executors after payment, no case of pressure or actual fraud was made out, nor of very gross overcharge, but various items were of a considerably greater amount than would have been allowed to the executors in a suit to administer the estate:—Held, that taxation had been rightly ordered, for that overcharges of this nature were overcharges amounting to fraud, within the technical meaning of the term. *Re Dickson*, 3 Jur., N. S., 29; 26 L. J., Ch., 89; 5 W. R. 108.

Held, also, that affidavits filed between the hearing before a Vice-Chancellor and of the appeal were receivable, though evidence so introduced was not entitled to much weight. *Ib.*

11. When a bill of costs is paid, the onus of proving overcharges is thrown on the client. *Re Towle*, 30 Beav. 170; 3 L. T., N. S., 283.

Charges for attendances, to the extent of eight on one day, are not sufficient to open a paid bill. *Ib.*

Where a mortgagee had instituted a suit for foreclosure, and an arrangement had been made for a transfer, and the bill of costs was not delivered until the day appointed for com-

pletion, but was not paid until fourteen days after, the Court refused to order a taxation, no overcharges being satisfactorily proved. The Court considered that the mortgagee ought to have obtained an order to stay the suit, on payment of the mortgage, and the deposit of the amount claimed for costs. *Id.*

1. On the occasion of the payment of a mortgage debt by the mortgagor, the mortgagee's solicitor delivered his bill of costs, which was paid by the mortgagor. The bill contained items to the amount of 10*l.* for the preparation of a bill of foreclosure against the mortgagor, which was never filed:—Held, that the preparation of the bill of foreclosure being under the circumstances unnecessary and improper, the charges were of such a nature as to induce the Court to allow taxation after payment although there had been no pressure or surprise. *Re Barron*, 2 W. R. 109; 18 Jur. 181.

9. Undue Influence.

2. Where the client was in the power of his solicitor, and without the means, or proper assistance, for obtaining any effective examination of the bills, which consisted of general items, and were otherwise not sufficiently explanatory, and the solicitor appeared to be driving the client into a bargain on unequal terms, the relation of attorney and client still continuing, the Court held that the latter was not precluded from an order for reference for taxation by the circumstances of an admission of the balance and payment of the settled account. *Nokes v. Warton*, 5 Beav. 448.

3. Agreement between a solicitor and his client, an illiterate person, for payment of his bills (taken at a given amount) solely out of the produce of some property, the subject of the suit:—Held, not to preclude taxation. *Re Ingle*, 21 Beav. 275; 1 Jur., N. S., 1059; 25 L. J., Ch., 169.

4. The retention and appropriation of money under such an agreement is not such a payment of the bill of costs as, under the 6 & 7 Vict., c. 73, will supersede the taxation, especially when the client is illiterate and without professional assistance. *Id.*

5. An account which had been settled between a client, who was an old lady, and her solicitor, including arranged bills of costs, was ordered to be opened and the bills of costs taxed, after the lapse of nearly two years, without actual proof of error or overcharge, on the ground that the client had acted under undue influence and without sufficient information, and that much of the business charged for was unnecessary and improper. *Watson v. Rodmell*, 11 L. R., Ch. D., 150; 48 L. J., Ch., 209; 27 W. R. 265; 39 L. T. 614. Affirming 7 L. R., Ch. D., 625; 47 L. J., Ch., 418; 26 W. R. 524.

6. The solicitor of a mortgagee, at a meeting to execute the mortgage deeds, by directing the solicitor of the mortgagor to draw cheques on account of the money to be advanced for the payment of divers bills of costs owing to him, across which he required the mortgagee to sign her name at the back, at once withdraws his protection, and subjects the client and mortgagee to constraint and undue influence amounting to pressure, which,

notwithstanding payment, will render the bills liable to taxation. *Re Abbott*, 23 L. J., Ch. 955; 18 Beav. 393; 2 W. R. 379.

XIV. AFTER ACTION BROUGHT.

7. Solicitor may proceed to tax his costs after a verdict at law, with a view to commence an action in his own name for the amount, after a final settlement between the parties by arbitration without his concurrence, notwithstanding an injunction to stay execution. *Brooks v. Bourne*, 1 Price 72.

8. A solicitor to a railway company, provisionally registered, brought an action against three of the managing directors for the amount of his bill of costs, and recovered judgment. An order was afterwards obtained for winding up the company under the Act, and a petition was then presented by the official manager for taxing the solicitor's bill, under the stat. 6 & 7 Vict., c. 73, on the ground of excessive charges:—Held, that the Court could not be called upon to examine the items of a bill to ascertain their correctness, and that an allegation of excessive charges was not such a special circumstance as to bring the case within the 38th section of the Act. Petition dismissed, with costs. *Re Vardy*, 20 L. J., N. S., Ch., 325.

9. A bill of costs having been incurred by A. and B. jointly, and an action having been brought against them for the recovery of the amount, the Court refused to direct a taxation and to stay the proceedings at law, on the undertaking of A. alone, to pay what might be found due. *Re Chilcote*, 1 Beav. 421.

10. Where an action at law has been brought by a solicitor for his costs, and the defendant permitted judgment to go by default at law, Equity cannot interfere to order taxation. *Bryan v. Twigg*, 3 L. J., N. S., Ch., 114.

11. A solicitor was employed by three partners. He brought an action against them for his bill of costs, and, representing one, he obtained judgment against him by default:—Held, that this did not prevent the others from obtaining an order for taxation; held, also, that an application for taxation by the two was regular, the third not concurring, but that he ought to be served with the petition. The taxing masters have jurisdiction to determine questions of retainer. *Re Hair*, 10 Beav. 187; 16 L. J., N. S., Ch., 163; 11 Jur. 139.

12. A judgment at law which is not final does not preclude an order of course for taxation. *Re Gedye*, 15 Beav. 254.

How far a judgment signed at law for default will prevent the obtaining an order of course in this court; and whether such order, if granted, will not stay execution on such judgment, *quære*. S. C. 21 L. J., N. S., Ch., 430.

13. A client obtained an order of course to tax after action brought, but before notice of it, and the order did not provide for the costs of the action:—Held, that this was not irregular, and a motion to discharge it was refused with costs. *Re Farrington*, 33 Beav. 346.

14. After final judgment, signed by an attorney and solicitor, in an action upon his bills of costs, there can be no reference for taxation under the 6 & 7 Vict., c. 73, except under special circumstances, although there has been no verdict nor writ of inquiry executed in the

action. *Re Barnard*, 17 Jur. 53; 2 De G. M. & G. 359.

Semble, that after the question of taxation of a solicitor's bill of costs has been adjudicated upon in an action, a special petition to this Court to tax the costs, under the 6 & 7 Vict., c. 73, s. 37, cannot be entertained. *Ib.*

Semble, that after judgment in an action for costs the special jurisdiction to direct taxation given by the 6 & 7 Vict., c. 73, is gone. *Ib.*

In an action brought by an attorney against his client, upon his bill of costs, the client obtained an order for taxation on the terms of withdrawing all his pleas except *nunquam in-debitatus*. Afterwards he withdrew all his pleas, and applied to the judge for an order of taxation, under the 6 & 7 Vict., c. 73, which was refused for want of jurisdiction:—Held, that the client could not obtain an order for taxation from the Court of Chancery, there being no special circumstance beyond mere overcharge. *Ib.*

1. A solicitor brought an action at law for the recovery of his bill of costs. The client contested the retainer, and while the action was pending, obtained an order of course to tax the bill of costs; but the order contained no submission to pay what, upon taxation, should be found due. Upon motion to discharge the order as irregular:—Held, that the Court had jurisdiction to make such an order; but that in such a case the facts ought to be brought specially before the Court, which would make a special order, according to the circumstances of the case. The Court made a special order; and in case the respondent should refuse to take it, directed the order of course to be discharged, but without costs. *Re Thurgood*, 18 Jur. 821; 23 L. J., Ch., 952; 19 Beav. 821.

XV. ORDER TO TAX AS BETWEEN PARTY AND PARTY.

2. When costs are given against a party, he must pay the costs of his antagonist when taxed as between party and party. *Kirkwood v. Lyons*, 1 Hog. 116.

3. In a suit to restrain the piracy of a literary work, a plaintiff who, in opposition to the defendant's denial of his title, obtains an injunction, is entitled to an answer from the defendant for the purpose of having his title admitted (in case, by arrangement between the parties, the title is not established at law), and also of having an account from the defendant of the profits made by the sale of the spurious work. The plaintiff, therefore, under such circumstances, is entitled to the cost of the suit, including the answer as between party and party; and if, by the refusal of the defendant to pay those costs, the plaintiff is compelled to bring his cause to a hearing, he will be entitled to the whole costs of the suit as between party and party, although, at the hearing, he may waive the account. And the plaintiff's equity in this respect will not be affected by his having offered to waive his right to an answer, with a view to obtain terms more beneficial to himself than the Court would, under any circumstances, afford to him; as, for instance, with a view to receive costs as between solicitor and client. *Kelly v. Hooper*, 1 Y. & Coll. C. C. 197.

4. Costs of process of contempt for not answering, not allowed in the taxation of costs of suit as between party and party. *Att.-Gen. v. Carrington (Lord)*, 6 Beav. 454; 12 L. J., N. S., Ch., 453.

5. In a suit against an attorney, for the purpose of having his bills of costs on the plaintiff taxed, and for an injunction against his proceeding at law in the meantime, defendants moved that the costs might be taxed as between attorney and client; but the Court said, that the rules of taxation of costs, as between attorney and client, did not apply where they appear in the court as party and party in a cause, and that these costs, therefore, must be taxed as between party and party. *Spelman v. Woodbine*, 1 Cox 49.

6. A railway company, made a defendant in order to ascertain the amount of shares belonging to a testator's estate, will only have party and party costs on being dismissed. *De Combe v. De Combe*, 3 Jur., N. S., 712.

7. Where a company is made a defendant to a bill by a plaintiff claiming an incumbrance on shares of a shareholder, also made defendant, the company is entitled to costs as between party and party from the plaintiff, and to the difference between such costs and costs as between solicitor and client out of the fund. *Chartered Mercantile Bank of India, London, and China v. De Jonge*, 9 L. T., N. S., 678.

See also Next Subdivision and Titles there referred to.

What Items Allowed.] *See* XVIII. *infra*.

XVI. ORDER TO TAX AS BETWEEN SOLICITOR AND CLIENT.

8. The Exchequer never orders costs to be taxed, as between attorney and client. *Leathes v. Nerritt*, 8 Price 570. *S. P. Fontaine v. Tyler*, 9 Price 105; *Sharples v. Sharples*, 13 Price 748; *McClcl*, 505.

9. Costs directed by decree to be taxed as between a solicitor and client, cannot, on petition, be ordered to be taxed on another principle. *Massie v. Drake*, 4 Beav. 533.

10. The 159th General Order does not affect or regulate the taxation of costs as between solicitor and client. *Brangan v. Gorges*, 7 Ir. Eq. R. 225.

11. By a decree, the costs of all parties were ordered to be taxed as between solicitor and client. Upon a re-hearing, the decree was affirmed, and the deposit was ordered to be returned, but nothing was said as to costs. By a subsequent order, the costs of all parties were ordered to be taxed, as between solicitor and client, from the last taxation. Held, that this did not include the costs of the re-hearing. *Agabeg v. Hartwell*, 5 Beav. 271.

12. An adverse application was made against a receiver by a party to the cause, which was refused with costs. The applicant being wholly unable to pay the costs:—Held, that the receiver was entitled to be indemnified and have his costs, as between solicitor and client, out of the fund in hand belonging to incumbrancers. *Courand v. Hammer*, 9 Beav. 3.

13. Costs as between solicitor and client will

be allowed to the plaintiff, in a legatee's suit, where there is a deficient fund. *Burkitt v. Ransom*, 2 Colly. 536.

1. A solicitor's bill having been partly taxed and paid, an order, obtained as of course, referring the bill generally for taxation, was discharged with costs. The conduct of the solicitor cannot be adduced in support of such an order, and the costs of affidavits upon that subject were ordered to be paid as between solicitor and client. *Clutton v. Pardon*, T. & B. 301. And see *Gretton v. Leyburne*, id. 407.

2. In cases of scandal the costs are as between solicitor and client. *Exp. Porter, Re Robinson*, 2 Mont. & A. 220.

3. Affidavit in bankruptcy ordered to be taken off the file as irrelevant and scandalous, with costs as between attorney and client. *Exp. Simpson*, 15 Ves. 476.

4. Costs as between attorney and client against parties to a fraudulent bankruptcy, except those who discovered and gave evidence; and the attorney deprived of the office of master extraordinary, and committed. *Exp. Thorp*, 1 Ves. J. 394.

5. A suit instituted by a solicitor without authority was dismissed on motion, with costs of the suit, and of the motion, as between solicitor and client. *Allen v. Bone*, 4 Beav. 493.

6. When an unsuccessful party has been ordered to pay costs, it is not the practice to direct such costs to be taxed as between solicitor and client, except where a fiduciary relation exists between the parties, or where there is something in the nature of scandal, as where gross charges of fraud have been made and not sustained; but the Court may direct an unsuccessful party to pay the costs of a trustee as between solicitor and client, whether there is or not any fund out of which they may be paid. *Turner v. Collins*, 12 L. R., Eq., 488; 40 L. J., Ch., 614; 25 L. T., N. S., 264.

7. A bill was filed by a solicitor as next friend, charging that the plaintiff was of unsound mind, against the plaintiff's house-keeper, to restrain her from exercising undue influence over the plaintiff. Proceedings directed by the Court to be taken by the next friend in lunacy to ascertain the state of plaintiff's mind having resulted in a dismissal by the lords justices of the next friend's petition in lunacy with costs, the plaintiff applied to have the bill taken off the file, and Malins, V.-Ch., made an order accordingly, but, being of opinion that the suit had not been instituted by the next friend without reasonable cause, gave no costs. On appeal upon the subject of costs, the lords justices, in reversal *pro tanto* of the Vice-Chancellor's order, gave costs to the plaintiff as between solicitor and client, and to the defendant as between party and party. *Palmer v. Walesby*, 37 L. J., Ch., 612; 19 L. T., N. S., 1. See *Davies v. Davies*, 18 L. T., N. S., 701.

A person who has been made plaintiff without authority, is entitled to full indemnity; and a defendant who, by reason of the bill being ordered to be taken off the file, cannot be heard on the merits, is entitled to costs as if the cause had come to a hearing, and the bill been dismissed on the merits. *Id.*

8. A taxation at the instance of a mortgagor of the bill of the mortgagor's solicitor, must be

as between the solicitor and his client, the mortgagee. *Re Wells*, 8 Beav. 416; 14 L. J., N. S., Ch., 215; 9 Jur. 820.

9. The taxation of the bill of a mortgagee's solicitor, at the instance of the mortgagor, takes place as between the solicitor and the mortgagee, his client. *Re Harrison*, 10 Beav. 57; 16 L. J., N. S., Ch., 170; 11 Jur. 197.

See also EXECUTOR AND ADMINISTRATOR, XXXIV. v. 3 and XXXIV. VIII. 3—PRACTICE (Costs XIII. 2 & 4, XXXIV. 2, and other Sub-titles)—TRUSTEE RELIEF ACTS, III. IV. 8—TRUSTS, XXXI. XXI. 2.

What Items Allowed.] See XVIII. *infra*.

XVII. JURISDICTION OF THE MASTER.

1. *In General*, 6482.
2. *Discretion*, 6483.
3. *What Items are Taxable*, 6483.
4. *Directions as to Retainer*, 6484.
5. *Agreements as to Costs*. See XIII., I., II., and III. *ante*.

1. In General.

10. The Court refused (but without costs) a motion for special direction to Master, requiring him to deduct, in his taxation of costs of the parties, the costs which he should allow to defendant from those which he should allow to plaintiff (who had become insolvent) after decree had been passed and acted upon. *Rumney v. Beale*, 10 Price 113.

11. A motion for the taxation of a solicitor's bill, with special directions to disallow the costs of certain proceedings alleged to have been improperly taken by the solicitor, or with a qualification that the tax was to be of the costs of such proceedings only as had been properly incurred, refused, as such objections may be taken advantage of under the common order for a taxation. *Wiggins v. Pippin*, 2 Beav. 403. See S. C. 3 Jur. 721.

12. Where a report of scandal or impertinence has been excepted to, the Master cannot tax the costs of the reference, under the 22nd Order of 1833, without further order. *Desanges v. Gregory*, 6 Sim. 473.

13. Under a general order of taxation, the Master will, without any special direction, exercise a discretion as to taxing the costs of informal proceedings. *Clayton v. Meadows*, 2 Hare 26.

14. The Master has no jurisdiction to tax costs under the 201st General Order, except with the consent of both solicitor and client. *Massy v. Millar*, Sau. & Sc. 425.

15. Two solicitors, A. and B., dissolved partnership, and it was agreed that B. should be entitled to half the profits of a suit instituted by them. After some time an order was made, by consent of both, for the taxation of the costs down to the date. Some of the costs had, unknown to B., been already taxed, and received by A.:—Held, under the circumstances, that the order comprised all such costs; and the previous costs having been omitted in the Master's certificate, the Court, upon a petition to review the taxation, referred the matter

back to the Master. *Greenwood v. Churchill*, 14 Beav. 160.

1. The defendant having succeeded in two interlocutory applications, with costs to be paid to him by the plaintiff, the costs were measured by the Court, pursuant to the 159th General Order. The bill was afterwards dismissed for want of prosecution, and upon taxation, the Master, notwithstanding the award of the sum for costs, taxed the defendant's costs of the two applications to sums greater than those awarded:—Held, that the sum awarded by the Court was final and conclusive, and that the Master was not authorised to tax those costs. *Woodley v. Woodley*, 7 Ir. Eq. R. 77.

The 159th General Order applies to all interlocutory motions. *Ib.*

2. An order, directing the costs of the suit to be taxed, warrants a taxation up to the time of the Master's making his report, *semble*. *Clutton v. Pardon*, T. & R. 304.

3. Parties agreed to compromise a suit, and that the costs, charges, and expenses, as between solicitor and client, should be paid out of the fund:—Held, that the taxing master ought to treat the suit as properly constituted, and ought not, in the taxation, to consider whether defendants, having interests similar to the plaintiffs, should have been made co-plaintiffs; and, secondly, that if any of the parties entering into the compromise intended to challenge the propriety of the constitution of the suit, they ought to have distinctly stated, and have provided for it in the agreement. *Lucas v. Peacock*, 8 Beav. 1.

4. On a reference for taxation the taxing master has no jurisdiction to judge of the propriety of a compromise entered into on behalf of the client, which the client has taken no proceedings to impeach. *Re Catlin*, 18 Beav. 511.

5. A decree directed a reference to the Master to tax the defendant's bills of costs, and a reference to the Master in Ordinary to take an account of all the dealings and transactions between the plaintiff and the defendants. By a subsequent order made on a motion, it was directed that, notwithstanding the decree, both references should go to the taxing master:—Held, first, that the order was erroneous as varying the decree in such a manner in which it could not be varied upon motion without consent. *King v. Savery*, 8 De G. M. & G. 311.

Held, secondly, that matters unconnected with bills of costs could not, under the 9th Order of the 20th October 1842, be referred to the taxing master. *Ib.*

6. A bill was dismissed with costs. Considerable costs had been incurred by the examination and cross-examination of witnesses in Australia under a commission:—Held, that the Master must have regard to the rules of taxation there; but the Court refused to refer the taxation of that bill to the proper officer in Australia. *Wentworth v. Lloyd*, 34 Beav. 455.

In the course of a suit in this country, special examiners were appointed to take evidence in Sydney. That evidence was duly taken. The costs of taking it, which were very heavy, were taxed as between solicitor and client, at Sydney, and paid by the defend-

ant. The scale of taxation there was larger than here. The bill in the suit was dismissed by the Master of the Rolls at the hearing, and ultimately on appeal by the House of Lords. Upon the question what was the proper course to adopt with reference to the final taxation of the costs of taking the evidence at Sydney, the Court was of opinion that the bill of costs ought to be finally taxed in this country on the same scale as it would have been taxed in Australia; and that if the Master here felt any difficulty, he must refer to Sydney for information to guide him. S. C. 13 W. R. 486; 13 L. T., N. S., 226.

2. Discretion.

7. The taxing master has, under the Solicitors' Act, 6 & 7 Vict., c. 73, a discretion to disallow costs he may think unduly claimed. *Re Clark*, 1 De G. M. & G. 43; 21 L. J., N. S., Ch., 20; 15 Jur. 1047. Affirming 13 Beav. 173.

The disallowance of the whole costs of an action of replevin, where replevin was clearly the wrong remedy, is a proper exercise of that discretion. *Ib.*

8. Great discretion is allowed to the taxing master as to the items of the costs of taxation. Where, upon appeal from the taxing master, there appeared considerable difficulty in ascertaining the real facts, and questions of law depended upon them, the Court directed an action to try the question. *Re Burchell*, 11 Beav. 596; 21 L. J., N. S., Ch., 236.

9. Where, under an order directing an account of what was due to a party in respect of costs of proceedings taken by him to enforce a judgment in the Exchequer Division, the taxing master to whom the bill of costs was referred disallowed the costs of certain abortive garnishee summonses. On a summons to review the taxation:—Held, that the taxing master was not precluded by the form of order from disallowing any costs that he thought proper, and that, under Rules of Court 1875 (Costs), Ord. VII., r. 26, he was bound to do so; also that the costs in question were properly disallowed. *Simmons v. Storer*, 14 L. R., Ch. D., 154; 49 L. J., Ch., 121; 42 L. T. 291; 28 W. R. 408.

See also XXII. *infra*.

3. What Items are Taxable.

10. If a solicitor retains money received by him in his character of solicitor, for the use of his client, his bill is taxable, though it contains no charges for business done in a court of law, or equity. *Semble*, items in a solicitor's bill for preparing and settling a bill in equity, will render the solicitor's bill taxable, though the bill in equity was never filed. *Re Barker*, 6 Sim. 476.

11. Under the common order for taxing a solicitor's bill, the Master is bound to take a general account of receipts and payments by the solicitor, as agent to the client. *Russel v. Buchanan*, 9 Sim. 167; 7 L. J., N. S., Ch., 210; 2 Jur. 610.

12. Under the common order for taxing a solicitor's bill, the Master ought to take an account of sums received by the solicitor for

his client, in the character of solicitor, and which are connected with the items of the bill. But the Master ought not to take under that order a general account between the parties; and consequently the decision to the contrary in *Russel v. Buchanan* (9 Sim. 167, 175) was erroneous. *Cooper v. Enart*, 15 Sim. 564; 2 Ph. 362; 16 L. J., N. S., Ch., 417.

1. An account of all the dealings and pecuniary transactions of a solicitor not connected with the bills of costs, cannot be obtained upon a petition for the taxation of costs, the account directed on petition being limited to moneys paid or duly appropriated towards satisfaction of the bills. *Re Smith*, 4 Beav. 309.

2. Where the taxing master has received no special directions from the Court in regard to payments made by a client to his solicitor, it is his duty to confine himself to simple payments plainly proved to have been made on account of the bill of costs. In ascertaining what is due on bills of costs, and in the consideration of what payments have been made on account of them, questions of law and fact of considerable difficulty may incidentally arise, and may possibly justify and require discussion and determination, even in the jurisdiction exercised by the Court on petitions for taxation. *Re Smith*, 9 Beav. 182; 15 L. J., N. S., Ch., 238.

3. Under the common order for the taxation of costs, the Master is not authorised to take an account of pecuniary matters between the parties which are foreign to the bill of costs; but *secus*, where moneys are paid by the client on account of the bill of costs, or where, by agreement between the solicitor and client, the moneys which come to the hands of the solicitor are to be applicable to the payment of the bill of costs. *Jones v. James*, 1 Beav. 307; 3 Jur. 310.

Under the common order, the Master is not authorised to allow interest on the balances of moneys of the client, from time to time in the hands of the solicitor, though such appears to have been the agreement between the parties. *Id.*

4. The Court has no jurisdiction, in directing the taxation of a solicitor's bill of costs, to order any account of dealings between the parties, in which the solicitor did not act as such, even though the latter has given credit for such items in the bill of costs. *Sneyd v. Conroy*, 8 Ir. Eq. R. 469.

5. A bill of costs, nearly the whole of which had been paid, contained items unconnected with professional employment, as for a horse, etc.:—Held, that the solicitor ought, in taxation, to have credit for such items (if due), although they had not become due to him in the character of solicitor. *Waring v. Williams*, 2 Beav. 1.

6. As to what items of disbursement are properly included in a bill of costs. Legacy and probate duties, estimated at 140%, were payable in order to make available certain funds in court. The solicitor, at the request of the client, engaged to pay them, and took a charge on the funds for 140% and interest. The duties, amounting to 78% only, were paid by the solicitor:—Held, that sum formed a proper item in his account on the taxation of his bill of costs. *Re Bedson*, 9 Beav. 5; 15 L. J., N. S., Ch., 153.

7. Under an order to tax, the Master may take an account of the receipts of the solicitor on account of interest received by him; but he cannot charge him with the profits made from moneys of his clients in his hands. *Re Savery*, 13 Beav. 424.

8. By a decree made in a suit by a client against his solicitor, it was referred to the taxing master to tax the defendant's bills of costs, and to the Master in ordinary to take an account of all dealings and transactions between the plaintiff and the defendant. The plaintiff afterwards applied, on motion, to have the whole account taken by the taxing master:—Held that this was such an alteration of the decree as could not, without consent, be ordered on motion. *King v. Savery*, 2 Jur., N. S., 431; 25 L. J., Ch., 564; 4 W. R. 471.

Such a reference to the taxing master could not be made, for that giving to the 9th Order of the 26th October 1842 the widest construction of which it was susceptible, it did not authorise a reference to the taxing master of accounts not connected with the bills of costs under taxation. *Semble. Id.*

9. A petition was presented for taxation of a paid bill of costs, alleging specific items of overcharge. The solicitor thereupon offered to repay the amount of such items and the costs. The petitioner did not accede to this, but brought the petition to a hearing. The Court ordered the taxation of the bill, treating these items as omitted. *Re Catlin*, 23 Beav. 412.

10. An Act of a railway company provided that the company should pay the costs of obtaining the Act and preparatory thereto:—Held, that the solicitor's costs as to parts of the original scheme, which were abandoned before the passing of the Act, were properly included. *Re Tilleard*, 11 W. R. 764; 8 L. T., N. S., 587.

11. The Master has, under the 201st Order, jurisdiction to tax mere conveyancing costs between solicitor and client. *Re Smith's Trustees*, Fl. & K. 627.

4. Directions as to Retainer.

12. In equity, the client, in prosecuting the common order for taxation, may object, on the ground of want of retainer, to any items of the bill except those as to which he has admitted the retainer by his petition. The practice is different at law. A party applying for a special order for taxation in a case in which he might have obtained the common order, must pay the costs, though he succeeds. *Re Bracey*, 8 Beav. 266; 14 L. J., N. S., Ch., 299; 9 Jur. 417.

13. A court of equity has jurisdiction to make an order for the taxation of a bill of costs, giving liberty to the client to question the retainer. *Re Thurgood*, 19 Beav. 541; 18 Jur. 821; 23 L. J., Ch., 952; 2 W. R. 682; 8 Eq. R. 1152.

Finding an action by a solicitor for his bill of costs, the client, disputing the retainer, obtained an order of course at the Rolls to tax the bill, which omitted the submission to pay, and a stay of proceedings at law:—Held, first, that the order was irregular. *Id.*

Held, secondly, that it ought not to have been made *ex parte*. *Ib.*

Held, thirdly, that the proper order would be this: on submission to pay, to order taxation, with liberty to the client to question the retainer, and the proceedings at law be stayed. *Ib.*

1. In ordering the taxation of a bill claimed against two, the Court gave both liberty to question the retainer, and directed the Master to distinguish by and to whom each sum found due was to be paid. *Re Kitton*, 35 Beav. 369.

Joint and Several Retainer.] See IV. III. *ante*.

XVIII. SPECIAL ALLOWANCES.

- I. *General Principles*, 6485.
- II. *Abstracts*, 6485.
- III. *Accountant's Charges*, 6385.
- IV. *Affidavits and Interrogatories*, 6486.
- V. *Attendances*, 6486.
- VI. *Auctioneer's Charges*, 6487.
- VII. *Briefs*, 6487.
- VIII. *Conferences and Consultations*, 6487.
- IX. *Copies*, 6488.
- X. *Counsel*, 6490.
- XI. *Decees and Minutes, Drawing up*, 6494.
- XII. *Evidence and Witnesses*, 6494.
- XIII. *Journeys and Attendances in London*, 6497.
- XIV. *Letters and Posting*, 6498.
- XV. *Perusals*, 6498.
- XVI. *Prolixity and Unnecessary Matter*, 6498.
- XVII. *Shorthand Notes*, 6501.
- XVIII. *Other Items*, 6502.

1. General Principles.

2. Observations on the unsatisfactory mode of remunerating solicitors. *Stephens v. Newborough (Lord)*, 11 Beav. 403; 17 L. J., N. S., Ch., 332; 12 Jur. 319.

3. Observations on the imperfect mode in practice in which the solicitors are remunerated for their services. By the practice of the Court, solicitors are often not paid at all, or very ill paid, for very important services, and therefore they ought not to be deprived of any lawful fees which the practice warrants, upon the notion that the business charged may have been of no practical benefit. Thus, where a solicitor acts for a plaintiff and for some defendants, he is entitled to charge such defendants for the plaintiff's warrants served on his clients the defendants, and for attendance thereon, and for separate copies of the proceedings. *Lucas v. Peacock*, 8 Beav. 1.

4. Observations as to the allowance to solicitors in taxation of costs for business not necessary or required for the interests of their clients, by way of compensation for services for which they are inadequately remunerated. Distinction between this and fictitious charges for important business as done, which, in fact, has been neglected. *Davenport v. Stafford*, 8 Beav. 503; 14 L. J., N. S., Ch., 414; 9 Jur. 801.

5. In ascertaining what is due on bills of costs, and in the consideration of what payments have been made on account of them,

questions of law and fact of considerable difficulty may incidentally arise, and may possibly justify and require discussion and determination even in the jurisdiction exercised by the Court on petitions for taxation. *Re Smith*, 9 Beav. 182; 15 L. J., N. S., Ch., 238.

2. Abstracts.

6. Where an abstract of title which was used in the preparation of a defendant's answer had been prepared mainly, if not entirely, before the commencement of the suit, and there was no evidence before the Court to show what part, if any, had been prepared since the institution of the suit:—Held, that in taxation as between party and party the costs of preparing such abstract could not be allowed. *Davis v. Dysart (Earl)*, 2 Jur., N. S., 219; 25 L. J., Ch., 322; 8 De G. M. & G. 33; 4 W. R. 268. Affirming 21 Beav. 124; 1 Jur., N. S., 1153; 25 L. J., Ch., 122.

Quære, whether, if the abstract had been made after the institution of the suit, and solely for the purposes of the defence, the costs of its preparation could have been allowed. *Ib.*

7. According to the practice under the 15 & 16 Vict., c. 86, s. 56, in cases of sale by the Court, an abstract of title is submitted to counsel to prepare the conditions of sale. Counsel having made certain queries upon four sheets of the abstract, the vendor's solicitor charged 1*l.* 1*s.* for perusing the same, and 4*l.* 6*s.* 8*d.* for a second fair copy of the abstract for the purchaser's solicitor. The taxing master disallowed the first item, and reduced the second to 13*s.* 4*d.*, which he allowed for re-copying the four spoiled sheets of the abstract, to render it fit to be sent to the purchaser's solicitor. On a petition to review:—Held, that the taxing master was right, and that they were matters entirely within the discretion of the taxing master. *Ex p. Rumsey*, 21 Beav. 40.

A second fair copy of abstract is not allowed, except under special circumstances, as where the notes of counsel render the copy laid before him wholly unfit to go to the purchaser. *Ib.*

The solicitor usually charges for drawing the conditions of sale, though they are really drawn by counsel, and he is thereby remunerated for the trouble of answering counsel's queries. *Ib.*

8. The costs of an abstract of a deed prepared to accompany a case submitted to counsel, disallowed under the circumstances. *Re Pender*, 10 Beav. 390.

9. In taxation, abstracts are ordinarily passed if they contain eight folios on an average; but the strict rule is, that they should contain ten folios. *Re Walsh*, 12 Beav. 490.

Taxation of a paid bill sought on the ground of overcharge in abstracts containing less than ten folios refused, the practice being in uncertainty and there being no pressure or surprise. *Ib.*

Explanatory notes of the taxing-master as to the charge for abstracts, etc., etc. *Ib.*

3. Accountant's Charges.

10. The expense of an accountant, employed with reference to and pending the suit, does

not come under the general denomination of costs, and will not be allowed on taxation. *Small v. Attwood*, 1 Y. & Coll. 53; 4 L. J., N. S., Exch. Eq., 1.

1. In the absence of any special arrangement, the rule for accountant's charges, fixed by the General Order in Bankruptcy of the 19th May 1855, will be adopted by the Court of Chancery. *Meymott v. Meymott*, 10 Jur., N. S., 715; 33 L. J., Ch., 686; 12 W. R. 993; 10 L. T., N. S., 681; 33 Beav. 590.

2. An accountant had been employed to examine books for the purpose of preparing an affidavit in a suit in Chancery, and had also been employed in extracting items of profit and loss and recording them in supplemental books, and in setting up new journals and ledgers:—Held, that the taxing-master was right both in making an allowance of five guineas a day to the accountant for such time as he had been employed in preparing to give evidence, and in refusing to make any allowance in respect of work done by him as an accountant. *Re Lafitte & Co.*, 20 L. R., Eq., 650; 33 L. T., N. S., 91; 24 W. R. 7; 44 L. J., Ch., 633.

See also BANKRUPTCY, XXXV. iv.

4. Affidavits and Interrogatories.

3. The costs of documentary evidence not read, nor entered as read, were disallowed. *Stuart v. Greenall*, McClel. 705; 13 Price 755.

4. Costs of preparing interrogatories, which were not used, owing to admissions being put in, allowed as between party and party. *Davies v. Marshall*, 1 Dr. & Sm. 564.

5. A solicitor is entitled to charge for the costs of the affidavit made by him on delivering up the papers under an order for taxation. *Re Catlin*, 18 Beav. 514; 7 Jur., N. S., 669; 9 W. R. 756.

6. So much of a bill for an account against trustees, and to have sums claimed by them disallowed, as charged fraud, was dismissed with costs, and accounts were directed. The Master, in taxing the defendant's costs, had refused to allow to the plaintiff any costs whatever in respect of the interrogatories, answer, or production of documents, considering that all these items were unnecessary upon a mere bill for an account:—Held, that the Master was not justified in disallowing these items without distinguishing those portions which related to the part of the bill which had not been dismissed, and as to which his certificate was sent back for review. *Heming v. Leifchild*, 8 W. R. 352. Affirmed 9 W. R. 174.

7. Where an affidavit was filed which the Court considered to be of unnecessary length, a direction was made, under the 122nd Order of May 1845, that the taxing master should, on taxing the costs, look into the affidavit, and distinguish those parts which he might consider to be of unnecessary length, and disallow the costs occasioned thereby. *Re Skidmore's Trusts*, 1 Jur., N. S., 696; 24 L. J., Ch., 711; 3 W. R. 584; 3 Eq. Rep. 736.

8. Where a motion for an injunction had been refused, with costs, on the ground of want of parties, the defendant is not to be entitled to the costs of affidavits which have been filed by him, but not used on the motion.

Camille v. Donato, 11 Jur., N. S., 26; 13 W. R. 358; 11 L. T., N. S., 584.

9. The costs of affidavits, used to qualify the answer of a defendant, so as to excuse him from the production of documents, must be paid for by the defendant. *Smith v. Massie*, 4 Beav. 417; 5 Jur. 1053.

10. The costs of an affidavit, filed in support of a motion, but not entered in the order as read, will not be allowed on taxation, even as between solicitor and client. *Stephens v. Newborough*, (Lord), 11 Beav. 403; 17 L. J., N. S., Ch., 332; 12 Jur. 319.

11. Costs may be allowed for affidavits used in reference to the common injunction. *Small v. Attwood*, 1 Y. & Coll. 53; 4 L. J., N. S., Exch. Eq., 1.

5. Attendances.

12. Only one fee is allowed to a solicitor for attendance on a motion. *Doolan v. Tobeau*, 2 Jones 314.

13. Costs of solicitor attending execution of commission abroad. *Hamond v. Wordsworth*, Dick. 381.

14. The costs of a London attorney attending the execution of a commission for the examination of witnesses in the country, may, under special circumstances, be allowed on taxation of costs between party and party. *Howell v. Tyler*, 2 Y. & Coll. C. C. 284; 12 L. J., N. S., Ch., 223; 7 Jur. 525.

15. Costs of attending the defendant's solicitor for undertaking to appear were allowed. *Davies v. Marshall*, 7 Jur., N. S., 669; 9 W. R. 756; 1 Dr. & Sm. 564.

16. A charge in a solicitor's bill "for attending a great many times" is too vague, and on taxation the charge will be disallowed. *Re Pender*, 10 Beav. 390.

17. Where a motion to dismiss stood over for a space of time, including fifty-three motion days, the defendant's solicitor being unable to swear that he actually attended in court upon such motion days, the taxing master allowed him costs for ten attendances only, and the Vice-Chancellor, on petition, confirmed this order. *Hollocombe v. Hollocombe*, 17 Jur. 362; 1 W. R. 160.

18. A vendor of land to a railway company having filed a bill for specific performance, opposed three bills in Parliament, and by an Act which was eventually obtained his lien was provided for. It was then arranged that he should be paid principal, interest, and costs:—Held, that the Master in taxing the costs should allow all reasonable costs, charges, and expenses of appearing before the committee and opposing the bills in Parliament. *Cooper v. London, Chatham, & Dover Railway Co.*, 17 L. T., N. S., 283.

19. The attendance of a solicitor's clerk in addition to the solicitor himself, on cross-examination before the examiner, is unnecessary and unusual, and the costs of such attendance will be disallowed in taxation. *Smith v. Buller*, 45 L. J., Ch., 69; 19 L. R., Eq., 473; 23 W. R. 332; 31 L. T., N. S., 873.

20. Where one solicitor attends in chambers for two parties in different interests the costs of one attendance only will be allowed. *Brown v. Gellatly*, 15 W. R. 887; 16 L. T., N. S., 553.

6. Auctioneer's Charges.

1. Under the usual taxation order, a solicitor is entitled, in the absence of negligence or improper conduct, to be allowed all moneys paid out of pocket. *Re Page*, 9 Jur., N. S., 1116; 11 W. R. 584; 8 L. T., N. S., 281; 32 Beav. 487.

Where, upon the sale of some property, an auctioneer employed by the solicitor deducted the amount of his commission, which was at the usual rate:—Held, that in the absence of improper conduct, the solicitor was entitled to be allowed the amount in account, although the rate of commission was higher than that allowed in chambers. *Id.*

7. Briefs.

2. An order for re-hearing was discharged with costs, but, in the meantime, the cause had been set down, and briefs delivered:—Held, that the costs thereof could not be included in the order, and could only be given on a re-hearing, or upon special application. *Davenport v. Stafford*, 9 Beav. 106.

3. Brief of pleading prepared for counsel after publication and before the cause had been set down, and which became useless in consequence of a compromise before hearing, disallowed on taxation as between solicitor and client. *Friend v. Solly*, 10 Beav. 329; 11 Jur. 958.

4. Brief of pleadings made before the case was at issue, disallowed. *Re Pender*, 10 Beav. 390.

5. The plaintiff's solicitor is entitled to give out briefs and fees to counsel upon the same day that he sets down the cause to be heard *pro confesso*. *Ivie v. Gahan*, 9 Ir. Eq. R. 223.

6. Where an injunction or receiver is prayed by the bill, the defendants, who are interested in resisting the motion, are entitled to the costs of two briefs on the filing of their answers; but the plaintiff is not entitled to the costs of briefs, unless he has moved or served a *bonâ fide* notice of motion, or unless some act had been done by the defendant after the briefs were *bonâ fide* made, which rendered the notice of motion unnecessary. The bill prayed an injunction, and, upon the coming in of the answer, the solicitor prepared two briefs for the injunction motion. The suit was compromised before the briefs were given out or notice of motion served:—Held, that the plaintiff was not entitled to the costs of the briefs against the defendant. *Broadbent v. Hughes*, 10 Ir. Eq. R. 65.

7. In a bill of costs taken in before the Master for taxation, one charge under the title of "observations," of considerable amount, was for copies of certain charters, accompanying briefs to counsel:—Held, that the Master was right in allowing the charge. *Skinners' Co. v. Irish Society*, 1 Jur. 37.

8. As a general rule, it is improper to introduce, into counsel's briefs, both the original and amended bills. *Higgins v. Bateman*, 2 Dr. & War. 70.

9. Costs of supplemental briefs on petition allowed, where made necessary by opposition of respondents, after expressing their intention not to oppose petition. *Stephens v. New-*

borough (Lord), 11 Beav. 403; 17 L. J., N. S., Ch., 332; 12 Jur. 319.

10. The 1*l.* is allowed for the orders of 7th August 1852, for instructions for brief, was intended as a compensation for the whole fee for abbreviating the bill, at 4*d.* a folio, which ceased on bills being printed. And where there has been a change of solicitors, the solicitor at the time of filing the replication is ordinarily entitled thereto. *Re Catlin*, 18 Beav. 517.

11. In instructing counsel to prepare pleadings, etc., a solicitor is bound to send only copies of deeds, and not the original deeds, which act would be a violation of his duty to his client. The costs of such copies will be allowed on taxation. *Re Beamish*, 19 W. R. 740.

In preparing briefs for the hearing, such copies should not be made up into the brief, but should be kept for the use of the Court if necessary. The deeds should be briefed independently of such copies. *Id.*

12. When one party, by his pleading, puts in issue documents which the other may reasonably expect will be read in evidence, and he accordingly has them briefed to his counsel, the Master ought, in the exercise of his discretion, and having regard to the probable materiality and relevancy of those documents to the case as pleaded, to allow the costs of the briefs containing them, if he considers that the party was justified in having them briefed; even though they were not read in evidence at the hearing. *Haslam v. O'Connor*, 6 Ir. R., Eq., 615.

13. Diagrams annexed to the margin of copies of the evidence supplied to counsel, illustrative of the subject matter in dispute, although convenient are not necessary, and the extra costs occasioned thereby will not be allowed in taxation as between party and party. *Smith v. Buller*, 45 L. J., Ch. 69; 19 L. R., Eq., 473; 23 W. R. 332; 31 L. T., N. S., 873.

14. The entry, upon the decree, of documents as read at the hearing does not, upon taxation of costs between party and party, exclude the Master's discretion as to disallowing the charges for briefing them to counsel. *Murphy v. Nolan*, 7 Ir. R., Eq., 498.

15. In taxation between party and party, costs of counsels' fees on brief to fix a day for the hearing, disallowed. *Clarke v. Malpas*, 1 N. R. 221.

16. A demurrer having been allowed with costs, the costs of preparing "observations" to counsel's briefs, including marginal notes and an index to the bill, which was very long, disallowed. *Ernest v. Partridge*, 2 N. R. 232; 11 W. R. 715; 8 L. T., N. S., 655.

8. Conferences and Consultations.

17. On taxation of costs, a charge for consulting counsel previously to presenting the petition, and a fee to a second counsel on the hearing, if the petition is one of a special nature, ought to be allowed. *Exp. Ellis, Re Musgrove*, 3 M. D. & De G. 600.

18. Costs of a case laid before counsel as to a supplemental bill, and costs of a consultation between a new junior and the former junior,

who had been promoted, allowed in a taxation as between solicitor and client. *Lucas v. Peacock*, 8 Beav. 1.

1. In the absence of sufficient reason, only one consultation ought to be allowed under the 120th Order of May 1845; and the taxing master's certifying the fact of one counsel being brought specially from another court, is not a ground for allowing an extra number. *Smith v. Effingham (Earl)*, 10 Beav. 378; 16 L. J., N. S., Ch., 297; 11 Jur. 444.

2. A. B. was entrapped into becoming a trustee; but it was agreed that he should be discharged. He consulted counsel as to the liability he had incurred, and instructed him to prepare proper deeds for his protection. It was discovered that a breach of trust had been committed previous to his becoming trustee, and counsel prepared a bond and release for A. B.'s protection, but which were never executed, in consequence of a suit having been instituted by A. B. to set the matter right. During the above-mentioned suit, the tenant for life made proposals to A. B. for a settlement, and on which the advice of counsel was obtained by A. B. in conference:—Held, also, that A. B. was entitled to the fee paid by him for this conference. *Stephens v. Newborough (Lord)*, 11 Beav. 403; 17 L. J., N. S., Ch., 332; 12 Jur. 319.

3. The expression "costs of the suit as between solicitor and client" means such costs as the client would have to pay to his solicitor under the technical "costs of the suit." *Foster v. Davies*, 11 W. R. 813; 8 L. T., N. S., 626; 9 Jur., N. S., 741; 32 Beav. 624; 33 L. J., Ch., 185; 2 N. R. 350.

Where, therefore, a junior counsel requests and obtains a consultation with his leader in it, in order to settle the frame of the bill, the costs of that consultation must be allowed as between solicitor and client, but not as between party and party, without reference to the result of the suit, or the fact whether or not the advice of the Queen's counsel was acted upon. *Id.*

4. A fee for a conference with counsel allowed, as the solicitor had thereby spared counsel much trouble, and been able to give him a more moderate fee on his brief than would otherwise have been the case. *Ernest v. Partridge*, 11 W. R. 715; 8 L. T., N. S., 655; 2 N. R. 232.

5. Where settled estates had been purchased by a corporation under the powers in their Act, and the purchase money paid into Court, the tenant for life of the land taken petitioned for payment out of Court of part of the money to be invested in purchase of another estate. She had the abstract before her own counsel, who approved of the title, and subsequently it was laid before one of the conveyancing counsel of the Court, who also approved the title. The Master disallowed the fees of the private counsel, but his decision was overruled by the Vice-Chancellor:—Held, on appeal, that so much of the costs as consisted of fees for consultation between the two counsel were reasonable charges, but that the whole costs of the investigation of the title by the private counsel was too much, and the Court sanctioned a compromise of the claim, and varied the order of the Vice-Chancellor. *Re Jones*, 4 Jur., N. S., 887; 27 L. J., Ch., 706.

6. Where no fee is paid to counsel on a consultation, no charge can be allowed to the solicitor for his attendance. *Re Catlin*, 18 Beav. 516.

7. Where, by arrangement, exceptions to an answer were heard with the cause, a charge for consultation between counsel on the exceptions, as distinct from the consultation on the hearing of the cause, was allowed. *Davis v. Dysart (Earl)*, 8 De G. M. & G. 33; 25 L. J., Ch., 322; 2 Jur., N. S., 219. Affirming 21 Beav. 124; 1 Jur., N. S., 1153; 25 L. J., Ch., 122; 4 W. R. 41.

A charge for copies only of those parts of the interrogatories, the answers to which were excepted to, can be allowed for the purposes of the consultation on the exceptions, as distinct from the copies made for the purpose of preparing the answer; for which latter purpose, also, only one copy to one junior counsel can be allowed. *Id.*

8. The Master is not at liberty to disallow a charge for a conference, where the solicitor has thought one necessary and paid the counsel's fee, except where a number of conferences has been charged for on the same point. *Re Braund*, 39 L. J., Ch., 384.

9. The Court refused to allow the fees paid on a second consultation held pending the hearing of the appeal. *Wegman v. Corcoran*, 41 L. T. 792.

9. Copies.

10. Where any of the plaintiffs in a suit live in the country, close copies of the answer will be allowed, and the costs of them will be costs in the cause. The costs of all copies of documents, which are required by the judge for his assistance in hearing the cause, are costs in the cause. *Small v. Attwood*, 1 Y. & Coll. 53; 4 L. J., N. S., Exch. Eq., 1.

11. If upon a motion by the plaintiff, grounded upon the defendant's answer, documents therein shortly stated have been read from copies in which they are set out at length; an order dismissing the motion with costs, will not entitle the defendant to the costs of such copies. *Skinner's Co. v. Irish Society*, 1 Myl. & C. 162.

12. A charge for copies only of those parts of the interrogatories, the answers to which were excepted to, can be allowed for the purposes of the consultation on the exceptions, as distinct from the copies made for the purpose of preparing the answer; for which latter purpose, also, only one copy to one junior counsel can be allowed. *Davis v. Dysart (Earl)*, 2 Jur., N. S., 219; 25 L. J., Ch., 322; 8 De G. M. & G. 33. Affirming 21 Beav. 124; 1 Jur., N. S., 1153; 25 L. J., Ch., 122; 4 W. R. 41.

13. It would appear to be the settled practice, that where the same solicitor acts for both the plaintiff and the defendant in a cause, not to allow copies to be taken by one party of documents brought into chambers by the other. *Sharp v. Wright*, 1 L. R., Eq., 634; 14 W. R. 552; 14 L. T., N. S., 246.

14. An order for taxation of costs having been made in a suit, in which three copies in writing of the bill had been served, and the Master, in the absence of any special direction in the decree, having refused to allow the costs of these:—Held, that the omission to ask

for them at the hearing being by inadvertence, the costs of these bills might be allowed; but the costs of the motion refused, it arising out of the negligence of the party himself. *Hewitt v. White*, 12 Jur., N. S., 46; 14 W. R. 220; 13 L. T., N. S., 787.

1. In allowing the costs of attested copies, it is discretionary with the taxing master whether he will allow for the copy of the whole or a part only of a document. *Clanmorris v. Mahon*, 10 Ir. Eq. R. 144.

2. A defendant's solicitor, who himself furnishes copies of documents which the plaintiff has a right to take under the 15 & 16 Vict., c. 86, ss. 18, 20, will not be permitted to charge for them at the rate of 4d. per folio, but will be allowed only stationer's charges actually incurred. *Kennedy v. George, Re Honnor*, 6 W. R. 218.

3. The sums paid for office copies of answers at 4d. per folio, and for ordinary printed copies at ½d. per folio, are payable to the defendant, and when received by his solicitor must be applied in reduction of the cost of printing the answer. *Att.-Gen. v. Etridge*, 32 L. J., Ch., 706; 11 W. R. 927; 9 L. T., N. S., 314.

4. Copy of a correspondence between the parties, furnished to counsel as instructions for a bill, and partially inserted therein, disallowed on a taxation as between solicitor and client. *Stephens v. Newborough (Lord)*, 11 Beav. 403; 17 L. J., N. S., Ch., 332; 12 Jur. 319.

5. The costs of copies of deeds or documents not actually read at the hearing, but furnished by the parties to the Court, are not allowed where they are personal costs, and do not come out of a fund. *Bozon v. Williams*, 3 Y. & J. 378.

6. A solicitor is not entitled to charge at the rate of fourpence per folio for documents existing in print prior to the institution of a suit, though the documents may have been properly used for the purposes of the suit. *Underwood v. Secretary of State for India*, 16 W. R. 752; 18 L. T., N. S., 351. Affirmed 16 W. R. 926; 19 L. T., N. S., 270.

7. In instructing counsel to prepare pleadings, etc., a solicitor is bound to send only copies of deeds, and not the original deeds, which act would be a violation of his duty to his client. The costs of such copies will be allowed on taxation. *Re Beamish*, 19 W. R. 740.

8. If notice that certain affidavits will be read at the hearing of an appeal be given to one of the parties, to the admission of which he objects, his proper course is to inform the party, who has given him notice, of his objection, and to oppose their reading at the opening of the appeal without having taken copies, and, if the Court decides that they are admissible, to ask for time to furnish himself with copies. If, however, he has previously taken copies, and the affidavits be not read, he will have to bear the costs of the copies, although he gets the costs of the appeal. *Re Brompton and Longdown Railway Co., Shaw's claim*, 23 W. R. 813; 33 L. T., N. S., 5.

The appellants from an order on a claim in a winding up gave notice to read a mass of affidavits made in the winding up but not

used on the hearing below. The respondent objected to their being admitted, but took copies. The Court of Appeal confined the argument in the first instance to a question not affected by these affidavits, and being against the appellants on that question, dismissed the appeal with costs, so that the question as to the admissibility of the affidavits was not decided. The respondent applied to have the affidavits entered in the order, as otherwise he would not be able to get the costs of having taken copies:—Held, that the application could not be granted, and that the respondent ought not to have taken copies unless and until the Court held the evidence admissible, in which case it would have given him time to enable him to meet it. 8 C. 10 L. R., Ch., 186.

9. Under the common order of the Court of Appeal giving the costs of the appeal, and of the shorthand writer's notes of the evidence and of the judgment in the Court below, the solicitor of the successful party, when the shorthand notes have been printed in the first instance, is entitled on taxation of the costs to be allowed, in addition to the printer's bill, 3d. per folio for one printed copy of the shorthand notes of the evidence supplied to each of his counsel on the appeal, and 3d. per folio for one printed copy of the shorthand notes of the judgment supplied for the use of each judge of the Court of Appeal. *Singer Manufacturing Co. v. Loog*, 52 L. J., Ch., 288; 49 L. T. 484; 31 W. R. 392.

10. An order had been made by the Court of Appeal on the application of the defendants directing part of an affidavit to be struck out as scandalous and giving the defendants the costs of the application. Among the items in the bill of costs of the defendants were charges for four copies of the pleadings, one for the use of counsel and three for the use of the judges of the Court of Appeal. The taxing master, without entering into the consideration of the question whether the copies were necessary for the purpose of the application, disallowed them on the ground that it was the general rule not to allow the costs of copies of pleadings on an interlocutory application:—Held, that no such general rule as was alleged to exist in the taxing master's office could be sustained; that it was the duty of the taxing master, under the Rules of the Supreme Court (Costs), rule 26, to consider in each case whether the copies were "necessary or proper for the attainment of justice," and that as the copies in the present case were necessary for the hearing of the application, the costs of them must be allowed. *Warner v. Mosses*, 19 L. R., Ch. D., 72; 51 L. J., Ch., 86; 45 L. T. 359.

11. A deposition of a witness, taken in the Court of Bankruptcy for one purpose, and filed, may be used against him as an admission in any other proceeding in the matter of the same bankruptcy. *Exp. Hall, Re Cooper*, 19 L. R., Ch. D., 580; 51 L. J., Ch., 556; 46 L. T. 549.

12. But when a party to an application in the Court of Bankruptcy gives notice to his opponent of his intention to use as evidence on the hearing of the application a deposition which is on the file, though it was originally taken for another purpose, he ought not to serve his opponent with a copy of it, and if

he does so, he will not, though successful on the application, be allowed the costs of the copy thus served. *Ib.*

Semble, per curiam. With regard to the costs of the copies of the deposition which were supplied for the use of the respondent's counsel, we think that in the present case those costs should be allowed. It must not be supposed that we should in all cases allow such costs, we might in some cases allow only the costs of making extracts. *Ib.*

10. Counsel.

- (a) *In General*, 6490.
- (b) *Attorney-General*, 6490.
- (c) *Number of*, 6491.
- (d) *Amount of Fees*, 6493.
- (e) *Refreshers*, 6494.
- (f) *Clerk's Fees*, 6494.
- (g) *Receipt*, 6494.

(a) *In General.*

1. Payment in respect of counsel's fees should specify the cause, and each particular fee. Payments, except for stated and specific fees for particular matters of business done or to be done, disapproved of. *Re Smith*, 4 Beav. 309.

2. Party allowed counsel's attendance at the signing of the draft report, where an application had been made to delay the signing thereof. *Bourne v. Farren*, 6 Ir. Eq. R. 659.

3. The costs of counsel in chambers are always understood as being allowed, unless the contrary is expressed. *Greville v. Greville*, 27 Beav. 596.

4. A fee to counsel for setting a draft report is not allowed in taxation of costs between party and party. Practice before the 1st General Order of April 1847, as to fees to counsel in the Master's office. *Clanmorris v. Mahon*, 10 Ir. Eq. R. 144.

5. On taxation between solicitor and client, the costs of a case laid before counsel for an opinion on a point decided by the decree disallowed, on the ground that the solicitor was not justified in endeavouring to re-open the question. *Nemby v. Drew*, 12 Ir. Eq. R. 24.

6. In taxation between party and party, it is not the practice to allow the common retaining fee to counsel. *Green v. Briggs*, 7 Hare 279; 19 L. J., N. S., Ch., 294.

Before the 120th Order of May 1845, the expense of attending the Master by counsel was not allowed between party and party, except on reference for scandal. *Ib.*

7. Fee of counsel for settling a special affidavit for leave to amend, disallowed in a taxation between solicitor and client. *Re Pender*, 10 Beav. 390.

8. Rule 17 of 4th Consolidated Order, empowering the Master to consider whether he will allow an affidavit to be settled by counsel, does not take the question of the costs of the affidavit out of the discretion of the Court. *Davies v. Marshall*, 1 Dr. & Sm. 564; 7 Jur., N. S., 639; 9 W. R. 756.

Costs of settling affidavit (which was an echo of the bill) by counsel allowed. *Ib.*

Costs of drawing observations for counsel, when cause stood over, allowed. *Ib.*

9. In a patent suit in which the plaintiffs, after the briefs were delivered, but before the hearing, took the common order dismissing their bill, with costs:—Held, on taxation of the costs, and notwithstanding the judge had not certified what particulars had been proved, that the defendants were entitled to allowances in respect of drawing and settling by counsel particulars of breaches. *Batley v. Kynnooh*, 44 L. J., Ch., 565.

10. On the taxation of a plaintiff's bill of costs (in a suit in which a bill for the production of title deeds had been dismissed), the Master allowed charges for the settlement of the answer by the defendant's junior equity counsel, and by his conveyancing counsel, who was familiar with the defendant's title, and also allowed a charge for an abstract of title laid before the junior equity counsel for the purpose of preparing the answer, but which abstract did not appear to have been prepared entirely for that purpose:—Held, that these allowances ought not to have been made. *Davis v. Dysart (Earl)*, 8 De G. M. & G. 33; 2 Jur., N. S., 219; 25 L. J., Ch., 322. Affirming 21 Beav. 124; 1 Jur., N. S., 1153; 25 L. J., Ch., 122; 4 W. R. 61.

Costs of a conveyancing counsel employed to assist in the preparation of an answer disallowed. *Ib.*

Fees to two junior counsel (one of them being a conveyancer only) to settle the answer, cannot be allowed as between party and party, unless by special order of the Court. *Ib.*

A charge for abbreviating the answer, estimating it at its total length, including schedules, is proper, and to be allowed on a taxation between party and party. *Ib.*

(b) *Attorney-General.*

11. Liberty given to except to the Master's report of taxation being applied for on the ground of his disallowance of a brief to the attorney-general, besides two other counsel in a charity information, the report was referred back to the Master for review. *Att.-Gen. v. Drapers' Co.*, 4 Beav. 305.

12. Upon the taxation of costs as between party and party, where the attorney-general is made a party to protect the interests of the Crown, the rule is, to allow two counsel in addition to the attorney-general, in every case in which, if it were that of a private individual, that number of counsel would be allowed. *Cockburn v. Raphael*, 12 L. J., N. S., Ch., 263; 7 Jur. 246.

13. Held, that in taxing the costs of a suit, which were to be paid by the defendant, a special retainer paid by the plaintiff, to the attorney-general, who did not usually practise in the Court of Chancery, ought to be allowed, although there were no special circumstances which rendered the employing the attorney-general necessary. *Nichols v. Haslam*, 15 Sim. 49. S. C. *nom. Nickells v. Haslam*, 9 Jur. 649.

14. When the attorney-general, upon making an application in the matter of a charity, desires an order for taxation and payment of his costs, charges, and expenses relating to the

charity, not being costs in the matter, the summons should contain a statement of the matters in respect of which payment of such costs is desired. *Re Dulwich College*, 15 L. R., Eq., 294; 21 W. R. 519.

(c) *Number of.*

1. Upon the taxation of costs, even as between solicitor and client, the rule is to allow only two counsel, or under special circumstances three. *Downing College case*, 3 Myl. & C. 474.

2. Under a reference to the Master to tax costs as between solicitor and client, he disallowed the fees to two out of five counsel, who appeared at the hearing:—Held, that the Master was right. *Att.-Gen. v. Vigors*, 7 L. J., N. S., Ch., 214; 2 Jur. 508.

3. The plaintiff's solicitor employed a Queen's counsel and a junior to oppose a motion for further time to answer. The Court held that he was justified in so doing, and ordered the taxing master, who had disallowed the fees of the junior counsel, to review his taxation. *Cooke v. Turner*, 12 Sim. 649.

4. The solicitor for the plaintiffs employed three counsel (two of whom were Queen's counsel) to appear for his clients at the hearing of a cause; and the Master, in taxing the solicitor's bill as between solicitor and client, under an order obtained by one of the plaintiffs, disallowed the fees of the second counsel. The Court referred it back to the Master to review the report, there being nothing to show that it was unnecessary to employ more than two counsel. *Wastell v. Leslie*, 14 Sim. 84; 13 L. J., N. S., Ch., 368; 8 Jur. 1001.

5. The costs of employing two Queen's counsel for the plaintiff at the hearing allowed; the second Queen's counsel having drawn the bill when he was without the bar. *Carter v. Barnard*, 16 Sim. 157; 17 L. J., N. S., Ch., 278; 12 Jur. 322.

6. In the taxation of costs as between solicitor and client, the taxing master had disallowed the costs of two counsel in several applications to the Court. The Master having used his discretion, and not proceeded on any general principles, a petition to review the taxation was dismissed with costs. *Friend v. Solly*, 10 Beav. 329; 11 Jur. 958.

7. The general rule is, that the costs of two counsel only are allowed upon a taxation between party and party. In the absence of sufficient reason, only one consultation ought to be allowed under the 120th Order of May 1845; and the taxing master's certifying the fact of one counsel being brought specially from another court, is not a ground for allowing an extra number. *Smith v. Effingham (Earl)*, 10 Beav. 378; 16 L. J., N. S., Ch., 297; 11 Jur. 444.

8. Briefs to two counsel, on an unopposed motion, made by a trustee, to pay money into court, allowed, upon appeal from the decision of the taxing master. *Stephens v. Newborough (Lord)*, 11 Beav. 403; 17 L. J., N. S., Ch., 332; 12 Jur. 319.

A petition was presented to compromise a suit, which it was supposed would be unopposed, but, after the delivery of the briefs, an opposition was threatened. Further briefs being thereupon delivered, the costs thereof

were allowed, on taxation, as between solicitor and client. *Id.*

9. A fee given to senior counsel to plead, the cause was not heard on the day set down. At the next hearing the counsel was from home and another senior was feed. An appeal from the taxing master allowing both fees was dismissed. *Kidd v. Young*, 1 W. R. 214.

10. The fact of a petition being unopposed is not of itself a sufficient reason for the disallowance of the costs of two counsel. Costs of two counsel, upon a petition of a retiring trustee for a reference to appoint a new trustee, and of a petition to confirm the Master's report, allowed under the circumstances. *Sturge v. Dimadale*, 9 Beav. 170; 15 L. J., N. S., Ch., 211; 10 Jur. 277.

11. The general rule that, for the purposes of taxation as between party and party, only two counsel can be allowed as against an adverse party, will not be departed from except under very special circumstances. *Att.-Gen. v. Munro*, 1 Macn. & G. 231.

12. The costs of more than two counsel disallowed in taxation between party and party, notwithstanding the third counsel was retained after the counsel by whom the pleadings had been drawn had been called within the bar. *Green v. Briggs*, 7 Hare 279; 17 L. J., N. S., Ch., 323.

13. There is no rule that only one counsel on each side shall be heard in long vacation causes. *Henry v. Great Northern Railway Co.*, 3 Jur., N. S., 1117.

14. Where the evidence was voluminous, and required careful consideration, the costs of a third counsel were allowed. *Wentworth v. Lloyd*, 2 L. R., Eq., 607; 12 Jur., N. S., 581; 35 L. J., Ch., 642.

15. The general rule that, upon taxation of costs as between party and party, the briefs of more than two counsel shall not be allowed, is not inflexible. *Pearce v. Lindsay*, 1 De G. F. & J. 573.

A plaintiff having retained two counsel on the original hearing of a cause, and succeeded, and having on an appeal retained a third counsel, there being a considerable amount of additional evidence:—Held, under the circumstances of the case, that the costs of the third counsel ought not to be allowed in taxation as between party and party, and the certificate of the Master who had allowed these costs, sent back for review; but on appeal the costs of the third counsel were allowed. *S. C.* 1 Johns. 702, 705; 8 W. R. 354, 383.

16. Circumstances under which the costs of a third counsel will be allowed. *Betts v. Clifford*, 1 John. & H. 74.

17. Parties employing more than two counsel in equity do so at their own risk; the costs will not be allowed unless directed by the Court. *Davis v. Dysart (Earl)*, 21 Beav. 124; 1 Jur., N. S., 1153; 25 L. J., Ch., 122; 4 W. R. 41. Affirmed 2 Jur., N. S., 219; 25 L. J., Ch., 322; 8 De G. M. & G. 33; 4 W. R. 268.

The fees of two junior counsel engaged in settling defendant's answer will not be allowed. *Id.*

Only one junior counsel allowed as between party and party, except by special leave of the Court. *Id.*

1. Where notice of motion is irregularly given before the Master of the Rolls, in a Vice-Chancellor's cause, this Court has jurisdiction to award costs. *Yearsley v. Yearsley*, 19 Beav. 1.

Two counsel having been instructed by the respondents in such a case, 42s. costs were summarily given. *Ib.*

2. Where the taxing master had refused to allow the briefs of more than two counsel on the taxation of costs between party and party, the Master having exercised his discretion by looking into the circumstances of the case, and not having relied wholly on the general rule, the Court refused to disturb the certificate. *Midland Railway Co. v. Brown*, 10 Hare (App.) xlv.; 17 Jur. 969; 22 L. J., Ch., 1092.

3. The costs of more than one counsel attending the examination of witnesses before an examiner will not be allowed. *Hallons v. Fernie*, 16 W. R. 175; 17 L. T., N. S., 347.

4. Costs of a brief to a second Queen's counsel on the hearing of the cause allowed, he having before he had been called within the bar been the junior counsel in the cause. *Horsley v. Cox*, 38 L. J., Ch., 678; 7 L. R., Eq., 461; 17 W. R. 603; 20 L. T., N. S., 473.

5. B., a second mortgagee, filed a bill for redemption and foreclosure against F., who held the first and third mortgages on the property. F., by his answer, disputed B.'s security by denying the consideration, and filed a cross-bill for foreclosure impeaching that security. By the decree made in both suits, F.'s bill was dismissed with costs, so far as it sought to set aside B.'s security, and F. was ordered to pay the costs of the first suit, "so far as the same have been increased by the answer of F. impeaching the validity of the security of B." The Master held that the costs incurred by B. in proving the consideration, and consequent thereon, were the increase of costs in the first suit which F. was to pay, and that the expense of the hearing must be apportioned according to the number of folios, and that the costs of the second suit must be apportioned. He allowed the costs of three counsel in the second suit on account of the complexity of the case. B. objected to this taxation, and contended that he ought to be allowed all his costs except such as would have been incurred if the suits had been ordinary redemption and foreclosure suits heard as short causes, and that F. ought to have all his costs disallowed, except such as would in that case have been incurred, the difference being attributable to F.'s impeaching B.'s security:—Held, that the Master had proceeded on a correct principle. *Begbie v. Fenwick*, *Fenwick v. Begbie*, 6 L. R., Ch., 869; 20 W. R. 67; 25 L. T., N. S., 441.

Held, also, that so much of B.'s bill as was directed to anticipating the objection taken by F.'s answer ought to be dealt with as occasioned by the objection taken in the answer, and that in the other suit regard ought to have been had in taxation to the circumstance that the complexity which justified the allowance of three counsel was owing to B.'s security being impeached. *Ib.*

6. A solicitor who acts for two parties in the same interest should employ one set of counsel for both, although he acts directly for one, and

as agent for the solicitors of the other. *Walters v. Webb*, 18 W. R. 86.

7. The costs of three counsel allowed where the junior who had drawn the pleadings was called within the bar before the hearing of the cause. *Cousens v. Cousens*, 20 W. R. 48; 7 L. R., Ch., 48; 41 L. J., Ch., 166; 25 L. T., N. S., 719.

It is not a matter of course to allow the costs of three counsel in such a case. They ought to be allowed only where the matter is of such a nature that, according to the ordinary practice of litigants, it would have been proper in the first instance to give a retainer to a Queen's counsel. *Ib.*

When the junior counsel who has prepared the pleadings in a Chancery suit is called within the bar before the hearing, and after a retainer has been given to a leader (the propriety of which retainer is a question to be considered), the costs of giving briefs to the leader so retained, the junior who has been called within the bar, and a new junior will be allowed on taxation between party and party. *Ib.*

8. When a leader has been employed in a suit but not retained, the costs of employing him as third counsel at the hearing will not be allowed as between party and party, although the junior counsel who drew the pleadings has before the hearing been called within the bar. *Betts v. Cleaver*, 7 L. R., Ch., 613; 41 L. J., Ch., 663; 20 W. R. 732; 27 L. T., N. S., 85.

9. Whether the costs of two counsel retained on behalf of parties having liberty to attend the proceedings, and being in the same interest as the plaintiff, ought to be allowed or not is a question for the discretion of the taxing master. *Re Webb*, 21 W. R. 745; 28 L. T., N. S., 726.

The mere fact of such parties appearing by the same solicitor as the plaintiff is no good reason why they ought to be allowed the costs of a junior counsel only. *Ib.*

10. Costs of two junior counsel allowed. *North-Eastern Railway Co. v. Jackson*, 22 W. R. 629.

11. A bill having been dismissed with costs, after a hearing of fourteen days' duration, in a suit in which nineteen individuals and two companies—who had, to a great extent, a common case—were defendants, and some of them had justifiably answered separately, and had severally appeared by three counsel, two only of whom were heard for each defendant or set of defendants; the Court refused, in the instance of an individual defendant, to review the taxation whereby the costs of the third counsel were disallowed by the taxing master as between party and party. *Haslam v. O'Connor*, 6 Ir. R., Eq., 615.

12. The costs of a third counsel of the Common Law Bar disallowed. *Flookton v. Peake*, 4 N. R. 466; 12 W. R. 1023.

13. Although two counsel only are heard in the Court of Appeal, the costs of three counsel in that Court should be allowed on taxation between party and party where the difficulty and importance of the case render it proper to retain them, particularly in cases where three counsel had been allowed on taxation between party and party in the court below. *Robb v. O'Connor*, 9 Ir. R., Eq., 373.

14. The junior counsel who had advised throughout the proceedings taken by a claimant against a company in liquidation, in respect of its breach of contract to purchase his busi-

ness, having been called within the bar before the hearing of the claim and after a leader had been retained:—Held, that having regard to the length and complication of the case and evidence, the costs of a third counsel as junior counsel at the hearing ought to be allowed. *Re Laffitte & Co., Laffitte's claim*, 20 L. R., Eq., 650; 44 L. J., Ch., 633; 24 W. R. 7; 33 L. T., N. S., 91.

1. The mere fact of a junior counsel in a cause having been appointed a Q.C. is not a sufficient reason for allowing the costs of briefs to three counsel. *Mem.*, 10 L. R., Ch., 540.

2. The rule that charges will not be allowed for employing more than two counsel will only be departed from in exceptional circumstances, and in determining whether such circumstances exist the amount of interest which the successful party has in maintaining the suit may be taken into consideration. *Smith v. Buller*, 19 L. R., Eq., 473; 23 W. R. 232; 31 L. T., N. S., 873; 45 L. J., Ch., 69.

3. An arrangement by which a Q.C. retained for one of the defendants for the hearing of an appeal has been transferred to the co-defendants to argue the case for them as leading counsel, does not justify the allowance of three counsel on party and party taxation, although only four counsel were employed between the two sets of defendants, and the hearing of the appeal occupied several days. *Merchant Banking Co. v. Maud*, 20 L. R., Eq., 452; 44 L. J., Ch., 581; 23 W. R. 788; 32 L. T., N. S., 794.

4. On the hearing of an action in the Chancery Division, the plaintiff was represented by four counsel, the defendants by two only. Judgment was then given for the defendants. The plaintiff having given notice of appeal, the defendants retained another counsel, and were represented by him and their former counsel at the hearing of the appeal, which was dismissed with costs. The taxing officer disallowed the fees paid to the additional counsel:—Held, that the case was one in which the Court ought not to interfere with the taxing officer's discretion. *Wegmann v. Corcoran*, 41 L. T. 792.

5. The action, after a motion for an injunction had been heard before Malins, V.-Ch., was transferred for hearing to Fry, J.; the defendant, therefore, retained a third counsel. The taxing master allowed his costs:—Held, that the costs of such counsel could not be allowed on account of the transfer, and that the weight of the case did not justify such allowance. *Mason v. Brentini*, 42 L. T. 726. S. C. on appeal 43 L. T. 557; 29 W. R. 126; 15 L. R., Ch. D., 287.

6. In a case of considerable complication, in which charges of fraud were made against the defendant, judgment having been given for him with costs, he was allowed the costs of employing three counsel, though the Master had only allowed the costs of two. *Kirkwood v. Webster*, 9 L. R., Ch. D., 239; 47 L. J., Ch., 880; 26 W. R. 812.

What Counsel will be heard.] See PRACTICE (COUNSEL AND CROSS REFERENCES THERE).

(d) Amount of Fees.

7. The Court will not interfere with the dis-

cretion of the taxing masters as to the quantum of fees to counsel. *Att.-Gen. v. Carrington (Lord)*, 6 Beav. 454; 12 L. J., N. S., Ch., 453.

8. The Court will not entertain an application to review the certificate of the Master as to the amount of fees to be allowed to counsel. *Parkinson v. Hanbury*, 11 Jur., N. S., 474; 13 W. R. 1056; 12 L. T., N. S., 624.

9. On a summons to review the Master's certificate, in a suit where all the evidence was written, for disallowing refreshers to counsel in some cases and allowing them in others:—Held, that there is a discretion to allow refreshers where, from the nature of the case, the period of time occupied in the hearing, and the amount of fee originally given with the brief, it appears reasonable to allow further fees, and that the quantum of fees to be allowed is entirely a matter of discretion for the Master. *Smith v. Daniell, Walker v. Daniell*, 34 L. T. 899.

10. The Master having reduced counsel's fees, on taxation between party and party, not because the amount was excessive, but because the fee had been increased at the instance of the counsel, the Court referred it back to the Master to review his taxation as to those items. *O'Brien v. Cantwell*, 12 Ir. Ch. R. 221.

It would be illegal for the bar, as a body, to fix a minimum fee for any particular class of business; but any individual member of the bar may decline to take a fee less than a certain amount. *Id.*

The Master, in taxation between party and party, should only allow the usual and accustomed fee payable on each particular class of business, though a larger fee had been paid to counsel. *Id.*

11. One of several defendants appealed, substantially, from the whole decree, and the appeal was dismissed with costs:—Held, on taxation, that the same fees on the plaintiffs' briefs which had been allowed on the original hearing ought to be allowed on the appeal. *Sturgis v. Morse*, 26 Beav. 562.

Held, also, that the length of the interval between the two hearings ought not to vary the amount. *Id.*

12. The rule that the decision of the Master is final as to the proper charge for business done, does not apply to counsel's fees on the hearing of an appeal, on the ground that the judge of the court below is better able to decide the question of quantum. *Gilbert v. Guignon*, 21 W. R. 745.

13. The taxing officer allowed for the defendants' two original counsel only the same fees as had been allowed in the court below:—Held, that the Court ought not to interfere with the taxing officer's discretion. *Wegman v. Corcoran*, 41 L. T. 792.

14. The Court of Appeal will not interfere with the discretion of the taxing master as to the amount of counsel's fees. *Cousens v. Cousens*, 41 L. J., Ch., 166; 7 L. R., Ch., 48; 20 W. R. 48; 25 L. T., N. S., 719.

15. The taxing master's decision as to the amount of counsel's fees will not be interfered with unless a gross mistake is made. *Brown v. Sewell*, 16 L. R., Ch. D., 517; 44 L. T., N. S., 41; 29 W. R. 295.

16. In estimating the amount of fees to counsel, the taxing master should always have regard to the difficulty and complication

of the questions of law and fact involved in the case, and the importance of the result of it to the parties. *Robb v. Connor*, 9 Ir. R., Eq., 373.

The fees *bonâ fide* paid by a solicitor to counsel, and fairly required by the magnitude or complication of the cause, ought not to be reduced, but should be allowed on taxation between party and party. *Ib.*

1. The Court has the right, although reluctant to exercise it, to interfere with the amount of counsel's fees. In cases of great intricacy, a fee of 7*l.* 7*s.* a day to counsel for attending before the examiner not considered excessive, and allowed as between party and party, as also a fee of the same amount to a scientific witness for reading papers and getting up the case with a view to giving his evidence. *Smith v. Buller*, 45 L. J. Ch., 69; 19 L. R., Eq., 473; 31 L. T. 873; 23 W. R. 332.

(e) Refreshers.

2. The rule of the common law courts as to refreshers applies to the hearing of heavy suits in Chancery, whether on written or *vivâ voce* evidence; but the brief fee may fairly be taken to cover two days, after which refreshers should be allowed. *Smith v. Buller*, 19 L. R., Eq., 473; 23 W. R. 332; 31 L. T., N. S., 873; 45 L. J., Ch., 69.

The charge to be allowed for counsel's fees for cross-examination will not ordinarily exceed 5*l.* 5*s.* a day after the first, for which a larger fee may be allowed in heavy cases; and where the case is long and complicated, as much as 7*l.* 7*s.* a day may be allowed for the subsequent days. *Ib.*

3. The costs of proceedings in court in the course of which several witnesses were examined *vivâ voce*, and which involved the question whether a certain person was legitimate, were ordered to be taxed upon the common law scale, so as to give the equity counsel refreshers for every day after the first day of the hearing, as in the case of counsel of the common law bar. *Hill v. Hibbit*, 14 L. R., Eq., 221; 41 L. J., Ch., 703; 27 L. T., N. S., 334.

4. On a summons to review the Master's certificate, in a suit where evidence all written, for disallowing refreshers to counsel in some cases and allowing them in others:—Held, that there is a discretion to allow refreshers where, from the nature of the case, the period of time occupied in the hearing, and the amount of fee originally given with the brief, it appears reasonable to allow further fees, and that the quantum of fees to be allowed is entirely a matter of discretion for the Master. *Smith v. Daniell*, *Walker v. Daniell*, 34 L. T., N. S., 899.

5. In taxing the costs of an action in the Chancery Division tried on oral evidence, the taxing master should follow the rule in the common law divisions of allowing refreshers to counsel for every day occupied by a trial beyond one day's time; but where the action is tried on affidavit evidence no refreshers should be allowed. The amount of the refreshers lies in the discretion of the taxing master, and depends on the fee originally marked on the brief and the nature of the

case. The rule in *Smith v. Buller* (19 L. R., Eq., 473), that the criterion for allowing refreshers is the length of time occupied by the trial, irrespective of the mode in which the evidence has been taken, dissented from. *Harrison v. Wearing*, 11 L. R., Ch. D., 206; 48 L. J., Ch., 365; 27 W. R. 526.

6. When the trial of an action commences on one day and is concluded on the next day, refreshers to counsel will not be allowed unless the trial occupied in the whole more than one day's sitting, *i.e.* six hours. *Brown v. Sewell*, 16 L. R., Ch. D., 517; 44 L. T., N. S., 41; 29 W. R. 295.

(f) Clerk's Fees.

7. Fees to counsel's clerks are mere gratuities, for which they have no legal demand, and this Court has no jurisdiction in respect of such fees as against the clerks. The sum allowed for clerks' fees on taxation does not limit the sum which may be spontaneously given, but it does limit the sum which the solicitor can safely pay without the special direction or permission of the client. The Regulation of the 5th November 1840 (Ordines Can. 157) is not a general order of the Court, giving the clerks a legal demand for the fees therein mentioned, but a mere intimation of the opinion of the equity judges, that they may be properly allowed in taxation. *Exp. Cotton*, 9 Beav. 107; 10 Jur. 84.

(g) Receipt.

8. The taxing master ought not to require a receipt stamp to be affixed to counsel's signature to a fee before allowing the charge on taxation. *Re Beavan*, 5 De G. M. & G. 40; 22 L. J., Ch., 536; 2 W. R. 229.

11. Decrees and Minutes. Drawing up.

9. Where the Court has pronounced an order, but no minutes of it have been drawn up, the solicitor is, nevertheless, entitled to his costs of the minutes, as if they had been actually drawn up. *Gould v. Drummott*, 2 L. R., Eq., 609; 12 Jur., N. S., 614; 35 L. J., Ch., 794; 14 L. T., N. S., 881.

10. Costs of inrolling decree disallowed on taxation between party and party. *Clark v. Malpas*, 31 Beav. 554; 9 Jur., N. S., 612; 32 L. J., Ch., 313; 11 W. R. 251; 7 L. T., N. S., 659; 1 N. R. 221.

12. Evidence and Witnesses.

(a) *In General*, 6494.

(b) *Interpreter's Charges*, 6496.

(c) *Professional Witnesses*, 6496.

(d) *Production and Inspection of Documents*, 6496.

(a) *In General*.

11. Where plaintiff not only failed to establish his case by evidence, but also incurred the suit with an unnecessary multitude

of witnesses, and with a body of very irrelevant depositions, he must pay the costs of the depositions, although the bill, not being vexatious, was dismissed without costs, as to the rest of the cause. *Moore v. M'Kay*, Beat. 282.

1. A plaintiff, who enters into evidence to prove facts clearly admitted by the answer, must pay the costs, though he succeed in the suit. *Booth v. Booth*, 1 Beav. 130; 8 L. J., N. S., Ch., 39; 2 Jur. 938.

2. Where much unnecessary evidence was adduced on the part of the plaintiffs, in whose favour a decree was given, costs were only given against the defendants up to the date of the replication. *Harvey v. Mount*, 8 Beav. 439; 14 L. J., N. S., Ch., 233; 9 Jur. 741.

3. Where defendant in the cause examines many witnesses whose testimony is inadmissible to any extent, the Court will give plaintiff his costs of the rejected depositions, independently of the result of the cause. *Petch v. Dalton*, 6 Price 232.

4. The costs of documentary evidence not read, nor entered as read, were disallowed. *Stuart v. Greenall*, M'Clel. 705; 13 Price 755.

5. Costs for witness served to testify before Lord Mayor, awarded. *Rome v. Guybone*, Cary 35.

6. The costs of bringing up witnesses for cross-examination in court allowed, in a taxation between party and party, although they had not been actually cross-examined. *Clark v. Malpas*, 31 Beav. 554; 9 Jur., N. S., 612; 32 L. J., Ch., 313; 11 W. R. 251; 7 L. T., N. S., 659; 1 N. R. 221.

7. Where a country witness remained in London, the sum which his journey would have cost, being less than his expenses in town, will be allowed. *Turner v. Turner*, 5 Jur., N. S., 839.

A barrister is *prima facie* entitled to the expenses of a professional man, without proof of his being in practice. *Id.*

Where an examination is adjourned by the fault of a witness, the Master taxes the costs of both days, and has no jurisdiction to decide that the second examination was unnecessary. *Id.*

The 14th Order of June 1854 does not empower the Court to adjudicate on the amounts of the items allowed. *Id.*

8. On taxation of costs as between party and party, the only costs chargeable against the unsuccessful party are such as are necessary for the conduct of the litigation. Therefore, in a suit to restrain the infringement of a patent, in which the defendant had set up several cases as anticipations, the costs of drawings of exhibits for the purpose of affixing to the margin of counsel's briefs were disallowed. *Smith v. Buller*, 19 L. R., Eq., 473; 23 W. R. 332; 31 L. T., N. S., 873; 45 L. J., Ch., 69.

9. An injunction obtained by a plaintiff having been dissolved with costs on motion by the defendant, the plaintiff gave notice to read, on motion for decree, his evidence on the motion to dissolve the injunction. The decree, which was made with costs, recited part of this evidence:—Held, that the plaintiff was entitled to include the charges for this evidence in his bill of costs. *Stempson v. Jepson*, 18 W. R. 962.

10. In a suit for specific performance the

plaintiff, after expiration of the time prescribed, obtained liberty to cross-examine the defendants at the hearing, and they accordingly attended at the hearing for the purpose, but the plaintiff declined to cross-examine them:—Held, that, although the plaintiff was entitled to the general costs of the suit, he should be disallowed all costs in reference to the cross-examination, and pay the expenses of the witnesses so attending. *Guilfoyle v. Hutchinson*, 8 Ir. R., Eq., 298.

11. All costs caused by unnecessary evidence must be paid by the party offering it. *Littlewood v. Collins*, 1 N. R. 457.

12. It is improper to examine in chief as to particular items of the account, the defendant being an accounting party; or to examine in chief as to the particular acts of wilful default in not receiving rents, the defendant being bound to account for the wilful default simply by reason of the nature of his relation to the plaintiff. Such evidence may however be entered as read, but the plaintiff must pay the defendant the costs of it. *Hamilton v. M'Cormick*, 3 J. & L. 183.

13. When a petition is dismissed with costs, the Court will not limit the payment of costs merely as to the affidavits that were read on the hearing of the petition, for in general all affidavits filed are entered as read. *Eap. Lucas, Re Oldham*, 3 Dea. & Ch. 664; 1 Mont. & A. 405.

14. The party on whose behalf a witness gives evidence, if required by the other side to produce him for cross-examination, is bound in the first instance to pay such witness his reasonable expenses, even though he may be out of the jurisdiction of the Court. *Richards v. Goddard*, 17 L. R., Eq., 238; 43 L. J., Ch., 144; 22 W. R. 204; 29 L. T., N. S., 884.

The plaintiff produced a witness before the examiner, and demanded the expenses of his production. The defendant's solicitor objected to the amount, but undertook to pay what should be found due upon taxation. The witness was then sworn, and the cross-examination proceeded. The plaintiff then applied for an order for repayment by the defendant of the amount paid by the plaintiff to the witness for his expenses, or for taxation, and payment of the amount found due. The Vice-Chancellor considered that the question had better be left till the hearing of the cause, and declined to make any order:—Held, on appeal, that the matter was not one for judicial discretion, but that the plaintiff was entitled, *ex debito justitiae*, to an immediate order for taxation and payment. 8 C., 10 L. R., Ch., 288; 23 W. R. 329; 33 L. T., N. S., 13.

15. The costs incurred in a colony, under a commission to examine witnesses, must be taxed in England upon the scale which would be allowed in the colony, and the Master, in case of difficulty, ought to refer to the colony for information, but not to send the bill of costs there for taxation. *Wentworth v. Lloyd*, 13 W. R. 486; 13 L. T., N. S., 226; 34 Beav. 455.

[Printing.] 16. Where the *viva voce* evidence is voluminous, and the parties cannot properly argue the appeal without referring to all parts of it, the Court will allow the costs of

printing it. *Bigby v. Dickinson*, 4 L. R., Ch. D., 24; 40 L. J., Ch., 280; 35 L. T. 679; 25 W. R. 122.

(b) *Interpreter's Charges.*

1. A party examining, by means of an interpreter, a witness ignorant of the English language, must bear the expense of the interpreter's services on the cross, as well as the direct examination. *Plunkett v. Williams*, 6 Ir. Eq. R. 80.

2. On taxation of costs as between party and party, the Master has a discretion to allow the expense of employing an interpreter to assist a foreigner in preparing instructions for his answer; but such allowance ought not to include the tavern or travelling expenses of an interpreter brought to this country for the special purpose. *Shrewsbury (Earl) v. Trappes*, 8 Jur., N. S., 587; 31 L. J., Ch., 680; 10 W. R. 663; 6 L. T., N. S., 516.

(c) *Professional Witnesses.*

3. There is no positive rule in equity as to the sum to be allowed to a scientific witness attending before an examiner; but the Master decides on the sum to be allowed in each case according to the circumstances. *Smith v. Butler*, 19 L. R., Eq., 473; 23 W. R. 332; 31 L. T., N. S., 873; 45 L. J., Ch., 69.

4. Upon taxation of costs between party and party, the sums paid to witnesses for inspecting, measuring, and valuing improvements upon lands will not be allowed in addition to the charges for the affidavits made by those witnesses. *Murphy v. Nolan*, 7 Ir. R., Eq., 498.

5. In a suit in equity, raising the question of title to a chapel, the defendant employed an antiquary to search after, translate, and report upon various ancient records, and the judgment of the Court turned, in a great measure, upon the evidence so collected. The bill having been dismissed with costs, the antiquary's fees and expenses amounted to 334*l.*, in respect of which the Master allowed 220*l.*; also, of two sums of 26*l.* 5*s.* and 22*l.* for journeys and reports to two other experts. The plaintiff objected, on the ground that the evidence was procured only for the purpose of informing the mind of the defendant as to the best mode of framing his case, that the defendant had no prior knowledge of the existence of many of the documents, and that he had refused to make the antiquary himself a witness in the cause:—Held, that the costs in question had been necessarily and properly incurred by the defendant, and rightly allowed by the Master. *Churton v. Frezen*, 36 L. J., Ch., 660; 15 W. R. 559; 16 L. T., N. S., 171.

Held, also, that the travelling expenses of two eminent architects, who had made affidavits in the cause, were rightly allowed. *Id.*

6. An accountant employed as a skilled witness to give evidence in support of the claim, though entitled to a reasonable allowance for his time and expenses in preparing his evidence by an examination of the books, is not entitled upon party and party taxation to his charges for balancing and putting the books

into shape for the purpose of supporting the claim. *Re Laffitte & Co., Laffitte's claim*, 20 L. R., Eq., 660; 44 L. J., Ch., 633; 24 W. R. 7; 33 L. T., N. S., 91.

7. The daily fee allowed to a professional witness on taxation between party and party is not necessarily to be limited to 3*l.* 3*s.* In this case a fee of 5*l.* 5*s.* a day was allowed to an engineer and architect of eminence employed under the direction of the Court. *Robb v. Connor*, 9 Ir. R., Eq., 373.

8. In a patent suit in which the plaintiffs, after the briefs were delivered, but before the hearing, took the common order dismissing their bill, with costs:—Held, that they were entitled to an allowance in respect of the charges of scientific witnesses, and that such allowance was not limited by the rules of taxation at common law, and also that they were entitled to an allowance in respect of the cost of a model; but the Court followed the Master's decision as to amount. *Bailey v. Kynoch*, 44 L. J., Ch., 565.

9. An auctioneer summoned to give evidence before a special examiner appointed under proceedings in the Chancery Division is, as a professional witness, entitled to be paid a guinea a day by way of compensation for his loss of time, together with the amount of his travelling expenses, if any, including therein his railway fare, first-class, from his residence to the place of his examination and back again. And, although sworn, he may refuse to answer any questions until a sum sufficient to cover these amounts has been paid to him. *Re Working Men's Mutual Society*, 21 L. R., Ch. D., 831; 51 L. J., Ch., 850; 47 L. T. 645; 30 W. R. 938.

(d) *Production and Inspection of Documents.*

10. As to how far a vicar, plaintiff in a tithe cause, is compellable to produce for inspection, etc., vicar's books, and those of predecessors, admitted by him, in his answer to cross bill by defendant, to be in his possession, and to contain entries relating to payments of sums of money, as compositions corresponding in amount with the money payments set up by the defendant as modus relied on. The costs of all proceedings had, for obtaining the discovery by such means, must be paid by party so acquiring it. *Firkins v. Lowe*, 13 Price 193; M'Clel. 73.

11. Defendant ordered to deposit books in the hands of the deputy remembrancer for inspection of other party, and afterwards ordered to account, in doing which he must refer to these books, is not obliged to pay the fees of the office in taking copies. *Gabbit v. Cavendish*, 2 Anstr. 547.

12. The defendants were ordered to deposit certain documents with their clerk in Court for the usual purposes, and to give an inspection of the remainder at their office, and produce them at the examination of witnesses and at the hearing:—Held, that the production on the examination of witnesses in town and at the hearing should be at the expense of the defendants, but the production on the examination of witnesses in the country at the expense of the plaintiff. *Davies v. Harford*, 3 Beav. 118.

1. The costs of affidavits used to qualify the answer of a defendant so as to excuse him from the production of documents, must be paid by the defendant. *Smith v. Massie*, 4 Beav. 117; 5 Jur. 1053.

2. On a motion for the production of documents, the defendant was permitted to show, by affidavit, that they could not be left in the office without great inconvenience; but as the ground for this indulgence was not stated by the answer, he was ordered to pay the costs. *Gardner v. Dangerfield*, 5 Beav. 389.

3. Plaintiff procured the usual order for defendants to produce certain deeds within a particular time, but did not take the usual steps to enforce it, on account of the defendants submitting to perform the order. Subsequently, the defendants not having produced a particular deed, plaintiff gave notice of motion to produce the same, and for defendants to pay the costs of the application. Defendants immediately produced the deed, but refused to pay the costs of the application:—Held, upon motion by plaintiff for defendants to pay the costs, that plaintiff was entitled to the costs of the motion, made necessary by the non-compliance of defendants with the order, although the plaintiff had not taken the regular steps to enforce it. *Maw v. Marsden*, 4 Jur. 1079.

4. Where documents which a defendant is ordered to produce are permitted to remain in his solicitor's office for the plaintiff's inspection, the solicitor is not entitled to charge the plaintiff for inspecting them, although the clerk in Court would have been entitled to demand 6s. 8d. per hour. *Woodroffe v. Daniel*, 10 Sim. 126.

5. Where the inspection of documents on either side is ordered to take place at the office of the solicitor, instead of at the record and writ clerk's office, the solicitor at whose office the inspection takes place is not entitled to charge the other side for attendances during the inspection. *Flookton v. Peake*, 12 W. R. 1023; 4 N. R. 456.

6. Where an order is made in an action in the Chancery Division for the production of documents at the office of the producing party's solicitor, that party, if ultimately successful in the action, is not entitled, as between party and party, to his solicitor's costs of the production, nor to his own costs of inspecting the documents of the other party. *Brown v. Sewell*, 16 L. R., Ch. D., 517; 44 L. T. 41; 29 W. R. 295.

13. Journeys and Attendances in London.

7. Where it is the usage of the profession that certain business should be intrusted to an agent in London, a country solicitor will not be allowed to charge for his attendance in London, to perform that business, although his client has requested his attendance, unless the solicitor has first explained to his client, that, by the usage of the profession, such attendance is considered to be unnecessary. The comparison of an abstract of title with the title-deeds is business within this rule, and a country solicitor will not be allowed to charge for his personal attendance in London, in respect of such

business. *Alsop v. Oxford (Lord)*, 1 Myl. & K. 564; 2 L. J., N. S., Ch., 174.

8. Charges by a country solicitor, for attending the cause in London, to be allowed in some cases; but the circumstance of their being undertaken by the direction of the client, is not alone a sufficient ground for allowing them, as the solicitor himself is better able to judge of their necessity. *Crossley v. Parker*, 1 Jac. & Walk 460.

9. Generally, country solicitors are not allowed the costs of a journey to London to examine abstracts there, unless there be some speciality. *Re Tryon*, 7 Beav. 496.

10. A solicitor acting for a third mortgagee, negotiated for a transfer of the first mortgage, and had proceeded so far as to send the drafts. He took a journey into the country to complete the matter, which proved fruitless; and having previously received an intimation that the second mortgagee had already obtained a transfer of the first mortgage, the costs of the journey were, on taxation, disallowed, on the ground that, after that intimation, he ought to have obtained his client's sanction before incurring the expense. *Re Price*, 9 Beav. 234.

11. A considerable portion of a charge for attendance of a solicitor in town at the request of his client disallowed, on the ground that the solicitor had failed to prove that the whole time was required for the business. Where a solicitor makes against his client any charge not authorised in the usual and regular mode of proceeding, the burden of the proof is upon the solicitor; and in a case where for the interest of a client the solicitor had advanced money to put in the answer of a co-defendant, it was disallowed on the ground that it was not clearly made out that the client authorised or acquiesced in it. *Re Pender*, 10 Beav. 390.

12. A country solicitor personally attending an appeal instead of employing his London agent, will be allowed the additional charges and expenses thereby occasioned. *Re Foster, Ex p. Dickens*, 8 L. R., Ch. D., 598; 26 W. R. 915.

13. Costs of attendance of the country solicitor in a country cause, where witnesses were cross-examined in court, disallowed in a taxation between party and party. *Clark v. Malpas*, 31 Beav. 554; 9 Jur., N. S., 612; 82 L. J., Ch., 313; 11 W. R. 251; 7 L. T., N. S., 659; 1 N. R. 221.

14. Costs of a journey to Paris to obtain the execution of a deed disallowed, beyond the expense of doing it through an agent. *Re Bevan*, 20 Beav. 146.

15. A solicitor had a retainer to act generally for a company, and also a special retainer to conduct a chancery suit on behalf of the company. Being employed by another client to go to America, he collected information on behalf of the company in furtherance of their suit, but without special instructions from the company to do so. On his return to England, he reported to the company what he had done, and they made use of the information he had obtained. He afterwards took three journeys to Paris to conduct negotiations for a compromise of the same suit, without instructions from the company, but with the knowledge of some of the directors, and on two of them he was accompanied by the chairman:—Held, that, under the special circumstances of the

case, the solicitor was entitled to charge the company for his professional services in America, and also for his professional services and expenses on his journeys to Paris. *Re Snell*, 5 L. R., Ch. D., 815; 36 L. T., N. S., 534; 25 W. R. 736. Reversing 25 W. R. 40.

14. Letters and Posting.

1. Letters written by a solicitor to his client which are not properly required for the interests of the client in the business for which the solicitor is engaged, will not be allowed on taxation. *Re Brady*, 15 W. R. 632.

2. A country solicitor, with an office in town, conducting personally the business which would ordinarily be transacted by a London agent, is not entitled to charge for letters passing between the two offices; but such charges are not "overcharges amounting to fraud," so as to induce the Court to refer the bill more than twelve months after delivery. *Re Harle*, 19 L. T., N. S., 305; 17 W. R. 21.

3. A solicitor is not entitled to charge a profit upon the addressing and posting of documents for his client. *Eap. Ditton*, *Re Woods*, 13 L. R., Ch. D., 318; 42 L. T. 161; 28 W. R. 402.

15. Perusals.

4. Taxation of costs between solicitor and client: solicitor's fee for perusing and signing approbation of a draft deed submitted for approbation of his client, who was to be an executing party. *Westby v. Greene*, 5 Ir. Eq. R. 449.

5. Where depositions have been taken abroad, a reasonable allowance should be made to the solicitor in England for perusing them. *Wentworth v. Lloyd*, 2 L. R., Eq., 607; 12 Jur., N. S., 581; 35 L. J., Ch., 642; 14 W. R. 751.

6. A demurrer to the whole bill having been allowed with costs:—Held, that the solicitor for the defendant was not entitled to fees for perusing interrogatories (so as to render the plaintiff liable to the costs of a double defence by demurrer and answer), for drawing an index and marginal notes to the bill (which was of extraordinary length and complication), for the assistance of counsel, or for drawing observations for counsel's brief to argue the demurrer. *Ernest v. Partridge*, 11 W. R. 715; 8 L. T., N. S., 655; 2 N. R. 232.

7. A similar affidavit was filed by a plaintiff in each of several suits. The solicitor for the defendants took an office copy of the affidavit in one suit only, and examined at the record office the affidavits in the other suits:—Held, that he was not entitled to charge for perusing the affidavits in the other suits. *Betts v. Cleaver*, 7 L. R., Ch., 513; 41 L. J., Ch., 663; 27 L. T. 85; 20 W. R. 732.

8. Under an order for taxation, 2l. 2s. was allowed to the solicitor then acting for the client for perusing the bill of his predecessor, it having led to a compromise. *Re Catlin*, 18 Beav. 510.

9. Mortgagee's solicitor, at the time of the loan, perused the title-deeds, and was paid the costs therefore by the mortgagor. After the decree for sale in the mortgage cause, the

same solicitor prepared the abstract of title under the 138th General Order, which, though deducting the title to the time of sale, did not contain any new deeds. The Master having refused to allow the costs of perusing the deeds, the Court refused to send back his taxation. *Scott v. King*, 7 Ir. Eq. R. 483.

10. Biddings were opened upon an advanced price on payment by the applicant of the costs properly incurred of the purchaser:—Held, that the costs of perusing the abstract and of the examination of the title, prior to the first purchase being confirmed, ought not to be allowed on taxation. *Raymond v. Lakeman*, 34 Beav. 584.

11. The costs of perusals of exhibits to affidavits are not allowed on taxation under the Rules of Court, August 1875 (Costs), Ord. VI., without a special direction to the taxing-master, who by the form of order has liberty to allow a special charge for perusal and consideration of the exhibits, the amount of such charge, if any, to be in his discretion. *Re De Rosaz*, *Rymer v. De Rosaz*, 24 L. R., Ch. D., 684; 49 L. T. 133.

16. Prolixity and Unnecessary Matter.

12. Additional costs of long amendments, granted. *Rome v. Stuart*, Dick. 58.

13. Where the bill prayed a sale, and account and payment of prior contemporaneous incumbrances, and a prior elegit creditor had put in an answer of unreasonable length, the Court directed that the Remembrancer should, in taxing the costs, have regard to the length of the answer. *O'Brien v. O'Brien*, Jon. & C. 193.

14. In a suit for tithe composition, all the defendants appeared by the same attorney, and such of them as were tenants from year to year answered the bill separately at length. The Court, upon motion, permitted the plaintiff to dismiss his bill against those defendants, upon payment of costs; and directed the officer, in taxing the costs, to disallow the costs of any answer, or part of any answer, which should appear to have been improperly and unnecessarily filed. *Armstrong v. Bannon*, 2 Jones 538.

15. Where the bill was dismissed with costs, the Court referred it to the Master to inquire what parts of a cross-bill were of unnecessary length, and the costs thereby occasioned. *Woods v. Woods*, 5 Hare 229.

16. Where, in an unopposed petition, unnecessary statements were introduced, the Court directed the taxing master, on taxing the costs, to have reference to such statements. *Hyder v. Coleman*, 21 L. J., N. S., Ch., 592.

17. The Masters do not act under the 40th Consolidated Order, r. 9, in relation to the unnecessary length of the pleading, unless directed by the order of reference. *Re Farington*, 33 Beav. 346.

18. Where a petition was presented to the Court of vexatious length, the Court directed the Master, in taxing the costs, to have regard to the length of the petition. *Canning v. Bell*, 13 L. J., N. S., Ch., 304.

19. The plaintiff, in a supplemental bill, set out at considerable length the statement of

the original bill:—Held, that he ought to pay the costs of any unnecessary statements, to be determined by the Master. *Horsley v. Fawcett*, 11 Beav. 565.

1. The Court will, on the hearing of a cause, decide the question whether the pleadings contain any impertinent matter, and will order a direction to be inserted in the decree, that the taxing master, in taxing the costs, shall have regard to the matter so decided to be impertinent. *Stephens v. Lawrie*, 12 L. J., N. S., Ch., 71.

2. A plaintiff having by an amended bill abandoned part of the relief prayed by his original bill, the Court referred it to the Master, upon motion by the defendant, to tax the additional costs which had been occasioned by so much of the plaintiff's claim as had been so abandoned, and ordered the costs when taxed to be paid by the plaintiff. *Strickland v. Strickland*, 3 Beav. 242; 9 L. J., N. S., Ch., 392.

3. The Masters never tax the costs of such parts of an answer as are prolix or unnecessary. *Parsons v. Potter*, 2 Hog. 281.

A mere trustee is only allowed an answer of one skin and a guinea. *Id.*

4. Remarks as to the effect of the 122nd Order of May 1845 as to costs of prolix or unnecessary affidavits, and jurisdiction of Master in respect of them on their taxation. *Moore v. Smith*, 14 Beav. 393.

5. Where bill had been amended three times, and the two last were by the negligence or error of plaintiff, the defendant was allowed extra costs of those latter amendments. *Watts v. Manning*, 1 Sim. & S. 421.

6. Special direction to taxing master to see whether matter had been properly introduced by amendment, and to charge the plaintiff therewith. *Burchell v. Giles*, 11 Beav. 34.

7. A solicitor, in carrying in a state of facts to obtain the Master's approval of a contract to purchase, appended a long schedule thereto of the parcels proposed to be purchased. The taxing master disallowed the charge for drawing, and only allowed for copying such schedule:—Held, that such disallowance was proper, although the Master in ordinary had allowed attendances upon a number of warrants proportioned to the length of the state of facts, including the schedule:—Held, also, that the allowances in respect of these attendances were properly considered by the taxing master as a compensation for other business actually transacted, and in respect of which he disallowed the charges. *Jones v. Lewis*, 1 De G. & Sm. 245; 11 Jur. 511.

8. Directions given to the Master, that in taxing the costs he should, under Rule 9 of the 40th Order, strike off such parts of the costs as might have been occasioned by an improper mode of framing the pleadings and the affidavits on both sides. *Hanslip v. Kitton*, 8 Jur., N. S., 835.

9. The costs of an unnecessarily long petition will be limited to ten guineas. *Bourne v. Buckton*, 36 L. J., Ch., 792.

10. Where an affidavit was filed which the Court considered to be of unnecessary length, a direction was made, under the 122nd Order of May 1845, that the taxing master should, on taxing the costs, look into the affidavit, and distinguish those parts which he might consider

to be of unnecessary length, and disallow the costs occasioned thereby. *Re Skidmore's Trusts*, 1 Jur., N. S., 696; 24 L. J., Ch., 711.

11. On dismissing a claim, the Court may direct the defendant to pay the costs of any scandalous and impertinent portions of his affidavits. *Dufaur v. Sigel*, 4 De G. M. & G. 520; 22 L. J., Ch., 678.

12. Where, in an interpleader suit, the plaintiffs filed an affidavit of some length as to merits:—Held, that in making an order on the defendants to interplead, and for taxation of costs, there should be a direction to the Master to have regard to any prolixity in the affidavits. *Scottish Union Insurance Co. v. Steele*, 9 L. T., N. S., 677.

13. Directions given to the taxing master under Rule 18 of Order VI. of the Additional Rules of Court, August 1875, to look into and disallow costs of affidavits of unnecessary length. *Cracknall v. Janson*, 11 L. R., Ch. D., 1.

14. An affidavit of documents unnecessarily prolix was ordered, on motion, to be taken off the file, the costs to be paid by offending party. *Walker v. Poole*, 21 L. R., Ch. D., 835; 51 L. J., Ch., 840.

15. When a defendant obtains the ordinary order to stay proceedings upon payment of costs, it is the duty of the Master when taxing such costs to consider and determine questions raised by the defendant as to the necessity or propriety of proceedings for which charges are made in the bills of costs. *Re Wormsley, Baines v. Wormsley*, 39 L. T., N. S., 85; 27 W. R. 36; 47 L. J., Ch., 844.

16. On an abandoned motion, or on the discontinuance of an action, the costs of all work in preparing, briefing, or otherwise, relating to affidavits or pleadings, are allowed, provided, in the opinion of the taxing master, such work has not been prematurely done. *Harrison v. Leutner*, 16 L. R., Ch. D., 559; 50 L. J., Ch., 264; 44 L. T. 331; 29 W. R. 393.

17. Shorthand Notes.

17. Special retainer disallowed in the taxation of costs as between party and party. Transcript of shorthand writer's notes used on appeal disallowed, on a taxation between party and party. *Smith v. Effingham (Earl)*, 10 Beav. 378; 16 L. J., N. S., Ch., 297; 11 Jur. 444.

18. In taxing the costs of a motion for a new trial of an issue, the cost of copies of the shorthand writer's notes of the evidence taken on the former trial are in the discretion of the taxing master, regard being had to the nature of the issue, and the extent to which such copies, if at all, were necessary; but in no case will more than two copies be allowed. *Malins v. Price*, 1 Ph. 590; 9 Jur. 955.

19. As to allowance for shorthand notes taken before a Master in winding up proceedings. See *Re London and Birmingham & Buckinghamshire Railway Co. Exp. Curzon (Viscount)*, 6 W. R. 141.

20. A charge for shorthand notes of *vivâ voce* evidence taken at the hearing, and used on the appeal, will not be allowed on taxation between party and party. *Mockett v. Peake*, 12 W. R. 1023; 4 N. R. 456.

1. Shorthand writer's notes of the cross-examination of witnesses in court allowed, but costs of his notes of the judgment disallowed, on a taxation between party and party. *Clark v. Malpas*, 31 Beav. 554; 9 Jur., N. S., 612; 32 L. J., Ch., 313; 11 W. R. 251; 7 L. T., N. S., 659; 1 N. R. 221.

2. The charge for a copy of a shorthand writer's notes of the proceedings in a county court may be allowed as part of the costs of an appeal. *Exp. Sawyer, Re Bowden*, 1 L. R., Ch. D., 698; 45 L. J., Bky., 56; 33 L. T. 759; 24 W. R. 375.

3. An appellant was allowed the costs of transcribing and printing shorthand notes of the evidence given *vidé voce* in the court below, though they had been printed without any previous order of the Court, and without any consent on the part of the respondent, on the ground that the appeal could not have been properly heard without the printed evidence; but the Court refused to allow the costs of the attendance of the shorthand writer to take the notes. *Bigsby v. Dickinson*, 35 L. T., N. S., 679; 4 L. R., Ch. D., 24; 25 W. R. 122.

4. A motion to vary the Master's certificate by allowing costs of supplying copies of shorthand notes to counsel during the progress of trial was refused on the ground that special directions ought to have been asked for at the trial. *Kirkwood v. Webster*, 47 L. J., Ch., 880; 9 L. R., Ch. D., 239; 26 W. R. 812.

5. Upon the hearing of an action the principal evidence was given *vidé voce*, and the solicitors on each side agreed together that one shorthand writer should be engaged on behalf of both plaintiff and defendant. Shorthand notes were accordingly taken of the speeches of counsel, of the evidence, and of the judgment of the Court. An order having been made in favour of the defendant, the plaintiff appealed, and the Court of Appeal dismissed the appeal with costs, nothing being said about the shorthand writer's notes. On taxing the defendant's costs of the appeal, the Master disallowed the costs of copies of the shorthand notes, except those of the judgment of the Vice-Chancellor, and further disallowed the sum paid by the defendant for shorthand writer's charges. The Vice-Chancellor decided that the two items in question must be allowed as costs in the cause:—Held, on appeal, that the Master was right in disallowing the two items, there having been a simple dismissal of the appeal with costs, without any special directions. *Ashworth v. Outram*, 39 L. T., N. S., 441; 9 L. R., Ch. D., 483; 27 W. R. 98.

The agreement between the solicitors was merely an arrangement for saving expense, and left the case on the same footing as if each party had employed his own shorthand writer. *Ib.*

6. The costs of shorthand notes of evidence in the court below are not to be allowed as a matter of course upon an appeal, but only where a case is made for such allowance. *Re Duchess of Westminster Silver Lead Ore Co.*, 10 L. R., Ch. D., 307; 27 W. R. 539; 40 L. T. 300.

7. Where shorthand notes of evidence are essential to the proper hearing of the case, the costs of such notes will be allowed. *Lee Conservancy Board v. Button*, 12 L. R., Ch. D., 383; 41 L. T. 500.

8. The Court declined to give the successful plaintiff the costs of the shorthand writer's notes of the proceedings which had been taken by each side, as the Court had not required them to be produced for its own use. *Thorley's Cattle Food Co. v. Massam*, 41 L. T. 543.

9. The Court will not include in the costs of an action the costs of the shorthand writer's notes of evidence unless there has been an agreement between the parties on the subject. *Mostyn v. Lancaster*, 51 L. J., Ch., 705.

10. The Court allowed the costs of copies of the transcript of the shorthand writer's notes of the judgment below, furnished to the defendants' two original counsel. *Wegman v. Corcoran*, 41 L. T. 792.

11. The costs of shorthand writers' notes of a judgment are not allowed when it has appeared in the reports, provided that the report appeared a sufficient length of time before the briefs were delivered; if the report appeared too late, the costs will be allowed. *London & South Western Railway Co. v. Gomm*, 20 L. R., Ch. D., 589; 46 L. T. 455.

12. Where the Court has used the shorthand writers' notes of evidence taken in the court below, the costs will be allowed. *Smith v. Chadwick*, 20 L. R., Ch. D., 81; 51 L. J., Ch., 621.

13. The costs of the transcript of a shorthand writer's notes of evidence are, like other costs, in the discretion of the judge within r. 188 of the Bankruptcy Rules 1870, notwithstanding the provisions with reference to these costs made by r. 207. *Re Albeverie, Exp. Smith*, 8 L. R., Ch. D., 599; 48 L. J., Bky., 13; 38 L. T. 395; 26 W. R. 513.

14. It is the duty of the taxing master in a bankruptcy appeal to decide as to the costs of the transcript of a shorthand writer's notes of the depositions. *Exp. Cooks, Re Poole*, 21 L. R., Ch. D., 407.

Costs of the transcript of the registrar's judgment in a bankruptcy appeal were ordered to be included in the costs of the trustee. *Ib.*

15. The Court allowed the respondents the costs of copies of a shorthand writer's notes of evidence taken before the registrar, on the ground that they had been served by the appellant with notice that such notes would be read. *Re Harris, Exp. Ward*, 30 W. R. 561.

16. The Court generally allows the costs of the shorthand writers' notes of the judgment of the court below, if the transcript of the judgment is made use of. *Collyer v. Isaacs*, 45 L. T. 567; 30 W. R. 71.

17. As a general rule the Court of Appeal refuses the costs of shorthand notes of the evidence in the court below. *Kelly v. Byles*, 13 L. R., Ch. D., 682; 49 L. J., Ch., 181; 28 W. R. 585. See also *Bewley v. Atkinson*, 13 L. R., Ch. D., 300.

18. The Court will not allow the costs of shorthand notes of evidence except under very special circumstances. *Vernon v. St James's Vestry*, 16 L. R., Ch. D., 473; 44 L. T. 229; 29 W. R. 222.

19. Under the common order of the Court of Appeal giving the costs of the appeal, and of the shorthand writer's notes of the evidence and of the judgment in the court below, the solicitor of the successful party, when the shorthand notes have been printed in the first instance, is entitled on taxation of the costs to

be allowed, in addition to the printer's bill, 3*d.* per folio for one printed copy of the shorthand notes of the evidence supplied to each of his counsel on the appeal, and 3*d.* per folio for one printed copy of the shorthand notes of the judgment supplied for the use of each judge of the Court of Appeal. *Singer Manufacturing Co. v. Loog*, 52 L. J., Ch., 288; 49 L. T. 484; 31 W. R. 392.

1. It is a settled rule that the costs of shorthand writers' notes of evidence will not be allowed on taxation unless there is in the order a direction to that effect. Such a direction will only be inserted in exceptional cases; the notes of the judge, supplemented by those of counsel, being amply sufficient, if not better, for all ordinary purposes. The general utility of shorthand writers' notes considered. *De la Warr (Earl) v. Miles*, 19 L. R., Ch. D., 80; 45 L. T. 424; 30 W. R. 35.

After the order of the Court of Appeal has been drawn up, the Court has no power to alter the order by adding a direction that the costs of shorthand writers' notes of the evidence be allowed. *Ib.*

2. Costs will not be allowed of shorthand notes of evidence which are not used on the hearing of an appeal, the decision turning on a question of law. *Eap. Webster, Re Morris*, 22 L. R., Ch. D., 136; 52 L. J., Ch., 375.

18. Other Items.

3. An order was made for the division and transfer of a fund in court, but before it could be completed the fund became altered, and the solicitor presented a petition for a similar object:—Held, that it could not be considered as unnecessary, it appearing that the solicitor using his best exertions was unable to act on the first order, by reason of a difficulty as to the legacy duty; the solicitor was therefore allowed the costs upon taxation. Expedition money, paid by a solicitor to a stationer or writing clerk employed in the registrar's office, disallowed upon taxation. A gratuity paid to the clerks of the accountant-general's office was disallowed to the solicitor on taxation, as was also a fee paid upon bespeaking an order for transfer which could not be made available. *Re Bodson*, 9 Beav. 187; 15 L. J., N. S., Ch., 189; 10 Jur. 213.

4. Costs of registry searches, although directed by counsel, refused, under the circumstances, to be allowed the solicitor on a taxation between solicitor and client. Costs of proceedings in a cause, after the object of it had, with the knowledge of the solicitor, been otherwise obtained, not to be allowed on a taxation between solicitor and client, except under special circumstances. *Langford v. Mahony*, 3 J. & L. 97.

5. On a summary application by injunction, the Court will direct the costs of a written bill to be allowed, unless it is shown that such additional expense has not been incurred *bonâ fide*. *Elt v. Islington (Burial Board)*, 2 W. R. 584; 2 Eq. Rep. 1089.

6. Solicitors in London were appointed solicitors to a projected company; other solicitors were appointed as local solicitors,

and were directed to prepare notices to land owners, and other matters connected with the local board; errors were discovered in these, and the scheme was ultimately abandoned. The London solicitors, in their bill of costs, charged for the preparation of these notices, and the taxing Master allowed them. The master of the Rolls disallowed the claim, and "directed" the solicitors to establish their right at law, on the ground that the facts were disputed, and that on the facts, so far as they were ascertained, there were questions of law to be decided. On appeal, the claim was disallowed until it should be established at law, and the solicitors "were to be at liberty" to bring such action as they might be advised. *Re Burchell*, 21 L. J., N. S., Ch., 236; 11 Beav. 596.

7. A solicitor is entitled to charge 6*s.* 8*d.* for every three defendants to a bill for whom he enters appearances, although he may enter the appearances for all the defendants at the same time; and the scale of fees contained in the 5th General Order of the 23rd October 1852, as to entering appearances, is not to be confined to appearances to summonses. *Morritt v. Walton*, 18 Jur. 563; 23 L. J., Ch., 1003; 2 W. R. 599.

8. Term fee allowed where the only proceeding was leaving copy of decree and bill of costs before the Master. *Davies v. Marshall*, 1 Dr. & Sm: 564; 7 Jur., N. S., 669; 9 W. R. 756.

Costs of drawing observations when a cause stood over were allowed.

9. The fee of 2*d.* per folio for revising the print of a defendant's answer can be allowed only in those cases where the defendant swears to and files a printed answer. *Att.-Gen. v. Ethridge*, 32 L. J., Ch., 706; 11 W. R. 927; 9 L. T., N. S., 314.

10. A solicitor is not entitled to charge at the rate of 4*d.* per folio for documents existing in print prior to the institution of a suit, though the documents may have been properly used for the purposes of the suit. *Underwood v. Secretary of State for India*, 16 W. R. 752; 18 L. T., N. S., 351. Affirmed 16 W. R. 926; 19 L. T., N. S., 270.

11. Under an order for taxation, 2*l.* 2*s.* was allowed to the solicitor then acting for the client for perusing the bill of his predecessor, it having led to a compromise. *Re Catlin*, 18 Beav. 510.

12. Only one fee of 6*s.* 8*d.* is allowed for attending for and to file a certificate of taxation, and not 6*s.* 8*d.* to bespeak for attending filing same. S. C. 18 Beav. 513.

A client was liable to a solicitor for the costs of procuring the execution of a lease by her tenant, but which the tenant was to bear. The amount not having been paid when the order to tax was made:—Held, that the charge was properly included in the bill of costs of the solicitor against his client. *Ib.*

13. Charge of 13*s.* 4*d.* for a list of deeds handed over by a solicitor under an order for taxation disallowed. S. C. 18 Beav. 514.

A solicitor is entitled to charge for the costs of the affidavit made by him on delivering up the papers under an order for taxation. *Ib.*

14. Three guineas is a proper sum to allow to each successful claimant to a fund in court for the costs of establishing his claim. *Waterton*

On appeal, the Court declined to interfere with the discretion which the Master had exercised in the matter, and ordered L. to pay to the parties served with the motion a sum for costs. *Stahlschmidt v. Lett*, 7 Jur., N. S., 1271; 9 W. R. 830.

1. Practice of the Taxing Master's Office as to the proceedings under a taxation of costs not requiring service or where service is dispensed with. *Re Harvey's Settlement*, 10 Hare (App.) lxxv.

2. Personal service on a solicitor of proceedings under a taxation dispensed with, and service by placing under his door substituted. *Re Templeman*, 20 Beav. 574.

3. A party does not attend a taxation by writing letters to the taxing master. *Re Upperton*, 30 W. R. 840.

2. Affidavit of Increase.

4. Where one of the parties to an action in the Chancery Division has been ordered to pay costs, the common law practice of requiring in all cases from the party to whom the costs are to be paid an affidavit of increase, proving that payments said to have been made have in fact been made, that witnesses were material, how many days they were in attendance, etc., will not be followed, but the party ordered to pay costs will only be entitled to call for such an affidavit in cases in which the taxing master has required it to supply information of which he is not in possession. *Smith v. Day*, 16 L. R., Ch. D., 726; 50 L. J., Ch., 333; 44 L. T. 217; 29 W. R. 424.

5. On an objection to a solicitor's charge for journeys, his affidavit that they "were necessarily and properly taken for the benefit of the trust estates," was, in the absence of evidence to the contrary, held sufficient. *Mum v. Pearson*, 3 N. R. 99.

3. Allocatur.

6. The allocatur of the taxing master, upon a taxation, does not, when registered under the 1 & 2 Vict., c. 110, s. 18, constitute a charge on the real estate of the client. *Shaw v. Neale*, 20 Beav. 157; 1 Jur., N. S., 1666; 24 L. J., Ch., 563.

7. An order for taxation was to be void, unless the Master made his report in a fortnight, or certified that further time was necessary. The time elapsed without such certificate, and the parties afterwards attended several times before the Master without objecting:—Held, that the irregularity had been waived, and an order was made for the Master to proceed in the taxation. *Re Field*, 16 Beav. 593.

4. Other Matters.

8. Upon taxation of a bill of costs, the solicitor must advance the sum payable to the Chancery fund. *Hodgens v. Wheeler*, Fl. & K. 162; 3 Ir. Eq. R. 323.

9. It is not the duty of the solicitor of a party entitled to costs to tot, upon oath, the items in the bill of costs as certified by the

taxing officer; but if he takes it upon himself to make the tot in the absence of the solicitor of the opposite party, his client will be liable for the consequences of any mistake he may make. *Kelly v. O'Beirne*, 16 W. R. 172.

10. Where an attorney has been seven years without getting his bills taxed, after an order so to do, and they are lost in the meantime in the Master's office, the Court will not allow it to go again to the Master. *Yea v. Yea*, 2 Anstr. 494.

11. Where after an order of taxation and payment the solicitor has assigned his bill to a purchaser and absconded, the Court was inclined to think that the purchaser could not stand in place of the solicitor until he had procured him to be examined under the order. *Wilson v. Williams*, Barnard. 263.

12. The usual order for taxation empowers the Master to examine the solicitor as to what money he had received only; but, upon proper affidavits, the Court will order him to be examined as to his disbursements. *Anon.*, Mos. 331.

13. Special direction given on an order for taxation, that if the solicitor should be unable to establish any of the charges by reason of the death of his clerk, or the absence of the books and papers delivered to the client, the taxing master should report specially thereon. *Re Watts*, 7 Beav. 491.

14. A solicitor may be cross-examined on an affidavit made by him in support of a bill of costs under an order for taxation, and it is the duty of the examiners to take such examination. *Re Flux, Argles, and Rawlins*, 44 L. J., Ch., 375.

15. After the delivery by a solicitor of his bill, he executed a deed, assigning all his property for the benefit of his creditors, which became binding on all the creditors. The clients afterwards obtained the common order for taxation against the solicitor himself, notwithstanding the deed. He thereupon gave them notice of the deed, but went in before the taxing master and opposed the taxation. There was a balance due from him. The Court allowed the clients to complete the taxation, on their undertaking not to proceed personally against the solicitor. *Re Bartrum*, 12 W. R. 699; 10 L. T., N. S., 313.

16. A railway company was ordered to be wound up. A claim was made before the Master, but not prosecuted. One contributory agreed to pay all debts proved before the Master, and thereupon an order was made to stay all proceedings under the winding-up order. In the same matter two solicitors obtained an order for the taxation and payment of their bills of costs. The taxation was commenced, and had not concluded when the order to stay proceedings was made:—Held, that the solicitors were entitled to proceed with the taxation of their bills of costs. *Reep. Clifton, Re Dover, Deal, and Cinque Ports Railway Co.*, 3 W. R. 8; 24 L. J., Ch., 83.

XXI. PAYMENT INTO COURT PENDING.

17. On the client's neglecting to attend the Master on the taxation of the bill, the Chancellor would not order him to bring the money into court, but only that the order of reference

should be discharged, if he did not procure a report in a fortnight. *Anon.*, Mos. 68.

1. Solicitor's bill taxed without bringing the money into court as formerly. The judgment not afterwards opened for the client to have an account taken in respect of moneys due to him. *Anon.*, 2 Ves. 452.

2. A solicitor cannot obtain the taxation of his agent's bill without bringing the amount into court. *Ostle v. Christian*, T. & R. 324.

3. An order for the taxation of an agent's bill cannot be obtained as of course by a solicitor, nor can the rule for bringing the amount of the agent's bill into court, upon such application, be dispensed with except under special circumstances. *Lees v. Nuttall*, 2 Myl. & K. 284; 3 L. J., N. S., Ch., 124.

4. Where a reference for taxation of a solicitor's bill of costs is applied for, after the expiration of the one month mentioned in the 37th section of 6 & 7 Vict., c. 73, and the bill is under 100*l.* in amount, the order will be made for a reference, without requiring the amount of the bill to be paid into court. *Re Bromley*, 7 Beav. 477; 13 L. J., N. S., Ch., 320.

The taxation of a bill was directed on terms of paying the amount, 50*l.*, into court; it was taxed at 25*l.* The Court, upon motion, directed payment out of court of the funds deposited. *Id.*

5. Where decree orders defendant to retain his costs, when taxed, out of the balance in his hands, and pay the residue into court, if the defendant delays to get costs taxed, plaintiff must move that he may bring his bill of costs to be taxed within limited time, and not that he may pay in the whole balance. *Newsome v. Shearman*, 2 Sim. & S. 95.

6. Taxation of a bill was directed on the terms of paying a sum of money into court. The fund accumulated:—Held, that the solicitor was not entitled to the stock and the benefit of the accumulations, but that the whole must be sold, and the produce applied in part discharge of the bill. *Re Smith*, 9 Beav. 342.

7. Leave given to except to Master's report of costs, on payment of taxed costs into court. *Exp. Leigh*, 4 Madd. 394.

8. An application that the officer of the Court may be directed to review his certificate as to the taxation of costs, may be made by motion. It is not an objection to such application that the amount of the taxed costs has not been paid into court, though it may be proper to make such payment one of the terms of the order for re-taxation. *Exp. Richardson, Re Consett*, 3 Dea. & Ch. 735; 1 Mont. & A. 377.

XXII. REVIEW OF.

1. *Order for. How Obtained*, 6505.
2. *On What Grounds*, 6506.
3. *Costs of*, 6507.
4. *Other Matters*, 6507.

1. Order for. How Obtained.

9. Exceptions are not regularly taken to the Master's report for costs only, but should be

by petition. *Pitt v. Mackreth*, 3 Bro. C. C. 321.

10. The application for leave to file exceptions to Master's certificate of taxation of costs must be made on affidavit, stating the facts on which exceptions are founded, and the notice of motion should state the exceptions intended to be filed, and the ground of exception. *Jenkinson v. Royston*, 9 Price 215. S. P. *Oliver v. Court*, *id.* 216. n.

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12. An application for a review of a Master's certificate of taxation, on the ground that certain items had been improperly allowed, is not regular by way of motion. *Att.-Gen. v. Brown*, 1 Myl. & K. 567.

13. An application for the re-taxation of a solicitor's bill should be by petition, stating particularly the grounds of complaint, and not by motion. *Att.-Gen. v. Nethercoat*, 3 Beav. 297. S. P. *Mussett v. Hill*, 3 Beav. 301.

14. The Master's certificate on taxation of costs cannot be questioned without the special leave of the Court, to be obtained by petition setting forth the grounds of complaint, and the charges alleged to be erroneous. *Re Congreve*, 4 Beav. 87.

On petition for liberty to file exceptions to the Master's certificate of taxation, the Court will sometimes decide the point in dispute without putting the parties to file their exceptions. *Id.*

15. Objections to the Master's report on taxation of costs, are properly taken by petition. A solicitor presented a petition complaining that the Master, in taxing his bill, had taken into consideration matters not referred to him, and praying for leave to except to the certificate. It was objected that the solicitor ought to have filed exceptions to the certificate, but the Court overruled the objection. *Russel v. Buchanan*, 9 Sim. 167; 7 L. J., N. S., Ch., 210; 2 Jur. 610.

16. In equity the proper mode in this court of objecting to the Master's taxation of costs is to move upon affidavits, stating the ground of objection, for leave to file exceptions to the report. *Wright v. Southwood*, 1 Y. & J. 430.

17. A motion for leave to except to the Master's certificate of the taxation of costs was refused, and a petition directed. *Bozon v. Williams*, 3 Y. & J. 378.

18. The Master will not be ordered, on motion, to review his taxation of costs; such an application must be made by petition. *Anon.*, 1 L. J., Ch., 104.

19. An application to review a taxation must be made by a summons in chambers, and cannot be made on motion. *Webster v. Manby*, 4 L. R., Ch., 372; 17 W. R. 545; 20 L. T., N. S., 387.

20. When a superior court of record has jurisdiction to make upon motion an order or a certificate for costs, such order is binding and conclusive, and the Master's taxation for

On appeal, the Court declined to interfere with the discretion which the Master had exercised in the matter, and ordered L. to pay to the parties served with the motion a sum for costs. *Stahschmidt v. Lett*, 7 Jur. N. S., 1271; 9 W. R. 830.

1. Practice of the Taxing Master's Office as to the proceedings under a taxation of costs not requiring service or where service is dispensed with. *Re Harvey's Settlement*, 10 Hare (App.) lxxv.

2. Personal service on a solicitor of proceedings under a taxation dispensed with, and service by placing under his door substituted. *Re Templeman*, 20 Beav. 574.

3. A party does not attend a taxation by writing letters to the taxing master. *Re Upperton*, 30 W. R. 840.

2. Affidavit of Increase.

4. Where one of the parties to an action in the Chancery Division has been ordered to pay costs, the common law practice of requiring in all cases from the party to whom the costs are to be paid an affidavit of increase, proving that payments said to have been made have in fact been made, that witnesses were material, how many days they were in attendance, etc., will not be followed, but the party ordered to pay costs will only be entitled to call for such an affidavit in cases in which the taxing master has required it to supply information of which he is not in possession. *Smith v. Day*, 16 L. R., Ch. D., 726; 50 L. J., Ch., 333; 44 L. T. 217; 29 W. R. 424.

5. On an objection to a solicitor's charge for journeys, his affidavit that they "were necessarily and properly taken for the benefit of the trust estates," was, in the absence of evidence to the contrary, held sufficient. *Mam v. Pearson*, 3 N. R. 99.

3. Allocatur.

6. The allocatur of the taxing master, upon a taxation, does not, when registered under the 1 & 2 Vict., c. 110, s. 18, constitute a charge on the real estate of the client. *Sham v. Neale*, 20 Beav. 157; 1 Jur., N. S., 1666; 24 L. J., Ch., 563.

7. An order for taxation was to be void, unless the Master made his report in a fortnight, or certified that further time was necessary. The time elapsed without such certificate, and the parties afterwards attended several times before the Master without objecting:—Held, that the irregularity had been waived, and an order was made for the Master to proceed in the taxation. *Re Field*, 16 Beav. 593.

4. Other Matters.

8. Upon taxation of a bill of costs, the solicitor must advance the sum payable to the Chancery fund. *Hodgens v. Wheeler*, Fl. & K. 162; 3 Ir. Eq. R. 323.

9. It is not the duty of the solicitor of a party entitled to costs to tot, upon oath, the items in the bill of costs as certified by the

taxing officer; but if he takes it upon himself to make the tot in the absence of the solicitor of the opposite party, his client will be liable for the consequences of any mistake he may make. *Kelly v. O'Beirne*, 16 W. R. 172.

10. Where an attorney has been seven years without getting his bills taxed, after an order so to do, and they are lost in the meantime in the Master's office, the Court will not allow it to go again to the Master. *Yea v. Yea*, 2 Anstr. 494.

11. Where after an order of taxation and payment the solicitor has assigned his bill to a purchaser and absconded, the Court was inclined to think that the purchaser could not stand in place of the solicitor until he had procured him to be examined under the order. *Wilson v. Williams*, Barnard. 263.

12. The usual order for taxation empowers the Master to examine the solicitor as to what money he had received only; but, upon proper affidavits, the Court will order him to be examined as to his disbursements. *Anon.*, Mos. 331.

13. Special direction given on an order for taxation, that if the solicitor should be unable to establish any of the charges by reason of the death of his clerk, or the absence of the books and papers delivered to the client, the taxing master should report specially thereon. *Re Watts*, 7 Beav. 491.

14. A solicitor may be cross-examined on an affidavit made by him in support of a bill of costs under an order for taxation, and it is the duty of the examiners to take such examination. *Re Flus, Argles, and Rawlins*, 44 L. J., Ch., 375.

15. After the delivery by a solicitor of his bill, he executed a deed, assigning all his property for the benefit of his creditors, which became binding on all the creditors. The clients afterwards obtained the common order for taxation against the solicitor himself, notwithstanding the deed. He thereupon gave them notice of the deed, but went in before the taxing master and opposed the taxation. There was a balance due from him. The Court allowed the clients to complete the taxation, on their undertaking not to proceed personally against the solicitor. *Re Bartrum*, 12 W. R. 699; 10 L. T., N. S., 313.

16. A railway company was ordered to be wound up. A claim was made before the Master, but not prosecuted. One contributory agreed to pay all debts proved before the Master, and thereupon an order was made to stay all proceedings under the winding-up order. In the same matter two solicitors obtained an order for the taxation and payment of their bills of costs. The taxation was commenced, and had not concluded when the order to stay proceedings was made:—Held, that the solicitors were entitled to proceed with the taxation of their bills of costs. *Exp. Clifton, Re Dover, Deal, and Cinque Ports Railway Co.*, 3 W. R. 8; 24 L. J., Ch., 83.

XXI. PAYMENT INTO COURT PENDING.

17. On the client's neglecting to attend the Master on the taxation of the bill, the Chancellor would not order him to bring the money into court, but only that the order of reference

should be discharged, if he did not procure a report in a fortnight. *Anon.*, Mos. 68.

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The taxation of a bill was directed on terms of paying the amount, 50*l.*, into court; it was taxed at 25*l.* The Court, upon motion, directed payment out of court of the funds deposited. *Ib.*

5. Where decree orders defendant to retain his costs, when taxed, out of the balance in his hands, and pay the residue into court, if the defendant delays to get costs taxed, plaintiff must move that he may bring his bill of costs to be taxed within limited time, and not that he may pay in the whole balance. *Newsome v. Shearman*, 2 Sim. & S. 95.

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XXII. REVIEW OF.

1. Order for. How Obtained, 6506.
2. On What Grounds, 6506.
3. Costs of, 6507.
4. Other Matters, 6507.

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On petition for liberty to file exceptions to the Master's certificate of taxation, the Court will sometimes decide the point in dispute without putting the parties to file their exceptions. *Ib.*

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19. An application to review a taxation must be made by a summons in chambers, and cannot be made on motion. *Webster v. Manby*, 4 L. R., Ch., 372; 17 W. R. 545; 20 L. T., N. S., 387.

20. When a superior court of record has jurisdiction to make upon motion an order or a certificate for costs, such order is binding and conclusive, and the Master's taxation for

such costs cannot be impugned except by a suggestion of error in fact upon the record that no order or certificate was made by the Court. *Scott v. Bennett*, 20 W. R. 686; 5 L. R., H. L., 234.

2. On What Grounds.

1. The Court will not review a Master's taxation of costs unless he has been wrong in principle. *Darley v. Nicholson*, 1 Con. & L. 391; 2 Dr. & War. 86.

2. On general exception to report on taxation, referring to a schedule, Court will hear exception on principle only. *Exp. Christy, Re Barron*, 3 Mont. & A. 102; 2 Dea. 129; 6 L. J., N. S., Bky., 68.

3. Exceptions do not lie to Master's report as to costs, nor can there be a re-taxation as to *quantum*. Irregularity in proceedings, or Master acting on mistaken principle, will induce Court to interfere. *Fenton v. Crickett*, 3 Madd. 496.

4. The Master's decision on questions of taxation is final, as to matters of fact and amount of charges, and is only reviewed by the Court when the Master acts upon a mistaken principle; and if the solicitor negligently or ignorantly takes some unnecessary proceeding, it is the duty of the Master to disallow the charge made in respect of such proceeding. *Alsop v. Oxford (Lord)*, 1 Myl. & K. 564; 2 L. J., N. S., Ch., 174.

5. Principles upon which the Court acts in permitting a review of the Master's certificate on taxation. *Re Congreve*, 4 Beav. 87.

The Master, on evidence before him, allowed a few items on the taxation of a solicitor's bill for business, as to which there was a conflict, whether the solicitor had authority to perform it:—Held, that this was not a sufficient reason for permitting a review of the taxation. *Ib.*

On petition for liberty to file exceptions to the Master's certificate of taxation, the Court will sometimes decide the point in dispute without putting the parties to file their exceptions. *Ib.*

6. The Court will not interfere where an objection is made to the *quantum* allowed by the Master, in his taxation of a solicitor's bill. *Stoken v. Dawson*, 5 L. J., N. S., Ch., 122.

The Master having taxed a solicitor's bill, the client presented a petition, stating a rule, that in the taxation of bills there was a distinction in the amount allowed for attendances by solicitors, and those by their clerk; that, for a number of attendances which had been made by the solicitor's clerk, the Master had allowed the same amount as if they had been made by the solicitor himself, and prayed liberty to except to the Master's report, and for a re-taxation. The Court, considering this a mere question of *quantum*, refused the application, with costs. *Ib.*

7. In appeals respecting costs the Court entertains not only questions whether a principle of taxation was correct or not, but also whether a given principle was applicable or not to the particular items. *Newby v. Dren*, 12 Ir. Eq. R. 24.

On reference A. and B. had a common interest in one question, and A. a separate

interest in another. On the former the Master directed one charge to be filed for both. During the proceedings on it the taxing master allowed only one term fee to the solicitor, who acted for both A. and B.:—Held, that he was right in disallowing the second, and the taxation was affirmed. *Ib.*

In the course of the cause the opinion of a strange counsel was taken, and the taxing master allowed only the costs of a short case such as might have been laid before a counsel acquainted with the cause. The Court refused to interfere with this discretion, considering it doubtful if, in strictness, the case should have been allowed at all. *Ib.*

A solicitor is entitled to charge for fully instructing every counsel employed at the hearing. Therefore when A. and B. had a common interest in one question at the hearing, and A. only was interested in another question, and the taxing master disallowed the charges for so much of the briefs to A.'s counsel as related to the former question, the taxation was sent back to be reviewed. *Ib.*

8. The taxing master disallowed a general objection to a bill of costs as not properly chargeable under a trust deed, on the ground that the words of the trust deed covered all expenses incurred by the trustee in the proper matters of the trust, and that the majority of the items of costs were incurred with the plaintiff's consent, and some admitted by the plaintiff's bill. The Master also disallowed an objection to particular items, as having been "unnecessarily and improperly incurred," on the ground that such costs had been proved before him to have been properly incurred:—Held, that the above answers were sufficient. *Maw v. Pearson*, 3 N. R. 99.

9. A petition of a solicitor to review the Master's decision, as to specified items of charges for conferences, some of which had been reduced and others wholly disallowed, was dismissed with costs, the Court declining to enter into the merits of such matters. *Re Hubbard*, 23 Beav. 481.

10. The Court refused to entertain the question whether the master had properly disallowed costs of separate answers. *Beattie v. Ebury*, 43 L. J., Ch., 80; 29 L. T. 419; 22 W. R. 68.

11. Principles and practice in the taxing master's office, and before the Court in cases of taxation. The Court will only determine questions on items in a bill of costs which involve some principle, and not those relating to *quantum* only. *Re Catlin*, 18 Beav. 508.

12. A creditor's administration action was ordered to be stayed on payment by the applicant, the executrix and residuary legatee, of the debt and the costs of the action. Before the Master, the executrix objected to items in the plaintiff's bill of costs, alleging, as to some of them, that they had been incurred in taking unnecessary and improper proceedings in the action. The Master refused to inquire into the truth of these allegations, and taxed the costs without reference to them:—Held, that, under r. 18 of the Additional Rules of Court 1875, the Master ought to have considered the plaintiff's objections, and that there must be a new taxation. *Baines v. Wormsley*, 47 L. J., Ch., 844; 39 L. T., N. S., 85; 27 W. R. 36.

13. An appeal will lie from a decision by a

judge under Rules of the Supreme Court (Costs), August 1875, Order VI., rule 3, as to the taxation of costs on the higher or lower scale; but where he has exercised his discretion the Court of Appeal will not interfere unless he has proceeded on a wrong principle or made a manifest slip. *Re Terrell*, 22 L. R., Ch. D., 473; 47 L. T. 588; 31 W. R. 208.

3. Costs of.

1. A petition to review a taxation was successful, but the petitioner, not having taken proper steps to satisfy the taxing master when the matter was in his office, was ordered to pay the costs. *Sturge v. Dimsdale*, 9 Beav. 170; 15 L. J., N. S., Ch., 214; 10 Jur. 277.

2. Where exceptions are taken to the Master's certificate of the taxation of costs, on the ground that he has not charged the solicitor with all the moneys received by him with which he ought to have been charged, and such exceptions are allowed, and the Master directed to review his report, in that respect the Court does not give the exceptant the costs of such proceedings, on the ground that they are necessary to correct a mistake, or misapprehension of the Master. *Wright v. Southwood*, 1 Y. & J. 527.

4. Other Matters.

3. A taxing master at common law referred certain items in a bill of costs to one of the Chancery taxing masters. On an application for an order that the Chancery Master might be directed to review his finding:—Held, that it was not within the jurisdiction of the Court to make an order as to anything which was not before it. *Exp. Lett, Re Parry*, 10 W. R. 6; 5 L. T., N. S., 416.

4. The Court having determined to communicate with the taxing master as to a proceeding in his office, declined to receive an affidavit, tendered by the parties, of what had there taken place. *Sturge v. Dimsdale*, 9 Beav. 170; 15 L. J., N. S., Ch., 214; 10 Jur. 277.

5. A bill of costs had been referred for taxation, and the parties agreed in the office upon the sum at which they were to be reported; subsequently, the client, having discovered certain entries in his own handwriting of advances made to the solicitor, and for which he had received no credit, applied that the costs should be sent back to the Master for taxation. The application was refused with costs. *Austin v. Chambers*, 3 Dr. & War. 178.

6. In October 1839 a client obtained an order to tax his solicitor's bill. He commenced the taxation in January 1840, and proceeded therein to a very considerable extent. A year and a half after, and before the report, the client applied to vary the order:—Held, that after his acquiescence, he came too late to alter the order, and too early to correct any erroneous principle acted on by the Master. *Tarbut v. Tarbut*, 4 Beav. 149.

7. An order of course was obtained for the taxation of a solicitor's bill of costs, and the taxation was commenced and virtually completed:—Held, that an application to vary

such order, on the ground of an alleged mistake appearing on the face of it, ought to have been made directly the mistake was discovered, and not delayed until after the virtual completion of the taxation. *Re Tibbitts*, 30 W. R. 177.

8. When a party carries in an objection in writing to the certificate of a taxing master under Rules of Court 1875 (Costs), Order VII., rule 30, he is only bound to state the items to which he objects, not the reasons of his objection. *Simmons v. Storer*, 14 L. R., Ch. D., 154; 49 L. J., Ch., 121; 42 L. T. 291; 28 W. R. 408.

An order directing an inquiry what is due to a party for costs, but not containing a direction to tax them, does not preclude the taxing officer from not allowing him any costs. *Id.*

9. A person who is not a party to the making of an order for the taxation of costs, and who desires that the taxation under the order may be reviewed, ought not to apply by motion to review the taxing master's certificate, but ought to apply to have the order for taxation set aside. *Charlton v. Charlton*, 31 W. R. 237.

XXIII. COSTS OF TAXATION.

1. *Of Order to Tax*, 6507.
2. *Where One-sixth Deducted*, 6508.
3. *Calculation of One-sixth*, 6509.
4. *Where Solicitor Dead*, 6510.
5. *Where Solicitor Bankrupt*, 6510.
6. *Other Cases*, 6510.

1. Of Order to Tax.

10. The Court, though it refuses the petition for taxation, does not always give the costs. *Re Thompson*, 8 Beav. 237; 14 L. J., N. S., Ch., 137; 9 Jur. 169.

11. A special petition was presented for the taxation of two bills; it succeeded only as to one, as to which the order might have been obtained as of course. The petitioner was ordered to pay all the costs. *Barrwell v. Brooks*, 8 Beav. 121.

12. On petition to confirm the Master's report, after an order of reference to tax the respondent's bill of costs (more than one-sixth of the amount of the bill having been struck off), and for reference back to tax the costs of taxation, the costs of and incidental to the original petition and the petition for reference back to the Master, were ordered to be paid by the respondent, after deducting therefrom the costs of an action brought by the respondent previously to the date of the order directing the taxation of the respondent's bill of costs. *Exp. Cow*, 17 L. J., N. S., Ch., 247.

On petition to confirm the Master's report, after reference to tax a bill of costs, it is too late to object that the petition to tax ought not to have been a special one. *Id.*

13. A mortgagee's solicitor retained the amount of his bill of costs out of the produce of the sale of the mortgaged estate, and he charged the amount in an account delivered to the mortgagor:—Held, that an order for taxation within twelve months might be obtained as of course; and a special petition

having been presented for that object, the order was made, but the petitioner was ordered to pay the costs. *Re Bignold*, 9 Beav. 269.

1. A party applying for a special order for taxation in a case in which he might have obtained the common order, must pay the costs. *Re Bracey*, 8 Beav. 266; 14 L. J., N. S., Ch., 299; 9 Jur. 417.

2. An order of course for taxation was refused at the secretary's office; but the Court, on a special application, thought that it was a proper case for an order of course:—Held, that the costs ought to follow the result of the taxation. *Re Taylor*, 15 Beav. 145.

In a doubtful case, the client should apply to the solicitor for his consent to an order of course. *Id.*

3. A client presented a special petition for the taxation of his solicitor's bill, complaining that he had taken reckless proceedings, and praying that the costs of them might be wholly disallowed on taxation. A special petition was held to be unnecessary, and the petitioner was ordered to pay the costs of it. *Re Atkinson*, 26 Beav. 151.

4. A client, on a special petition, obtained an order for taxation. The taxation having been completed, the client presented a petition for the consequential directions. The solicitor then objected, that the common order would have been sufficient, and he asked the costs beyond those of a common order:—Held, that the objection came too late. *Re Hair*, 11 Beav. 96.

5. Costs of motion to tax and of appeal motion ordered to abide the result of the taxation. *Re Newman*, 2 L. R., Ch., 707; 15 W. R. 1189; 17 L. T., N. S., 128.

6. A solicitor ordered to pay the costs of a special petition rendered necessary by his refusal to consent to the common order for delivery of his bill and for its taxation. *Re Adamson*, 18 Beav. 460. And see *Re Cattlin* 8 Beav. 121

7. Where a special petition for the taxation of a bill of costs was occasioned by breach of arrangement on the solicitor's part, he was ordered to pay the costs of the petition. *Exp. Bailey*, *Re Cattlin*, 3 Jur., N. S., 33. Affirmed 30 L. T. 110.

2. Where One-sixth Deducted.

8. Solicitor's bill reduced to less than one-twenty-eighth part, costs of taxation refused him. *Ramsden v. Hilton*, Dick. 322.

9. Where bill reduced one-sixth part, solicitor pays costs of taxation. *Exp. Hathorway*, 2 Madd. 329.

10. Rule of taxation is adopted in bankruptcy, if more than one-sixth is deducted, solicitor pays costs of taxation. *Exp. Westall*, 3 Ves. & B. 141.

11. Solicitor allowed costs of taxation, the reduction of his bill being less than a sixth, charged with costs of proceedings before the Master, creating useless expense. *Yea v. Freere*, 14 Ves. 154.

12. An order was made for the taxation of four several bills of a solicitor for various business done for the same assignee, under which more than a sixth part was taken off the gross amount of the four bills, but not off

the amount of every one of the bills:—Held, that as all the bills were incurred by the same person in the same right, there was no need for a separate order of taxation for each bill, and that, as more than a sixth was taken off from the whole amount, the solicitor must pay the costs of taxation. *Exp. Barrett*, 3 Dea. & Ch. 731; 1 Mont. & A. 447.

13. Upon an application that the solicitor may be directed to pay the costs of taxation, more than a sixth part having been taken off his bill, the Court will not enter into the particulars of the bill. *Exp. Millington*, 1 Dea. 114.

14. One of the three petitioning creditors may apply for the taxation of the solicitor's bill, without the others joining in the application. Notwithstanding an action is commenced by the solicitor, before such an application is made, still, if more than a sixth is taken off the bill, the solicitor pays the costs of taxation. A conditional order to that effect, to save expense, was made in the first instance. *Exp. Watts*, 1 Dea. 588; 2 Mont. & A. 621; 5 L. J., N. S., Bk., 21.

15. In a suit for the administration of the estate of a testator, a solicitor carried in a claim for his bills of costs, which, on taxation, were reduced by more than one-sixth:—Held, that the solicitor ought to pay the costs of the taxation. *Silvertop v. Ramsay*, 1 Beav. 434.

16. A solicitor was retained by A. B. and four other defendants; A. B. having withdrawn his retainer, the solicitor delivered his bill against A. B., amounting to 19*l.* 19*s.*, which was referred for taxation; the Master, considering that A. B. was liable to one-fifth part only of several charges, struck off four-fifths thereof, and certified that he had taxed the bill at 4*l.* 10*s.* 6*d.* The client then obtained an order of course for payment by the solicitor of the costs of the taxation; a motion being made on behalf of the solicitor, to discharge the latter order for irregularity, on the ground that more than one-sixth had not been struck off within the rule, but no application being made to be relieved from the certificate, which warranted the second order, the motion was, on that ground, refused with costs. *Mussett v. Hill*, 3 Beav. 301.

17. Where in a minor matter, upon a reference to the Master to ascertain what lien the solicitor of the father of the minor had upon the several documents, etc., in his possession, for costs incurred in the lifetime of the father, the costs claimed were reduced upon taxation by more than one-half:—Held, that the solicitor should pay his own costs of the taxation, as well as those incurred by the guardian of the minor in reducing the amount of the costs claimed. *Re Lawler*, Fl. & K. 73; 3 Ir. Eq. R. 102.

18. Where under an order referring it to the Master to tax bills of costs, furnished by the solicitor in pursuance of the statute, and staying an action which had been brought by him at law, for recovery of the same, the client undertaking to pay whatever balance should be found due, the Master reported that more than one-sixth had been struck off from each upon taxation:—Held, that the solicitor should pay his own costs of the taxation, as well as those incurred by the client. *Bower v. Nagle*, Fl. & K. 78; 3 Ir. Eq. R. 105.

1. A bill was filed by the executors and devisees in trust under a will, to have the trusts of the will established, and the usual accounts taken. J. F. acted as the solicitor of the plaintiffs as well as of the defendants, and conducted the proceedings in the suit subsequently to the decree, until the conduct of it was taken from him by the plaintiffs, and a new solicitor appointed by them. J. F. having delivered up the documents relating to the suit to the new solicitor, a paper writing was discovered amongst them, purporting to be a copy of a charge which had been carried in by J. F. under the decree, in the joint names of certain persons, of whom J. F. was one, as creditors of the testator; the charge thereby made by J. F. for himself amounted to the sum of 57*l.*, alleged to be the balance due from the testator's estate for business done by J. F. for the testator and his son, as partners in business, on the testator's retainer, after deducting from the aggregate amount of his several bills of costs the sums received by him from the testator on account of such business. On the copy of the charge found amongst the documents so delivered up by J. F. was indorsed a memorandum, in the handwriting of J. F.'s town agent, to the effect that the charge had been allowed, subject to the approval thereof by the defendants' solicitor: the copy also bore a subsequent indorsement, in the same handwriting, to the effect that the charge had been afterwards absolutely allowed, but no entry to any such effect was to be found in the Master's books. The Master having referred the bills of costs to be taxed, J. F. withdrew his charge. On application to the Court by the plaintiffs by petition, the bills of costs of J. F. were ordered to be taxed, and an account was directed to be taken of the moneys received by J. F. on account thereof, and more than one-sixth part of the amount of the bills having been taken off on taxation, J. F. was ordered to pay the costs of the petitioners occasioned by his charge, and also the costs of the petitioner's application to the Court relative to the charge and bills of costs, and consequential thereon. *Acoy v. Simpson*, 12 L. J., N. S., Ch., 449.

2. In a suit against a solicitor for an account in taxing of which the bills of costs are taxed, and reduced more than one-sixth in amount, the Court has jurisdiction to give or withhold the costs of taxation, according to the circumstances and justice of the case. *Barton v. Pyne*, 1 Hare 493.

3. Less than one-sixth was taken off a bill of costs on taxation, but more than one-sixth was taken off in the suit (which was one for a general account between the solicitor and client) on other grounds, into which the Master could not enter. The costs of taxation were allowed to the solicitor. *May v. Biggenden, Cheeseman v. May*, 24 Beav. 207.

4. A married woman having separate property, employed a solicitor, and undertook to pay him out of her separate estate. By the decree in a suit instituted by the solicitor, his bills were ordered to be paid out of the separate property, and it was referred to the Master to tax them. *Semble*, that the solicitor is entitled to the costs of taxation, though more than one-sixth was taken off. *Murray v. Barlee*, 7 Sim. 194.

5. Where taxation is directed after action

brought, this Court does not give the client the costs of taxation, though more than one-sixth be taxed off. *Toghill v. Grant*, 6 Beav. 348; 12 L. J., N. S., Ch., 481; 7 Jur. 589.

3. Calculation of One-sixth.

6. Held, that a solicitor must pay the costs of the taxation of his bill of costs, reduced by the taxation more than one-sixth of the amount, which reduction arose from the Master disallowing fees, paid to the commissioners for travelling expenses. *Eap. Inman*, Buck 129.

7. Sums deducted in respect of business done for a third person, at the alleged retainer of the client, but the authority not proved, are always computed as deductions in the question of costs of taxation. *Rigby v. Edwards*, 5 Madd. 20. This is said to be overruled.

8. *Semble*, on taxation charges disallowed for want of authority, and charges reduced by limiting to one of several defendants, his aliquot part of a joint charge ought not to be computed in determining on whom the costs of taxation should fall. *Att.-Gen. v. Nethercoat*, 3 Beav. 297.

9. Cases may arise as between solicitor and executor where costs would be ordered against solicitor, though less than one-sixth were taken off. *Eap. Christy, Re Barrow*, 3 Mont. & A. 108. And see 2 Dea. 113; 6 L. J., N. S., Bk., 68.

After bill has been referred for taxation, erroneous overcharges inserted by mistake cannot be withdrawn so as to be excluded from the calculation of the one-sixth as between the solicitor and the estate. On taxation, items disallowed by commissioners and again taxed off, are included in the one-sixth. S. C. 3 Mont. & A. 104; 2 Dea. 131, 132; 6 L. J., N. S., Bk., 68.

10. The plaintiff had obtained an order for taxation of his solicitor's bills, amounting to 399*l.* The solicitor, with the Master's permission, struck out certain items as having been inserted by mistake. The bills were then taxed, and less than a sixth was taken off; but if the items struck out were included, then more than a sixth would have been taken off:—Held, that as less than a sixth had been taken off, the plaintiff must pay the costs of taxation. *Marshall v. Oxford*, 5 Sim. 456.

11. A solicitor was retained by A. B., and four other defendants. A. B. having withdrawn his retainer, the solicitor delivered his bill against A. B., amounting to 19*l.* 19*s.*, which was referred for taxation; the Master, considering that A. B. was liable to one-fifth part only of several charges, struck off four-fifths thereof, and certified that he had taxed the bill at 4*l.* 10*s.* 6*d.* The client then obtained an order of course for payment by the solicitor of the costs of the taxation; a motion being made on behalf of the solicitor, to discharge the latter order for irregularity, on the ground that more than one-sixth had not been struck off within the rule, but no application being made to be relieved from the certificate which warranted the second order, the motion was on that ground refused with costs. *Muskett v. Hill*, 3 Beav. 301.

12. The costs of taxation depend on whether one-sixth is taken off the bill of costs; and

to determine this, a distinction is to be made between strictly professional charges and disbursements, and independent cash payments. Those payments only which are made in pursuance of the professional duty undertaken by the solicitor, and which he is bound to perform, or which are sanctioned as professional payments, by the general and established custom and practice of the profession, ought to be entered and allowed as professional disbursements in the bill of costs; other disbursements ought to be included in a separate cash account. *Re Remnant*, 11 Beav. 613; 18 L. J., N. S., Ch., 374.

In a legal proceeding, A. became liable to pay 60*l*. This was paid by B., his solicitor, who had not acted for A. in the proceeding:—Held, that in a taxation as between A. and B., the 60*l*. was not properly included in B.'s bill of costs, for the purpose of determining whether one-sixth had been taxed off, although it was properly chargeable as a cash payment. *Id.*

1. A payment for legacy duty made by a solicitor for his client ought, for taxation, to be included in his cash account and not in his bill of costs, and therefore such a payment is not to enter into the computation, in considering whether a sixth is taxed off. *Re Haigh*, 12 Beav. 307; 19 L. J., N. S., Ch., 79; 14 Jur. 340.

2. Since the Solicitors Act, items struck out of a solicitor's bill on taxation as chargeable against another person, must be taken into account in determining the costs of the taxation. *Re Clark*, 13 Beav. 173. Affirmed 1 De G. M. & G. 43; 21 L. J., N. S., Ch., 20; 15 Jur. 1047.

3. Moneys specifically paid by a client to his solicitor for counsel's fees and stamps, as they were required:—Held, properly included in the solicitor's bill, in calculating the sixth on a taxation. *Re Metcalfe*, 30 Beav. 406.

4. Where Solicitor Dead.

4. Representatives of a deceased solicitor will not be ordered to pay costs of taxation of his bill, more than a sixth being taken off; nor, where they have brought an action for the amount, to the costs of which the assignees are liable, can they set off such costs against each other. *Exp Hammond*, *Re Jackson*, Mont. & Ch. 136; 4 Dea. 48; 8 L. J., N. S., Bky., 26.

5. The assignees or executors of a bankrupt solicitor, are not, under statute, liable to pay the costs of taxation, if more than one-sixth of the bill of costs of the solicitor is deducted on taxation. *Willasey v. Mashiter*, 3 Myl. & K. 293.

6. If a bill of costs is taxed after solicitor's death, his representative will not be ordered to pay costs of taxation, although more than a sixth is deducted. *Re Cole*, 2 Sim. & S. 462. S. C. *nom. Miller v. —*, 4 L. J., Ch., 71.

7. Court has no jurisdiction to order executor of deceased solicitor to pay costs of taxing solicitor's bill, nor to order executor to refund balance found due from deceased solicitor, if executor does not admit assets, and even if he admit assets. *Sed. quare Exp. Spackman*, *Re Phillips*, 3 Mont. & A. 135.

5. Where Solicitor Bankrupt.

8. The costs of taxing the bills of costs of a solicitor who has become bankrupt do not fall upon his assignees, on the ground that more than a sixth part is deducted on taxation, although the assignees may have attended the taxation by their solicitor. *Alsop v. Oxford (Lord)*, 1 Myl. & C. 26.

9. The assignees or executors of a bankrupt solicitor are not under the statute liable to pay the costs of taxation, if more than one-sixth of the bill of costs of the solicitor is deducted on taxation. *Willasey v. Mashiter*, 3 Myl. & K. 293.

10. Upon taxation, under the 6 & 7 Vict., c. 73, s. 37, assignees of a bankrupt solicitor are personally liable for the costs of taxation of a bill of costs delivered by them, where more than one-sixth is taken off. *Re Peers*, 21 Beav. 520.

11. Assignees in insolvency of solicitors ordered to pay the costs of taxation, more than one-sixth having been taxed off a bill of costs delivered by them. *Re Poile*, 25 Beav. 561.

6. Other Cases.

12. Where the solicitor was guilty of great delay in bringing in his bills, the Court will not give him his costs of the taxation, although less than one-sixth part is taken off. *Yea v. Yea*, 2 Anstr. 589.

On taxation of costs, the Court cannot make the attorney pay the costs of the taxation, unless for improper items in the bill, amounting to a sixth. *Id.* 494.

13. Though not a sixth deducted from bill, circumstances having given sufficient ground of suspicion for necessity of taxation, costs of taxation were refused to solicitor. *Webb v. Stone*, 1 Anstr. 260.

14. When a person obtains an order of reference at his own expense, he must pay the costs on both sides, which were properly incurred. *Curtain v. Blennerhassett*, 1 Hog. 395.

15. Upon an application that the solicitor may be directed to pay the costs of taxation, more than a sixth part having been taken off his bill, the Court will not enter into the particulars of the items of the bill. *Exp. Millington*, 1 Dea. 114.

16. Where an attorney, who had received a sum of money on account of costs, contended that a balance was still due, and threatened to file a bill for its recovery; and upon a reference obtained by the client, on a petition praying, among other things, that the sum received by the attorney should be ascertained, and his costs taxed as between party and party; although the client was wrong as to the principle of the taxation, and also in praying repayment of the entire amount received by the attorney, and not merely of the balance overpaid, yet:—Held, that the attorney should pay all the costs of the reference and other proceedings in the matter, except the costs of so much of the petition and answering affidavit as were incidental to the principle of taxation. *Armstrong v. Pollock*, 6 Ir. Eq. R. 663.

17. When an order has been made for the taxation of the solicitor's bill of costs, *Semble*,

that a subsequent petition for the costs of the taxation cannot be heard, until the Master has made his certificate, nor unless the original petition is also set down in the paper. *Exp. Elce*, 2 Dea. & Ch. 332.

1. The costs of the plaintiff and of the several parties to the cause having been ordered to be paid out of the fund, and a puisne creditor not a party, but whose demand had been decreed to be paid, having obtained leave to attend the taxation of the costs:—Held, that he was entitled to the costs of reading over the bills of costs of the several parties to the cause. *Phillips v. Page*, Hay. & J. 819.

2. After action brought, an order was made here for taxation. The solicitor was found overpaid; but the action at law was in such a state, by the mispleading of the client, that, if it had proceeded, a balance would have been found due to the solicitor. On an application for an order against the solicitor to refund and pay the costs of the taxation, the Court made such order, but gave no costs of the action, or of the application. *Re Smith*, 11 Beav. 468.

3. Upon a taxation, a solicitor put in an insufficient examination. He was ordered, on motion, to pay the costs occasioned thereby, and of the four-day order and of the application. *Re Bainbridge*, 11 Beav. 620.

4. Upon a motion, after taxation, for an order on a solicitor to pay the amount found due from him, he was also ordered to pay the costs of the application. *Re Bainbridge*, 13 Beav. 108.

5. Where a taxation is ordered after action brought, the general rule is, that if anything is found due, the client must pay the costs of the action. *Re Hair*, 11 Beav. 96.

6. A solicitor proceeding under the common order for taxation (which is in accordance with s. 37 of the Solicitors Act 1843) must pay the costs of reference if the party chargeable does not attend the taxation. A person does not attend by writing letters to the taxing master. *Re Upperton*, 30 W. R. 840.

XXIV. RECOVERY OF COSTS.

1. *By Action or Suit*, 6511.
2. *By Action after Taxation. Injunction*, 6511.
3. *By Attachment*, 6512.
4. *By Charging Order*, 6513.
5. *By Fi. Fa. or Elegit*, 6514.
6. *By Sequestration*, 6514.
7. *By Subpoena*, 6514.
8. *Against Persons under Disability*, 6515.
9. *Other Cases*, 6515.
10. *Lien of Solicitor on Funds and Property Recovered or Preserved*. See XIV. ante.
11. *On Appeal to House of Lords*.
See PRACTICE (Costs).

1. By Action or Suit.

For Solicitor's Bill.] 7. Solicitor brings a bill for his fees. Plea of statute, 3 Jac., that the plaintiff had not signed his bill, good plea. *Norris v. Bacon*, 1 Vern. 312.

8. A solicitor suing for his bill need not state all the circumstances required by the statute 2 Geo. 2, c. 23, s. 22, being matter of evidence. *Worrall v. Harford*, 8 Ves. 9.

9. A bill may be brought for solicitor's fees only, if for business done in this court; and so it may where the business is done in another court, if it relates to another demand made by plaintiff in this court. *Ranelagh v. Thornehill*, 1 Vern. 203; 2 Ch. Ca. 153.

10. Attorney, quitting his client before trial, cannot bring an action for his bill. *Cresswell v. Byron*, 14 Ves. 273.

11. In a suit, instituted by a solicitor, for payment of costs due to him from a client, it appeared, by the answer, that he had not delivered a signed bill conformably to the Act of Parliament. A bill duly signed was subsequently delivered, and that fact was put in issue by a supplemental bill. *Semble*, the defect in the title of the plaintiff, as it stood at the institution of the suit, was not cured: but held, that the objection, not having been urged at the original hearing, could not be taken at the hearing on further directions. *Pritchard v. Draper*, 1 Russ. & M. 191; Tam. 332.

For Costs.] 12. The party to whom costs were awarded in a bankruptcy matter brought an action on a written undertaking to pay them, received judgment, and levied for the money; Lord Redesdale said, he would never suffer costs awarded by this Court to become the subject of an action, particularly costs awarded in bankruptcy, which are to come out of a fund over which he would lose all control if the order made by him in the bankruptcy were to be proceeded in elsewhere. The party was ordered to acknowledge satisfaction on the judgments, to refund the money, and to pay the costs of the defendants at law, with the costs of this application. *Re Dillon*, 2 Sch. & Lef. 110.

13. Where plaintiff's solicitor, with notice, suffers defendant to satisfy plaintiff's demand, without taking effectual security for payment of his costs, the Court will not suffer him to proceed in suit against defendant for recovery of them. *Morse v. Cook*, McClel. 211; 13 Price 437.

2. By Action after Taxation. Injunction.

14. An order was made in bankruptcy referring a solicitor's bill to be taxed, and reserving the question as to the costs of the taxation. The costs were taxed, and one-sixth taken off, and the solicitor brought an action for the amount without deducting the costs of taxation. On petition, the action was stayed, a reference directed to tax the costs of taxation, and that the amount, after deducting the costs of taxation, be paid to the solicitor. *Exp. Bellott, Re Lingard*, 4 Madd. 379.

15. After an order for the taxation of a solicitor's bill, staying proceedings at law till the report, the solicitor having died before a report, and no measures having been taken for continuing the taxation, his administratrix, proceeding at law against the client, was held not to have committed a contempt. *Houlditch v. Houlditch*, 1 Swan. 58; 1 Wils. 17.

1. Injunction granted to restrain an action for the amount of a solicitor's bill, which had been taxed after the commencement of the action, and more than one-sixth had been taken off, but the costs of taxation had not been ascertained. *Walton v. Johnson*, 2 Sim. 456.

2. A solicitor, whose bill had been taxed, and more than one-sixth taken off, brought an action against his client before the costs of taxation were ascertained for the amount so taxed; the Court granted an injunction to restrain the action. *Barr v. Wiggins*, 4 Sim. 125.

3. Motion to restrain a solicitor from proceeding to recover the amount of a bill of costs refused, although much the greater part of the bill consisted of charges in respect of proceedings improperly taken by the solicitor, some few of the items of trifling amount appearing to be due from, and improperly claimed against the client. *Wiggins v. Peppins*, 2 Jur. 320.

4. A bill of costs having been incurred by A. and B. jointly, and an action having been brought against them for the recovery of the amount, the Court refused to direct a taxation and to stay the proceedings at law, on the undertaking of A. alone, to pay what might be found due. *Re Chilcote*, 1 Beav. 421.

5. The omission by a client to file a certificate of taxation of a solicitor's bill within the four days prescribed by the Order of 29th October 1692, does not render the order a nullity, but the client's representatives, after his death, may, notwithstanding the omission, obtain an order under the summary jurisdiction for the delivering up of the client's papers on payment of the amount of the bill as taxed, and an action by the solicitor on the bill, after such taxation, is a contempt, and will be restrained by injunction at the instance of the representatives. *Re Campbell*, 3 De G. M. & G. 585; 17 Jur. 1171; 22 L. J., Ch., 865; 1 W. R. 204.

3. By Attachment.

6. After decree for debt and costs, attachments may be taken out for each separately. *Frazer v. Thoburn*, 2 Anstr. 380, 413.

7. Cashier of bank in cause detained to answer solicitor's bill of fees, etc. *Fairland v. Evener*, Dick. 114.

8. Where a solicitor's bill of costs is taxed, he may take out an attachment for them without previously taking out a subpoena; but he must serve his client with the order for taxing his bill of costs, and with the Master's report of such costs. *Murphy or Murphy v. Balderson*, Barnard. 266; 2 Atk. 114.

To bring a defendant into contempt in an order of taxation, a copy and the report of the sum at which the bill is taxed must be left at his house. *Ib.*

9. Where costs are directed to be paid to A. or his solicitor, a personal demand by A. alone is sufficient ground for an order of committal against the party for non-payment of such costs. *Exp. Diaoh*, 3 Dea. 53.

10. The sheriff cannot take a bail bond upon an attachment for not paying costs, but in

such case a messenger is to go to bring in the party. *Anon.*, Pre. Ch. 331.

11. Where a decree directs the plaintiff to pay the costs of one of the defendants, and to have them over again from another defendant, and that defendant to pay the plaintiff's costs, the plaintiff is not at liberty to issue more than one subpoena, or more than one attachment for both sets of costs. *Semble*, but the circumstance of two subpoenas having been issued, when they were followed by but one attachment, is not a ground for discharging the attachment, as the defendant was only charged with one subpoena, and suffered no additional expense. *Chute v. Ross*, 7 Sim. 255; 4 L. J., N. S., Ch., 67.

12. Where an order for payment of costs has been made on two persons jointly, the four-day order will not be granted against one unless the order has been also brought into contempt. *Exp. Batten*, 1 M. D. & De G. 82; 9 L. J., N. S., Bky., 41.

13. When a warrant for taxation was irregularly served on the plaintiff, and the Master's certificate irregularly obtained, and the plaintiff was arrested for the non-payment of the costs, all proceedings were on motion set aside for irregularity, and defendant's solicitor ordered to pay the costs. *Bricknell v. Stamford*, 2 Jur. 1010.

14. Personal service of an order for payment of costs by a plaintiff, not a party to the suit, will be dispensed with, where the plaintiff cannot be found. *Hunter v. —*, 6 Sim. 429.

15. The service of a petition to dismiss a petition for taxation of costs, need not be personal. *Secus*, the order for payment of the costs. *Exp. Stephens, Re Billing*, 2 Mont. & A. 482.

16. Where there is an order against two persons jointly to pay costs, the process for giving it effect may be joint or several. *Sangar v. Gardiner*, C. P. C. 262.

It is not the practice, to prove the execution of the power of attorney, to receive costs as a foundation for the succeeding process. *Ib.*

17. When order to pay costs is made on person not party to suit, motion for four-day order or commitment requires notice. *Re Partington*, 6 Madd. 71.

18. An attachment issued against a party for the non-payment of costs which had been taxed by the Master. It appeared that part of the amount, certified by the Master to be due, consisted of fees to counsel, which had not been paid till after the Master's certificate had been granted. Under the circumstances, the attachment was set aside, and it was referred back to the Master to review his taxation. *Herring v. Cloberry*, 11 L. J., N. S., Ch., 410; 6 Jur. 619.

19. Decree for the sale of a vessel condemned, after appeal asserted and inhibition served personally on the judge:—Held, not such a contempt, under the circumstances of the case, as to entitle the owners to an attachment against the judge for costs and damages incurred thereby. *Barton v. Field*, 4 Moo. P. C. 273; 8 Jur. 113.

20. A party admitted to sue *in forma pauperis* after the commencement of a suit, may be attached for non-payment of costs which have been previously ordered to be paid in that

suit, without being first dispaupered. *Davenport v. Davenport*, 1 Ph. 124; 11 L. J., N. S., Ch., 325; 6 Jur. 633.

1. After an order to tax, not in a cause, and application for the sum found due declined, the Court made the order for payment within ten days, and not for an attachment under the 11th General Order of August 1841. *Re Lovell*, 9 Beav. 332.

2. An order was made, on the application of the plaintiff, that certain costs should be taxed and paid, without stating to whom. The subpoena for costs directed them to be paid to the plaintiff, and an attachment in the usual form:—Held, regular. *Oldfield v. Cobbett*, 12 Beav. 91.

3. The sheriff, having taken a defendant, under an attachment for non-payment of a large sum of money, in obedience to an order of the Court, received a part of the amount, and a deposit of title deeds as security for payment of the balance on the return of the writ. At the return of the writ the defendant did not pay the balance. Upon the motion of the sheriff, the Court permitted him to pay the sum he had received into court, and to issue an attachment in the names of the plaintiffs, without prejudice to the question of his liability to them; he also indemnifying them against consequent costs, and undertaking to allow the defendant inspection of the title deeds deposited as security. *Thomas v. Hall*, 2 De G. & Sm. 264.

4. Where a plaintiff's bill is dismissed with costs, a writ of attachment is the right mode of recovering such costs. *Andresen v. Walton*, 1 Macn. & G. 380; 2 H. & Tw. 154; 19 L. J., N. S., Ch., 249; 14 Jur. 260.

Certificate of the clerks of records and writs upon the practice in relation to the issue and execution of writs of attachment for non-payment of costs. *Id.*

5. After service of a subpoena for costs the party liable is allowed, by the practice of the Court, eight days to pay the costs. An attachment sued out before that time has expired is irregular, and will be set aside. But where the party was in custody under an execution when the attachment issued, it was set aside without costs, the party undertaking not to bring an action in respect of the arrest or detention. *Brennan v. Kenny*, 2 Ir. Ch. R. 94.

An attachment sued out irregularly may be withdrawn, though executed, and another attachment may be sued out on the same subpoena. *Id.*

6. Upon a motion for attachment, an order was made, except that the respondent pay the costs of the motion. Upon default in payment:—Held, that the Court had no jurisdiction to commit to prison for the default. *Micklathwaite v. Fletcher*, 27 W. R. 793.

7. Where an order, directing a solicitor's bill to be taxed, goes on to direct payment of what shall be found due within twenty-one days from the date of the certificate, no further order for payment is necessary, and no subpoena for costs need be sued out. *Re Reynolds*, 10 W. R. 709.

It is sufficient, in order to found an attachment, to serve a copy of the order properly endorsed, and a copy of the Master's certi-

ficate on the party thereby certified to be liable to pay; and the circumstance that the party to receive is a corporation makes no difference if they, under their common seal, authorise any one to receive. But if the copy of the Master's certificate which is served is not a true copy, however slight the error, an attachment will be discharged with costs. *Id.*

8. The Crown has a right to supersede a process which has issued at its own instance, and a party attached for non-payment of costs, decreed against him on an appeal in a slave case, ordered to be discharged, notwithstanding the objection of the captors to the Crown receiving the costs out of the proceeds. *Jennings v. Hill*, 4 Moo. P. C. 369.

9. The proper mode of enforcing orders made in the taxing master's office is by an attachment under Cons. Order XXIX., Rule 2. *Re Saul's Estate*, 3 N. R. 701.

Effect of on Right of Set Off.] 10. The Lord Chancellor on the 8th November ordered the defendant to pay costs to the plaintiff, but the order was not completed till the 23rd December. The Master of the Rolls on the 15th December ordered the plaintiff to pay costs to the defendant, and on the 19th the plaintiff offered to set off the costs. The defendant in January following issued an attachment for the costs:—Held, that the plaintiff, notwithstanding he was in contempt, might, under these circumstances, move to set off the costs. *Cattell v. Simons*, 6 Beav. 304.

11. The execution of a writ of attachment for costs does not deprive the party issuing it of any lien or right to set off he may possess for the payment of such costs. *Bantree v. Watson*, 2 Keen 713; 7 L. J., N. S., Ch., 183.

4. By Charging Order.

12. Where a motion was dismissed with costs, and every endeavour made to serve the party with a subpoena for them had failed, the Court enforced the order by charging Government stock of the party, under 1 & 2 Vict., c. 110. *Blake v. White*, 3 Y. & Coll. 434; 3 Jur. 749.

13. A plaintiff's bill having been dismissed with costs, an order nisi charging railway shares belonging to the plaintiff with the amount of the defendant's costs when taxed was made before taxation. *Burns v. Irving*, 46 L. J., Ch., 423; 3 L. R., Ch. D., 291; 25 W. R. 66; 34 L. T., N. S., 754.

14. A decree declaring a plaintiff entitled to one-fifth of the proceeds of sale of chattels, and directing an account to be taken of what was due, and payment of such amount together with the costs of the action to him, does not entitle him to a charging order under 1 & 2 Vict., c. 110, s. 18, or to a stop order against funds in court in another suit belonging to the same defendant. *Widgery v. Tepper*, *Hall v. Tepper*, 6 L. R., Ch. D., 364; 37 L. T. 297; 25 W. R. 872.

15. Parties interested in a fund standing in the name of the accountant-general in one suit were ordered to pay the defendants in another suit their costs. These being taxed,

and a minute having been left with the senior Master of the Common Pleas, the Court on petition made a charging order on the fund for such costs, and granted an interim stop order. *Wells v. Gibbs*, 22 Beav. 204.

1. A Master's allocatur, and *à fortiori*, a mere rule for taxation of costs, is not an order whereby money is payable, so as to operate as a judgment within 1 & 2 Vict., c. 113, s. 18. *Shaw v. Neale*, 6 W. R. 635; 6 H. L. Ca. 581; 27 L. J., Ch., 444; 4 Jur., N. S., 695.

2. A plaintiff who had obtained an order for payment of costs was held entitled under 1 & 2 Vict., c. 110, to rank as an incumbrancer upon the defendant's estate from the date of the first registration of the certificates of taxation only. *Hargrave v. Hargrave*, 23 Beav. 484.

5. By Fi. Fa. or Elegit.

3. The 1st Order of May 1839 is not superseded by the 11th and 12th General Orders of August 1841; but a party, to whom money or costs are ordered to be paid, may still issue a *fi. fa.* or elegit. *Streeten v. Whitmore*, 5 Beav. 228; 6 Jur. 92.

4. The form of the decree on dismissal of a bill with costs, ordered to be altered, by adding the words "to be paid by the plaintiffs," with reference to the 1st Order of the 10th May 1839, giving a remedy by *fieri facias* or elegit for costs ordered to be paid. *Taylor v. Jardine*, 1 Hare 316; 11 L. J., N. S., Ch., 236; 6 Jur. 519.

5. The Court has a discretion not to supersede a writ of *fi. fa.* issued for costs payable to an outlaw. The discretion exercised in favour of an outlaw's solicitors, to whom costs had been assigned by way of security subsequent to the decree, but previously to the outlawry. *Grand Trunk Railway Co. v. Brodie*, 1 W. R. 321; 1 Eq. Rep. 64.

6. By Sequestration.

6. Order for sequestration made upon the return to a single *distringas*, issued under a decree for payment of costs; such an Order is only an Order *nisi* in the first instance. *Lowten v. Colchester (Mayor)*, 3 Meriv. 543.

Form of *distringas* regular, being to appear and answer contempt merely (not *ad comparandum et solvendum*); but the cause for which it issued being specified by indorsement. *Ib.*

7. The warden's certificate of a prisoner being in his custody for contempt for non-payment of costs taxed is sufficient to found a motion for a sequestration, without any affidavit of demand and refusal to pay. *Phillips v. Stephenson*, 11 Price 473.

8. Permission to execute a sequestration for non-payment of costs in a cause will only be given when it appears that a party cannot be arrested. *Mellifont v. Whitney*, Hay. & J. 219.

9. There cannot be separate sequestrations for debt and costs; therefore, plaintiff permitted to execute a sequestration for the costs only, on the terms of his waiving any further proceeding against the defendant for

the sum reported and decreed due. *Graves v. Fennell*, 1 Ir. Eq. R. 28.

10. When a deposit on an appeal had been ordered to be returned to the appellant, and before it was paid to him sequestration was issued against him for non-payment of costs previously due, the deposit was ordered to be paid to the sequestrators instead of the appellant. *Conn v. Garland*, 9 L. R., Ch., 101; 22 W. R. 175.

11. The petition of a defendant had been dismissed with costs to the infant plaintiffs. A subpoena and *fi. fa.* were issued, but the defendant was in Paris, and no effects could be taken. A commission of sequestration was then issued, under which the sequestrators obtained moneys which, by orders of Court, were paid in the cause to "the sequestration account," and were invested in consols. Upon the petition of the infant plaintiffs, the stock standing to "the sequestration account" was ordered to stand charged with payment to them of the taxed costs and interest from the date of the Master's certificate, unless the defendant should, within one month, show cause to the contrary. Service on the defendant's solicitor in England to be good service. *Westby v. Westby*, 5 De G. & Sm. 516; 16 Jur. 945.

Costs of. 12. A party will be entitled to the costs of issuing and serving an order of sequestration *nisi*, to enforce payment of taxed costs, though, upon a petition to review the taxation, their amount should afterwards be reduced, if the other party has not employed due diligence in obtaining a review of the taxation. — *v. Marlborough (Duke)*, 1 L. J., Ch., 24.

13. Costs of a sequestration as between solicitor and client will not be taxed. *Re Shapland, Ex p. Hunt*, 23 W. R. 40.

7. By Subpoena.

14. Demurrer to examination by witness overruled: subpoena for costs not of course. *Valiant v. Dodomead*, Dick. 92. S. C. *nom.* *Vailiant v. Dodomead*, 2 Atk. 592.

15. Costs to be paid out of estate: no subpoena lies against defendant, but part of estate to be sold. *Cannon v. Beely*, Dick. 115.

16. Where a decree directs the plaintiff to pay the costs of one of the defendants, and to have them over again from another defendant, and that defendant to pay the plaintiff's costs, the plaintiff is not at liberty to issue more than one subpoena, or more than one attachment for both sets of costs, *semble*. But the circumstance of two subpoenas having been issued, when they were followed by but one attachment, is not a ground for discharging the attachment, as the defendant was only charged with one subpoena, and suffered no additional expense. *Chute v. Ross*, 7 Sim. 255; 4 L. J., N. S., Ch., 67.

17. Service of subpoena for costs out of the jurisdiction of the Court, is irregular, and an attachment founded upon it will be discharged. *Hawkins v. Hall*, 1 Beav. 73; 4 Myl. & C. 280; 8 L. J., N. S., Ch., 285; 3 Jur. 282.

A person, who has caused another to be irregularly arrested, will not be allowed to serve him while detained, in his own suit, with a subpoena for costs. *Semble*, that the service

would also be bad if the defendant was irregularly in custody at the suit of any other person. *Id.*

1. The party who serves a subpoena for costs, is authorised by the subpoena itself, without any power of attorney, to receive the costs for which the subpoena is issued. *Empringham v. Short*, 12 L. J., N. S., Ch., 144.

8. Against Persons under Disability.

Infants.] 2. A continued employment of an attorney by infant client, after the latter comes of age, may amount to an undertaking to pay a prior bill of costs. *Guy v. Burgess*, 1 Sim. 117.

3. The Remembrancer having been appointed guardian to a minor defendant, upon process of contempt for want of an appearance, the Court, upon motion of the minor by her mother and testamentary guardian, gave her liberty to answer by her testamentary guardian, "praying the costs, as offered by the defendant's notice of the 30th January, the costs to be paid within a week after taxation, and the answer to be filed within a week after the payment of such costs." The notice of 30th January had been served by the mother. The minor's answer was afterwards filed and accepted, the costs not having been paid. The Court made an order for an attachment against the guardian for non-payment of those costs. *Brady v. Finnegan*, Jon. & C. 426.

4. The defendant, who was decreed to pay the costs, having run away, and the *prochein ami* poor, the solicitor was paid the bill of costs out of the money lodged in court for the benefit of the plaintiffs during their infancy. *Staines v. Maddox*, Mos. 319.

A person who signs an authority for the use of his name as next friend to an infant, becomes *prima facie* liable to pay the infant's solicitor's bill of costs, as well as those of the other side. *Re Flower*, 19 W. R. 578.

5. If for any cause he disputes this liability, the solicitor may nevertheless obtain the common order for taxation against him without mentioning that fact, for the defence cannot be raised in the process of taxation, but requires independent proceedings to be taken to enforce it. *Id.*

Lunatics.] 6. A solicitor employed on part of a lunatic can have no action against him for his bill of costs. *Barnesley v. Powell*, Amb. 102.

7. A lunatic died in June 1853. The solicitor in the lunacy obtained an order for taxation of his costs in the lunacy, in February 1854, and the taxation was completed in February 1855. He presented a petition under the 23 & 24 Vict., c. 127, s. 29, but not before October 1860, for an order to charge the lunatic's real estate with his costs:—Held (*Per* Knight Bruce, L. J.), that his right to recover his costs accrued on the death of the lunatic: (*Per* Turner, L. J.), that the right must have accrued when the order for the taxation of them was obtained: and therefore, *quacunq; viâ*, he was within the proviso of the 29th section, and barred of his remedy against the lunatic's real estate. *Re Cumming*, 6 Jur., N. S., 1129.

S. C. *nom. Exp. Turner*, 20 L. J., Ch., 29; 3 L. T., N. S., 391.

See also PRACTICE (Costs).

Married Women.] 8. Wife cannot be taken in execution for costs. *James v. Champion*, Dick. 160.

9. In a proceeding in which a married woman and her husband are co-plaintiffs or co-petitioners, a sequestration cannot issue for costs against her separate estate; *semble*, it is otherwise if she sues by her next friend. *Keogh v. Cathcart*, 12 Ir. Eq. R. 215. And see S. C. 11 Ir. Eq. R. 280.

Liability of Married Woman's Separate Estate.] See HUSBAND AND WIFE, XI. XI. 6.

9. Other Cases.

10. *No caveat* does not lie in respect of costs taxed in a Chancery suit. *Goodman v. Sayers*, 5 Madd. 471.

11. Mode of proceeding to compel payment of costs by one not a party to the suit. *Att.-Gen. v. Skinners' Co.*, C. P. C. 1.

12. How payment of costs enforced by and against persons not a party to the suit. *Sangar v. Gardiner*, C. P. C. 262.

Order against two persons jointly to pay costs; the process for giving it effect may be joint or several. *Id.*

It is not the practice to prove the execution of the power of attorney to receive costs, as a foundation for the succeeding process. *Id.* No costs of order fixing time for payment, nor of order to commit in default. *Id.*

13. Solicitor not to be paid fees till he has settled clerk in court's bill. *Stevens v. Avery*, Dick. 224.

14. Where plaintiff's solicitor, with notice, suffers the defendant to satisfy the demands of his client, without making effectual provision for payment of his costs; the Court will not suffer him to proceed in suit against defendant for recovery of them. *Morse v. Cooke*, McClel. 211; 13 Price 473.

15. An order obtained on petition by the client against the solicitor for a taxation of his costs as between solicitor and client, upon an undertaking to pay the balance:—Held, under the circumstances, not to be a bar to the more extended relief the client was entitled to. *Gomley v. Wood*, 3 J. & L. 678; 9 Ir. Eq. R. 418.

16. A. B. had obtained an order in the Exchequer for payment of costs against a party to a suit in this Court, who was tenant for life of certain property over which a receiver had been appointed with directions to pay her the rents. The Court gave leave to A. B., notwithstanding the appointment of receiver, to sue out and execute such writs as he might be advised. *Gooch v. Haworth*, 3 Beav. 428.

17. After an order to tax, not in a cause, and application for the sum found due declined, the Court made the order for payment within ten days, and not for an attachment under the 11th General Order of August 1841. *Re Lovell*, 9 Beav. 332.

18. An order was made for taxation, nominally, on the petition and undertaking of A. and others. The certificate was made ten

years after, and an order was then made on A. to pay. A. applied to discharge the order for payment, showing that the order had been obtained without his authority, and during his absence from England:—Held, that while the order for taxation stood, the order for payment was regular. *Re Thompson*, 25 Beav. 246.

1. Where an order, directing a solicitor's bill to be taxed, goes on to direct payment of what shall be found due within twenty-one days from the date of the certificate, no further order for payment is necessary, and no subpoena for costs need be sued out. *Re Reynolds*, 10 W. R. 709.

2. When a plaintiff has given notice to the defendant to discontinue the action, and the costs have been taxed, no further order of the Court is required to enable the chief clerk to issue a writ to enforce payment, and the writ may be varied to suit the circumstances of the case. Ord. XXIII. (Judicature Act) has the force of an order of the judge or Court. *Bolton v. Bolton*, 24 W. R. 663; 35 L. T., N. S., 358.

XXV. RECOVERY OF BALANCES DUE FROM SOLICITOR TO CLIENT, AND VICE VERSA.

3. Course of proceeding to compel payment of a balance found due, on taxation, from a client to his solicitor. *Stocken v. Dawson*, 7 Sim. 547.

Where a balance is found on taxation due from the client, payment must be first demanded before applying for the four-day order, which when served and payment refused, the order for commitment is granted without notice, but on affidavit of the service of the order, and demand and refusal. *Id.*

4. Where decree orders defendant to retain his costs when taxed out of the balance in his hands, and pay the residue into court, if the defendant delay to get costs taxed, plaintiff must move that he may bring his bill of costs to be taxed within limited time, and not that he may pay in the whole balance. *Newsome v. Shearman*, 2 Sim. & S. 95.

5. On ordering taxation of a bill of costs in respect of a trust estate, the Court will not direct any money found due from the solicitor to be paid to the *costis quo trustent*, for the solicitor would have no indemnity against a breach of trust. *Re Hallett*, 21 Beav. 250.

6. After taxation of solicitor's bill and balance found due to client, the solicitor avoiding personal service of taxing master's certificate, service by putting a copy of Master's certificate through or under solicitor's door, with a copy of order authorising the same, to be deemed good service. *Re Templeman*, 20 Beav. 574.

7. Upon a taxation, not in a cause, a sum was found due to a solicitor from his client:—Held, that to compel payment, proceedings must be had under the old practice, and not under the 11th Order of August 1841. *Re Lovell*, 9 Beav. 332.

8. A sum being, on taxation, found due from a solicitor to his client, the first order fixing a day for payment must be obtained on notice; but the second or four-day order is made *ex parte*. *Re Stevenson*, 14 Beav. 27.

9. A sum of money having on taxation been found due from a solicitor to his client, the solicitor was ordered to pay the costs of the application for the second order for payment. *Re Bainbridge*, 14 Beav. 645.

10. Special applications for delivery and taxation of a bill, and for payment over to the applicant of the balance of the cash account, must be made by summons, and not by petition. *Re Edmonds*, 19 W. R. 1048; 25 L. T., N. S., 152.

11. A solicitor may be imprisoned for default in payment of a balance ordered to be paid on a common order to tax his bill of costs. *Re Rush*, 39 L. J., Ch., 159; 9 L. R., Eq., 147; 18 W. R. 331.

12. Default by a solicitor in payment of the balance found due from him to his client upon taxation, under the common order in Chancery, is default in payment of a sum of money, when ordered to be paid by a solicitor in his character of an officer of the Court, and an attachment may be issued against him. *Re White*, 19 W. R. 39; 23 L. T., N. S., 387.

13. Under an order to tax made in 1873, a balance was found due from a solicitor in respect of moneys received by him, and ought to have been paid within twenty-one days from the 21st August 1875:—Held, that the case was governed by Rules of Court 1875, Ord. XLIV., rule 2, and that an attachment for non-payment could not be issued without notice to the solicitor. *Anon.*, 1 L. R., Ch. D., 445.

14. Default by a solicitor in payment of a bill of costs found on taxation to be due by him to another solicitor whom he had employed to act for him, is "default by a solicitor in payment of a sum of money, when ordered to pay the same in his character of an officer of the Court making the order," within the Debtors Act 1869, s. 4, sub-s. 4, and an attachment may be issued against him. *Re Barfield*, 24 L. T., N. S., 248; 19 W. R. 466.

15. A solicitor was ordered to pay the costs of an unsuccessful appeal against an order to tax his bill of costs, which had been obtained by his client:—Held, that the nonpayment of the costs of the appeal was not a default in payment of money within the Debtors Act 1869, s. 4, sub-s. 4. *Re Hope*, 41 L. J., Ch., 797; 7 L. R., Ch., 523; 20 W. R. 694; 26 L. T., N. S., 814.

XXVI. INTEREST ON COSTS.

1. Allowance of, 6516.

2. Agreements for between Solicitor and Client, 6517.

1. Allowance of.

16. A party was directed to pay certain costs and make other payments, but was declared to be entitled to be indemnified out of funds in Court:—Held, that he was entitled to interest at 4l. per cent. on all sums paid for costs or otherwise. *Wainman v. Bomker*, 8 Beav. 363.

17. A deed after reciting that A. had agreed to charge certain property with all sums which B. should pay as surety for a third party, together with interest on all such payments,

and all such costs, etc., as he might sustain, etc., proceeded to charge the property with the payment of all such sums, costs, etc., with interest as aforesaid:—Held, that interest was not payable on the costs, etc. *Hodgson v. Hodgson*, 2 Keen 104; 7 L. J., N. S., 5.

1. *Quere*, as to right to interest on untaxed costs, from the date of a mortgage given for them. *Lawless v. Mansfield*, 1 Dr. & War. 557; 4 Ir. Eq. R. 113. And see *Moss v. Bainbridge*, *Bainbridge v. Moss*, 6 De G. M. & G. 292.

2. Interest on a bill of costs while under taxation not allowed. *Re Smith*, 9 Beav. 342.

3. Under 1 & 2 Vict., c. 110, ss. 17, 18, interest is recoverable on costs which one party is ordered to pay another, but not on costs directed to be raised out of an estate. *Att.-Gen. v. Nethercoote*, 11 Sim. 529; 10 L. J., N. S., Ch., 162.

4. Where a decree was pronounced for the payment to the plaintiffs of a sum of money and costs, the costs do not bear interest (under the 27th section of 3 & 4 Vict., c. 105) from the date of the decree, but from the date of the certificate of taxation of the costs. *Lidwell v. Lidwell*, 7 Ir. Eq. R. 91.

5. Where the time for payment of principal, interest, and costs, under a foreclosure decree, is enlarged, and no terms are imposed as to payment of subsequent interest, such subsequent interest is to be calculated upon the principal due and the unpaid costs, and not upon the aggregate of principal, interest, and costs. *Whitfield v. Roberts*, 7 Jur., N. S., 1268; 9 W. R. 844.

6. Where the payment of taxed costs was unavoidably delayed:—Held, that under the 27th section of the 23 & 24 Vict., c. 127, interest was payable on such costs from the date of the taxing master's certificate, to the day of the payment thereof. *Fox v. Charlton*, *Charlton v. Fox*, 6 N. R. 352.

7. When an order has been made for payment of costs after taxation, the Court will order the payment of interest on the amount found due by the Master's certificate, under 23 & 24 Vict., c. 127, s. 27, from the date thereof to the date of the application upon evidence that the payment has been unavoidably delayed. *Carter v. Carter*, 8 L. T., N. S., 692; 2 N. R. 512.

8. The 23 & 24 Vict., c. 127, only applies to solicitors, and a party to a suit cannot claim under it interest on his costs. *Jenner v. Morris*, *Morris v. Jenner*, 11 W. R. 943.

9. The Court will give interest on costs payable out of a fund which cannot be immediately realised. *Re Campbell*, 19 W. R. 427.

10. By orders of the Court of Chancery, made in 1862 and 1863, costs to which a petitioner was entitled were directed to be added to the moneys secured to him by a deed, and it was ordered that they should stand as a charge upon the property comprised in the deed. The deed referred to was a grant, in consideration of 400*l.*, of an annuity of 40*l.* a year for lives to the petitioner, secured by the covenant of the grantor, and by a charge of the annuity upon specified real and personal estate. The order mentioned nothing about interest:—Held, independently of the Attorneys Act 1860, that inasmuch as the costs were an equitable charge, they bore interest at 4*l.* per cent. *Lippard v. Ricketts*, 14 L. R., Eq., 291; 41 L. J., Ch., 595; 20 W. R. 898.

11. The 33 & 34 Vict., c. 28, s. 17, which enables the Master upon a taxation of costs to allow interest on moneys disbursed by a solicitor for his client, is intended to apply only as between a solicitor and his own client, and does not apply to a taxation of costs to be paid as between solicitor and client out of a fund in court belonging wholly or partly to other persons than the client. *Harland v. Murrell*, 16 L. R., Eq., 285; 43 L. J., Ch., 94; 28 L. T. 725; 21 W. R. 781.

3. Agreements for between Solicitor and Client.

12. An agreement of the assignee to allow the solicitor interest on the amount of his bill of costs, does not bind the bankrupt's estate; nor does a resolution of creditor, at a meeting held for this purpose, bind those who are absent. *Repp. Philips*, 1 Dea. 368; 2 Mont. & A. 526.

13. It is the bounden duty of a solicitor, before he enters into a bargain with his client that he shall be allowed interest upon his bills of costs, to inform his client that the law allows of no such charge for interest. *Lyddon v. Moss*, 5 Jur., N. S., 637; 4 De G. & J. 104.

14. Where, according to agreement, a solicitor charged, in addition to his costs, a commission of 5*l.* per cent. upon certain property recovered for a client, such charge was disallowed, although it formed part of a settled account. *Pince v. Beattie*, 9 Jur., N. S., 1119; 11 W. R. 979; 32 L. J., Ch., 734.

15. A security taken for untaxed costs gives a solicitor no right to interest on them. There may, however, be a contract to pay such interest, if it is made with full knowledge, sufficient advice, and necessary warning; but, in the absence of these, it will be of no force between solicitor and client. *Shannon v. Casey*, 8 Ir. R., Eq., 307.

XXVII. INTEREST ON BALANCES AND ADVANCES.

16. Where a solicitor, engaged in various suits, obtained payment out of court of a sum of money standing in trust in the cause, and retained it towards his costs, and upon a subsequent taxation of his bill it appeared that at the time he obtained payment of the money he had in fact been already overpaid. The Court refused, upon a motion for that purpose, to charge him with interest, the parties having made considerable delay before they taxed the costs, and there being no fraud or laches imputable to the solicitor. *Wright v. Southwood*, 1 Y. & J. 527.

17. Under the common order, the Master is not authorised to allow interest on the balance of the moneys of the client from time to time in the hands of the solicitor, though such appears to have been the agreement between the parties. *Jones v. James*, 1 Beav. 307; 3 Jur. 310.

18. On taxation a solicitor cannot be charged with interest on balances in hand; but, a solicitor having debited himself with interest in his cash account rendered:—Held, that the Master ought to have charged him. *Re Savery*, 15 Beav. 58.

19. A solicitor took up his client's bills:—Held, that these payments could only be

treated in the same light as any other ordinary cash advances made by the solicitor for the benefit of his client, and that the solicitor was not entitled to charge interest thereon. *May v. Biggenden, Cheeseman v. May*, 24 Beav. 207.

1. The 33 & 34 Vict., c. 28, s. 17, authorising on taxation the allowance of interest on moneys disbursed by a solicitor for his client, only applies to costs between a solicitor and his own client, not to a case where costs are to be paid out of a fund in court not belonging wholly to the client. *Hartland v. Murrell*, 43 L. J., Ch., 94; 28 L. T. 725; 21 W. R. 781; 16 L. R., Eq., 285.

2. The Attorneys and Solicitors Act 1870 is not retrospective, and, therefore, interest cannot be allowed under s. 17, on disbursements made prior to the passing of the Act. *Ward v. Byre*, 15 L. R., Ch. D., 180; 49 L. J., Ch., 657; 43 L. T. 525; 28 W. R. 712.

In May 1872, a country solicitor commenced a suit against his London agent, claiming an account and taxation of the bills of costs between them. The defendant filed his answer in October 1872, and thereby alleged a large balance due to him, and claimed interest thereon. He had also, in 1869, furnished the plaintiff with an account which contained items for interest. In 1875 a copy of the account was enclosed in a letter which referred to the account, but made no formal demand of payment, and which was signed by a firm of solicitors as his agents:—Held, that neither the answer nor the letter enclosing the account was a sufficient demand in writing or notice within 3 & 4 Will. 4, c. 42, s. 28. *Id.*

XXVIII. WAIVER OF TAXATION.

3. At the hearing, a plaintiff obtained an order for taxation of his costs of suit, and payment out of the fund in court. The plaintiff had, in the progress of the suit, employed three different sets of solicitors successively. The plaintiff and his solicitors, at the date of the decree, agreed to accept a gross sum in full of all costs, instead of proceeding to taxation, and received the sum accordingly, for which they gave a receipt to that effect. They applied the money to their own use, and never paid the former solicitors the costs incurred during the early period of the suit. The decree did not direct any distributive payment among the various solicitors of the plaintiff:—Held, that the plaintiff and his solicitors, at the date of the decree, had a right to waive taxation, and to accept of a gross sum, in satisfaction of all costs, without consulting the former solicitors. *Mornington v. Wellesley*, 4 Jur., N. S., 6.

It appearing that the gross sum was taken in satisfaction of all costs:—Held, that the lien of the former solicitors upon the fund in court was gone. *Id.*

Semble, that the remedy of the former solicitors was by action against the solicitors who received the money, as for money had and received to their use. *Id.*

SOUTH AUSTRALIA.

See COLONIES AND COLONIAL LAW, X. XXXIII.

SOVEREIGNS AND STATES.

— *As Parties to Suits.* See PRACTICE (PARTIES).
— *Discovery by.* See PRACTICE (DISCOVERY, PRODUCTION, AND INSPECTION).

See also CROWN—FOREIGNER AND FOREIGN LAW, III.

SPECIAL CASE.

See BANKRUPTCY—PRACTICE (SPECIAL CASE).

SPECIAL EXAMINER.

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SPECIALLY INDORSED WRITS AND PROCEEDINGS UNDER JUDICATURE ACT, ORDER XIV.

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I. IN GENERAL.

1. Principle of specific performance that the legal remedy is inadequate or defective. *Flint v. Brandon*, 8 Ves. 159.
2. Specific performance of contract by competent party, and its nature and circumstances unobjectionable, are as much of course in equity as damages at law. *Hall v. Warren*, 9 Ves. 608.

1. He who seeks relief in equity on the foot of an agreement, must show that he has performed his part. *Stratford v. Aldborough*, 1 Ridgw. P. C. 287.

2. Where one party to an agreement trifles or shows a backwardness in performing his part of it, equity will not decree a specific performance in his favour; especially if the circumstances and situation of the other party are materially altered in the meantime. *Hayes v. Caryl*, 1 Bro. P. C. 126.

3. In equity there is a marked distinction between what is necessary to resist a suit for a specific performance of a contract, and a suit founded on a contract executed. *Vigers v. Pike*, 8 Cl. & F. 562. And see *Pike v. Vigers*, 2 Dr. & Wal. 1.

A case may happen in which the governing body of a joint stock company, or the partners of a firm, may so unite with a stranger in practising fraud against the company for whom they act, as to entitle the company to repudiate such acts, and to be relieved against them. *Id.*

In a case depending on alleged misrepresentations of value, there cannot be a more effectual bar to the plaintiff than by showing that he was from the beginning cognisant of all matters complained of, or after full information of them continued to deal with the property. *Id.*

4. If a person contracts to do a thing which he may do himself, or has the means of compelling others to do, equity will compel him to do it, unless it be highly unreasonable, in which case the other party shall not be held to the contract. If in that case the other party refuses to give up the contract, equity will not enforce a specific execution of it, but leave him to recover damages at law. *Costigan v. Hastler*, 2 Sch. & Lef. 166.

5. Specific execution of agreements decreed where damages would not answer the intention in making the contract, and a specific performance is therefore essential to justice; but equity will not decree specific performance of a covenant where, from circumstances, it is become unconscientious strictly to enforce specific performance of it; but on the terms of plaintiff's submitting to a conscientious modification of the covenant, equity will grant specific performance subject to such modification, especially where the conduct of both parties for a great length of time has caused the contract so to be acted upon as to make it unconscientious to refuse a specific performance. *Davis v. Hone*, 2 Sch. & Lef. 341.

6. A court of equity will, in many cases, enforce the specific execution of agreements, where the deed will not enable the party to recover damages at law. *Chandos v. Brownlow*, 2 Ridgw. P. C. 416. But see *Normandy v. Devonshire*, 216.

7. In agreements, no relief in equity where an action at law would not lie by reason of a substantial defect, such as a contingency not happening. Husband covenants in marriage articles, in six months after the death of his mother, and that he should come to and be in possession of the estate in jointure, to settle, etc. He dies in mother's life, having no issue. The estate comes to his heir, who shall not be compelled by the wife to a specific performance. *Whitmel v. Farrel*, 1 Ves. 256.

8. The fact that the performance of an

agreement has, owing to circumstances which have subsequently occurred, become hard in its consequences to one of the parties, or that he is called upon to perform it under circumstances which he had not contemplated, is no objection to the specific performance of the contract in equity, there being nothing doubtful in the meaning of the agreement, and nothing hard or oppressive in its terms at the time it was made, *semble*. *Webb v. Direct London & Portsmouth Railway Co.*, 9 Hare 129; 20 L. J., N. S., Ch., 566; 15 Jur. 697.

But this was reversed on the ground that a decree for the specific performance would be more productive of injustice than justice, in such a case. S. C. 1 De G. M. & G. 52; 21 L. J., N. S., Ch., 337; 16 Jur. 323.

9. The Court will not decree a specific performance of a contract, if any circumstances of suspicion exist which remain unexplained. *West v. Haggood*, 6 L. J., N. S., Ch., 369; 1 Jur. 259.

10. Specific performance of an agreement, become useless to the defendant, refused. — *v. White*, 3 Swan. 108. n.

11. The interest which a third party may have against the specific performance of a contract, may preclude the execution of it, as between trustees and *cestui que trust*; as, where an insolvent tenant made over his lease to another, who treated for a renewal under a secret agreement, in trust for the original tenant. *Featherstonhaugh v. Fenwick*, 17 Ves. 313.

12. Specific performance refused where the parties had treated the non-performance of some of the stipulations as the subject of pecuniary compensation where the other stipulations might reasonably be dealt with in the same way. *Paris Chocolate Co. v. Crystal Palace Co.*, 3 Sm. & G. 119; 1 Jur., N. S., 720; 3 W. R. 267.

13. A seller of land, like a purchaser of it, is entitled to file a bill for specific performance, where he seeks a more complete remedy than he could obtain by an action for damages for the non-performance of the contract. This rule applies equally to an incorporated company as to individuals. *Eastern Counties Railway Co. v. Hames*, 5 H. L. Ca. 331; 24 L. J., Ch., 601.

14. The rule that he who seeks equity must do equity, is restricted to an equity in respect of the subject-matter of the suit. *Gibson v. Goldsmid*, 5 De G. M. & G. 757. Reversing 18 Beav. 584.

Where, therefore, in a deed of dissolution of partnership, one partner assigned certain foreign shares (which were recited to be transferable, as it was believed, by delivery), and covenanted for further assurance; and the other partner covenanted to indemnify the former against certain liabilities; and it afterwards appeared that the shares were not transferable by delivery, but required a formal act to complete the assignment:—Held, in a specific performance suit instituted by the assignee of the shares, that he was entitled to have the assignment completed, although there might in the meantime have been on his part a failure to perform the covenant of indemnity. *Id.*

15. This bill was filed for the purpose of enforcing a contract for a lease of mines, at a rent of one-fifteenth of the minerals obtained.

The defendant had subsequently granted a lease to another party at the same rent. The bill charged that, under an Act of Parliament, it was directed that the best rent should be obtained by the owner of the mines; and although one-fifteenth was a fair rent when the plaintiff's contract was entered into, that afterwards, the mines having become more valuable, the amount was not then a fair rent, and the lease granted by the defendant was therefore contrary to the Act:—Held, upon a demurrer for want of equity, that a party coming for performance of a contract could only have it as it actually existed, and that, as the rent reserved in the plaintiff's contract was not the best that could be obtained, it was contrary to the Act, and in effect fraudulent. The plaintiff, therefore, could not have his contract enforced, and the demurrer was allowed:—Held, also, that it was an undeniable proposition, that when a party entered into a contract without having the power of performing it, and afterwards acquired the right to do so, he was then bound to perform it. *Carne v. Mitchell*, 15 L. J., N. S., Ch., 287; 10 Jur. 909.

1. If two parties for a valuable consideration enter into a contract, of which one of the stipulations is for the benefit of a third person, who is a stranger to the consideration, the Court will not enforce the contract without securing his interest under it. *Davenport v. Bishop*, 2 Y. & Coll. C. C. 451; 12 L. J., N. S., Ch., 492; 7 Jur. 1077. Affirmed 1 Ph. 98.

II. FOREIGN CONTRACTS.

2. Specific performance decreed of articles executed in England concerning boundaries of two provinces in America. *Penn v. Baltimore*, 1 Ves. 444.

Original jurisdiction as to bounds of proprietary governments is in the king in council; but by the contract of parties it is brought within this jurisdiction. *Id.* 446.

3. A suit between parties residing here to enforce a lien on immovable property situate out of the jurisdiction requires that some special state of circumstances should exist, in order to enable the Court to give any relief. *Norris v. Chambres*, 29 Beav. 246. Affirmed 3 De G. F. & J. 583.

A director of a company, established in England to work some Prussian mines, had paid a large sum towards the purchase. The vendor annulled the contract, and resold the mines to a new company with notice. A bill by the representative of the director to establish a lien on the estate for the advances, was dismissed. *Id.*

4. A contract made in France, on the marriage of two people of that nation, who afterwards take refuge and live in England, shall be carried into a specific execution here, although the terms of it refer to the custom of Paris. *Foubert v. Twist*, 1 Bro. P. C. 129; Pre. Ch. 207.

5. An English court of equity has no jurisdiction to enforce the contracts of a foreign government against the property of such government in England. *Smith v. Woguelin*, 8 L. R., Eq., 198; 17 W. R. 904; 38 L. J., Ch., 465; 20 L. T., N. S., 724.

By a convention between the government of Peru and a Peruvian company all guano to be exported from Peru to Great Britain and Ireland was consigned to the company, and it was agreed that the company should sell the guano, and hold a portion of the proceeds at the disposal of the government. The Peruvian government afterwards contracted a loan in England upon the terms, that all the Peruvian guano to be imported into Great Britain and Ireland and Belgium should be hypothecated for the repayment of the loan, and that out of the proceeds of the guano a certain sum should be applied half-yearly in redemption of the loan:—Held, in a suit by the bondholders of the loan (to which the Peruvian government was made a defendant, but did not appear), that the Court had no jurisdiction to compel the company or its agents to apply the proceeds of the guano in the hands of the agents in England to the redemption of the loan. *Ib.*

When the government of a state contracts a loan in another country, the contract is governed by the law of the state whose government contracts the loan, and not by the law of the country in which the contract is made. *Ib.*

6. The Court has jurisdiction to carry out an agreement entered into by persons in England and relating to lands abroad, although such agreement is not made in a form which by the foreign law would affect the land. *Sichel v. Raphael*, 3 N. R. 662; 10 Jur., N. S., 1165; 18 W. R. 191; 11 L. T., N. S., 433.

7. Court of England will relieve against fraudulent conveyances of land gained in Ireland when the defendant is in England. *Arglisse v. Muschamp*, 1 Vern. 75.

8. The Court will specifically enforce against a foreigner a contract of sale made abroad, if the subject-matter of the contract is within its jurisdiction. *Hart v. Herwig*, 42 L. J., Ch., 467; 28 L. T. 329; 21 W. R. 538. Affirmed 8 L. R., Ch., 860; 29 L. T. 47; 21 W. R. 663.

Therefore, when a contract was made abroad for the sale of a foreign vessel to be delivered in this country, the Court granted an interim injunction to restrain the removal of the ship from an English port, allowing substituted service of the notice of motion on the captain. *Ib.*

II. Discretion of the Court.

9. Specific performance is discretionary in court. *Clowes v. Higginson*, 1 Ves. & B. 527.

10. Specific performance is wholly discretionary in court, as is also the jurisdiction to set aside a contract. *Mortlock v. Buller*, 10 Ves. 294. Affirmed 2 Dow 510.

11. A bill for specific performance of an agreement is an application to the discretion, or rather the extraordinary jurisdiction, of the court, which cannot be exercised in favour of persons who have slept on their rights, or acquiesced for a long time in a title and possession adverse to their claim. In cases seeking a specific execution, laches are equally as strong against a plaintiff not prosecuting, as in not commencing a suit. *Moore v. Blake*, 1 Ball & B. 69.

1. In decreeing a specific performance, a court of equity exercises a discretion, and will not exert its authority for that purpose, if by so doing injustice will be done. *Powell v. Lloyd*, 2 Y. & J. 372. See also *Martin v. Mitchell*, 2 Jac. & Walk. 420. *Mason v. Armistage*, 13 Ves. 25. *Drew v. Hanson*, 7 Ves. 35. *Omerod v. Hardman*, 5 Ves. 734. *Goring v. Nash*, 3 Atk. 186. *Jones v. Statham*, 3 Atk. 389.

2. Specific performance is not of course because there is a contract, but a relief in the nature of indulgence peculiar to the jurisdiction of equity. *Cox v. Middleton*, 2 Drew. 290; 23 L. J., Ch., 618.

3. The Court cannot speculate on the damages which a jury might have given for the breach of an agreement, nor on the damage caused to property by failure of a sale; therefore the specific performance of an agreement of hereditaments, where the consideration money is 50*l.*, is not too small a matter for the jurisdiction of the Court. *Bennett v. Smith*, 16 Jur. 421.

The exercise of the jurisdiction is discretionary in the court; but the discretion is not arbitrary, but must be exercised according to the circumstances of the case. *Id.*

III. Relief by Way of Damages.

- I. *Jurisdiction before the 21 & 22 Vict., c. 27*, 6523.
- II. *Jurisdiction under the 21 & 22 Vict., c. 27*, 6523.
- III. *Assessment*, 6527.
- IV. *Damages generally*. See COPYRIGHT, XII. II.—DAMAGES—INJUNCTION, I. X.—LIGHT AND AIR, V. VII. 2.—PATENT, VII. VIII. and VII. XII. 7.
- V. *Abatement and Compensation*. See LANDLORD AND TENANT, I. III.—VENDOR AND PURCHASER, IX.

I. JURISDICTION BEFORE THE 21 & 22 VICT., C. 27.

4. Court relieved against breach of agreement, on making a compensation. *Rose v. Rose*, Amb. 331.

Voluntary compensation must be paid at the time. *Id.*

5. A certain estate is covenanted to be conveyed, and is not so; the breach is remediable in damages. Such damages are money, not land, in the hands of the party injured. *Wade v. Paget*, 1 Bro. C. C. 364. For the judgment see 8. C. 1 Cox 74.

6. Compensation for non-performance of an agreement is not a mode of equitable relief. *Cinan v. Cooke*, 1 Sch. & Lef. 25.

7. Plaintiff, in a bill for specific performance of a contract, is not entitled generally to satisfaction by way of damages for the non-performance, to be ascertained by an issue, or a reference to the Master. Distinction as to case of compensation, as for a part subject to tithes, though represented as tithes free, giving the purchaser, if he chooses to take the purchase, a right to compensation, but not to

compel the vendor to purchase the tithes. *Todd v. Gee*, 17 Ves. 273. See also *Blare v. Sutton*, 3 Meriv. 237.

8. On a bill for a specific performance of an agreement for the sale of a house, the plaintiff made out his case; but it appeared that the defendant had actually sold the house to another person for a valuable consideration, and without notice. The Court directed the Master to inquire what damage the plaintiff had sustained by the non-performance of the agreement, and that such damages, together with the costs of the suit, should be paid by defendant. *Denton v. Stewart*, 1 Cox 258.

9. In general, a court of equity will not direct any inquiry as to damage sustained by the non-performance of an agreement. *Williams v. Hignett*, 6 L. J., Ch., 125.

10. Vendor, upon objection to the title, sold to another, after notice that she would do so, if the title was refused. Under a bill for a specific performance, or an issue or reference to ascertain the loss of the first purchaser, a reference was directed upon the authority of *Denton v. Stewart* (1 Cox 251). As to the principle, *quære*. *Greenaway v. Adams*, 12 Ves. 395.

11. The jurisdiction of equity is never exercised to decree compensation singly, without other relief. As to the jurisdiction in cases of compensation generally, see *Newham v. May*, 13 Price 749; *M'Clell*. 511.

12. A sub-lessee having been evicted on the expiration of the term granted by his lease, sued on a covenant to grant an additional term; but the term covenanted to be granted having nearly expired at the time of the decree, instead of a specific performance, an account in the nature of an inquiry *quantum damnificatus* was directed. *M'Nulty v. Hamill*, Bent. 541.

13. In a case decided before the stat. 21 & 22 Vict., c. 27:—Held, that the Court has jurisdiction to award damages for the want of a literal performance of a contract, of which it directs the specific performance: it will in general do so rather than compel the parties to resort to another forum. *Phelps v. Prothero*, 7 De G. M. & G. 722.

As to Damages generally and in Lieu of Remedy by Injunction. See DAMAGES—INJUNCTION, I. X.

II. JURISDICTION UNDER THE 21 & 22 VICT., C. 27.

1. *Where an Action for Specific Performance is not Sustainable*, 6523.

1. *In Aid of, or Substitution for, Relief by way of Specific Performance*, 6526.

1. *Where an Action for Specific Performance is not Sustainable*.

14. Under the 21 & 22 Vict., c. 27, damages, independent of relief, cannot be given by a court of equity, but the usual account of interest and rent will be directed. *Chinnoch v. Sainsbury*, 30 L. J., Ch., 409; 5 N. R. 185. 6 Jur.. N. S., 1318; 9 W. R., 7; 3 L. T., N. S., 258.

15. A court of equity can give damages only

where it can decree specific performance. *De Brassac v. Martyn*, 11 W. R. 1020; 9 L. T., N. S., 287.

Where a plaintiff has, by delay in prosecuting a suit, allowed the term in an agreement for the lease of a house to expire before the cause can be heard, the Court will not direct an inquiry as to damages. *Ib.*

1. The Court has power to entertain questions of compensation for damages under 21 & 22 Vict., c. 27, only in those cases where it has power to enforce specific performance. *Rogers v. Challis*, 27 Beav. 175; 6 Jur., N. S., 334; 29 L. J., Ch., 240.

2. Although relief by award of damages, under 21 & 22 Vict., c. 27, is in the nature of consequential relief, yet the Court has jurisdiction to grant it, notwithstanding that it may not be in a position at the hearing to grant an injunction or a specific performance on which the right to damages depends. *Cory v. Thames Ironwork & Shipbuilding Co.*, 11 W. R. 589; 8 L. T., N. S., 237; 2 N. R. 16.

3. When a plaintiff fails to establish any covenant contract, or agreement of which specific performance can be directed, the Court has no jurisdiction to grant relief in damages. *Lewers or Lever v. Shaftesbury (Earl)*, 2 L. R., Eq., 270; 12 Jur., N. S., 389; 14 L. T., N. S., 855.

Suit for specific performance of an alleged parol agreement entered into between the plaintiff and the agent of the defendant, for a lease to the plaintiff of two farms for a term of twenty-one years. The plaintiff occupied the farms till 1855, and paid rent, but no lease was ever granted to him:—Held, that the Court has no jurisdiction to deal with the question of damages where a plaintiff has failed to establish, by proper evidence, a bill for the specific performance of the contract. S. C., 16 L. T., N. S., 185.

4. Where in the result it appears that at the time of the plaintiff filing a bill for specific performance, he had no title to any equitable relief, the Court has no power to assess damages under the 21 & 22 Vict., c. 27. *Ferguson v. Wilson*, 12 Jur., N. S., 912; 15 W. R. 80; 15 L. T., N. S., 230.

The plaintiff advanced money to a company upon the faith of a resolution, that when the time for which the loan was made expired he should be entitled to be repaid in money, with interest, or by an allotment of shares to the amount of his advance. He elected to accept shares in payment, but the company refused to allot him any, and he filed a bill for specific performance of the agreement, and for damages for the breach thereof against the directors and the company. At that time there were no shares remaining unallotted, and the plaintiff was aware of the fact:—Held, that under such circumstances he could not maintain a bill for specific performance; and that, as at the time when the bill was filed the plaintiff had no title to the equitable relief sought, the Court could not, under the 21 & 22 Vict., c. 27, award him damages; for that Act was never intended to transfer the jurisdiction of a court of law to a court of equity, but to enable a court of equity to do complete justice between the parties in matters actually within its own jurisdiction. *Ib.*

5. It is not the intention of 21 & 22 Vict., c.

27, s. 3, to enable a party to have damages for breach of specific performance assessed, where he has good reason to believe that a bill for specific performance cannot be sustained; but where on a bill for the specific performance of an agreement to grant a lease, it appeared that the defendant could not grant the lease on account of the mortgagees refusing to concur therein, the Court directed an inquiry what damages the plaintiff had sustained by reason of the defendant's breach, instead of sending him to law to try the question; but it gave no costs in the suit up to the hearing. *Hove v. Hunt*, 8 Jur., N. S., 834; 32 L. J., Ch., 36; 10 W. R. 813; 7 L. T., N. S., 124; 31 Beav. 420.

6. A. agreed with the plaintiff to grant a lease of premises, and to execute such repairs as they should jointly agree upon, to the intent that the premises should be made fit for the use and occupation of the plaintiff and his family; upon the performance of which stipulation the plaintiff agreed to accept a lease. The plaintiff entered, and, after several years, A. died without any joint agreement having been come to as to the repairs, and having, shortly before his death, sold the premises, subject to the agreement. On demurrer to a bill against the purchaser and A.'s executors, for specific performance and damages:—Held, that the 21 & 22 Vict., c. 27, did not apply, and the demurrer was allowed both for want of equity and for multifariousness. *Norris v. Jackson*, 1 John. & H. 319; 7 Jur., N. S., 540.

7. Where a contract cannot be performed specifically, the Court will not interfere, in the absence of any step taken to reform the agreement, so as to make a new contract, even although there has been a virtual mistake, but will leave the plaintiff to his relief in damages, to be ascertained either by a jury at law, or by directing an inquiry. *Raphael v. Thames Valley Railway Co.*, 12 Jur., N. S., 656; 14 W. R. 750; 34 L. J., Ch., 659; 14 L. T., N. S., 652.

8. The 21 & 22 Vict., c. 27, has not conferred upon the Court a jurisdiction to assess damages in cases where it did not before exist. *Lawrence v. Austin*; *Durell v. Pritchard*; *Dumball v. Walters*, 11 Jur., N. S., 576; 34 L. J., Ch., 588; 13 L. T., N. S., 759.

Where by reason of the injury complained of being completed, or otherwise, the Court has no jurisdiction, it will not assess the damages which the plaintiff has sustained, but will leave him to take proceedings at law. *Ib.*

9. In a case for an injunction which, from circumstances arising after the bill was filed, could not be granted, the Court, under the 21 & 22 Vict., c. 27, s. 2, awarded damages, though not specifically prayed for by the bill. *Cotton v. Wyld*, 32 Beav. 266.

10. A plaintiff, though barred by acquiescence or otherwise from his remedy by injunction, may obtain damages under the 21 & 22 Vict., c. 27, and that even though no action would be maintainable by the plaintiff. *Eastwood v. Lever*, 33 L. J., Ch., 355.

11. When an agreement is entered into between two parties, and performance by the first party of his part goes to the root of the whole agreement, and the first party fails to perform his part, and the second party also fails to perform his part, the Court will restrain the first party from bringing an action against

the second party for non-performance of his part, until he (the first party) shall have performed his part; and that although the Court has no jurisdiction to compel the first party to specifically perform his part, and no jurisdiction to award damages for its non-performance. *Acreman v. Price, Davies v. Price*, 18 W. R. 540.

A lease of a colliery contained an implied covenant on the part of the lessor to procure land by certain compulsory powers, for the lessees to make a railway to a neighbouring canal, without which they had no access to any available market. The lessor did not procure the land, but brought an action against the lessees for rent. The lessees applied for an injunction, and, the powers having expired, they asked at the hearing for an inquiry as to damages:—Held, that the Court would restrain the action until the land was provided, but that, as it could not have compelled the defendant to provide the land, it had no jurisdiction to award damages. *Id.*

1. Upon a bill for specific performance of agreement for a partnership:—Held, that the Court would not grant damages under 21 & 22 Vict., c. 32, there being a difficulty in suing at law, and no case which would have entitled the plaintiff to relief before the Act. *Scott v. Raymond*, 19 L. T., N. S., 4; 38 L. J., Ch., 48.

2. The defendant, in December 1873, demised to the plaintiff premises to be used for refreshment-rooms for twenty-one years. The plaintiff put up a stove for the purposes of his business, which made the party-wall so hot as to endanger the adjoining premises. On receiving notice from the defendant's solicitors to abate the nuisance he substituted another stove in August 1874, but the evil continued. In October 1874 the defendant commenced an action of ejectment against the plaintiff for breach of covenant. The plaintiff then had the premises examined, and found that in several respects the provisions of the Metropolitan Building Act, 18 & 19 Vict., c. 122, had been violated. The plaintiff by his bill sought to have the lease cancelled, the action of ejectment stayed, and damages awarded. The defendant did not insist on the lease or seek damages for past breaches of covenants:—Held, that as the bill was filed before the Judicature Acts came into operation, and was really for damages and not for the rescission of a contract, as the defendant did not seek to enforce the contract, it could not be sustained. The plaintiff's remedy was at law and not in equity. *Thorley v. Glassop*, 34 L. T., N. S., 169.

3. The Court will not entertain a bill for specific performance of a contract to pay a sum of money, either on the ground of part performance, or on the ground that for want of formality the contract is not enforceable at law; nor in such a case can the Court give damages in lieu of specific performance under 21 & 22 Vict., c. 37. *Crompton v. Varna Railway Co.*, 41 L. J., Ch., 817; 20 W. R. 713; 7 L. R., Ch., 562.

By the constitution of a railway company all contracts above the value of 500*l.* were required to be under seal. By an agreement not under seal, made between the duly authorised agent of the company and the contractor

for the line, it was agreed that if the contractor would erect and leave upon the company's land substantial cottages, the company would pay him a rent of 500*l.*, or a lump sum of 5,000*l.* at their option. The contractor having performed his part of the agreement, filed a bill against the company for payment of the money or for damages in lieu of specific performance, alleging that for want of a seal the contract was not enforceable at law. A demurrer was allowed to the bill. *Id.*

4. A Gibraltar firm entered into a contract with A., of Algeciras, in Spain, in consideration of property having been transferred to them, to open a credit in his favour to the extent of 9,400 dollars, and to honour his drafts to that amount. After advancing him some sums of money, they refused to accept a bill for 1,000 dollars, drawn upon them by him, and subsequently refused to make any further advances. Proceedings in equity were thereupon commenced by him in the Supreme Court of Gibraltar to enforce a specific performance of the contract, and to obtain an award of damages under 21 & 22 Vict., c. 27, for the non-performance of the contract:—Held, that a court of equity will not decree the specific performance of a mere agreement to advance money. Moreover, that that being so, it has no jurisdiction to award damages. However, the Court of Gibraltar might have proceeded with the case as if it had been commenced as an action. *Larios v. Gurety*, 5 L. R., P. C., 346.

Though the Supreme Court of Gibraltar may be bound, in administering the law, to follow the principles which govern English courts of law, and, in administering equity, to follow the principles which govern English courts of equity, yet, where a suit for specific performance is commenced before it, and it is found that the plaintiff ought not to have taken proceedings in equity, but at law, for damages in respect of a breach of contract, the Court may, amending the pleadings if necessary, continue the case as if the plaintiff had brought an action for damages. *Id.*

5. Although the Chancery Division of the High Court exercises both legal and equitable jurisdictions, those jurisdictions still exist, and the Court still acts upon the rule that there could be no damages at law for a breach by the assignee of an agreement. *White v. Boby*, 37 L. T. 652; 26 W. R. 133.

Damages instead of specific performance will only be given when a plaintiff had an equity at the time of issuing the writ. *Id.*

6. The plaintiffs claimed the specific performance of an agreement for the composition of a literary work by the defendant, alleging that the agreement was contained in three written documents. At the trial the first and third of the documents were proved; the second was not produced, nor was any evidence given of its contents. The defendant, by his statement of defence, denied that he had agreed with the plaintiffs as alleged by them with reference to the second document;—Held, that the plaintiffs were not entitled to specific performance of the agreement contained in the first and third documents, or to damages for the breach of it. *Post v. Marsh*, 16 L. R., Ch. D., 395; 50 L. J., Ch., 287; 43 L. T. 628; 29 W. R. 198.

2. In Aid of, or Substitution for, Relief by way of Specific Performance.

1. A plaintiff agreed to grant a lease to the defendant when and so soon as he, the defendant, should have built a new house on the land; and the defendant agreed to accept such lease when required, and by a certain day to pull down an old house standing on the land, and build a new one on the site:—Held, on demurrer to a bill praying specific performance and damages, that the 21 & 22 Vict., c. 27, applied, and that the plaintiff was entitled to damages for the non-building of the house, and to specific performance of the contract to accept the lease. *Soames v. Edge*, 1 Johns. 669.

2. The Court will not, under the terms of the 21 & 22 Vict., c. 27, award any damages to a plaintiff in addition to specific performance, where it does not appear that he has suffered any special injury from the delay which has occurred in the completion of the contract. *Chinnock v. Ely (Marathoness)*, 2 Hem. & M. 221; 34 L. J., Ch., 899; 13 W. R. 178.

3. Decree for specific performance on an agreement for a lease, without prejudice to the question of damages. *Tomlinson v. Dixon*, 14 W. R. 528.

4. When the Court has jurisdiction to decree the specific performance of an agreement, but from circumstances is unable to decree specific performance of certain parts of it which are merely incidents to the agreement, and do not affect its substance, it has power to provide for them otherwise than by directing that they be specifically carried into execution, and notably by assessing the damages which, by reason of their non-performance, the plaintiff may have sustained. *Middleton v. Greenwood*, 10 Jur., N. S., 350; 10 L. T., N. S., 149; 2 De G. J. & S. 142; 3 N. R. 694.

5. *Semble*, that the Court will not enforce against a mortgagee specific performance of an agreement for a lease in which the mortgagor refuses to concur, but will give damages in substitution for the specific performance, where the concurrence of the mortgagor is no part of the agreement. *Franklin v. Ball*, 4 N. R. 128; 10 Jur., N. S., 606; 10 L. T., N. S., 446; 12 W. R. 845.

6. On a bill for specific performance of a negative contract, or, in the alternative, for damages, the plaintiff having come in time for an injunction as to part, an inquiry as to damages, under 21 & 22 Vict., c. 27, was directed in respect of the rest of the contract, the breach of which was complete at the time of filing the bill. *Hindley v. Emery*, 11 Jur., N. S., 874; 14 W. R. 25; 13 L. T., N. S., 272.

7. When a bill is filed for specific performance of a contract, and circumstances prevent the Court from giving a decree for specific performance, the Court may at the hearing award damages, although the subject-matter of the contract has then expired. *Oakeley v. Ramsay*, 27 L. T., N. S., 745.

8. A mortgagor agreed to grant a lease of a shop; the lessee entered into possession and commenced alterations; the mortgagees refused to confirm the lease or to allow him to proceed with the alterations. Upon a bill against the lessor for specific performance:—Held, as damages had clearly been sustained, that the

Court would make an order to assess them, though the 21 & 22 Vict., c. 27, in simple cases never intended to transfer the jurisdiction from a court of law to a court of equity. *Howe v. Hunt*, 8 Jur., N. S., 834; 32 L. J., Ch., 36; 10 W. R. 813; 7 L. T., N. S., 124; 31 Beav. 420.

9. A plaintiff agreed to take a house and premises for three years, and the defendant agreed to put the same in substantial and decorative repair, and keep the same so during the term. The plaintiff entered into possession in the full expectation and belief that the premises would be put in complete substantial and decorative repair, and that the additions and repairs required by him, and agreed to by the defendant, would be made and done; but the defendant refused to perform his part of the agreement. The plaintiff prayed for specific performance of the agreement, and that damages might be awarded in respect of the breach and non-performance of the agreement. The Court decreed specific performance, and directed an inquiry whether the agreement as to decorative repairs had been performed, and if not, decreed, that the lessor should compensate the lessee in damages. *Samuda v. Lawford*, 8 Jur., N. S., 739; 6 L. T., N. S., 890; 4 Giff. 42.

10. The Court has no power, under 21 & 22 Vict., c. 27, upon motion in a cause, after a decree for specific performance of a covenant, to add an order for assessing damages for breach of the covenant. Such an order would be a supplemental decree upon facts which had subsequently occurred. *Hythe (Corporation) v. East*, 1 L. R., Eq., 620; 35 L. J., Ch., 257; 14 W. R. 273; 13 L. T., N. S., 788.

11. A., a lessee under a lease containing a covenant not to assign or underlet without a licence from the lessor, and a proviso for re-entry on breach of the covenant, agreed to grant an under-lease, but his lessor requiring a consideration for a licence which A. considered excessive, A. refused to complete. In a suit by the proposed under-lessee against A. for specific performance, the Court made a decree for specific performance, with a reference as to damages in case the defendant should be unable to procure the licence. *Hilton v. Tipper*, 16 W. R. 888; 18 L. T., N. S., 626.

In every case where there is a valid contract and an unexceptionable subject, and the parties are under no disability, the Court has power to decree damages. *Id.*

12. The defendant agreed with the plaintiffs by a certain day to pull down an old house and build a new one on the site, agreeably to plans to be submitted by the plaintiffs' contractor, and under the inspection and to the satisfaction of their architect; and the plaintiffs agreed, when the new building should be completed, to grant a lease of the premises for a certain term at a fixed rent, the defendant agreeing to accept such lease when required. A demurrer to a bill praying specific performance and damages was overruled on the ground that the plaintiffs, waiving the specific performance of that part of the agreement which related to the building of the house, might be entitled to damages for the breach thereof, and to specific performance of the other part, viz., the contract to accept the lease. *London (Mayor) v. Southgate*, 38 L. J., Ch., 141; 17 W. R. 197; 20 L. T., N. S., 107.

Held, also, that such waiver might be made at the bar, and need not be offered by the bill. *Id.*

1. S. contracted with J. for the purchase of a leasehold interest. S. entered into possession, with J.'s consent, in February 1867, without having paid the purchase-money. Afterwards J. extended the time for payment to the month of November 1867. On the 7th November S. by a letter offered to pay the purchase-money, but did not tender an assignment for execution. He received no answer to that offer, and on the 27th November J. forcibly turned S. out of possession. S. then came to the court to enforce specific performance, and prayed for damages for the non-performance of the contract by J., and for the wrongful entry and detention. A decree was made for specific performance of the contract with costs against J., but the Court refused to grant an inquiry as to damages. *Johnston v. Johnston*, 17 W. R. 278.

2. In a suit to administer the trusts of a settlement, the chief clerk having certified, in pursuance of an inquiry directed on motion for decree, that the most beneficial way of letting the premises which formed the subject of the suit would be to let them on lease, two persons (one of whom was the defendant and also a *cotrustee* and the receiver of the property) carried in equally beneficial proposals, and that of the defendant was accepted, and a conditional contract for a lease was signed by him accordingly, and approved by the judge. The defendant having afterwards declined to perform the contract, the Court, on further consideration, directed an inquiry as to the damages occasioned by his breach of contract. *Carme v. Brancher*, 17 W. R. 342.

3. By a memorandum in writing, defendant agreed to let, and plaintiffs agreed to take, business premises for one year, with an option for plaintiffs at the end of the year to have a lease for seven, fourteen, or twenty-one years. Plaintiffs, having gone into possession under the agreement, and having laid out money in alterations, at the end of the year gave notice of their intention to exercise the option; but when the defendant's title came to be investigated it was found that she was possessed of only a moiety of the premises, the other moiety being vested in her son, a minor. The defendant was decreed to perform specifically so much of the contract as she was able to perform, with an abatement of one moiety of the rent. An inquiry as to damages was refused, there being no evidence to show that the plaintiffs had sustained any damage. *Burton v. Scammell*, 19 L. R., Ch. D., 175; 51 L. J., Ch., 296; 45 L. T. 606; 30 W. R. 310.

4. An agreement was executed between a banker at Paris and the directors of a company formed to take over his business. No day was fixed for the completion of the transfer of the business and offices. In fact, the transfer was never carried out; but the company was started, and it transacted business, and the banker admitted a committee of its directors to his offices, which he vacated, removing his clerks to a higher storey in the same building, where he continued to transact his business pending the completion of the contract, which he was always anxious and willing to effect by handing

over books and executing legal transfers. The contract never was completed by the default of the company. The company came to a winding-up. The banker claimed the full amount of the purchase-money for which he had contracted.—Held, that the contract was *in fieri*, and as it was owing to the fault of the company that it never became fully executed, an inquiry was directed before the chief clerk as to the damages sustained by the banker through the breach of the contract, he to be allowed to prove for the amount of damages so ascertained. *Lafitte & Co. v. Lafitte*, 42 L. J., Ch., 716; 29 L. T. 80; 21 W. R. 750.

5. Where specific performance is refused on the ground of mistake by the defendant, so that under the old practice a bill for specific performance would have been dismissed without prejudice to an action, the Court will proceed to consider the question of damages. *Tamplin v. James*, 15 L. R., Ch. D., 215; 43 L. T. 520; 29 W. R. 311.

6. The plaintiff agreed with the defendant to take a lease of premises belonging to the defendant for the purpose, as the defendant knew, of carrying on a trade which the plaintiff was about to commence. In consequence of his wilful refusal to fulfil his agreement, the plaintiff was unable for fifteen weeks to commence his trade.—Held, that, in addition to judgment for specific performance of the agreement, damages must be awarded in respect of the loss of profits from his trade during the fifteen weeks; and 250*l.* damages were awarded. *Jaques v. Millar*, 6 L. R., Ch. D., 153; 37 L. T., N. S., 151; 25 W. R. 846; 47 L. J., Ch., 544.

7. A railway company agreed for valuable consideration with a landowner to erect, construct, and fit up a station on certain lands which they had bought from him. The agreement contained no further description of the station, nor any stipulations as to the use of it. The company having refused to erect a station in the specified place, and substituted one at a distance of two miles.—Held, that the case was one in which justice could be better done by an inquiry as to damages than by a decree for specific performance, and in assessing those damages the Court will give the landowner the benefit of all such presumptions as, according to the rules of law, are made against wrongdoers. *Wilson v. Northampton & Banbury Junction Railway Co.*, 9 L. R., Ch., 279; 43 L. J., Ch., 503; 30 L. T. 147; 22 W. R. 380.

III. ASSESSMENT.

8. Where a bill for specific performance asks also for the damages consequential on non-performance, and the defendant specifically performs his contract before the hearing, the Court has, nevertheless, jurisdiction at the hearing to direct a reference as to the damages. *Cory v. Thames Ironworks & Shipbuilding Co.*, 2 N. R. 16.

Simple questions, like the assessment of damages, are not such as the Court will try by jury, but it will refer them to a court of law. S. C. 11 W. R. 589; 8 L. T., N. S., 237.

9. Where a person seeks for damages, on

the ground of the improper use of the process of the Court, and the person against whom the complaint is made requires the matter to be tried at law, the Court will permit it to be tried at law, instead of itself assessing the damages. *Whithead v. Lyles*, 34 Beav. 161.

1. In an action for specific performance, where, on an inquiry as to damages, it was necessary to examine witnesses, the inquiry was referred to an official referee. *Stafford v. Cowan*, 25 W. R. 788.

2. In the case of a breach of contract, where a vendor is entitled to recover nothing as purchase-money, but is entitled to compensation for the loss and injury he has sustained by the breach of contract, the measure of the damage is the difference between the price fixed by the contract and the market value at the time of the breach. But when the market value is unascertainable, and a serious loss and injury is proved, the Court, acting on the principle that no wrong done is to remain without redress, awards substantial damages. Such damages must not be greater in amount than the amount the vendor would have been entitled to under the contract if it had been punctually carried out. *Re Lafitte & Co., Lafitte's Claim*, 23 W. R. 379.

3. When a person wrongfully in possession had pulled down buildings, the demolition of which had increased rather than diminished the selling value of the property, and the owners of the property were trustees in bankruptcy:—Held, that he was not liable to pay damages in respect of the demolition of the buildings, the duty of the trustees being to sell the property, and the considerations which might arise, in the case of an ordinary owner who might desire to reside on the property, not being applicable. *Krehl v. Park*, 22 W. R. 487; 71 L. T., N. S., 325.

Damages in the nature of occupation rent will not be given where no advantage could be gained by the occupancy. *Ib.*

4. A contract entered into by a railway company with a landowner to build a railway station at a particular spot, nothing being said as to the user of the station, or the degree of convenience and accommodation to be afforded by it, is too vague and indefinite to be enforced by decree for specific performance; but the Court will give damages for the breach of such contract, and in assessing those damages will give the landowner the benefit of all such presumptions as, according to the rules of law, are made against wrongdoers. *Wilson v. Northampton & Banbury Junction Railway Co.*, 43 L. J., Ch., 503; 9 L. R., Ch., 279; 22 W. R. 380; 30 L. T., N. S., 147.

Measure of.] See DAMAGES, II.

5. Upon a contract for the sale and purchase of a real estate, if the vendor, without fraud, is incapable of making a good title, the proposing purchaser is not entitled to recover compensation in damages for the loss of his bargain. *Bain v. Fothergill*, 7 L. R., H. L., 158; 43 L. J., Exch., 243; 31 L. T. 387. Affirming 6 L. R., Exch., 59; 40 L. J., Exch., 34; 23 L. T. 670; 19 W. R. 134.

F. was in possession of a mining royalty under a written agreement for a lease, of which he had taken an assignment. One of

the stipulations of the agreement was that H. (the person with whom the agreement was originally made) should not assign without the licence of the lessors. They were ready to consent to the assignment to F., provided he would execute a duplicate of the agreement containing this stipulation. Though repeatedly communicated with on the subject he delayed doing so. He entered into a contract with B. to sell his interest in the royalty; it was afterwards found that the lessors absolutely refused their assent to the transfer, and F. was unable to perform his contract with B. In an action by B. against F. for its non-performance:—Held, that B. could only recover the expenses he had incurred, but not damages beyond then. *Ib.*

Costs of.] 6. By a decretal order specific performance was decreed against a vendor; an inquiry was directed what damage had been sustained by the plaintiff by reason of the acts complained of in the bill, and the defendant was ordered to pay the costs of suit; liberty to apply being given, but further consideration not being reserved. The acts complained of by the bill were commencing to pull down buildings and removing the materials, and cutting and carrying away the crops on the land. The plaintiff carried in a very large claim for damages under various heads, most of which were at once rejected in chambers, but a certificate was made (which Bacon, V.-C., refused to vary) giving damages for pulling down buildings, and also under four other heads. The Lords Justices, on appeal, held that no damage was shown, on the ground that, under the peculiar circumstances, pulling down the buildings caused no damage, and that the other heads of damage were not within the scope of the inquiry. The defendant subsequently applied for the costs of the injury, on the ground that it had resulted wholly in his favour. This application having been refused by Bacon, V.-C.:—Held, that the plaintiff though unsuccessful, was entitled to the costs of the inquiry so far as they related to pulling down buildings, removing materials, and cutting and carrying away crops; but must pay all the other costs of the inquiry. *Krehl v. Park*, 10 L. R., Ch., 334; 44 L. J., Ch., 286; 33 L. T. 83; 23 W. R. 475.

IV. Indemnity in Addition to, or in Lieu of, Specific Performance.

7. Special directions, in a decree for specific performance against a company, providing for an indemnity to the company, and for works to be performed by the company. *Powell v. South Wales Railway Co.*, 1 Jur., N. S., 773.

8. When actual specific performance cannot be directed, and an indemnity is prayed, the Court will decree indemnity as ancillary to the relief by specific performance. *Cruse v. Paine*, 19 L. T., N. S., 127.

Indemnity on Sales of Land in General.]
See VENDOR AND PURCHASER, XIX.

V. Relief by Way of Injunction.

See also VII. and VIII. VIII. *post*.

- I. *General Principles*, 6529.
- II. *In Case of Negative or Quasi-Negative Stipulations*, 6529.
- III. *In Aid of Decree for Specific Performance*, 6533.

I. GENERAL PRINCIPLES.

1. Motion to restrain a defendant from violating his part of an agreement refused by Lord Lyndhurst, on the ground of the agreement being such, that the Court could not compel a specific performance by the plaintiff of his part of it. *Hills v. Croll*, 1 Coop. C. C. 84. n.; 2 Ph. 60; 14 L. J., N. S., Ch., 444; 9 Jur. 645.

2. The Court will not interfere by injunction to prevent the violation of an agreement of which, from the nature of the subject, there could be no decree for a specific performance, as, for instance, to restrain the defendant from imparting the secret of an invention which had been the subject of a patent long since expired. *Newbury v. James*, 2 Meriv. 446.

3. If an agreement consists of two distinct parts, one of which the Court can enforce, but not the other, and a bill is filed simply for an injunction to restrain the violation of the former part, the Court will grant the injunction, notwithstanding it would not enforce the agreement *in toto*. *Rolfe v. Rolfe*, 15 Sim. 88; 1 Coop. C. C. 87. n.; 10 Jur. 61.

4. By an agreement between the plaintiffs and the defendants, the former, in consideration of certain payments to be made by them to the latter, were to have the exclusive right of engraving and publishing a series of maps, from drawings to be furnished by them from time to time by the latter. The Court refused to restrain the defendants from acting in violation of the agreement, as it could not compel the defendants to furnish the drawings, and therefore could not decree a specific performance of the agreement. *Baldwin v. Society for the Diffusion of Useful Knowledge*, 9 Sim. 393; 2 Jur. 161.

5. The Court cannot specifically perform an agreement, whereby A. agrees to compose and write reports of cases determined in a court of justice, to be printed and published by a particular individual for a stipulated remuneration, nor interfere by injunction to restrain the party from permitting reports written by him to be published by another person. The remedy, if any, is at law. *Clarke v. Price*, 2 Wils. 157.

6. Consideration of the principle on which the Court may, in certain cases, interpose to prevent a contract from being performed *in specie*; protecting the legal or supposed legal right of the party seeking such assistance, and preserving to the other party the substantial benefit of the specific performance. *East Lancashire Railway Co. v. Hattersley*, 8 Hare 72.

II. IN CASE OF NEGATIVE OR QUASI-NEGATIVE STIPULATIONS.

7. Where a party agrees not to do a particular act, and there are other terms in the agree-

ment which are so vague that the Court cannot enforce them, it will not grant an injunction to restrain the breach of the negative term. *Kimberley v. Jennings*, 6 Sim. 340; 5 L. J., N. S., Ch., 115.

8. Where an agreement had been entered into between A. and B. (who were partners without any written articles) and persons in their employ, containing terms and provisions of a harsh description, and where one of the partners had filed a bill against the other for a dissolution of the partnership, the Court refused to interfere, at the suit of the other partner, to restrain the breach of the negative terms of the agreement. *Croft v. Haw*, 5 L. J., N. S., Ch., 305.

9. Injunction granted to restrain the Commissioners of Woods from building on part of the site of Carlton Palace, in violation of one of the terms of an agreement entered into by them with the plaintiffs for a building lease of an adjoining part of the site. *Rankin v. Huskisson*, 4 Sim. 13.

10. The plaintiff's house being so near the church that the ringing of the five o'clock bell in the morning disturbed her; the plaintiff came to an agreement in writing with the churchwardens and inhabitants at a vestry, that she should erect a cupola and a clock at the church, in consideration of which the bell was not to be rung in the morning. This agreement good, and decreed to be binding in equity, and an injunction was granted. *Martin v. Nuthin*, 2 P. W. 266.

11. The jurisdiction of the Court to restrain by injunction an act which the defendant is by contract bound to abstain from, is not confined to cases in which there are either no other executory terms in the contract, or none which a court of equity has not the means of enforcing. If a bill states a right or title in the plaintiff to the benefit of a negative agreement on the part of the defendant, or of his abstaining from a given act, the Court will equally interfere by injunction, whether the right be at law or under an agreement, which cannot be otherwise brought under its jurisdiction. *Dietrichsen v. Cabburn*, 2 Ph. 52; 1 Coop. C. C. 72; 10 Jur. 60. And see *Hills v. Croll*, 2 Ph. 60; and see also *Id.* 62. n.

12. The Court will, in some cases, by means of an injunction in a negative form, compel parties who have begun to take away the rights of others, in some measure to restore them before the hearing of the cause. *Spencer v. London & Birmingham Railway Co.*, 8 Sim. 193; 7 L. J., N. S., Ch., 281.

13. The Court will grant an injunction restraining defendants from acting contrary to a negative agreement, although it cannot specifically enforce the performance of the whole of the agreement. *Great Northern Railway Co. v. Manchester, Sheffield, & Lincolnshire Railway Co.*, 5 De G. & Sm. 138; 16 Jur. 146.

Two directors of a railway company (the plaintiffs) met two directors of another railway company (the defendants), and entered into an agreement in writing, signed by all four directors, on behalf of their respective companies, whereby it was mutually agreed that each of the companies should, interchangeably, use the railway of the other company, on certain specified terms. The agreement contained no words of succession or of restriction:

—Held, that these contracts were not mere licenses determinable at will, but conferred rights of a permanent nature on the companies. *Id.*

Held, also, that the terms of the contract were not too vague; but that the user conceded was one consistent with the proper enjoyment of the railway, the subject-matter of the contract, and with the rights of the granting party. *Id.*

1. The lessee of an inn covenanted to use and keep it open as an inn during the term, and not to do any act whereby the licenses might become forfeited. The lessee having threatened to do certain acts inconsistent with the first branch of the covenant, the lessor obtained an *ex parte* injunction restraining him from discontinuing to use and keep open the premises as an inn, and from doing any act whereby the licenses might become forfeited or be refused. But the injunction was afterwards dissolved; the Court having no jurisdiction to restrain a person from discontinuing to use premises as an inn, which was the same in effect as ordering him to keep an inn, and no intention having been shown on the part of the defendant to violate the negative part of the covenant. *Hooper v. Brodrick*, 11 Sim. 47; 9 L. J., N. S., Ch., 322.

2. When the terms of a contract are such that the Court cannot superintend so as to secure the performance by a plaintiff on his part, it will not decree specific performance. *Peto v. Brighton, Uckfield, & Tonbridge Wells Railway Co.*, 11 W. R. 874; 9 L. T., N. S., 227; 1 Hem. & M. 468; 32 L. J., Ch., 677; 2 N. R. 145.

If, on non-performance by a plaintiff, both parties cannot have equal justice, it will not, in the absence of an express negative covenant, grant an injunction to restrain acts, the doing of which is inconsistent with the maintenance of the contract. *Id.*

B., an engineer, received a written authority from the directors of a railway company, on their behalf, to enter into a contract for the construction, by P. and B. (railway contractors), of their line of railway for 215,000*l.*, 63,000*l.* to be paid in debentures, and the balance in shares of the company. B. negotiated the contract with P. and B., and on behalf of the railway company signed an agreement. In the meantime the directors of the company, having arranged for the sale of their undertaking to the Brighton company, repudiated the authority given to B. On a bill, filed by the contractors, praying specific performance, and that, the company might be restrained by injunction from parting with their shares:—Held, that as the Court could not compel P. and B. to carry out their part of the agreement, it would not interfere to prevent the company from parting with their shares to the Brighton company. *Id.*

Where a contract contains an express negative covenant, and complete justice can be done between the parties, the Court will grant an injunction to restrain a breach of the negative covenant; but the Court rarely interferes where there is no distinct negative stipulation, but the negative obligation is inferred only from the positive contract. *Id.*

3. The proprietors of Covent Garden theatre agreed with an actor, that he should act for

twenty-four nights, during a certain period of time, at their theatre, and that, in the meantime, he should not act at any other place in London:—Held, that the Court cannot enforce the positive part of the contract, and therefore it will not restrain by injunction a breach of the negative part. *Kemble v. Kean*, 6 Sim. 333.

4. A lady, not of age, and her father, by writing signed in a foreign country, agreed with a theatrical manager to sing at his theatre for a definite period. By a clause subsequently acceded to and signed by her agent, and to which she and her father afterwards assented, she engaged "not to use her talents at any other theatre, nor in any concert or reunion, public or private, without the written authorisation of" the manager. The lady engaged with the manager of a rival theatre to sing at his theatre within the defined period, and her *début* was announced in the usual public advertisements. Upon motion, in a suit by the manager against the lady, her father, and the manager of the rival theatre, it was objected that the positive and negative terms formed but one agreement, and that, as it had been settled that the Court could not by injunction enforce the positive term that the lady should sing, it could not enforce the negative stipulation:—Held, notwithstanding *Kemble v. Kean* (6 Sim. 333), that the Court would prevent the violation of the negative term, and restrain the lady from singing at the rival theatre, though the positive term of the agreement could not be enforced:—Held, also, that, although it was a foreign contract, the plaintiff was entitled to the injunction, without reference to where the contract was entered into, or what might be the remedies or forms of procedure in other countries on it. *Lumley v. Wagner*, 5 De G. & Sm. 485. Affirmed 1 De G. M. & G. 604; 16 Jur. 871; 21 L. J., Ch., 898.

Kemble v. Kean (6 Sim. 333), and *Kimberley v. Jennings* (6 Sim. 340), overruled. *Id.*

5. An agreement between a railway company and railway contractors (who were also landowners) for the construction of a branch railway, provided that the company should find the land within a reasonable time, and build the stations; that the contractors should give a bond to the amount of 50,000*l.* to secure the performance of the contract, and undertake to execute the works for a double line of railway, and the ballasting and permanent way for a single line, according to the terms of a specification, to be prepared by the engineer for the time being of the company; and that the company should work the branch in a reasonable and proper manner, as compared to the remainder of the main railway; and that in case of difference as to working, the same should be settled by arbitration; and that any of the details of the arrangement, in case of difference, should be determined by a referee, to be appointed by the solicitor-general for the time being:—Held, on demurrer, that this agreement was too vague, obscure, and uncertain to be enforced in a specific performance suit, and that the stipulation as to the execution of a bond could not be enforced apart from the rest, being merely an incidental and a subsidiary part of the agreement, and not within the principle

of *Lumley v. Wagner* (1 De G. M. & G. 604), where the negative stipulation was a distinct and substantive part of the contract. *South Wales Railway Co. v. Wythes*, 5 De G. M. & G. 880; 24 L. J., Ch., 87; 3 Eq. Rep. 153; 3 W. R. 133. And see S. C. 1 Kay & J. 186; 24 L. J., Ch., 1; 3 Eq. Rep. 70.

Though the Court may execute an agreement framed in general terms where the law will supply the details, yet if those details are to be supplied, in modes which cannot be adopted by the Court, there is no concluded agreement which can be enforced in equity. *Ib.*

1. When the principal portion of an agreement is incapable of specific enforcement by the Court, and it appears that the entire agreement has been broken, no relief will be granted in respect of a negative clause therein contained, which is merely incidental to the general relief sought, although such clause might have been enforced, had it stood alone, or had the agreement been in other respects still subsisting and undisputed. *Brett v. East India & London Shipping Co.*, 2 Hem. & M. 404; 3 N. R. 688.

2. D., an actor, contracted with the manager of a theatre to play at his theatre for twelve consecutive nights, commencing on a certain day, stipulating that he should be at liberty during those nights to perform (among other characters) three which were named; but there was no express condition that he should not act elsewhere during the twelve nights. On the approach of the day appointed for commencing the engagement, D. declared that he would only act in a piece which could not be produced at the theatre; and when told that was impossible, declared that he would not act all, and advertised himself to act at another theatre on the night appointed for the commencement of his engagement:—Held, that an injunction might be granted to prevent D. acting during the twelve nights at any other theatre during the ordinary hours at which the theatre was open for public performance. *Webster v. Dillon*, 3 Jur., N. S., 432.

3. An opera singer, by an agreement dated only as to the year 1870, agreed to sing at a theatre for the whole London season, and nowhere else in the kingdom of Great Britain "pending l'année," 1871, without the written consent of the employer. The salary did not extend beyond the season, which ended on the 5th August. On motion for an injunction to restrain him singing elsewhere after the season was over, but during 1871:—Held, that the Court would not under the circumstances grant an injunction on an interlocutory application. *Mapleson v. Brentham*, 20 W. R. 176.

4. Any actor who enters into a contract to perform for a certain period at a particular theatre may be restrained by injunction from performing at any other theatre during the pendency of his engagement, notwithstanding that the contract contains no negative clause restricting the actor from performing elsewhere. *Montague v. Flockton*, 16 L. R., Eq., 189; 42 L. J., Ch., 677; 28 L. T., N. S., 580.

On the 16th August 1871 F. agreed with M. to act for him "for the season of not less

than nine months; to commence on the 2nd October 1871." F. subsequently, on the 2nd March 1872, agreed to "a renewal of his engagement on the same terms for the next season:—Held, that such second season commenced on the 2nd October 1872, and terminated in July 1873. *Ib.*

5. A manager of a London theatre engaged a provincial actor, desirous of appearing on the London stage, for two years. Though there was nothing expressed on the subject, the Court inferred an engagement on the part of the manager to employ the actor for a reasonable time, and on his part not to perform elsewhere. The manager (under these circumstances) delayed the actor's appearance for five months; he broke his engagement and went to another theatre:—Held, that he had a right so to do, and that the manager was not entitled to an interlocutory injunction to prevent his performing there. *Fechter v. Montgomery*, 39 Beav. 22.

6. The ground upon which a court of equity goes in enforcing, by injunction, a negative term in an agreement, the positive terms in which cannot be enforced by decree for specific performance, is, that the injunction is dependent upon the plaintiff performing his part of the contract, and will be dissolved upon his failing to do so. *Stooker v. Wedderburn*, 3 Kay & J. 393; 26 L. J., Ch., 713.

The Court will not entertain a bill for specific performance of an agreement, which contains terms that cannot be enforced against the plaintiff, where the effect of a decree would be, that, on the plaintiff refusing to perform his part of the contract, the defendant could not be restored to his former position. *Ib.*

The plaintiff, being owner of certain patents, entered into a written agreement with other persons to form a company for working these patents, he agreeing on his part to sell the patents in foreign countries, and to give his whole services to the company for two years, and to do his best to improve the invention, and to impart such improvements to the company:—Held, that the plaintiff could not obtain specific performance of this agreement against his co-promoters, because from the nature of his own part of the agreement, the Court could not compel specific performance of it by him. *Ib.*

The difference in the cases where a negative term of an agreement has been enforced by injunction, although the rest of the agreement could not have been specifically performed in equity, is, that the Court could, at any time, upon a breach of any other term in the agreement, restore the parties to their former position, or nearly so, by dissolving the injunction; but if in such a case as the above the Court were to compel the defendants to become a registered company, that could not afterwards be undone, if the plaintiff were to fail in his part of the agreement. *Ib.*

7. Where property, either immovable or movable, is disposed of, with notice of a prior contract entered into by the person disposing of it for its use in a particular manner, the person taking it with such notice may be restrained from using it otherwise. *De Mattos v. Gibson*, 4 De G. & J. 276.

The Court will not affirmatively enforce a

charterparty, but it is implied in such a contract, that if the charterer provides a cargo the ship shall not be employed for any other purpose, and a mortgagee with notice of a prior charterparty effected with the mortgagor will be in general restrained from doing anything to prevent its performance. *Ib.*

1. The Court of Chancery cannot decree the specific performance of a charterparty, but it can restrain the parties from employing the ship in a manner inconsistent with the rights under a charterparty. *Le Blanch v. Granger*, 35 Beav. 187.

2. Injunction granted to restrain an owner of a vessel from doing any act inconsistent with a charterparty into which he had entered. *Servin v. Deslandes*, 7 Jur., N. S., 837; 30 L. J., Ch., 457; 9 W. R. 218.

3. The Court will not interfere by injunction to restrain the breach of a contract for the sale and delivery of chattels which it could not specifically perform. *Fothergill v. Rowland*, 17 L. R., Eq., 132; 48 L. J., Ch., 252.

Therefore, when the lessee of a colliery contracted to raise and deliver to the plaintiff all the get of coals in the colliery at a fixed price for five years, and subsequently agreed for the sale of the colliery to other parties:—Held, that the Court had no jurisdiction to grant an injunction to restrain the breach of contract. *Ib.*

4. In considering whether to grant or to refuse an injunction to restrain a breach of a particular clause of an agreement, the Court will look to the substance of the Act to be performed, and not merely to the presence or absence of negative words. *Wolverhampton & Walsall Railway Co. v. London & North-Western Railway Co.*, 16 L. R., Eq., 433; 43 L. J., Ch., 131.

A lease of a line of railway contained an agreement by the lessee company to carry over it all traffic between certain places, and to pay the lessor company one-half the receipts in respect of such traffic. The lease contained provisions on which no relief could have been obtained in equity, and it contained no negative stipulation restricting the lessee company from carrying the traffic in question over other lines. On demurrer to a bill by the lessor company alleging that the lessee company was carrying the traffic mentioned in the agreement over other lines of its own, and praying for an injunction to restrain it:—Held, that relief could be granted in such a case, and the demurrer must be overruled. *Ib.*

5. A contract for the sale of chattels to the plaintiff contained an express negative stipulation not to sell to any other manufacturer. The Court granted an injunction to restrain the breach of the negative stipulation, although the contract was one of which specific performance would not have been granted. *Wolverhampton & Walsall Railway Co. v. London & North-Western Railway Co.* (16 L. R., Eq., 433) considered. *Donnell v. Bennett*, 22 L. R., Ch. D., 835; 52 L. J., Ch., 414; 48 L. T. 68; 31 W. R. 316.

6. When the owners of a public building have contracted with the plaintiff, that he, renting a stall from them, shall have the exclusive right to exhibit and sell certain specified classes of goods, an injunction will lie against

them for permitting the exhibition and sale by other renters of stalls within the building of goods so specified. *Altman v. Royal Aquarium Society*, 3 L. R., Ch. D., 228.

7. The plaintiff, a brewer, sold a piece of land to the trustees of a freehold land society, who covenanted with him that he, his heirs and assigns, should have the exclusive right of supplying beer to any public-house erected on the land, but the plaintiff did not enter into any covenant to supply it. The defendant, a member of the society, who was also a brewer, acquired a portion of the land with notice of the covenant, and erected on it a public-house, which he supplied with his own beer. The plaintiff filed a bill in equity to restrain the defendant from supplying beer, alleging that the plaintiff had always been ready to furnish a sufficient supply of good beer at a fair price:—Held, that the covenant was not void either for uncertainty or want of mutuality, or as being an unreasonable restraint of trade, or because it purported to be perpetual, and that, though it was in terms positive, it was in substance negative, and that the Court could interfere by injunction to restrain the defendant from acting in contravention of it. *Catt v. Tourle*, 4 L. R., Ch., 654; 21 L. T., N. S., 188; 38 L. J., Ch., 665; 17 W. R. 939. Affirming 38 L. J., Ch., 401; 20 L. T., N. S., 551; 17 W. R. 662.

8. The defendant agreed to sell his business premises and good will to the plaintiff, and not to set up in the same business in the neighbourhood, the plaintiff agreeing to employ the former. The sale was carried out, the defendant employed for a short time, and then dismissed for alleged neglect of his work. Some months afterwards the defendant committed a breach of the negative covenant. A bill having been filed for specific performance of such covenant, the Court, at the hearing, granted an injunction to restrain the breach, but, not being satisfied as to the *bona fides* of the dismissal and the evidence of neglect, without costs. *Daggett v. Ryman*, 16 W. R. 302; 17 L. T., N. S., 486.

9. A corporation advertised for tenders for the supply of stone to the borough during 1875. A., C., D., and E., quarry owners, entered into an arrangement by which it was agreed that A. should send in the lowest tender, so that, if possible, it should be accepted, that C. should not send in any tender at all, and that D. and E. should send in tenders higher than A.'s; it was also arranged that A. should purchase from C., D., and E. certain quantities of stone to be supplied by him under his anticipated contract to the corporation, so that, by this means, A., C., D., and E. would each have some share in the profits to arise from A.'s contract with the corporation. Notwithstanding this arrangement C. sent in a tender which was accepted:—Held, that a bill for an injunction would lie against C. to restrain him from supplying any stone to the corporation under his contract with them during 1875. *Jones v. North*, 32 L. T., N. S., 149; 19 L. R., Eq., 426; 44 L. J., Ch., 388.

Held, also, that the corporation was not a necessary party to the suit. *Ib.*

See also VIII. VIII. post.

III. IN AID OF DECREE FOR SPECIFIC PERFORMANCE.

1. Upon a contract for a lease, the solvency or insolvency of the tenant is an objection of weight, depending upon the circumstances: upon that and other circumstances, an injunction against an ejectment by the landlord was dissolved. *Buckland v. Hall*, 8 Ves. 92.

2. Bill for specific performance of parol agreement to grant farm lease, with usual covenants for neighbourhood, and injunction to prevent ejectment, plaintiff having taken possession. Upon answer, stating insolvency of plaintiff, and various breaches of agreement, during five years' possession, the injunction was continued, on undertaking to give judgment in ejectment, go to commission, and set down cause for next term, paying rent into court. *Boardman v. Mostyn*, 6 Ves. 467.

3. In a correspondence between lessor and lessee respecting the granting of a new lease to the lessee; the latter having spoken of the renewal of the old lease, the lessor did not object to this expression, but adverted to other topics connected with the subject. On a bill filed for the specific performance of the agreement for renewal alleged to be contained in these letters:—Held, that they were so far evidence of such agreement, as to warrant the continuance of an injunction against an action of ejectment brought by the lessor against the lessee. *Price v. Asheton*, 1 Y. & Coll. 82; 4 L. J., N. S., Exch. Eq., 3.

4. It is not necessary for a party who seeks to continue an injunction to the hearing, to show an indefeasible right to the decree prayed by bill; where, therefore, assignees of a bankrupt sought a specific performance of an agreement for a lease against a party who was herself a lessee, and restrained from assigning without the consent of the lessor in writing thereto obtained, the Court continued the injunction to restrain proceedings at law, there being a probability of obtaining the consent of the lessor to the assignment. *Powell v. Lloyd*, 2 Y. & J. 427.

5. A bill was filed by a person in possession of certain lands, for the specific performance of an illegal parol agreement to grant him a lease for seven years, and for an injunction to restrain an ejectment; the defendant, by his answer, admitted that he had been disposed to permit, and would have permitted the plaintiff, if he had been satisfied with his conduct, to remain in possession for the time, and on the terms alleged to have been specified in the supposed agreement; and that the plaintiff probably expected to remain in possession for that time, and on those terms; but he expressly denied that any such agreement had been made; and he insisted that the plaintiff was only tenant from year to year, and had done many acts which would have been breaches of the covenants of the lease supposed to have been contracted. The Court, upon this answer, refused to make the order *nisi* absolute, and continued the injunction upon terms. *Attwood v. Barham*, 2 Russ. 186.

6. Injunction granted, restraining sale of estate, till answer to a bill, alleging parol agreement to exchange, partly performed by plaintiff having purchased estate for that pur-

pose. *Curtis v. Buckingham (Marquis)*, 3 Ves. & B. 168.

7. Injunction to restrain the vendor of copyhold premises after delivery of possession, and receipt of part of the purchase money, from surrendering them to persons other than the purchasers. *Spiller v. Spiller*, 3 Swan. 556.

In general, during a suit for specific performance, the Court will not restrain the owner from dealing with his property. *Id.* 557.

8. Injunction restraining vendor defendant to a bill for specific performance, from conveying the legal estate. *Echlin v. Baldwin*, 16 Ves. 267.

9. Injunction in a suit for specific performance to restrain a vendor from letting or selling the estate, refused. *Turner v. Wight*, 4 Beav. 40.

10. Injunction against cutting timber in the case of trespass, viz., by a person having got possession under articles to purchase. *Crookford v. Alexander*, 15 Ves. 138.

11. Purchaser before conveyance is the owner in equity for almost every purpose as to profit and loss, but, before payment, may be restrained from cutting timber: as between his representatives, it is real estate. *Ravlin v. Burgis*, 2 Ves. & B. 287.

12. In a suit for specific performance of an agreement for the sale of the next presentation to a living, the Court will restrain the bishop of the diocese from taking advantage of a lapse pending the suit. *Nicholson v. Knapp*, 9 Sim. 326; 7 L. J., N. S., Ch., 219.

13. A vendor is not entitled to an injunction to restrain a purchaser from buying another estate, on the ground that it will incapacitate him from completing his first purchase. *Wright v. Brighton Brewery Co.*, 13 W. R. 220.

14. Where there is a contract for the sale of land, the Court will restrain the owner of the land from dealing with it until a suit for the specific performance of the contract has been disposed of; but when a plaintiff sues for specific performance, and there is a serious question whether any contract exists, the Court will not interpose. *Hadley v. London Bank of Scotland*, 11 Jur., N. S., 554; 13 W. R. 978; 12 L. T., N. S., 747.

On motion for interlocutory injunction, the claim of the plaintiff being doubtful on the evidence, the court will act upon the consideration of the comparative inconvenience which may arise from granting or withholding the injunction. *Id.*

In a suit by a purchaser for specific performance, an injunction to restrain the vendor from selling the property was dissolved, it not being clear that he would be able to establish his right to specific performance, and it appearing that the granting the injunction would, in case of his ultimately failing, be more injurious to the vendor than the refusal of it would be to the purchaser, in the event of his ultimately succeeding. S. C. 3 De G. J. & S. 63.

15. A contract having been entered into for a purchase of land, it is not competent to the purchaser, before the title has been accepted, to obtain an injunction restraining the vendor from using or continuing to use the external

wall of the building, the subject of the contract, as a party wall, or from encroaching on the land, or from building so as to obstruct the light or air coming to the premises contracted to be purchased. *Heath v. Mayden*, 11 L. T., N. S., 473.

1. Where a vendor has executed a legal assignment of property to a purchaser, the Court of Chancery will not, on the application of the latter, interfere by injunction to restrain the former from illegally distraining upon the tenants of the property assigned, for alleged arrears of rent accrued since the assignment. *Drake v. West*, 22 L. J., Ch., 375.

2. When a contract is complete, the money paid, and possession given, the Court will prevent the possession being interfered with by the vendor, although the purchaser does not ask for the specific performance of the contract. *Hervey v. Smith*, 22 Beav. 299.

3. W., in 1816, agreed to sell his term and interest in a certain opera house to C., reserving to himself, W., his executors, administrators, and assigns, the right to a certain box therein, during the continuance of the said term. In 1823, all W.'s interest in the said opera house was assigned to a trustee for sale, in whose place the present plaintiff was afterwards appointed. C. subsequently filed his bill, and obtained a decree for specific performance of the agreement above mentioned, and having become bankrupt, his assignees sold his interest in the premises to defendant L., subject to certain covenants, which, as L. alleged, had, in the event, rendered it impossible for him to continue to W. or his representatives the enjoyment of the aforesaid box. The plaintiff, as such trustee as aforesaid, claimed to be entitled to the said box, or to an equivalent in money for its loss:—Held, that the said defendant, and all persons claiming under him, were bound by the reservation above mentioned. An injunction was granted to restrain the defendant, etc., from preventing the plaintiff from enjoying the said box, without prejudice to the right of the plaintiff to compensation, in case it should appear that his right to enjoyment of the box had been actually lost through the act of the defendant. *Helling v. Lumley*, 6 W. R. 758; 5 Jur., N. S., 301; 28 L. J., Ch., 249.

4. A tenant under an agreement for a lease having filed a bill to restrain his lessor from obstructing the ancient lights in the premises comprised in the agreement, but not asking to have the agreement specifically performed, a motion for injunction was refused. *Poa v. Pursell*, 3 Sm. & G. 242.

5. Proprietors of a newspaper dissolved partnership, and one of them agreed to purchase the whole. Before the completion, and pending a suit for specific performance, the purchaser published statements as to the profits and loss of the paper, in order to establish a company to carry it on. A motion for an injunction to restrain him was refused. *Marshall v. Watson*, 25 Beav. 501.

6. The Court will not restrain a company from doing an act within the scope of its objects, on the ground that, if the company does that act, the doing of it may incapacitate the company from performing something else which is also within the scope of its objects.

Syers v. Brighton Brewery Co., 13 W. R. 220; 11 L. T., N. S., 560.

A vendor cannot prevent his purchaser from buying a second estate from some one else, pending the first transaction, on the ground that, by making such second purchase, he may be rendered unable to complete his first. *Ib.*

7. The Court will not, by interlocutory injunction, restrain one of the parties to a contract from an act for which, if wrongful, the plaintiff can obtain compensation in damages at the hearing of the cause, and where the contract is one of which specific performance cannot be decreed as against the plaintiff. *Garrett v. Banstead and Epsom Downs Railway Co.*, 13 W. R. 878; 12 L. T., N. S., 654; 11 Jur., N. S., 654; 4 De G. J. & S., 462.

Where on motion for an interlocutory injunction the rights of the parties are doubtful on the evidence, the Court will act on the consideration of the comparative injury which may arise from granting or withholding the injunction. *Ib.*

8. A contractor agreed to execute the works of a railway within a certain time, and on being paid in a certain manner, and under a condition that if he failed to proceed with the works as required by the engineer of the company, the contract should be void, and the implements and materials belonging to the contractor should be forfeited. The contractor did not satisfy the engineer of the company, and the company proceeded to take possession of the works. The contractor alleged that the proper payments had not been made to him:—Held, that the Court would not restrain the company by interlocutory injunction until the questions between the company and the contractor were decided. *Munro v. Wivenhoe & Brightlingsea Railway Co.*, 11 Jur., N. S., 612; 13 W. R. 880; 12 L. T., N. S., 655; 4 De G. J. & S. 723.

9. If a defendant in an action pleads an equitable plea, he cannot come for an injunction to restrain the action upon the same ground which is the subject of the plea, provided the Court of law can give such relief as a court of equity will give. *Waterlow v. Bacon*, 2 L. R., Eq., 514; 12 Jur., N. S., 614; 14 W. R. 855; 14 L. T., N. S., 724; 35 L. J., Ch., 643.

But if it cannot, then the equitable plea is no bar to the defendant coming to a court of equity, subject, however, to the costs of the plea being controlled by the court of equity. *Ib.*

A court of equity will restrain an action for damages where the defence relied upon is an alleged agreement between the parties for the performance of certain acts, which a court of law cannot give effect to. *Ib.*

Prima facie, a defendant, by pleading an equitable plea, thereby makes his election of the tribunal in which his case is to be tried; but if the case is such that the Court of law cannot give full relief, then his having pleaded an equitable plea is no bar to his coming into equity. *Ib.*

To an action by B. against W. for damages for the obstruction of his light and air by the heightening of a party wall between his premises and those of W., W. pleaded, by way of equitable plea, an alleged agreement

on the part of B. to allow the wall to be raised on the terms of his not being called upon by W. to contribute to the expense, according to the Metropolitan Building Act, under which notice of the contemplated alteration had been given, and on his having a better skylight put up for him by W. On a bill filed by W. for specific performance of the agreement, and motion made to restrain the action:—Held, that inasmuch as this was a case in which a court of law could not give relief in respect of the agreement, the equitable plea did not preclude W. from coming into equity, and that W. was entitled to the injunction upon certain terms. *Ib.*

1. It is not the course of the Court, when it entertains jurisdiction in specific performance, to permit an action at law to proceed for the same subject matter. *Beaufort (Duke) v. Glynn*, 3 Sm. & G. 213.

2. In a suit to carry into effect an agreement, by giving the plaintiffs relief in respect of a breach of the agreement by the defendants, and at the same time, on the ground of such breach, to remove them from an office of trust and confidence which they held by virtue of the agreement, and to appoint other persons to such office; the Court, considering the plaintiffs entitled on an interlocutory application to the relief sought, restrained the defendants, by interlocutory order in a supplemental suit, from prosecuting actions at law against the plaintiffs under the agreement to recover damages for removing the defendants from such office. *Breman v. Preston*, 10 Hare 331.

In a question on the effect of a contract in the circumstances of the case, where the Court had concurrent jurisdiction with a court of law, and had assumed such jurisdiction by interfering to protect the rights of the parties, the Court restrained the parties to the contract from bringing actions at law founded on the facts with regard to which the Court had interfered, and in which actions the same question, of the legal effect of the agreement, and in the circumstances, would necessarily arise. *Ib.*

A case in which the Court, on an interlocutory application, appointed a ship's husband at the suit of some of the part owners of a ship as against the others, who were, under a contract, ship's husbands as well as part owners. *Ib.*

3. A plaintiff who comes to a court of equity for its aid is bound to put under the control of the Court his legal rights relating to the subject matter of litigation. *Prothero v. Phelps*, 2 Jur., N. S. 173; 25 L. J., Ch., 105.

Therefore where a party brought a suit for specific performance of an agreement, and after obtaining a decree brought an action to recover damages for injury sustained in consequence of breaches of the agreement, an injunction was granted. *Ib.*

Where the Court grants relief in a suit for specific performance, it has jurisdiction over the whole matter, and can therefore deal with any question of damages arising from a breach of the agreement. *Ib.*

Recovery of Deposit. See VENDOR AND PURCHASER, XIV. 1. 2.

VI. Relief on Ground of Part Performance.

- I. *General Principles*, 6535.
- II. *By Payment*, 6536.
- III. *By Taking Possession*, 6537.
- IV. *By Preparation of Conveyance*, 6538.
- V. *Other Acts*, 6539.
- VI. *In Case of Contracts to Grant Leases*. See LANDLORD AND TENANT, I. V.
- VII. *In Case of Promises and Representations as to Settlements on Marriage*. See SETTLEMENT, II.

I. GENERAL PRINCIPLES.

4. A performance only on one side is not a dispensation of the Statute of Frauds, but *casus omissus* against which there is no provision. *Charlewood v. Bedford (Duke)*, 1 Atk. 497.

5. Part performance takes a case out of Statute of Frauds. *Aylesford's (Earl) case*, 2 Stra. 763.

6. Equity will not decree upon a bare agreement by parol, without part performance. *Popham v. Eyre*, Lofft. 801.

Part performance of contract is not the mere tendering of conveyances, but it must be some act done, as in actual execution of contract, not towards the execution. Payment of earnest or delivery of possession of part are acts of part performance. *Ib.*

7. It is now established that if defendant has concurred in a material unequivocal act, by which he has obtained a substantial part of his object, as taking possession or accepting a considerable part of the purchase money, he shall not be allowed to retract, and plaintiff's right to a full execution of the contract has attached; but acts merely ancillary and introductory, as preparing conveyances, making surveys, valuations, etc., though attended with some expense to plaintiff, will not sustain an agreement on the ground of part performance. Acceptance of a trifling earnest would probably not be deemed sufficient. As binding the parties, it is not the mode prescribed by the statute; and as a part performance it is too inconsiderable in value. This, however, appears doubtful. See *Simmons v. Cornelius*, 1 Ch. Rep. 128; *Voll v. Smith*, 3 Ch. Rep. 16; *Anon.*, 2 Freem. 128; *Seagood v. Meale*, Pre. Ch. 560.

8. Acts of part performance avoiding the Statute of Frauds, as repairs, etc., must be in their nature almost necessarily done in pursuance of the contract alleged. *Exp. Hooper*, 19 Ves. 479; 2 Rose 328; 1 Meriv. 7.

9. Specific performance of a parol agreement for the sale of an estate, proved by one witness, confirmed by part performance, by taking possession, and acts of ownership, refused, there being some inconsistencies in the testimony of the witness, which, with other circumstances, placed the terms of the contract in doubt. *Reynolds v. Waring*, Younge 346.

1. Parol agreements in part performed, not resting on the agreement only, are in equity excepted out of the statute. *Kine v. Balfe*, 2 Ball & B. 343.

2. On a bill for specific execution relying on part performance, the agreement must be proved as stated. *Savage v. Carroll*, 1 Ball & B. 551.

3. Parol agreement proved by one witness, corroborated by others, and not denied by answer, enforced upon the ground of part performance. *Toole v. Medlicott*, 1 Ball & B. 393.

4. When a part of the agreement is performed on one side, it is just it should be carried into execution on the other. *Walker v. Walker*, 2 Atk. 100.

5. Plea of Statute of Frauds to discovery of a parol agreement not allowed where part performance. *Taylor v. Beech*, 1 Ves. 297.

6. Where nothing has been done under an agreement, the Court ought not to decree a specific performance, except when the right to compel it exists both in plaintiff and defendant. *Lawrenson v. Butler*, 1 Sch. & Lef. 13.

7. Parol evidence is not to be admitted on the ground of part performance, unless the agreement stated appears clearly to be the very same with that which was partly performed. *Lindsay v. Lynch*, 2 Sch. & Lef. 8.

8. If an agreement is in part performed by one of the parties, it is too late for the other to complain of fraud, surprise, etc., or attempt to set the agreement aside on that account; for a court of equity will decree a specific performance of the remaining part of it. *Anglesea (Earl) v. Annesley*, 1 Bro. P. C. 289.

9. Where a parol agreement is begun to be put in execution, and intended to be continued, equity will enforce the execution of it, notwithstanding the Statute of Frauds. *Guessey (Lord) v. Rodbridges*, Gilb. Eq. Rep. 4.

10. To maintain a contract on the ground that it is taken out of the Statute of Frauds by part performance, the Court will require it to be shown that the party seeking relief has expended money or otherwise acted in reliance on and in the execution of the agreement, and that non-performance would amount to a fraud upon him. Specific performance of a contract to purchase will not be enforced merely because the defendant has done acts on the property which, unless construed as acts of ownership, would, in the absence of licence, amount to a trespass. *Phillips v. Alderton*, 24 W. R. 8.

11. When a person has contracted for the purchase of land by an agreement, the terms of which are partly written and partly verbal, and has obtained possession upon performance of the written terms, to attempt to retain possession and refuse to perform the verbal terms amounts to a fraud. *Jervis v. Borridge*, 27 L. T. 436; 21 W. R. 96. Affirmed 8 L. R., Ch., 351; 42 L. J., Ch., 518; 28 L. T. 481; 21 W. R. 244.

A. signed a contract for the purchase of land from B., and on the same day transferred the benefit of the contract to C. by a memo-

randum in which some of the terms of the transfer were not expressed. C. entered into possession under the memorandum, but refused to perform the terms which were not expressed therein. A. filed a bill for cancellation of the memorandum, alleging that C.'s conduct amounted to fraud; and C. on demurrer contended that he was not guilty of fraud, inasmuch as under the Statute of Frauds the unwritten terms of the transfer were not binding upon him:—Held, that C.'s contention could not be sustained. *Id.*

See also LANDLORD AND TENANT, I. v. 1.

II. BY PAYMENT.

12. Payment of money by way of earnest merely, is not a part performance of agreement. *Pengall v. Ross*, 2 Eq. Abr. 46.

13. A. and B. agreed that B. should assign a term for years in his house, and certain vessels of beer for 200 guineas, whereof one guinea was paid down, and nineteen more next day. Part of the agreement was, that it should be reduced into writing. On a bill for performance, B. pleaded the statute, and insisted that the twenty guineas were paid for the lease. Plea overruled. *Leak v. Morris*, 2 Ch. Ca. 135.

14. Though a payment of a substantial part of the purchase money will take an agreement as to land out of the Statute of Frauds, on the ground of part performance, a small part, as five guineas, the purchase money being one hundred, will not do. The plea of the statute was allowed, with an intimation from the Court, that, under the circumstances of the case, the bill would be dismissed with costs. *Main v. Melbourne*, 4 Ves. 720.

15. Payment of the auction duty does not satisfy the Statute of Frauds, upon the general ground of part performance. *Buckmaster v. Harrop*, 13 Ves. 456; 7 Ves. 741.

16. An act of bankruptcy, and a docket struck, though no commission issued, a sufficient objection to a bill for specific performance of a previous contract for the sale of an estate to the plaintiff, in a case even where part of the money had been paid, and sub-contract for sale of part entered into by the plaintiff, and the defendants had agreed to convey accordingly. *Franklin v. Brownlow (Lord)*, 14 Ves. 550.

17. A parol agreement, and 20*l.* paid for the sale of a house, was decreed, without further execution proved. His Honour said he should have demurred to the bill, but now having proceeded to proof, he would decree it. *Anon.*, 2 Freem. 128.

18. Payment of money is not part performance to take an agreement, touching lands, out of the statute. *Clinan v. Cooke*, 1 Sch. & Lef. 40.

19. H. agreed with M. to convey her interest in a life estate for 300*l.* M. paid two-thirds, and then by accident the estate became more valuable, and M. agreed to give 140*l.* more; H. died, and nothing further was done. The latter agreement, though not in writing, decreed to be executed in favour of M.'s admini-

strator against his heirs. *Lacon v. Mortins*, 3 Atk. 1; 1 Ves. 312; Dick. 664.

Delivery of possession or payment of money is part performance of an agreement not reduced into writing. *Id.* 4.

1. Promise to renew a lease in consequence of money already laid out is *nudum pactum*, and will not be specifically performed, and money laid out afterwards will not vary it; on this ground a demurrer allowed. *Robertson v. St. John*, 2 Bro. C. C. 140.

2. H. contracted for the purchase of shares in a vessel, and paid part of the purchase money to P. and obtained possession of the vessel, but no bill of sale was executed. The registered owners alleged that P. was not their agent to receive the money, and arrested the vessel in the Admiralty Court, and threatened to sell the shares. They were restrained from selling or proceeding in the Admiralty Court. *Hughes v. Morris*, 13 Jur. 1065.

3. A agrees with B. for the purchase of nine houses which were in mortgage to J. S., and pays him a guinea in earnest; B. writes a note to J. S., and desires him to deliver up the writings, he having disposed of them, which J. S. refused, unless all the mortgage money was paid him down, and afterwards purchases them himself. On a bill brought by A. for a specific execution of the agreement, it was held that neither the guinea paid down, nor the note which was the only evidence of assent, but did not ascertain the terms of the agreement, was sufficient to take it out of the Statute of Frauds and Perjuries. *Seagood v. Meale*, Pre. Ch. 560.

4. Agreement by parol, that upon plaintiff's procuring a release of right from a stranger, defendant would convey. Plaintiff procures the release by paying a valuable consideration; that is not a part performance, and the Statute of Frauds may be pleaded to a bill for specific performance of such an agreement. *O'Reilly v. Thompson*, 2 Cox 271.

5. W. lets premises to V. upon a contract written in pencil by V., and signed by him in a note-book belonging to W.; both act under the contract, but V. ultimately alleges non-performance by W. of certain things not contained in it, and W. makes like charges. The defendant had *inter alia* paid 25*l.* towards certain alterations and additions made by the plaintiff W., in accordance with the terms of the contract. On a claim for specific performance, decree for specific performance made without costs. *Waller v. Vigurs*, 2 W. R. 51.

See also LANDLORD AND TENANT, I. v. 2 & 3.

III. BY TAKING POSSESSION.

6. Delivery of possession is part performance of an agreement not reduced into writing. *Lacon v. Mortins*, 3 Atk. 4; 1 Ves. 312; Dick. 664.

7. Where possession delivered under an agreement, and money expended in permanent improvements, parol evidence admitted to prove the agreement. *Toole v. Medlicott*, 1 Ball. & B. 401.

8. On a bill for a specific execution, relying on part performance, the agreement must be

proved as stated. *Savage v. Carroll*, 1 Ball. & B. 551.

Possession taken, referable only to a contract of sale, is part performance, and parol evidence may be given of the terms of such contract. *Id.* 262.

9. There being a parol agreement for the purchase of a farm and farmhouse, the possession of the farm by the purchaser will be held an act of part performance, sufficient to authorise the Court to execute the contract, even though the house should have been occupied adversely to him. *Gunter v. Halsey*, Ambl. 586.

10. The vendor of a share in a co-partnership business filed a bill against the purchaser, who had taken possession, charging that he had grossly mismanaged the property and destroyed its value, and praying that he might be declared to have accepted the title, and might be decreed to perform the contract specifically. The Court was of opinion that the title had not been accepted, and as a good title was not shown, a specific performance could not be decreed:—Held, that upon a record so framed, no accounts or inquiries could be directed as to the defendant's possession and management of the property, with a view to ascertain whether any and what sum ought to be paid, or compensation made by him to the plaintiff. *Stevens v. Guppy*, 3 Russ. 171; 6 L. J., Ch., 164.

11. Part performance by taking possession, cutting the crops, etc. *Buckmaster v. Harrop*, 13 Ves. 456; 7 Ves. 341.

12. Where the plaintiff alleged a parol contract for a lease of a house of which he was in possession, but the defendant denied the contract and alleged that the plaintiff was in possession in accordance with a written memorandum, whereby the plaintiff agreed to take the house from the defendant as a weekly tenant:—Held, that the possession was not of such a nature as to constitute an act of part performance to take the case out of the Statute of Frauds; though the plaintiff had been let into possession some days previously to the date of the memorandum. *Canning v. Catling*, 4 N. R. 259.

13. In a suit for specific performance, where possession and expenditure are fairly referable to an express agreement with the landowner, to give an adequate consideration, to be calculated on a principle sufficiently defined in the agreement, the Court will, in favour of the possession and expenditure, endeavour to decree a specific performance; but not where the plaintiff after filing his bill, but before the hearing, has obtained by an Act of Parliament the means of securing and keeping his possession without the aid of the Court. *Meynell v. Surtees*, 3 Sm. & G. 101; 3 W. R. 36; 1 Jur. N. S., 80. Affirmed 2 Jur., N. S., 737; 25 L. J., Ch., 257; 3 W. R. 535.

A landowner offered a way-leave for a railway over his land to an iron mining company, for sixty years, upon the payment of triple damages only. The company, pending a suit by them for specific performance, sold its line to a railway company for public traffic, who procured an Act authorising them compulsorily to purchase the land in fee over which the way-leave had been granted:—Held, at the hearing, that there had been a variation as to

the parties and the subject matter of the contract, and that there was no right to specific performance. *Ib.*

1. A purchaser being let into possession is enough to take a contract out of the Statute of Frauds, whether the vendor or the purchaser is seeking specific performance. *Wilson v. West Hartlepool Railway Co.*, 2 De G. J. & S. 475; 11 Jur., N. S., 124; 34 L. J., Ch., 241; 13 W. R. 361; 11 L. T., N. S., 692.

In cases of part performance of contracts not formerly binding in themselves, the Court gives relief by decreeing specific performance, on the ground of protecting against fraud, and this principle applies as much to companies as to individuals. *Ib.*

A. having by letters entered into a contract with the manager of a company for the purchase of lands, a branch line of railway was in accordance with the terms laid down by the company's servants, plant and machinery were removed to the purchased lands by the company, and A. was let into possession:—Held, that although the manager had at the outset no authority to make the contract at all, these subsequent acts of the directors had made it binding upon them. *Ib.*

2. To maintain a contract on the ground that it is taken out of the Statute of Frauds by part performance, the Court will require it to be shown that the party seeking relief has expended money or otherwise acted in reliance on and in the execution of the agreement, and that non-performance would amount to a fraud upon him. Specific performance of a contract to purchase will not be enforced merely because the defendant has done acts on the property which, unless construed as acts of ownership, would, in the absence of licence, amount to a trespass. *Phillips v. Alderton*, 24 W. R. 8.

3. The plaintiff, who was proposing to enter into business as a milliner, was induced by C. to abandon the project, C. promising her verbally that she should occupy a leasehold house of C.'s during her (the plaintiff's) life, the plaintiff to pay the ground rent, rates, and taxes, and maintain herself by letting lodgings. The plaintiff thereupon abandoned the idea of the millinery business, and entered into possession of C.'s house, and continued there for several years until C.'s death, paying the ground rent, rates, and taxes. C. bequeathed the house to P., who brought an action of ejectment against the plaintiff, who thereupon filed a bill to restrain the action:—Held, that there had been a part performance of the verbal contract between the plaintiff and C. sufficient to take the case out of the Statute of Frauds, *Coles v. Pilkington*, 19 L. R., Eq., 174; 44 L. J., Ch., 381; 31 L. T. 423; 23 W. R. 41.

4. A father verbally promised, in consideration of his daughter's marriage, to give her a house as a wedding present, and immediately after the marriage he put the daughter and her husband into possession. The father was then the owner of the house, which was leasehold, and was subject to a charge in favour of a building society, payable by instalments. The father paid the instalments which fell due during his lifetime, and at his death there remained a balance of 110*l.*, which fell due shortly afterwards:—Held, that the verbal promise to give the house having been esta-

blished, the possession took the case out of the Statute of Frauds; that the contract was to give the house free from incumbrances; and that the 110*l.* was payable out of the father's estate. *Ungley v. Ungley*, 5 L. R., Ch. D., 887; 46 L. J., Ch., 854; 37 L. T. 52; 25 W. R. 733. Affirming 4 L. R., Ch. D., 73; 46 L. J., Ch., 189; 35 L. T. 619; 25 W. R. 39.

See also LANDLORD AND TENANT, I. v. 2.

IV. BY PREPARATION OF CONVEYANCE.

5. A public survey is held for sale of an estate, and A. offering 1,250*l.* for it, it is accepted and agreed to, and conveyances are ordered to be got ready, and A. is put into possession, but disputes arise relative to the settling the conveyance. A. gets an assignment of the mortgage to which the estate is subject, and antedates it, and refuses to go on with the purchase. Though the agreement was only by parol, yet, on the circumstances of the case, A. is decreed to proceed in the purchase. *Pyke v. Williams*, 2 Vern. 455.

6. Putting a deed into the hands of a solicitor to prepare a conveyance of the estate to a son-in-law (after marriage) not a part performance of a parol agreement, so as to take it out of the Statute of Frauds; a demurrer allowed on that ground to a bill for specific performance. *Redding v. Wilkes*, 3 Bro. C. C. 400.

7. Admeasurement not a part performance of an agreement to exchange lands. *Pembroke v. Thorpe*, 3 Swan. 442.

8. A. alters the draft with his own hand this is not a signing to take it out of the Statute of Frauds, though the seller afterwards executes a conveyance, and being in Middlesex it is caused to be registered. *Hankins v. Holmes*, 1 P. W. 770.

9. Payment of fees to counsel, drawing drafts and engrossing them, and providing purchase money, under circumstances, held a part performance. *Child v. Comber*, 3 Swan. 427.

10. Bill for a specific performance of an agreement for the sale of lands and chattels. Plea, the Statute of Frauds. The defendant, during the negotiation, delivered a particular of the whole signed by him. The agreement was afterwards made at a less price. Both parties gave instructions to an attorney to prepare the conveyance; and the defendant delivered to him the particular, as instructions for the deed which was prepared. This is not sufficient to take it out of the statute, and being void as to the lands, is void *in toto*. *Cooke v. Tombs*, 2 Anst. 420.

11. Agreement by parol, that upon plaintiff's procuring a release of right from a stranger, defendant would convey, plaintiff procures the release, by paying a valuable consideration; that is not a part performance, and the Statute of Frauds may be pleaded to a bill for specific performance of such an agreement. *O'Reilly v. Thompson*, 2 Cox 271.

12. Specific performance decreed of a parol agreement in part performed for surrendering a lease and granting a new lease at a reduced rent. *Parker v. Smith*, 1 Colly. 608.

13. A. agrees by parol with B. for the purchase of lands; B. delivers a rent-roll, which was dated and altered in his own handwriting, and

showed by the title of it, that an agreement had been made between them for the sale of the estate, at twenty-one years' purchase. An abstract of the title was also delivered to A., together with the deeds, in order to be compared with the rent-roll. B. likewise wrote letters to several of his creditors, informing them that he had contracted with A. for the sale of his estate, at twenty-one years' purchase, and sent the tenants to treat with A. for a renewal of their leases. Notwithstanding all these circumstances, upon A.'s filing a bill for specific execution of this agreement, B. pleaded the Statute of Frauds in bar to both the discovery and relief; and the plea was allowed. *Whaley v. Baguel*, 1 Bro. P. C. 345; Wall. Lyn. 12. n.

1. A settlement contained a power for the trustee to lease at the request in writing of a married woman. She and the trustee, in pursuance of a parol agreement, executed a lease, and delivered it to their solicitor to exchange for the counterpart, but before the exchange was made or the counterpart executed, she directed the solicitor not to part with the deed:—Held, that the execution of the deed was not a part performance of the parol agreement, and that the deed was executed as an escrow, and that the Court would not compel the lessors to deliver it to the lessee. *Phillips v. Edwards*, 3 N. R. 658; 33 Beav. 440.

2. A. agrees for the purchase of an estate, but the agreement not reduced into writing: though A. in confidence thereof gave orders for conveyances to be drawn up, and went several times to view the estate, this Court will not carry such agreement into execution, and the Statute of Frauds may be pleaded to a bill brought for that purpose. *Clerk v. Wright*, 1 Atk. 12.

V. OTHER ACTS.

3. A. and B. being joint lessees of a building lease, A., by parol, agrees to sell his interest to B., and accepts a pair of compasses in hand to bind the bargain. *Quere*, if within the statute of Frauds. *Alopp v. Patten*, 1 Vern. 472.

4. Specific performance decreed of parol agreement as to land, made as a family compromise of doubtful rights, where there had been part performance by possession, and improvements, and acquiescence near nineteen years, a third person being permitted to act on his conception of the rights, not questioned at the time by the defendant, who had acquiesced under expectations from that third person, which were in part disappointed. *Stockley v. Stockley*, 1 Ves. & B. 23. S. P. *Stapleton v. Stapleton*, 1 Atk. 2.

Where a person contracts to grant a certain interest, which it afterwards appears he cannot carry into execution to the extent agreed on, yet the grant shall be available as far as his interest will permit. *Id.* 64.

5. Specific performance of a parol agreement to sell land, refused, notwithstanding many acts by which the defendant had treated the plaintiff as a purchaser. *Whaley v. Baguel*, Wall. Lyn. 12. n. 1 Bro. P. C. 345.

6. Act of part performance, avoiding the Statute of Frauds, as repairs, etc., must be in

its nature almost necessarily done in pursuance of the contract alleged. *Exp. Hooper*, 19 Ves. 479; 2 Rose 328; 1 Meriv. 7.

7. F., a mortgagee with a power of sale, agreed with K., who was entitled to a reversionary interest in the lands comprised in the mortgage, not to sell without his consent; and afterwards proposed to make a lease for a term to W. at a fine; K. refused to consent, unless the lands were settled on his wife (who was the daughter of W.) and her children after the death of W.; and this being acceded to K. gave his written consent, and thereupon the lease was executed by W., and, upon the occasion of its execution, the following document was signed by W. and K.:—"It is agreed between W. and K. that the lease and lands of Largan, after death of W., shall be and become, through his love for her, the property of Mrs. K. in trust for her child or children by K. (if blessed with such), if not, to be for her sole use or benefit":—Held, first, that this was a declaration of trust by W. in favour of Mrs. K. and her children, and that, after W.'s death his personal representative became a trustee for them. *Kelly v. Walsh*, 1 L. R., Ir., 275.

Held, secondly, that if it was not a valid declaration of trust, it was an agreement which should be specifically performed, upon the ground that, although the consideration expressed was not valuable, yet the consent by K. was a part performance which took the case out of the Statute of Frauds, and that evidence of the real consideration was admissible. *Id.*

8. In 1825 C. died at Arequipa, intestate, leaving real and personal estate at Valparaiso, in Chili. His mother and his three brothers, B., T., and H., survived him. They all resided in England, except H., who at the time of the death of C. was in Peru, and who for many years subsequently resided either in Peru or in Chili, but without acquiring a foreign domicile. In 1831 their mother died, having bequeathed all her property to her sons B., T., and H., equally. In 1832 T. offered his share of C.'s estate to H. for 1,000*l.*; H., in reply, intimated, that with a view to save the expense of rendering formal accounts of C.'s estate, he was willing to buy the shares of both B. and T., which led to a long correspondence. In 1833 B. wrote to H. offering his share for 1,100*l.*, to be paid in part out of the mother's estate, but by a given date, and T. wrote to H. at the same time, saying whatever B. determined would meet with his approval. The condition as to payment by the given time was not fulfilled; but in the subsequent correspondence between B. and H., the arrangement was treated as binding between them, and was never repudiated by T., nor were any accounts of C.'s estate applied for until after B.'s death, which occurred in 1849. In 1850 T. sent an agent to Valparaiso, who, on behalf of T. and the representatives of B., took proceedings in the Courts in Chili, and in 1858, by a decree made in the Court at Santiago, it was decided that the letters between the brothers amounted to an agreement which bound B., but not T.; and H. was directed to account to T. for one-third of C.'s estate upon a bill here by H., and the assignee under his insolvency:—Held, that having regard to H.'s avowed object in purchasing both shares, and

to T.'s acquiescence from 1833 to 1849, T. was bound equally with B.; and a decree was made restraining T. from further proceedings in Chili to compel an account, and declaring him a trustee of his share in the estate of C. for the plaintiffs. *Cood v. Cood*, 9 Jur., N. S., 1335; 33 L. J., Ch., 273.

1. A. devised his real estate to trustees to the use of his wife for life, with remainder to his son for life, with remainders over. A. afterwards gave the H. estate to his son, and signed a memorandum as follows: "H., together with my other freehold estates, are left in my will to my wife; but it is her wish, and I hereby join in presenting the same to our son for the purpose of furnishing him with a dwelling-house." The son took possession of the H. estate, and with the approbation of his father expended money on the erection of a dwelling-house thereon. Upon his death:—Held, that the son was entitled to have a conveyance to himself of the fee simple of the H. estate. *Dillwyn v. Llewellyn*, 31 L. J., Ch., 658.

2. Where a niece had been induced to render valuable services to her uncle on the faith of his representation that by so doing she would become entitled to the benefit of the trusts created in her favour by a codicil to his will, and the testator afterwards revoked such trusts:—Held, that he had no right to make such revocation, and a decree was made that the trusts in favour of the niece should be performed. *Loffus v. Maw*, 3 Giff. 592; 32 L. J., Ch., 49; 8 Jur., N. S., 607; 6 L. T., N. S., 346; 10 W. R. 513.

3. An intestate induced a woman to serve him as his housekeeper without wages for many years, and to give up other prospects of establishment in life by a verbal promise to make a will leaving her a life estate in land, and afterwards signed a will, not duly attested, by which he left her the life estate:—Held, that there was no contract, and that even if there had been, and although the woman had wholly performed her part by serving till the intestate's death without wages, yet her service was not unequivocally and in its own nature referable to any contract, and was not such a part performance as to take the case out of the operation of the Statute of Frauds, s. 4; and that she could not maintain an action against the heir for a declaration that she was entitled to a life estate in the land. *Loffus v. Maw* (3 Giff. 592) disapproved. *Maddison v. Alderson*, 8 L. R., App. Cas., 467; 52 L. J., Q. B., 737; 49 L. T. 303; 31 W. R. 820; 47 J. P. 821. Affirming *S. C. sub nom. Alderson v. Maddison*, 7 L. R., Q. B. D. 174; 50 L. J., Q. B., 466; 45 L. T. 334; 29 W. R. 556.

See also LANLORD AND TENANT, I. v. 3.

VII. Contracts Incapable of Complete Performance.

See also V. ante.—X. IX. post.

4. Though specific performance might have

been decreed against original parties holding as tenants in common; yet where an alteration prevented a decree as to one moiety, the Court would not direct a performance as to the other, the contract being entire, and an execution of half of it inadequate to the prime object. *Att.-Gen. v. Day*, 1 Ves. 218.

5. Plaintiff may have a specific performance in part, waiving the rest, and the defendant cannot object. *Mestaer v. Gillespie*, 11 Ves. 640.

6. Courts of equity cannot decree the performance of one part of an agreement, leaving the other parts unperformed. *Wood v. Rowe*, 2 Bligh 595.

7. The Court will not interfere to compel the specific performance of an agreement unless it can itself execute the whole contract in the terms specifically agreed upon. *Gervais v. Edwards*, 2 Dr. & War. 80; 1 Con. & L. 242; 4 Ir. Eq. R. 555.

8. Difficulty of decreeing a partial performance of a contract where a vendor has not the power of fully performing it. *Graham v. Oliver*, 3 Beav. 124.

9. In an agreement for the purchase of an estate, one of the stipulations was, that the vendor should be tenant from year to year to the purchaser:—Held, that the inability of the vendor to perform this stipulation by reason of embarrassments of which the purchaser must have had some notice, was no bar to the specific performance of the contract. *Lord v. Stephens*, 1 Y. & Coll. 222.

10. Where the articles provided for the continuance of the partnership for twenty-one years, determinable upon the death of both, and also for the introduction by deed or will of a relation of either of them, but made no provision for the case (which happened) of the death of one of them during the term, or for the amount of capital to be used:—Held, that the provisions for the continuance of the partnership during the remainder of the term could not be enforced in equity against the representatives of the deceased partner. *Dowds v. Collins*, 6 Hare 418.

11. By a written agreement between the plaintiff and the defendant, the plaintiff agreed to sell, and the defendant agreed to purchase, upon the terms stated, a certain property called L.; and by the same agreement the defendant agreed to sell and the plaintiff agreed to purchase another estate called H., and it was not expressed that the two contracts were to be dependent on each other. The defendant was eventually unable to make a good title to H.:—Held, that the plaintiff was entitled to a specific performance of the contract as to L. *Croome v. Lediard*, 2 Myl. & K. 251; 3 L. J., N. S., Ch., 98.

12. The Court will not decree a partial performance of articles; but when some parts appear unreasonable they always dismiss the bill. *Goring v. Nash*, 3 Atk. 189.

13. By an agreement between three incorporated railway companies, A., B., and C., it was agreed that A. should purchase the other two railways when completed, and that, in the meantime, their capitals should be amalgamated for the purpose of such completion, A.

undertaking to supply any deficiency; and it was provided that all the three companies should concur in applications to Parliament for the necessary powers to carry the agreement into effect. At the time the agreement was entered into, B. had power, with the consent of three-fifths of its shareholders, to sell its railway to A., but C. had no such power, and neither B. nor C. had any power of amalgamation. The agreement was duly ratified by three-fifths of the shareholders in each of the three companies, and C. subsequently obtained an Act giving it the required powers; but before a similar Act was obtained by B., a large majority of its shareholders had become adverse to the project, so that no such Act could be obtained; and the directors of that company, with the sanction of the shareholders, were proceeding to construct and dispose of their railway in a manner inconsistent with the agreement. A demurrer to a bill filed by A. against B. and its directors, for specific performance of the agreement and an injunction, was overruled, and the injunction granted; it being clear that, for the completion of the purchase, no further parliamentary powers were necessary, and it being at least doubtful whether the defendants could be heard in this court to say that the plaintiffs were not entitled to the performance of that part of the agreement, merely because there was another part (viz., the provision for amalgamation) which required additional parliamentary powers to give effect to it, which powers they refused to apply for. *Great Western Railway Co. v. Birmingham & Oxford Junction Railway Co.*, 2 Ph. 597; 5 Rail. Ca. 241; 17 L. J., N. S., Ch., 243; 12 Jur. 106.

1. It is fully settled that a contract cannot be specifically performed in part; it must be wholly performed or not at all. *Ford v. Stuart*, 15 Beav. 493; 21 L. J., Ch., 514.

2. Relief by specific performance of agreements is decreed only where compensation in damages for non-performance would not be adequate, and where the stipulations are such as can be specifically performed throughout. *Paris Chocolate Co. v. Crystal Palace Co.*, 1 Jur., N. S., 720; 3 Sim. & G. 119; 3 W. R. 267.

The Court will refuse to interfere by specific performance in cases where the larger subject matter of the contract is not fixed, but is to be ascertained by arbitrators, and where there is no reasonable mutuality in the stipulations. *Ib.*

Where in an agreement there are vague and peculiar stipulations to let at a certain rent space in a certain portion of a building for a particular purpose, the Court will refuse to interfere by enforcing specific performance of the agreement. *Ib.*

Where the Court finds an agreement which has not been performed, but has been dealt with by the parties themselves on the footing of pecuniary compensation, it is difficult to say that the non-performance of the entirety of the agreement should not be dealt with in the same manner, and therefore the specific performance of an agreement so dealt with would be refused. *Ib.*

Where a bill prayed for the specific performance of an agreement, and the main relief sought was not in respect of the main subject

matter of the agreement, but in respect of certain vague stipulations contained in it, and there had been a departure from the original terms of the agreement, and non-performance by the defendants had been dealt with by the plaintiffs on the footing of compensation, the Court held that it could not decree specific performance, and a motion for an injunction by the plaintiffs, to restrain certain acts alleged to be in violation of the agreement, was dismissed. *Ib.*

3. The Court will not decree specific performance of a contract unless it can enforce the whole; but the difficulty seems to be removed where the part which it is impossible to enforce has already been performed. *Hope v. Hope*, 22 Beav. 351; 8 De G. M. & G. 731; 4 W. R. 583; 3 Jur., N. S., 454; 26 L. J., Ch., 417.

4. The Court will not direct an account as to a part of an agreement, where it cannot decree specific performance of the whole, nor will the Court make any declaration of right upon a contract, except as to so much of it as has been or is about to be broken. *Holmes v. Eastern Counties Railway Co.*, 3 Kay & J. 675; 3 Jur., N. S., 737.

5. Where the principal agreement cannot be enforced, the specific performance of the accessory agreement will not be decreed. *Scottish North Eastern Railway Co. v. Stewart*, 3 Macq. H. L. Ca. 382.

6. If an agreement is capable of being carried out as a whole, the Court will decree specific performance, although there may be collateral subordinate provisions which would not be enforced independently. *Blackett v. Bates*, 2 Hem. & M. 270; 34 L. J., Ch., 515; 13 W. R. 736; 12 L. T., N. S., 844; 11 Jur., N. S., 500.

Although a court of equity will not make a decree for the specific performance of an agreement to repair a railway *simpliciter*, it will do so if the agreement forms a collateral part only of a larger agreement, and the relation of lessee and lessor has been created between the parties. *Ib.*

Specific performance of an award or an agreement cannot be granted unless the Court can give mutual relief to both parties; accordingly, where an award provided that the defendant should execute to the plaintiff a lease in a certain form, and that the defendant should have a right to the performance by the plaintiff throughout the whole term of certain continuous duties not specified in the lease, a decree of Wood, V.-Ch., ordering specific performance of the award by the defendant, and seeking to enforce specific performance by the plaintiff by means of an injunction restraining him from interfering with the defendant's rights, was reversed, and specific performance refused. 8 C. 12 Jur., N. S., 151; 35 L. J., Ch., 324; 14 W. R. 319; 13 L. T., N. S., 656. And see 12 Jur., N. S., 874 n.

7. The Court will not compel specific performance of an agreement by a company to employ a person as their broker; and the contract being at an end, that which is merely an adjunct to the principal relief sought—viz., an injunction to restrain the company from advertising, in breach of a stipulation contained in the agreement, the name of any other person as their broker will

not be granted. *Brett v. East India and London Shipping Co.*, 12 W. R. 596; 10 L. T., N. S., 187.

1. An owner of a coal wharf agreed to let it, and at the same time agreed to act as agent in the coal business for the tenant, and not to act for any other person:—Held, that these agreements were inseparable, and that specific performance of the agreement to let would not be decreed, because the Court could not enforce performance on the other side. *Ogden v. Fossick*, 9 Jur., N. S., 288; 32 L. J., Ch., 73; 11 W. R. 128; 7 L. T., N. S., 515; 4 De. G. F. & J. 426; 1 N. R. 143.

The fact of the agreement having been acted on for some time made no difference. *Ib.*

2. A firm of shipbuilders agreed to alter a vessel according to a specification; and it was provided that in case of their failing to execute the alterations according to the agreement, the owners of the vessel should be at liberty, with workmen, to enter on the shipbuilders' yard, and themselves complete the alterations. The shipbuilders were adjudicated bankrupts before the vessel was completed:—Held, that the Court could not specifically perform the whole agreement, and therefore would not restrain the trustee under the bankruptcy from selling the dock in which the vessel was lying, although the owners might be thus prevented from themselves entering and completing the vessel pursuant to the agreement. *Merchants' Trading Co. v. Banner*, 12 L. R., Eq., 18; 40 L. J., Ch., 515; 24 L. T. 861; 19 W. R. 707.

3. An agent of a railway company, without any direct authority, agreed to sell to the plaintiff a piece of land of the company at a certain price per acre. Some of the terms were, that the company should lay down a branch railway to the land; that the plaintiff, who was going to erect ironworks on the land, should use the company's railway in preference to others—use it whenever reasonably practicable, and for the longest distance it was reasonably capable of use; and that the traffic to and from the works should be conveyed on the terms of a prior agreement of the 8th May between the parties relating to another piece of land bought by the plaintiff from the company, and the other stipulations of that agreement carried out. The company's surveyor measured the land, the company's engineer laid down the branch railway to it, the plaintiff was let into possession, and his machinery was brought in the company's waggons to the land, and there deposited. After this the company refused to complete the sale. On an appeal from a decree of the Master of the Rolls directing specific performance:—Held, that the stipulations as to the use of the railway by the plaintiff did not render a decree for specific performance improper; for that the insertion of a covenant to that effect would effectuate what the parties must be held to have contemplated. *Wilson v. West Hartlepool Railway Co.*, 2 De G. J. & S. 475; 11 Jur., N. S., 124; 34 L. J., Ch., 241; 13 W. R. 361; 11 L. T., N. S., 692; 5 N. R. 289. Affirming 34 Beav. 187; 10 Jur., N. S., 1064; 13 W. R. 4; 11 L. T., N. S., 327. Affirmed in House of Lords, 23 L. J., Ch., 697; 5 H. L. Ca. 40.

Held, that although the company's agent contracted without sufficient authority, the company must be held by its acts to have ratified the contract, and that the contract thereby became binding on the company, although not under its common seal, nor executed in any other of the modes mentioned in 7 & 8 Vict., c. 16, s. 97, and that specific performance ought to be decreed, especially as possession had been given. *Ib.*

Held, also, that the fact of no sufficient evidence having been given of the contents of the prior agreement of the 8th August did not prevent a decree for specific performance, for that where possession has been given under an agreement a court of equity will, if possible, ascertain the terms of the agreement, and give effect to them. *Ib.*

4. A railway company, requiring some of the plaintiff's land, entered into a contract for the purchase, by which the company agreed to make and maintain, so long as it should be a convenience, a siding, with all necessary approaches, at B., for public use, for the reception and delivery of goods. The plaintiff and the company differing as to the construction to be put on these terms, the plaintiff filed a bill for specific performance:—Held, that the Court will not dismiss the bill, on the ground that the agreement was not such as could be carried out under the superintendence of the Court. *Lytton v. Great Northern Railway Co.*, 2 Kay & J. 394; 2 Jur., N. S., 436; 4 W. R. 441.

Certain persons entered into an agreement with A. B. to form a joint stock company for working certain patents to which A. B. was entitled, and which were to become the property of the company in consideration of payments and benefits secured to A. B., who agreed on his part to take any proceedings required of him by the company to obtain other patents in foreign countries; to devote his time to, and engage himself wholly for, the company; to promote its interests and improve the patents, and impart any new improvements discovered by him applicable to the process. A memorandum and articles of association were subsequently signed by the parties.

5. Demurrer allowed to a bill by A. B. for specific performance of the agreement, the Court having no power to compel performance from A. B. on his part of the contract, which was entire and could not be severed. *Stocker v. Wedderburne*, 5 W. R. 671; 3 Kay & J. 393; 26 L. J., Ch., 713.

6. Under an agreement to grant a building lease, including a covenant to insure in a particular office in the joint names of lessor and lessee, and to give the lessee an option to purchase for 500*l.*, the lessee built a house at a cost of more than 1,000*l.*, and insured in his own name only, and in the wrong office. The lessor brought ejectment, and the lessee thereupon claimed to exercise his option of purchase, and specific performance of that part of the agreement was decreed. *Green v. Low*, 4 W. R. 669; 22 Beav. 625.

7. When the conditions of an agreement between landlord and builder, whereby the landlord agrees to grant leases of successive plots of land as the houses upon each of them are built to a certain stage, are by the terms

of the contract separable, there is no rule of equity to prevent them from being separately enforced by way of specific performance. Therefore where the assignee of the builder's interest had completed the houses upon some only of the plots agreed to be built upon:—Held, upon a bill for specific performance, that he was entitled to the leases of those plots, even though disclaiming all interest in the remaining plots. *Wilkinson v. Clements*, 42 L. J., Ch., 38; 8 L. R., Ch., 96; 27 L. T., N. S., 834.

1. On a contract for the sale of lands, described as partly freehold and partly copyhold, and the timber thereupon (the latter at a specified valuation), upon a condition that the vendor should not be required to distinguish the freehold land from the copyhold, nor the respective boundaries thereof, it was held, that upon the particulars and conditions the contract for the land and timber was one contract, and not separate contracts, and that the purchaser was bound to pay for the timber at the valuation, notwithstanding the fact that it might be wholly upon the copyhold land, and therefore subject to the rights of the lord and the restrictions of the custom. *Crosse v. Lawrence*, 9 Hare 462; 16 Jur. 142; 21 L. J., Ch., 889.

Where, upon a contract for the sale of an estate, a separate and distinct contract is made for the sale of the timber upon it, the Court will not enforce the latter contract, unless the vendor can give the purchaser such possession and dominion over the timber as will entitle him to fell and remove it, but, if an entire contract be made for the sale, both of the estate and the timber (notwithstanding the purchase money is made up of distinct sums for each), the vendor is only bound to make out his title to the land according to the contract, and the title to the land is the title to the timber upon it. *Ib.*

The purchaser of undistinguished freehold and copyhold land and timber, under a single and entire contract, must be considered as estimating in the price he pays for the land, the price he pays for the timber. 8 C. 9 Hare 467; 16 Jur. 142; 21 L. J., Ch., 889.

2. A contract for the purchase of copyhold land at a certain price, and the timber upon it at a specified valuation, enforced as one entire contract, although the vendor could not show any licence from the lord or custom in the manor enabling the tenant of the manor or himself, or his assignees, to fell the timber. *Crosse v. Keene*, 9 Hare 469.

3. The defendants agreed with the plaintiffs to undertake to execute a branch railway according to the terms of a specification to be prepared by the plaintiffs' engineer for the time being, and to give a bond to secure the performance of their contract. The plaintiffs had at the date of the agreement a bill pending to enable them to make the branch, and holding them to complete within a specified time, on pain of a suspension of dividends on the capital of their entire line. The specification was prepared by the company's engineer, but prices having risen, the defendants repudiated their agreement. The plaintiffs then filed their bill for a specific performance of the agreement according to the terms of the specification, and to have the bond executed,

charging that they would have withdrawn the bill before Parliament, by reason of the liabilities incurred on the passing thereof, had not the defendants (to whom, as owners of a large estate adjacent to the proposed branch, it was of great importance that the plaintiffs should be bound to make the branch) assented to the terms of the agreement, and the plaintiffs believed that they would *bond fide* carry out the same; that the defendants, by their agreement, induced the plaintiffs to come under the obligation to make and complete the lines, and the Act was passed upon the faith of the agreement; and charging that the not carrying out the agreement was a fraud on the plaintiffs, there having been a part performance on their part. On demurrer, it was held (assuming the agreement to be valid within the Statute of Frauds, and in other respects one upon which the plaintiffs could recover), first, that the agreement could not be enforced as regards the construction of the railway, because from the nature of the works, the subject of the agreement, it was an agreement the execution of which the Court could not superintend consistently with public convenience, inasmuch as the motions would be incessant for committal or otherwise for non-performance of orders with regard to the making of particular works, besides the difficulty, on the ground of reciprocity, in enforcing that part of the agreement by which the plaintiffs were to provide the land, and because the plaintiffs having by their Act power to acquire the land, could make the railway for themselves; and having so ascertained the expense the defendants had put them to, would have an adequate and the better remedy in damages, and that the circumstances of fraud alleged in the bill did not prevent the application of the foregoing reasons. Secondly, that as the Court could not superintend the general execution of the whole works or enable the defendants to earn the whole of the money to which they would be entitled for the works when made, the execution of the bond would be a piecemeal performance of the agreement, which the Court would not direct, and the demurrer was allowed. *South Wales Railway Co. v. Wythes*, 1 Kay & J. 186; 24 L. J., Ch., 1; 3 W. R. 3; 3 Eq. R. 70. Affirmed 24 L. J., Ch., 87; 3 W. R. 133; 3 Eq. Rep. 153; 5 De G. M. & G. 880.

Whether in the simple case of an advance of money with an agreement to execute a bond for its repayment, such an agreement would be executed in this Court. *Quare. Ib.*

4. Held, that, although one party had to some extent acted on the award, by nominating trustees and signifying an election to take licences, there had not been such an acquiescence in the award as to justify the Court in enforcing a specific performance of it against him on that ground, no one appearing to have been misled by his acts. *Nichols v. Hancock*, 7 De G. M. & G. 300; 1 Jur., N. S., 1149.

5. A plaintiff agreed to grant a lease to the defendant when and so soon as he, the defendant, should have built a new house on the land; and the defendant agreed to accept such lease when required, and by a certain day to pull down an old house standing on the

land, and build a new one on the site:—Held, on demurrer to a bill praying specific performance and damages, that the 21 & 22 Vict., c. 27, applied, and that the plaintiff was entitled to damages for the non-building of the house, and to specific performance of the contract to accept the lease. *Soames v. Edge*, 1 Johns. 669.

1. There must be as clear evidence of the waiver as of the existence of the contract; the Court will not act upon less. A. wrote to C.:—"I have told Mrs. C. that it is my intention to let and lease to you that field which J. M. held under me, and that the rent thereof is to be 2*l.* 10*s.* per acre for your life and Mrs. C.'s, which will be stated in the lease, with the understanding that you are to be accountable for the payment of the tithe rent charge, poor-rate charge, cess, etc." The law agent of A., upon the instructions of C., and without the authority of A., afterwards prepared a lease which was executed by C., whereby the lands were purported to be demised for the lives of C., his wife, and a third person, or twenty-one years, whichever should last the longest, at a rent which was the aggregate of the rent mentioned in the letter, and the tithe rent charge. This reserved rent was for some time received by A., who afterwards refused to execute that or any other lease. A. was decreed specifically to execute a lease to C. for his own life and that of his wife, at the rent mentioned in the unexecuted lease; and the costs of the suit were given against A. because of his misconduct. *Carolan v. Brabazon*, 3 J. & L. 200; 9 Ir. Eq. R. 124.

Where there is an agreement to make the tithe rent charge payable by the tenant, and the agreement rests *in fieri*, the Court may, in favour of the intention, add the amount of the rent charge to the rent. *Semble*, where parties enter into an agreement for the letting of the lands, which is legal to a certain extent, to which extent they mean that the agreement should be executed by an actual lease; and stipulate that something further, not *malum in se*, but which is merely prohibited, should rest in understanding, the Court will decree the performance of the agreement as far as it is capable of legal execution. *Id.*

2. Where an agreement for the compromise of a suit for a divorce, provided that the wife should have the custody of two of the children, and should educate them in a particular manner, the first part of such provision being contrary to public policy, and the latter incapable of being enforced against the wife, a demurrer to a bill filed by her for specific performance was allowed. *Vanstart v. Vanstart*, 4 Kay & J. 63; 4 Jur., N. S., 276; 27 L. J., Ch., 222. Affirmed 2 De G. & J. 249; 4 Jur., N. S., 519.

3. The Court refused specific performance of an agreement which contained stipulations which could not be carried out, and it appearing that the parties had something in view which they had not expressed. *Williamson v. Wootan*, 3 Drew. 210.

4. A husband, upon a treaty for separation from his wife, agreed with a trustee to pay his wife an annuity for her separate use, and also, during their separation, to permit their daughter, an infant, but now of age, to reside with, and be under the control of, and educated

and supported by, her mother; in consideration whereof the wife (who was entitled under her marriage settlement to property, settled to her separate use without power of anticipation) agreed with the trustee to indemnify her husband in respect of any debt on her own account or on account of their daughter. The trustee declining to enforce payment of arrears of the annuity, or to act any longer as trustee:—Held, first, that this was a voluntary agreement on the part of the husband, no consideration moving from the trustee by way of indemnity or otherwise, and the wife having no power to contract so as to bind property as to which, though settled to her separate use, she was restrained from anticipation. *Walrond v. Walrond*, 1 Johns. 18; 4 Jur., N. S., 1099; 28 L. J., Ch., 97.

Held, secondly, that the agreement being voluntary on the part of the husband, the Court could not decree specific performance of it by him, or order him to account in respect of arrears; nor could it appoint a new trustee in the only mode in which a trustee could be effectually appointed, viz., by ordering the husband to enter into a new covenant with a new trustee. *Id.*

5. In a marriage settlement, which comprised only the property of the wife, it was agreed between the intended husband and wife, and each of them covenanted with the trustees, that any property to which the wife might become entitled during the coverture should be conveyed to such uses as she should by deed or will appoint, and in default of appointment to the use of herself for life; remainder to the use of the husband for his life; remainder to the use of the wife's children, and, in default of such children to the use of A. B., her niece, and her heirs. After the death of the wife without children, and without having exercised her power of appointment, the husband filed a bill against her heir-at-law, praying that a real estate to which she had become entitled during her lifetime might be conveyed to the uses of the settlement. On the question, whether the decree for specific performance should be confined to the life estate of the husband, or should extend to the limitation to the niece, who was also dead:—Held, that it should extend to the latter, on the ground that the right of the husband to a specific performance of part of the covenant drew with it the right to a specific performance of the whole, at least as against the heir of the settlor, whatever it might have done as against a purchaser for value. *Davenport v. Bishop*, 1 Ph. 698. Affirming 2 Y. & Coll. C. C. 451; 12 L. J., N. S., Ch., 492; 7 Jur. 1077.

6. Parts of an agreement can be separately enforced if an intention to separate the parts appears in the agreement. *Odessa Tramways Co. v. Mendel*, 47 L. J., Ch., 505; 8 L. R., Ch. D., 236; 26 W. R. 887; 38 L. T., N. S., 731. Affirming 37 L. T., N. S., 275.

The fact that an agreement is carried out by two instruments affords a presumption that the contracts in the two instruments are separable. *Id.*

A company was, by its articles of association, prohibited from issuing shares below par without the sanction of a general meeting. M. agreed to subscribe for 2,000 shares in the

company, which should be taken up and paid for in full by him, in such numbers and at such times as should be required for the purposes of the company. On the same day on which he entered into this agreement, the board of directors agreed to pay him 4,000*l.* in consideration of the services rendered by him in connection with the company. The company failed. On an action brought by the company against M. for specific performance of his agreement:—Held, that, as M. had acted in collusion with the directors to defraud the company, he could not be heard to set up this fraud for the purpose of invalidating the agreement to take the shares; that as the parties had contemplated a piecemeal performance of the agreement, the Court could decree specific performance of a part of it; and that in the absence of *mala fides* the resolution of the directors to call up the shares was conclusive evidence that the money was required for the purposes of the company. *Id.*

1. By the contract for the sale of an estate it was agreed that the price should be 24,000*l.*, and that certain furniture and other articles on the estate, the value of which was about 2,000*l.*, should be valued by valuers mutually agreed upon, and that the purchaser would take a part of the furniture and articles at that valuation. The vendor refused to appoint a valuer, and refused to complete. A decree made at the suit of the purchaser for specific performance of the contract, except so far as it related to the furniture and articles. *Richardson v. Smith*, 5 L. R., Ch., 648

Where Title Defective as to Part of Property or on Sale in Lots.] See VENDOR AND PURCHASER, XI. v.—XXIV. VI.
[*Sales at a Valuation.*] See VENDOR AND PURCHASER, V.

See also VIII. *post*.

VIII. Contracts with a Parol Variation.

2. A suit for specific performance of an agreement with a variation, cannot be supported. *Nurse v. Seymour (Lord)*, 13 Beav. 254.

3. Though a defendant, resisting specific performance, may go into evidence to show that by fraud the true terms were not expressed in the written agreement, yet plaintiff cannot do so for the purpose of obtaining specific performance, with a variation of the contract. *Wooliam v. Hearn*, 7 Ves. 211.

4. Parol evidence of declarations of auctioneers at sale, warranting quantity, received as defence to bill for specific performance on ground of fraud, though not for purpose of enforcing of specific performance. *Winch v. Winchester*, 1 Ves. & B. 375.

5. Bill for specific performance of an agreement dismissed: the agreement appearing from letters produced to have been different from that set up by the bill, and proved by one witness. *Legh v. Haverfield*, 5 Ves. 452.

6. Though a parol waiver of a written contract, amounting to a complete abandonment and clearly proved, would bar a specific performance, or even parol variations so acted upon that the original agreement could no longer be enforced without injury to one party: variations verbally agreed upon are not sufficient to prevent the execution of a written agreement; the situation of the parties, in all other respects, remaining the same. In this case the variations were all for the advantage of the defendant, by gratuitous covenants of the plaintiff. *Price v. Dyer*, 17 Ves. 366.

7. Parol evidence in aid of a specific performance upon the sale of the estate by auction; to explain, by declarations of the auctioneer, an ambiguity on the face of the particular, by a general claim for a separate valuation of the timber, and also special provisions as to the timber upon certain lots, the agreement, signed on the back of the particular, binding the purchaser, defendant, "to a strict fulfilment of this article, and to abide by the condition and declarations made at the sale," rejected: distinction, where evidence is to resist a specific performance. *Higginson v. Clowes*, 15 Ves. 516.

Though a paper, as the particular upon a sale by auction, may by reference be engrafted into a contract within the Statute of Frauds, that will not authorise the introduction of parol evidence to show what part was read. *Id.* 522.

8. Distinction between admission of parol evidence to support or resist specific performance of contract for land; admissible for latter purposes on mistake and surprise, as well as fraud, but not to vary, add to, or explain the written contract. *Clowes v. Higginson*, 1 Ves. & B. 524.

9. Where a parol agreement varying the terms of the written agreement is set up by the defendants in a suit for specific performance, and supported by evidence affording a presumption or suspicion of its existence, an inquiry will be directed. *Van v. Corps*, 3 Myl. & K. 269; 6 L. J., N. S., Ch., 208; 1 Jur. 101, 149.

10. Parol evidence admissible on the part of a defendant resisting the specific performance of an agreement to prove fraud, mistake, or omission in the article, and also to show the situation of the parties as connected with it. *Flood v. Finlay*, 2 Ball & B. 15.

11. Parol evidence admissible in opposition to specific performance of written agreement upon heads of mistake or surprise, as well as of fraud, and upon such evidence the bill was dismissed. Another bill for specific performance of agreement corrected according to same evidence, contradicted by answer, was also dismissed. *Townsend (Marquis) v. Stangroom*, 6 Ves. 328.

12. Specific performance of a written agreement refused, on parol evidence that one term of the actual agreement was omitted. *Garrard v. Grinling*, 2 Swan. 244; 1 Wils. 480.

13. *Quere*, whether a defendant, resisting the specific performance of an agreement, on the ground of alleged surprise and fraud, will be allowed to give parol evidence of a term of the contract, said to have been made at the same time with, but contradictory to, those

terms of it which were reduced into writing, and signed by him. *Bunning v. Bunning*, 1 L. J., Ch., 56.

1. Construction of a contract; that a reference of the expenses was confined to expense of the conveyance; but the evidence of the attorney was admitted for the defendant to prove the intention of both parties, according to verbal instructions that the plaintiff, the purchaser, should also pay the expense of making out the defendant's title. *Rumsbottom v. Gosden*, 1 Ves. & B. 165.

2. By a written agreement between the plaintiff and the defendant, the plaintiff agreed to sell, and the defendant agreed to purchase, upon the terms stated, a certain property called the Leigh estate; and by the same agreement, the defendant agreed to sell, and the plaintiff agreed to purchase, another estate, called the Haresfield estate, and it was not expressed that the two contracts were to be dependent on each other. The defendant was unable eventually to make a good title to the Haresfield estate:—Held, that the plaintiff was entitled to a specific performance of the contract as to the Leigh estate. Evidence *aliunde* was not admitted, to show that it was the real intention of the parties that the agreement should take effect on the basis of a mutual exchange. *Croome v. Lediard*, 2 Myl. & K. 251; 3 L. J., N. S., Ch., 98.

3. No relief under an agreement stated by the answer, the bill not being adapted to that agreement, but framed upon a different ground, which failed. *Pilling v. Armitage*, 12 Ves. 78.

4. *Seemle*, in a suit for specific performance of a written agreement a parol variation in the terms of the contract, being not such a one as would defeat the right to specific performance, not set up by answer, but coming out on cross-examination of one of plaintiff's witnesses, who was defendant's agent, is a proper subject of inquiry; but the plaintiff accepting the variation, specific performance was decreed with costs. What variations are consistent with this right to specific performance of original contract. *London & Birmingham Railway Co. v. Winter*, Cr. & Ph. 57.

5. A bill for a specific performance insisted on the literal construction of a written agreement, which was proved to be contrary to the real intention of the parties; and the bill contained a false statement as to a fact which would have been inconsistent with the plaintiff's representation of the case. The bill was dismissed on the parol evidence, although the plaintiff, at the hearing, offered to perform the true agreement, and the Court refused to dismiss the bill without prejudice. *Molloy v. Egan*, 7 Ir. Eq. R. 590.

6. Specific performance of an agreement refused, the same not having been accepted by the plaintiff in due time, nor any acceptance by him ever notified to the defendant, and the plaintiff having, after the defendant had signed the agreement, attempted to vary the terms of it, though he ultimately acquiesced in the defendant's terms. *Thornbury v. Bevil*, 1 Y. & Coll. C. C. 554; 6 Jur. 407.

7. Defendant held to the offer in his answer, though the circumstances of the case were varied from what they were at the time of

answer put in. *Holford v. Burnell*, 1 Vern. 448.

8. Bill for performance of written agreement, parol evidence read of different agreement, dismissed with costs; and plaintiff cannot resort to agreement set up by defendant; parol evidence allowed where a hard agreement, or in part executed. *Legal v. Miller*, 2 Ves. 299.

9. W. D., by indenture, agreed to guarantee a certain composition to all the creditors of J. D. who should before a fixed day execute a release of their debts: the plaintiff, who was a creditor of J. D., did not execute by the time named, but insisted that this delay had taken place in consequence of an arrangement entered into between him and the agent of W. D., the effect of which was to bind the plaintiff to accept the composition, but to allow him to postpone his execution of the release:—Held, dismissing a bill filed by the plaintiff against W. D., for specific performance of the agreement to pay the composition, that there was no evidence that the agent of W. D. had authority to enter into any new agreement; that, if such authority had been proved, the agreement being within the fourth section of the Statute of Frauds, any alteration in its terms must have been evidenced by writing; that, the condition in the original agreement not having been performed by the plaintiff, the agreement never took effect, so far as he was concerned; and that, in the absence of fraud, no parol agreement could be substituted. *Emmet v. Dewhurst*, 3 Macn. & G. 587; 21 L. J., N. S., Ch., 497; 15 Jur. 1115.

10. Court of equity has no power to alter the contracts of parties from an eventual change not contemplated at the time. *Revell v. Hussey*, 2 Ball & B. 288.

11. Performance cannot be decreed of an agreement with a variation made in it by the Court. *Jordan v. Sawkins*, 4 Bro. C. C. 477.

12. Where a party has failed to prove the terms of the agreement he relies on, equity will not assist him by directing an issue to ascertain the terms. If he be plaintiff, it is incumbent on him to state in his bill the agreement, of which he calls on the Court to decree the performance, and to prove the agreement as stated. *Savage v. Carroll*, 2 Ball & B. 451.

13. Original bill prayed execution of an agreement; defendant denied the agreement as in bill, but admitted a different agreement; plaintiff amended his bill, continuing to insist on the original agreement, but praying in the alternative, if not entitled to that, to have execution of the admitted agreement. Bill dismissed without prejudice to a bill for performance of the admitted agreement. *Lindsay v. Lynch*, 2 Sch. & Lef. 1.

If there be uncertainty as to the terms of an agreement, it cannot be carried into execution even though reduced to writing. *Id.* 7.

14. Upon a bill praying the performance of an agreement duly signed, but offering to the defendant the benefit of certain variations contained in an unsigned memorandum of a subsequent date, the Court will decree a specific performance of the agreement with

those variations, if the defendant elects to take advantage of them; and if the defendant does not so elect, it will decree specific performance of the original agreement. *Robinson v. Page*, 3 Russ. 114.

1. *Quere*, can a court of equity decree the performance of a written agreement, where the bill states that the written agreement was subsequently varied by parol, and prays, in the alternative, either that the agreement, with these variations, may be executed, or that it may be executed as it stands in writing. *Wright v. Howard*, 1 L. J., Ch., 94.

2. Where the plaintiff, in a suit for a specific performance, had assigned over a lease to the defendant (the latter being a surety for the rent), in consideration of a parol agreement for an annuity, which was denied in the answer, but such agreement or consideration was not expressed in the assignment:—Held, not an objection to a decree for specific performance, not being in contradiction to the instrument, nor that it was proved larger than that stated. *Clifford v. Turrell*, 1 Y. & Coll. C. C. 138; 14 L. J., N. S., Ch., 390.

3. Where an agreement is entered into for the sale of an estate, and the parties differ as to the quantity agreed to be sold, and the vendor files a bill for specific performance of the agreement as to part, and the vendee offers to complete the contract as to that part; but the vendor adds, as a condition, that the vendee shall pay the costs of the bill:—the Court will refuse a decree for specific performance. *Spence v. Mawson*, 9 L. J., Ch., 10.

4. Where the original agreement has been subsequently varied, unless there be certainty as to those variations as affecting the original agreement, so that both together should form one consistent agreement, the Court will not grant an injunction prayed for in a bill for specific performance. *Paris Chocolate Co. v. Crystal Palace Co.*, 3 Sm. & G. 119; 1 Jur., N. S., 720; 3 W. R. 267.

5. A parol addition to an agreement must be established without doubt or ambiguity, before equity will assist in carrying the additional provision into effect. *Vouillon v. States*, 2 Jur., N. S., 845; 25 L. J., Ch., 875.

A written agreement was entered into for the sale of the goodwill of a business, the purchaser to pay for the trade fixtures, 1,500*l.*, and to pay for the goodwill of the business, including the services of the vendor, "as agreed on," 200*l.* per annum for eight years. The agreement was to be carried out by a bond, in which the purchaser was to bind himself to the vendor to pay the above sum annually, and the vendor was to engage to introduce the purchaser to all the customers, and to use his utmost endeavours to procure their business for the purchaser. The purchaser paid the 1,500*l.*, and entered into possession. The vendor held the appointment of milliner to the Queen, and, as alleged by the purchaser, it was verbally agreed that the 200*l.* per annum was not to be paid unless the vendor procured the transfer of the appointment to the purchaser. The vendor was unable to do so, and the purchaser refused to pay the 200*l.* per annum, or to execute the bond. Upon bill filed by the vendor for specific performance of the contract:—Held,

that the parol agreement (if proved) was not referred to in the written agreement, and did not form part of it; and that the vendor was entitled to have the agreement as it stood specifically performed, especially as the parties could not be restored to their original position *Id.*

6. Where persons sign a written agreement and there has been no fraud or mistake, the written agreement binds at law and in equity according to its terms, although verbally a provision was agreed to which has not been inserted in the document; subject to this, that the defendant in equity may call upon the Court to be neutral unless the plaintiff will consent to the omitted term. *Martin v. Pyecraft*, 2 De G. M. & G. 785; 16 Jur. 1125; 22 L. J., Ch., 94.

Where, therefore, the defendants agreed in writing to grant a plaintiff a lease at a specified rent and for a specified term, subject to the same covenants, clauses, and agreements as were contained in an expiring lease under which he then held the property, and the plaintiff filed a claim for specific performance, stating the above agreement, and that it was further agreed that he should pay a premium of 200*l.*, which by his claim he offered to do:—Held, reversing the Vice-Chancellor's decision, that this additional term did not render the Statute of Frauds a valid defence to the claim. *Id.*

Other defences having been set up as to the agreement having been duly obtained, on which no decision had been given below, but which failed on appeal:—Held, that although the decree was one of reversal, the defendants must pay the costs of a *videlicet* examination, rendered necessary by these defences before the Appeal Court, the examination taking the place of an issue. *Id.*

Where intended lessors, in executing an agreement for a lease, acted partly upon a representation by the lessee as to what had taken place between their own solicitor and him in its preparation, and their intention was immediately afterwards directed to the point whether this representation was correct; but they took no step to question it for three years afterwards:—Held, that the delay was strongly confirmatory of the fairness of the transaction. *Id.*

7. A purchaser and his assignees sued for specific performance of a contract to sell land. The vendor pleaded fraud, and that the contract, if any, reserved mines. The plaintiff's subsequent pleadings affirmed there was no reservation in the contract. The contract signed by the purchaser contained a reservation; the receipt for deposit signed by the vendor stated the other terms, and was silent as to the reservation. Specific performance of the agreement with such reservation was decreed. *Smith v. Wheatcroft*, 47 L. J., Ch., 745; 9 L. R., Ch. D., 223; 39 L. T., N. S., 103; 27 W. R. 42.

See also LANDLORD AND TENANT, I. II.

Admissibility of Parol Evidence to Control Written Contracts in General. See PRACTICE (EVIDENCE).

IX. Parol Promises and Understandings.

- *Parol and Secret Trusts affecting Wills and Devises prevented by Promises made to the Testator.* See WILL.
- *Promises and Representations on Marriage.* See SETTLEMENT, II.

See also GIFT—TRUSTS, II. V.

1. Under some circumstances, a mere parol agreement is binding, and will be carried into specific execution by a court of equity. *Herbert (Lady) v. Powis (Earl)*, 1 Bro. P. C. 355.

2. If a legatee promises a testator, that in consideration of a disposition in her favour, she will do an act in favour of a third person, she who undertook to do the act must perform it. *Drakeford v. Wilks*, 3 Atk. 539.

3. Six documents were found amongst the papers of a testator written by his sister, and expressing a wish that he should benefit certain members of the family:—Held, that there was not sufficient evidence of a promise by the testator to enable the Court to enforce specific performance of the sister's wish as against the testator's estate. *Chester v. Urwick*, 23 Beav. 407.

4. A voluntary contract in favour of a mother and her children:—Held, to be executory only as related to the children, and executed as to the mother, and therefore enforced for the benefit of the mother absolutely. *Burrows v. Greenwood*, 4 Y. & Coll. 251.

5. An old gentleman who had several children and grandchildren, had made and executed two wills, and disputes having arisen in the family about them, some of the oldest members of it entered into an agreement amongst themselves for a division of his real and personal estate. This was to be taken the next day to the testator for his approbation, and he was to be desired to cancel both wills. In the course of the night the testator died. The personal property was divided according to the agreement, and a deed of covenant was executed with respect to the appropriation of the real estate; which deed, the party, whose rights under the last will would be much diminished by it, understood to be a deed for carrying the first agreement into execution; but, in fact, the two instruments differed in many particulars:—Held, that the first agreement was only a recommendation to the testator, and could not be carried into effect in equity:—Held, that the second agreement or deed differing from the first agreement, whilst it was understood to contain corresponding provisions, could not be carried into effect. No costs given, the defendant having secluded the testator from the other members of the family. *Beastall v. Swain*, Taml. 288.

6. Distinction between a mere voluntary promise, *nudum pactum*, that will not maintain an action; and a promise upon the faith of which another does some act, as entering into engagements, or paying money; forming a consideration that will support an action, and, therefore, establish a debt against assets. *Crossie v. McDonal*, 13 Ves. 148.

7. Court, in general, will not decree performance of voluntary agreements. *Wycherley v. Wycherley*, 2 Eden 177; *Brownsmith v. Gibbourn*, 2 Stra. 738.

8. In general, a court of equity will not interpose in voluntary agreements made without fraud. *Morris v. Burroughs*, 1 Atk. 401.

9. The plaintiff removed his place of business to a house belonging to the defendant, his father-in-law, upon the faith, as he alleged, of a parol promise by the defendant, that he should occupy the house rent-free during his life. During the period of his occupation he spent various moneys in repairs, which were chiefly of the ordinary description, except the putting up a new staircase, and a new roof to an outhouse. The defendant brought an ejectment, and the plaintiff filed a bill for relief:—Held, that the change of the plaintiff's place of business did not constitute a sufficient consideration to support the parol agreement. *Millard v. Harvey*, 10 Jur., N. S., 1167; 13 W. R. 125.

Held, also, that he was not entitled to any lien in respect of the moneys spent in repairs. *Id.*

The plaintiff's wife, without his knowledge, asked the defendant to sell a field belonging to him. She paid the defendant 150*l.*, but he refused to sell the field, and nothing further was then done. A short time afterwards the defendant let the plaintiff into possession, and the plaintiff, without knowing of the transaction between the defendant and his wife, continued in possession for ten years, without paying any rent. During this time no interest upon the 150*l.* was paid by the defendant:—Held, that there was sufficient evidence of a contract, and a decree was made for specific performance. *Id.*

10. One promised his brother's children that, if they would execute a deed, he would bequeath to them "at least as much as they would get under their father's will":—Held, that such promise, though verbal, constituted a binding obligation, and ought to be specifically performed. *Ridley v. Ridley*, 11 Jur., N. S., 475; 34 L. J., Ch., 462; 12 L. T., N. S., 481; 6 N. R. 11.

11. Though a parol agreement to give a bond might have been specifically enforced against an ancestor, yet, where terms of bond were not specified, court of equity will not enforce it against the heir. *Brizeck v. Manners*, 9 Mod. 284.

12. An unattested paper signed by A. and by him handed to B. stated that as a mark of his esteem and great friendship he agreed to allow B. 500*l.* a year, and that after his (A.'s) death he had in lieu thereof bequeathed to him 10,000*l.* B. took this document to C., who thereupon consented to the marriage of her daughter with B., such consent having hitherto been withheld on the ground of B.'s want of means. The marriage took place, but no settlement was made by B. on his wife. A. died about six months after signing the paper, having paid B. the first quarter of the allowance of 500*l.* a year. His will contained no provision whatever in favour of B.:—Held, that assuming the consent of C. to her daughter's marriage with B. to have been given on the faith of the engagement contained in the

paper, there was no such connection between A.'s promise or representation, and the consent given by C., as to sustain a claim against A.'s estate. *Dashwood v. Jermyn*, 12 L. R., Ch. D., 776; 27 W. R. 868.

1. The plaintiff, who was a builder, agreed with the defendant, who was an owner of freehold land, to erect thirty-one houses on the land on the terms of such agreement, and also of a parol understanding communicated to the plaintiff on behalf of the defendant prior to the signing of the principal agreement. The chief stipulation of the parol understanding was the advance of moneys in definite instalments by or through the defendant to the plaintiff for the purposes of the buildings. The plaintiff afterwards took leases of the unfinished houses and executed two successive mortgages to enable defendant to raise money on them as a security for the same purposes. The defendant failed to supply the plaintiff with the required funds as stipulated under the parol agreement, which, however, had been successively departed from:—Held, in a bill praying specific performance of the parol understanding, together with damages, or at all events damages, that the plaintiff was entitled to neither, but that (the defendant submitting to it) the plaintiff might have the ordinary redemption decree. *Thorpe v. Hogford*, 20 W. R. 922.

2. Where a testator in advanced years and ill health induced his niece to reside with him as his housekeeper on the verbal representation that he would leave her property by his will, which he accordingly caused to be prepared and executed, but subsequently by a codicil revoked, the Court directed the trusts of the will to be performed. *Loffus v. Maw*, 3 Giff. 592; 32 L. J., Ch. 49; 8 Jur., N. S., 607; 10 W. R. 513; 6 L. T., N. S., 346.

A gift made by a revocable instrument in pursuance of a verbal representation, whereby the donee is influenced, and on the faith of which he confers a benefit on the donor, becomes irrevocable. *Ib.*

3. An intestate induced a woman to serve him as his housekeeper without wages for many years and to give up other prospects of establishment in life by a verbal promise to make a will leaving her a life estate in land, and afterwards signed a will, not duly attested, by which he left her the life estate:—Held, that there was no contract, and that even if there had been, and although the woman had wholly performed her part by serving till the intestate's death without wages, yet her service was not unequivocally and in its own nature referable to any contract, and was not such a part performance as to take the case out of the operation of the Statute of Frauds, s. 4; and that she could not maintain an action against the heir for a declaration that she was entitled to a life estate in the land. *Loffus v. Maw* (3 Giff. 592) disapproved. *Maddison v. Alderson*, 8 L. R., App. Cas., 467; 52 L. J., Q. B., 737; 49 L. T. 303; 31 W. R. 820. Affirming *S. C.*, *sub nom. Alderson v. Maddison*, 7 L. R., Q. B. D., 174; 50 L. J., Q. B., 466; 45 L. T. 334; 29 W. R. 556.

X. Of Particular Contracts.

- I. *Agreements to Refer*, 6549.
- II. *Awards*, 6550.
- III. *Bonds*, 6551.
- IV. *Buildings and Works*, 6551.
- V. *Chattels. Sale of, and Other Transactions respecting*, 6554.
- VI. *Debts, Sale of, and Money Demands*, 6555.
- VII. *Indemnity. Contracts for*, 6556.
- VIII. *Loans*, 6557.
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- X. *Shares*, 6560.
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- XII. *Other Contracts*, 6563.
- XIII. *Contracts for Sale of Land. See VENDOR AND PURCHASER.*
- XIV. *Contracts to Purchase under Lands Clauses Act, and Notices to Treat. See LANDS CLAUSES ACT, X. II.—IV.*
- XV. *Contracts to Grant Leases. See LANDLORD AND TENANT, I.*
- XVI. *Covenants for Renewal of Leases. See LANDLORD AND TENANT, VIII. IV.*
- XVII. *Covenants in Leases. See LANDLORD AND TENANT, XII. XI.*
- XVIII. *Contract for Sale of Leases. See VENDOR AND PURCHASER.*
- XIX. *Leases of Mines and Minerals. See MINES AND MINERALS, III. 2.*
- XX. *Contracts to Grant Annuities. See ANNUITY, III.*
- XXI. *Contracts relating to Reversions and Expectancies. See HEIRS EXPECTANTS AND REVERSIONERS.*
- XXII. *Contracts between Partners. See PARTNERSHIP, II. III.*
- XXIII. *Contracts for Sale of Ships. See SHIPPING.*
- XXIV. *Contracts for Separation. See HUSBAND AND WIFE, III. IX.*
- XXV. *Contracts for Compromise. See COMPROMISE.*
- XXVI. *Contracts for Withdrawal of Opposition to Bills in Parliament. See PARLIAMENT, III. I.*
- XXVII. *Contracts and Promises in respect of Marriage, and Covenant for Settlements or Marriage Articles. See MARRIAGE—SETTLEMENT.—TRUSTS, V.*
- XXVIII. *Contracts respecting Railway Accommodation Works and Traffic Arrangements. See RAILWAY.*
- XXIX. *Contracts by Promoters of Companies. See COMPANY, I. II. I.*
- XXX. *Contracts by Corporations. See CORPORATION, VI.—LANDS CLAUSES ACT.*
- XXXI. *Contracts with a Penalty or Liquidated Damages. See PENALTY.*

I. AGREEMENTS TO REFER.

4. Bill for specific performance of agreement to refer to arbitration, will not lie. *Street v. Rigby*, 6 Ves. 818.

5. No specific performance of an agreement to refer to arbitration. Under particular circumstances, as in the case of the Opera House, or a brewery, where there were many partners, the parties were left to the remedy they had

chalked out for themselves, the Court refusing all interposition; not acting through the agency of the arbitrators, appointing them to take the accounts, and adopting their decision as the decree. *Gowlay v. Somerset*, 19 Ves. 431.

The price is of the essence of a contract of sale; if therefore to be fixed by arbitrators, and they do not fix it, there is no contract, but the Court determining that an agreement ought to be executed, does not require foreign aid to carry the details into execution. *Ib.*

1. Specific performance of agreement to refer to arbitration, or to substitute Master for arbitrators, refused. *Agar v. Macklow*, 2 Sim. & S. 418; 4 L. J., Ch., 16.

2. Although a court of equity will not in general decree the specific performance of an agreement to refer to arbitration, or, on the death of an arbitrator, substitute the Master for the arbitrator, yet, where matters of account have been referred to arbitration, which fails by the death of the arbitrator, a party who refuses to supply the defect, by naming a new arbitrator, will receive no relief from a court of equity, except upon the terms of his doing equity; and those terms may consist in his consenting to the accounts being taken by the Master. *Chestyn v. Dalby*, 2 Y. & Coll. 170.

3. Where a bill prayed the specific performance of a contract, one of the terms of which was to the effect, that if any damage should result to the defendant from certain works, the erection of which had been agreed upon between the parties, the plaintiff would give to the defendant an equivalent in land, the amount of the damage, and the quantity of the compensatory land to be ascertained by certain arbitrators:—Held, that the Court had not jurisdiction to grant such relief, and that the execution of a deed containing covenants for the performance of that part of the contract which lay *in fieri* would not be a specific performance. *Gervais v. Edwards*, 2 Dr. & War. 80; 1 Con. & L. 242; 4 Ir. Eq. R. 555.

4. Effect of an agreement for a reference to arbitration of a dispute between a vendor and purchaser as to certain terms, or alleged terms, of the contract, and of an award thereupon, in a suit subsequently instituted for the specific performance of the contract. *Clay v. Rufford*, 8 Hare 290; 14 Jur. 803; 19 L. J., Ch., 295.

5. A contract for the sale of land provided that A. and B., or their nominees, should have power to decide any question as to certain houses to be built thereon. There having been no decision, specific performance was refused. *Tillett v. Charing Cross Bridge Co.*, 26 Beav. 419.

[Of Sales at a Valuation] See VENDOR AND PURCHASER, V.

[In Articles of Partnership.] See PARTNERSHIP, XIII.

II. AWARDS.

6. Award ordered to be performed. *Reignolds v. Latham*, Cary 106.

7. Performance of award enforced by subpoena. *Baker v. Baker*, Cary 57.

8. An award, though extra-judicial, and not binding in strictness of law, yet decreed to be performed in specie. *Norton v. Mascoll*, 2 Vern. 24.

9. Although an award of part of matters

referred may be good, equity will not enforce it, unless of all matters referred. *Hide v. Pettit*, 1 Ch. Ca. 185.

10. Suit to have award by assent decreed; both parties must have notice. *Wakefield v. Hanson*, Cary 64.

11. Bond put in suit for performance of an award, stayed by injunction. *Knight v. Hartwell*, Cary 104.

12. Award not legally binding, is sometimes, in cases of part performance, enforced in equity, but not without such part performance. *Bishop v. Webster*, 1 Eq. Abr. 51.

13. Bill will not lie to carry an award into execution where the parties to the submission do not acquiesce in it, nor agree afterwards to have it executed; but it must be enforced at law. *Thompson v. Noel*, 1 Atk. 62.

14. A bill lies to compel specific performance of an award, where the party submitting has received the money in consideration whereof he is to convey the estate sued for. *Hall v. Hardy*, 3 P. W. 187.

Where husband, for a valuable consideration, covenants that his wife shall join with him in a fine, the Court will enforce performance of such covenant. *Sed quare*, *Id.* 189.

Quare, if it should appear that the wife will not join in the fine. *Ib.* (n.). And see Fonbl. on Equity, tit. "Baron and Feme."

Difference between award to pay money, and to do anything collateral, and why a bill may be proper only to compel specific performance of the latter. *Id.* 190.

15. If the terms of an agreement are to be ascertained by an award, being so ascertained, it shall be specifically performed, if anything is to be done in specie, as conveyances, etc.; not if the acts done towards executing it by an award are not valid at law as to the time, manner, or other circumstances, unless there has been acquiescence, notwithstanding the variation of circumstances or part-performance. *Blundell v. Brettarch*, 17 Ves. 241.

16. The specific performance of an award may be compelled in equity, on the principle that the award only ascertains the terms of a previous agreement between the parties; and although the illegality of the acts of which it directs the execution will afford a ground for refusing to decree the performance, the Court considering an award as the decision of judges chosen by the parties, will not examine whether it is unreasonable. *Wood v. Griffith*, 1 Swan. 43; 1 Wills. 34.

17. Where arbitrators are deceived or where they act clandestinely without hearing each party, a Court of Justice will interfere and avoid the award. *Ives v. Metcalfe*, 1 Atk. 64.

18. The jurisdiction to give effect to an award confirmed by a decree of the Court in the case of a charity is doubtful, but the renewal of a lease upon the terms of the award, having been twice directed by the Court, was again enforced. *Att.-Gen. v. Clements*, T. & R. 58.

19. In the course of the proceedings before an arbitrator the parties agree by parol that arbitrator shall determine as to a lease to be granted; such an agreement is within the Statute of Frauds, and the award, having directed a lease to be made, cannot be enforced. *Walters v. Morgan*, 2 Cox 369.

20. Award of arbitrators enforced in equity, although the submission to arbitration was to

be made a rule of a court of common law. *Hackworth v. Brammall*, 5 Myl. & C. 281.

1. Upon a reference by order of this Court, the award may be enforced before it has been made a rule of court. *Wood v. Taunton*, 11 Beav. 449; 18 L. J., N. S., Ch., 207; 18 Jur. 954.

2. The ground on which the Court of Chancery interferes to decree specific performance of an award not made, a rule of that Court is, that the award is an agreement between the parties to the submission, and that most, if not all, of the principles regulating specific performance are applicable. If, therefore, the arbitrator exceeds his authority, or does not decide all the matters submitted to him, or decides something which cannot be carried out consistently with the intention of the parties as shown by the terms of the submission, specific performance of the award cannot be decreed, as the award, to that extent, does not embody an agreement between the parties. *Nichols v. Hancock*, 1 Jur., N. S., 1149; 7 De G. M. & G. 300.

Scumble, the Court cannot in such a case separate that part of the award which cannot be enforced, and decree specific performance of the rest. *Id.*

3. The Court of Chancery has jurisdiction to entertain a suit for specific performance of an award, although the submission has been made a rule of a court of law. An award directed the execution of a lease to the plaintiff of certain portions of a railway running over the defendant's land, and provided that the lessor might from time to time require the lessee to supply engine-power during such time as he should keep an engine or engines for use. Twelve months after the date of the award the plaintiff filed a bill for specific performance, and specific performance was decreed of so much of the award as related to the execution of the lease; and, by the same decree, after declaring that the defendant was entitled during the continuance of the lease, and during such time as the lessee should keep an engine or engines for use, but not otherwise, to require the lessee to supply engine-power, awarded an injunction to restrain the plaintiff from interfering with the defendant in the enjoyment of his rights and privileges. But upon appeal this decree was reversed, on the ground that the relief was not mutual, inasmuch as specific performance could not be granted of the portion of the award which required the plaintiff to supply engine-power. *Blackett v. Bates*, 1 L. R., Ch., 117; 35 L. J., Ch., 324; 12 Jur. N. S., 151; 13 L. T., N. S., 656; 14 W. R. 319. Reversing 2 Hem. & M. 610; 11 Jur., N. S., 500; 34 L. J., Ch., 515; 13 W. R. 736; 12 L. T., N. S., 884. And see 12 Jur., N. S., 874, n. 3.

The award was made in June 1863, a bill for specific performance was filed in July 1864; the interval was filled up by legal proceedings, which the plaintiff could not accelerate, whereby he sought to set aside the award. *Scumble*, such circumstances alone disentitled the plaintiff to specific performance. *Id.*

4. An award which leaves some of the questions undecided, or leaves in doubt whether some of the questions have been decided, cannot be enforced. *Wakefield v. Llanelli Railway and Dock Co.*, 11 Jur., N. S., 456; 13 W. R. 823; 12 L. T., N. S., 509.

5. Uncertainty in award or valuation is ground for refusing specific performance. *Hopcraft v. Hickman*, 2 Sim. & S. 130; 3 L. J., Ch., 43.

III. BONDS.

6. A bond, conditioned to convey lands for money received, is considered in equity as articles, and the condition shall be performed in specie. The obligee having been in possession twenty years, need not prove the money paid. *Anon.*, Mos. 37.

7. Under a marriage settlement tenant for life, with remainder to his first and other sons by his wife F., in tail, with remainder to himself in fee, had power to grant leases for ninety-nine years in possession at the most improved rent under an indenture of lease to be executed with certain formalities. Twenty-eight years after the marriage, the wife still living, and there being no issue of the marriage, the husband gave a bond conditioned for the granting a lease for ninety-nine years, at a rent of 20*l.* per annum, upon the expiration of a subsisting lease. As soon as the subsisting lease determined, the obligee of the bond entered into possession, and for some years paid the rent of 20*l.*—Held, notwithstanding some evidence of inadequacy in the rent, that the representatives of the obligee were entitled to a decree for specific performance of the agreement contained in the bond. *Butler v. Powys*, 2 Colly. 156; 9 Jur. 959.

IV. BUILDINGS AND WORKS.

8. Plaintiff's father seized in fee of land, articles to pay J. 1,000*l.* to build a house on the premises, and dies before the house is built. The plaintiff, the heir, may compel the builder to build it, and his father's executor to pay for it. *Holt v. Holt*, 2 Vern. 322; 1 Ch. Ca. 190.

9. Specific performance of a contract to build a house. *Pembroke v. Thorpe*, 3 Swan. 437.

10. The plaintiff's house being so near the church that the ringing of the five o'clock bell in the morning disturbed her; the plaintiff came to an agreement in writing with the churchwardens and inhabitants at a vestry, that she should erect a cupola and a clock at the church, in consideration of which the bell was not to be rung in the morning. This agreement good and decreed to be binding in equity, and an injunction was granted. *Martin v. Nathan*, 2 P. W. 266.

11. Small deviations from a plan agreed upon for building, not material; otherwise if obstinate or corrupt. *Craven v. Tichell*, 1 Ves. J. 80.

12. Specific performance of an agreement to build may be decreed if sufficiently certain; but a general covenant to lay out a certain sum in a building of a certain value cannot be so executed. *Mosely v. Virgin*, 3 Ves. 134.

13. The Court refused to decree specific performance of a covenant to make good a gravel pit. *Flint v. Brandon*, 8 Ves. 159.

Principle of specific performance, that the legal remedy is inadequate or defective. *Id.*

14. The Court has jurisdiction to enforce the specific performance of a contract by a defendant to do defined work upon his property, in the performance of which the plaintiff has a material interest, and which is not capable of

adequate compensation in damages. *Storer v. Great Western Railway Co.*, 2 Y. & Coll. C. C. 48; 12 L. J., N. S., Ch., 65; 3 Rail. Ca. 106.

1. Proceedings taken by defendants towards the fulfilment of a contract for the erection of a certain building may enable the Court to decree a specific performance of the contract in a case where, without such proceedings, it might have been difficult to define what would be a sufficient performance. *Price v. Penanoe (Corporation)*, 4 Hare 509.

2. Specific performance decreed of an agreement, though an uncertain one. *Allen v. Harding*, 2 Eq. Abr. 17.

3. A bond for performance of covenants to build a bridge, and the sum agreed for actually paid, an injunction granted to restrain an action on the bond, and an issue *quantum damni-ficatus* ordered, the sum mentioned in the bond being penalty. *Errington v. Aynesley*, 3 Bro. C. C. 341; Dick 692.

4. Where a man in a building lease covenants to new build the brick messuages on the premises, rebuilding some and repairing others is not a sufficient performance of the covenant, for the lessee must rebuild the whole; neither is pulling down and rebuilding the fore and back fronts a rebuilding within the covenant; upon such a covenant the lessors are entitled to a specific performance. *Sed secus* of a covenant to repair. In this case, however, the Court, instead of decreeing a specific performance, left it to a jury to ascertain the damages sustained, and directed an issue accordingly. *London (City of) v. Nash*, 3 Atk. 512; 1 Ves. 12.

5. An order specifically to repair the banks of a canal, to stop gates, refused; but by injunction restraining defendant from impeding plaintiff from navigating, etc., by continuing to keep bank, etc., out of repair, etc.; the effect of such former order was given. *Lane v. New-digate*, 10 Ves. 192.

6. S. agreed to erect a house according to a plan to be approved by the lessors, and according to the regulations of the Metropolitan Building Act. A plan was sanctioned by the lessors, but the Metropolitan Board of Works objected to it on the ground that the house would project beyond the line of the adjoining houses:—Decree for specific performance of the agreement, subject to its being modified so as to make it conformable to the regulations of the Metropolitan Building Acts. *Cubitt v. Smith*, 10 Jur., N. S., 1123.

7. An agreement for a lease of premises containing a stipulation that the lessees should execute certain building works, and that the lessors should advance 1,000*l.* on mortgage to a limited company, was executed by the directors and secretary of the company as lessees. The money was advanced, and the lessor had in correspondence treated the company as liable to perform the stipulations of the agreement, and evidence was given that the directors and secretary were trustees of the benefit of the agreement for the company:—Held, nevertheless, that the directors and secretary who signed the agreement were personally liable, and decree made for specific performance of the agreement to take a lease, but specific performance of the building stipulations refused, and an inquiry as to damages granted in respect thereof. *Kay v. Johnson*, 2 Hem. & M. 118.

8. A plaintiff agreed to grant a lease to the defendant when and so soon as he, the defendant, should have built a new house on the land; and the defendant agreed to accept such lease when required, and, by a certain day, to pull down an old house standing on the land, and build a new one on the site:—Held, that the 21 & 22 Vict., c. 27, applied, and that the plaintiff was entitled to damages for the non-building of the house, and to specific performance of the contract to accept the lease. *Soames v. Edge*, 1 Johns. 669.

9. The defendant agreed with the plaintiffs by a certain day to pull down an old house and build a new one on the site, agreeably to plans to be submitted by the plaintiff's contractor, and under the inspection and to the satisfaction of their architect; and the plaintiffs agreed, when the new building should be completed, to grant a lease of the premises for a certain term at a fixed rent, the defendant agreeing to accept such lease when required. A demurrer to a bill praying specific performance and damages was overruled on the ground that the plaintiffs, waiving the specific performance of that part of the agreement which related to the building of the house, might be entitled to damages for the breach thereof, and to specific performance of the other part, viz., the contract to accept the lease. *London (Mayor of) v. Southgate*, 38 L. J., Ch., 141; 17 W. R. 197; 20 L. T., N. S., 107.

10. A bill in equity stated an agreement by A. to grant a lease of premises to the plaintiff, and to execute such repairs as they should jointly agree upon, to the intent that the premises should be fit for the habitation of the plaintiff and his family; and upon the performance of such stipulations, the plaintiff agreed to accept a lease; and that the plaintiff entered. A. sold the premises, subject to the agreement, and died. A bill was filed against the purchaser and A.'s representatives, and prayed specific performance against the purchaser, and damages against the representatives of A. Demurrer for want of equity, and multifariousness. Demurrer allowed on both grounds. *Norris v. Jackson*, 1 John. & H. 319; 7 Jur., N. S., 540.

11. Specific performance of an agreement to let the workings of quarries, and account of moneys due for working the quarries in a particular manner, refused; the party's remedy being at law. *Booth v. Pollard*, 4 Y. & Coll. 61.

12. A. agreed to grant a lease to B. as soon as B. should have built a house, with the necessary outbuildings, on the land, of the value of 1,400*l.* at the least, "according to a plan to be submitted to and approved by A." B. agreed to build and take the lease. No plan had been approved of:—Held, that no decree could be made for specific performance. *Brace v. Womert*, 25 Beav. 348.

13. A lessor agreed with the lessee to grant a lease of certain specified property if within a specified time the lessee erected certain specified buildings; the time having nearly expired and the buildings not having been begun:—Held, at the suit of the lessor, that the Court could not decree specific performance of this contract. *Asylum for Female Orphans v. Waterlone*, 16 W. R. 1102.

14. Agreement to grant a lease of copyhold

premises for twenty-one years, and to put the same in repair, there being no evidence that to grant such lease would work a forfeiture, or that the licence of the lord could not be obtained:—Decreed, to be specifically performed. *Paston v. Newton*, 2 Sm. & G. 437.

Though the Court will not ordinarily decree specific performance of an agreement to repair, it is the habit of the Court to decree specific performance of agreements involving the execution of leases or other instruments containing covenants to repair. *Ib.*

1. The Court will not decree specific performance of a building contract which provides that a party-wall shall be pulled down and rebuilt, after the adjoining owner has had the matter referred to arbitration under the Metropolitan Building Act, and an award has been made declaring that it is not necessary to take down such party-wall. *Seacell v. Webster*, 29 L. J., Ch., 71.

2. The plaintiff contracted to construct vaults and let them to the defendant, who was to use them for the purpose of keeping wine. The defendant entered upon the premises and occupied them, paying the stipulated rent, for more than two years, when he for the first time found fault with the condition of the premises, and shortly afterwards left them and repudiated the contract:—Held, that under the circumstances he was entitled to do so. *Dizon v. Lamare*, 19 W. R. 942.

3. The plaintiff, who was a builder, agreed with the defendant, who was an owner of freehold land, to erect thirty-one houses on the land on the terms of such agreement, and also of a parol understanding communicated to the plaintiff on behalf of the defendant prior to the signing of the principal agreement. The chief stipulation of the parol understanding was the advance of moneys in definite instalments by or through the defendant to the plaintiff for the purposes of the buildings. The plaintiff afterwards took leases of the unfinished houses and executed two successive mortgages to enable defendant to raise money on them as a security for the same purposes. The defendant failed to supply the plaintiff with the required funds as stipulated under the parol agreement, which, however, had been successively departed from:—Held, in a bill praying specific performance of the parol understanding, together with damages, or at all events damages, that the plaintiff was entitled to neither, but that (the defendant submitting to it) the plaintiff might have the ordinary redemption decree. *Thorpe v. Hogford*, 20 W. R. 922.

4. Though the Court will not, as a rule, specifically enforce contracts to build or repair, it will do so in cases where the contract for building is in its nature defined. *Hopburn v. Leather*, 50 L. T. 660.

5. A purchaser of a piece of land with a well or spring upon it covenanted with the vendor, who retained land adjoining intended to be disposed of for building sites, to erect a pump and reservoir, and to supply water from the well to all houses built on the vendor's land:—Held, first, that both the benefit and the burden of the covenant ran with the land, and that the case was not within the second resolution in *Spencer's case* (5 Rep. 16a; 1 Sm. L. C. 60), but if not, a sub-purchaser with

notice of the covenant was bound by it. *Cooke v. Chilcott*, 3 L. R., Ch. D., 694; 34 L. T. 207.

Held, secondly, that, though the covenant was not one of which the Court would decree specific performance directly, as being for the construction of works which the Court could not superintend, it could be enforced indirectly by an injunction restraining the defendant from allowing the work to remain unperformed. *Ib.*

6. The Court will not decree the specific performance of a preliminary building agreement, nor give damages for the breach of such an agreement. *Wood v. Silcock*, 50 L. T. 251; 32 W. R. 845.

7. In a suit for specific performance of an agreement, vague in its language, a court of equity, having regard to the terms of such agreement, will consider the surrounding circumstances, and conduct of the parties in dealing with the property comprised in it, in the interval between the making of the agreement and the commencement of the suit for its enforcement. *Oxford v. Prossand*, 2 L. R., P. C., 135; 5 Moo. P. C., N. S., 150.

P. & Co. entered into an agreement with O. & Co. for the transfer to them of the unexpired term of a lease held by P. & Co. of land and houses at Shanghai, and to build or finish certain houses thereon, to proceed with the building at once, to consult O. & Co.'s wishes in building the houses then in progress, and in building other houses not then commenced. O. & Co., on their part, agreed to take the term so to be transferred, and to pay a certain rent divided into three portions, the liability for each portion to begin from the time when the house to which that portion related was finished by P. & Co., and possession delivered over by them to O. & Co. Both parties further agreed that a proper contract should be drawn for their mutual execution by a solicitor named by them. No such contract, however, was executed. Possession was given, and the buildings altered by P. & Co. at O. & Co.'s instance:—Held, decreeing specific performance of such agreement, that the terms of the agreement expressed with sufficient clearness the intentions of the parties to bind them, from the time it was made, to do the several acts stipulated for each to perform, and that the stipulation that a proper contract should be made by a legal adviser was so isolated from the other stipulations in point of sequence, that it might be performed either directly after the signing of the memorandum of agreement or when possession was given of the first house specified, or at any subsequent time, either before or after the completion of all or any of the houses to be erected. *Ib.*

Held, also, that that part of the agreement which provided that the wishes of O. & Co. should be consulted in erecting the buildings was not so vague or indefinite as to render the contract impossible to be enforced, having regard to the surrounding circumstances, and to the fact of a part performance by O. & Co. in respect of the buildings and alterations of the houses. *Ib.*

See also MINES AND MINERALS, III AND IV.

Work and Labour Contracts.] See WORK AND LABOUR.

Railway Accommodation Works and Traffic Arrangements.] See RAILWAY.

V. CHATTELS. SALE OF, AND OTHER TRANSACTIONS RESPECTING.

1. The Court refused an injunction to restrain the defendants from acting in violation of an agreement to sell the exclusive right of printing and publishing certain maps, for which the defendants were to supply drawings, because the Court could not have compelled them in a suit for specific performance to fulfil that part of the agreement. *Baldwin v. Society for Diffusing Useful Knowledge*, 9 Sim. 393; 2 Jur. 161.

2. Specific performance of a contract for the sale of a barge, stores, etc., decreed in equity upon a claim. *Claringbould v. Curtis*, 21 L. J., N. S., Ch., 541.

3. Courts of equity will not lend their assistance to enforce the specific performance of ordinary contracts for the sale and purchase of chattels, unless there be something very special in the nature of the contract. On the other hand, if a trust be created, the circumstance that the subject-matter is a personal chattel will not prevent this Court from enforcing the due execution of that trust. *Pooley v. Budd*, 14 Beav. 34.

Trusts may be constituted not merely by direct declaration of trust, but also by the constructive operation of the consequences flowing from the acts of parties. Thus Equity will enforce the execution of a trust, not only against the trustees themselves, but against all persons who obtain possession of the property affected by the trust, provided they had notice of it. *Id.*

A., who sold 500 tons of iron stacked on his wharf to B., in consideration of a bill accepted by a third party, gave an acknowledgment engaging to deliver it to the bearer, he, A., "having been paid for the same." B. mortgaged the iron, and, the bill having been dishonoured, A. refused to deliver the iron. The mortgagee proceeded in equity to make A. responsible for the iron:—Held, that A. had no ownership or property in the iron so stacked, and was a trustee, and therefore a demurrer for want of equity was overruled. *Id.*

4. A court of equity has jurisdiction to enforce specific performance of an agreement relating to a copyright. *Thomleson v. Black*, 1 Jur. 198.

5. The principle of courts of equity in regard to cases of specific performance of contracts concerning mere chattels, is, that where courts of law, by awarding damages, can give adequate compensation, courts of equity will not interfere. Therefore that principle cannot apply where the defaulting party has become insolvent; and the Court of Review acts on this principle. *Exp. Masterman*, 4 Dea. & Ch. 751; 2 Mont. & A. 209; 4 L. J., N. S., Bk., 54.

6. Specific performance of agreement, made on dissolution of partnership, that particular book used in trade should become exclusive property of one of partners, and that copy of it should be delivered to other, will be decreed. *Lingen v. Simpson*, 1 Sim. & S. 600.

7. Where damages in action for breach of contract to sell chattel would be insufficient remedy for purchaser, although sufficient for vendor, specific performance decreed, as remedy must be mutual. *Withy v. Cottle*, 1

Sim. & S. 174; T. & R. 78; 1 L. J., Ch., 117. And see 1 L. J., Ch., 5.

8. Court will not decree specific performance of contract for purchase of debt. *Wright v. Bell*, 5 Pri. 325; *Adderley v. Dixon*, 1 Sim. & S. 607. But see 2 L. J., Ch., 102.

9. Articles by a guardian for sale of timber have been carried into execution by a court of equity. *Clavering v. Clavering*, Mos. 224; *Buaton v. Lister*, 3 Atk. 383.

10. An agreement is made between A., an iron company, and B., the owner of an adjoining colliery, for the supply of coals, to be raised and delivered at the rate of 500 tons per week, A. also agreeing to loose and drain the unworked coal in B.'s colliery:—Held, that no interval in the performance of this agreement (which was continuous in its nature), should have been allowed; and that A., after the lapse of eleven months between filing his bill and breach of the agreement, was precluded from relief upon it. *Semble*, that the Court will not decree specific performance of a contract for delivery of a chattel by instalments where mutual duties of a complicated nature are imposed upon the parties. Mere vicinity and convenience of situation will not induce the Court to decree specific performance of a contract for supply of goods. Observations upon *Buaton v. Lister* (3 Atk. 383). *Pollard v. Clayton*, 3 W. R. 349; 1 Kay & J. 462; 1 Jur., N. S., 342.

11. In a contract for the purchase of timber, time is of the essence of the contract; and if, by difficulties improperly raised by the vendor, the timber is prevented from being felled and carried away at the time limited by the agreement, the Court will not afterwards enforce the performance of the contract. *Arkwright v. Stovell*, 3 L. J., Ch., 49.

12. Property in a cargo transferred by bill of sale signed by vendor and vendee; but by a new agreement signed by them before they parted, that it shall be sold and accounted for by the factor for vendor, it is reduced to agreement, and therefore remedy in equity. *Weymouth v. Boyer*, 1 Ves. J. 416.

13. An agreement was entered into for the sale of a ship to A. and B. (one-third to A. and two-thirds to B.), at the price of 750*l.*; and, if default should be made by the purchasers, for the re-sale of the ship, the deficiency, if any, upon the re-sale, to be made good by the defaulting purchaser. Possession of the ship was delivered to the purchasers by the vendors, who received 250*l.* from A., and two bills of exchange, drawn by them, and accepted by A., for the remaining 500*l.* In the bills of sale, by which the agreement was carried into effect, the purchase money for the one-third and two-thirds of the ship was expressed to have been paid by A. and B. respectively. The acceptances of A. were dishonoured, and he became bankrupt. On a bill filed by the vendors, who had become entitled to the whole interest in the purchase money, against B., who had become the sole owner of the ship by purchase from A.'s assignee, praying specific performance of the agreement by B., or that the ship might be sold, and the proceeds applied in payment, the Court held that it had jurisdiction, and decreed an account and payment of the unpaid purchase money by B., or a resale of the

ship, in default of payment in a limited time. *Lynn v. Chaters*, 2 Keen 521.

1. Held, on demurrer, that although the Court will not in general entertain a bill for specific performance of an agreement simply for the delivery of specific chattels, yet specific performance of an agreement of which one clause provides for the delivery of specific chattels will not of necessity be refused. *Marsh v. Milligan*, 3 Jur., N. S., 979.

2. Where a chattel, from being used in business or otherwise, has a peculiar value, the Court will entertain a bill for an injunction to restrain its sale or detention. *North v. Great Northern Railway Co.*, 2 Giff. 64; 6 Jur., N. S., 244; 29 L. J., Ch., 301.

3. The Court will enforce specific performance of a contract for the sale of a chattel where pecuniary damages would not be a sufficient compensation for the breach of the contract, as where the chattel is of unusual distinction and curiosity, and of doubtful value. *Faleke v. Gray*, 5 Jur., N. S., 645; 29 L. J., Ch., 28.

But where the contract, although not actually fraudulent, was one in which the parties were not on equal footing, the plaintiff knowing, and the purchaser being ignorant of the value of the thing sold, and the price appeared to be inadequate, the Court refused relief. *S. C.* 4 Drew. 651.

4. If there has been an engagement to appropriate to a certain individual a particular cargo, or a particular part of a larger cargo, as, for example, "100 quarters of wheat out of 500 quarters, which I have now sent;" in either of these cases equity will interfere to enforce performance of the engagement; but though the person who has made an engagement to sell a certain quantity of property may be shown to possess such a quantity of that property, equity will not treat the property so possessed as available for the engagement. *Hoare v. Dresser*, 7 H. L. Ca. 290.

5. D. & Co. are manufacturers of light fabrics, of which the patterns are supplied by their own artists. Every spring and autumn they introduce new patterns into the English market; and after the season is over they are in the habit of selling their surplus stock at a greatly reduced price, but always for the purpose of having it shipped to foreign countries, where its sale at the reduced price could not injuriously affect the home trade of the plaintiffs. G., the plaintiff's agent, accordingly sold some lots of such surplus stock to P., at Manchester, as he alleged upon the express understanding and agreement that the goods were to be shipped by P. to the United States and the West Indies, and were not to be sold in the home market. It appeared that P. obtained a longer than the usual term of credit in the transaction, as plaintiffs stated, at P.'s request, upon the ground that he could not sooner obtain the money from abroad in return for the goods. Upon a bill for specific performance, and praying for an injunction to restrain P. from selling the goods in England:—Held, that the evidence of the contract was insufficient, and the proper remedy in such a case is at law. *Dollfus v. Pickford*, 2 W. R. 204.

And that an injunction will not be granted to restrain breach of agreement where damages at law are adequate. *Id.* 220.

6. A defendant entered into an agreement with the plaintiff, of which the material clause was in the following words. "Sold R. F., Esq., M.P., the whole of the get of the No. 3 coal out of the Newbridge Colliery property for five years, the quantity not to be less than at present delivered to his Taff Vale works, unless the coal should fail at 6s. a ton; payment as usual." He afterwards sold some of the coal to other persons, and contracted to sell the colliery itself:—Held, that the agreement was, in effect, for the sale of a chattel, and that not one of specific value, but a marketable commodity; that the plaintiff's remedy was at law for damages, and not in equity for specific performance; and that being so the Court would not extend its jurisdiction in granting an injunction to restrain a breach of a portion of an agreement when it could not enforce the whole. *Fothergill v. Rowland*, 43 L. J., Ch., 252; 22 W. R. 42; 29 L. T., N. S., 414; 17 L. R., Eq., 132.

Specific Delivery of Chattels.] See CHATTELS.

VI. DEBTS, SALE OF, AND MONEY DEMANDS.

7. Specific performance decreed, at suit of vendor, of contract for sale of debts proved under commission of bankruptcy. *Adderly v. Dixon*, 1 Sim. & S. 607; 2 L. J., Ch., 102.

8. Court will not decree a specific performance of contract for purchase of debt. *Wright v. Bell*, 5 Price 325.

9. By an agreement A. stipulated that he would transfer and assign all his property in the West Indies to B., as his chief creditor, on B.'s discharging A. from all obligations then existing relating to the business, and particularly a debt due to a creditor, from which B. was to obtain a release from creditor. To a bill by A. for specific performance of this agreement, a demurrer for want of equity was filed, and that the remedy was at law:—Held, that A. had a right to a specific performance of the agreement in a court of equity. *Clowes v. Garraway*, 7 L. T., N. S., 243.

10. The payee of two promissory notes being about to sue the maker, the brother of the maker agreed to pay 200*l.* to the payee, in trust for E., or 6*l.* 10*s.* per quarter, so long as the 200*l.* should be unpaid, so that the notes should be suspended and rendered inoperative so long as the brother continued to pay the 6*l.* 10*s.* a quarter to the payee, and on payment of the 200*l.* all claim on the notes to cease, and the same to be given up. The brother not having paid the 6*l.* 10*s.* to the payee for two quarters, but having paid these sums to E., the *cestui que trust* (as the latter admitted), the payee brought his action upon the notes against the maker:—Held, in error, reversing the judgment of the Queen's Bench, that the agreement could not be pleaded in bar to the action upon the notes, but might be the subject of a cross-action:—Held, in equity, that the agreement must be construed as a contract by the brother, to provide for E. the annuity of 25*l.* or the gross sum of 200*l.* as a substitute for the two notes, and by the

payee that the two notes should thenceforth be only a security for the performance of such contract, and not as an agreement under which the original right of the payee against the maker would revive on any failure of the quarterly payments by the brother; that the brother was entitled to the specific performance of the agreement in equity, not on the ground of circuity of cross-actions which the rule of law occasioned, but on the ground that this Court, by modifying its decree, could give to all parties the benefit of the agreement, whilst a court of law, being unable so to modify its judgment, could not give to one party the benefit of the agreement without depriving another party altogether of such benefit. *Beech v. Ford*, 7 Hare 208.

1. Where a bill was filed for the specific performance of an agreement, and the whole scope and object of the bill were for a purely money demand, the amount of which, if ascertained, the plaintiff would be entitled to recover by an action at law, and compensation in money being sought on the footing of an account, the Court held that relief under the jurisdiction of specific performance could not be granted. *Ord v. Johnston*, 1 Jur., N. S., 1063.

The Court never interferes in support of a purely voluntary agreement, or where no consideration emanates from the individual seeking the performance of the agreement. *Id.*

2. A court of equity will not entertain a bill for the specific performance of an agreement, to pay in a certain event, which has happened, an annual sum by quarterly instalments. *Brough v. Oddy*, 1 Russ. & M. 55; Taml. 215; 8 L. J., Ch., 23.

3. The plaintiff, who was a builder, agreed with the defendant, who was an owner of freehold land, to erect thirty-one houses on the land on the terms of such agreement, and also of a parol understanding communicated to the plaintiff on behalf of the defendant prior to the signing of the principal agreement. The chief stipulation of the parol understanding was the advance of moneys in definite instalments by or through the defendant to the plaintiff for the purposes of the buildings. The plaintiff afterwards took leases of the unfinished houses and executed two successive mortgages to enable defendant to raise money on them as a security for the same purposes. The defendant failed to supply the plaintiff with the required funds as stipulated under the parol agreement, which, however, had been successively departed from:—Held, in a bill praying specific performance of the parol understanding, together with damages, or at all events damages, that the plaintiff was entitled to neither, but that (the defendant submitting to it) the plaintiff might have the ordinary redemption decree. *Thorpe v. Hogford*, 20 W. R. 922.

4. A bill does not lie for specific performance of a partnership agreement, where the sole relief sought is the payment of a sum of money, for which there is a remedy by action. *Bagnoll v. Edwards*, 10 Ir. B., Eq., 215.

5. The agent of a railway company made a verbal agreement with the contractor for the line, that if he would build on land of the company certain cottages more substantially

than would be required for his own purposes, and would leave them for the use of the company, then the company would pay him 5,000*l.* The cottages were accordingly built, and when the railway was completed the contractor left them on the land, and the agent of the company made an agreement with the contractor that he should be paid 500*l.* a year for the cottages by way of rent, with an option to the company to purchase them for 5,000*l.* This agreement was confirmed by a resolution of the board of directors. The company paid the 500*l.* a year some years, and then refused to pay:—Held, that the claim of the contractor being simply for payment of money could not be enforced in the Court of Chancery; and that though the contractor was unable to sue at law because the agreement was not under seal, he did not thereby obtain an equity to enforce a claim for money. *Crampton v. Varna Railway Co.*, 7 L. R., Ch., 562; 41 L. J., Ch., 817; 20 W. R. 713.

Held, also, that inasmuch as the contractor did not act in ignorance of the rights of the company, he could not claim compensation for having been induced to build on the land of the company. *Id.*

VII. INDEMNITY. CONTRACTS FOR.

6. Covenant to save harmless decreed in specie; to wit, the principal was decreed to indemnify the surety. *Ranelagh v. Hayes*, 1 Vern. 189.

7. Where a bill is filed to enforce a covenant for a simple indemnity the Court will not decree specific performance; but where the indemnifying party also covenants to do an act, the doing of which will constitute a complete indemnity, specific performance will be decreed in such a case. *London & South Western Railway Co. v. Humphrey*, 6 W. R. 784.

8. The payee of two promissory notes being about to sue the maker, the brother of the maker agreed to pay 200*l.* to the payee, in trust for E., or 6*l.* 10*s.* per quarter, so long as the 200*l.* should be unpaid, so that the notes should be suspended and rendered inoperative so long as the brother continued to pay the 6*l.* 10*s.* a quarter to the payee; and on payment of the 200*l.*, all claim on the notes to cease, and the same to be given up. The brother not having paid the 6*l.* 10*s.* to the payee for two quarters, but having paid these sums to E., the *cestui que trust* (as the latter admitted), the payee brought his action upon the notes against the maker:—Held, in error, reversing the judgment of the Queen's Bench, that the agreement could not be pleaded in bar to the action upon the note, but might be the subject of a cross-action. Held, in equity, that the agreement must be construed as a contract by the brother to provide for E. the annuity of 25*l.*, or the gross sum of 200*l.*, as a substitute for the two notes, and by the payee that the two notes should thenceforth be only a security for the performance of such contract, and not as an agreement, under which the original right of the payee against the maker would revive on any failure of the quarterly payments by the brother; that the brother was entitled to the specific performance of the

agreement in equity, not on the ground of the circuitry of cross-actions which the rule of law occasioned, but on the ground that this court, by modifying its decree, could give to all parties the benefit of the agreement, whilst a court of law, being unable so to modify its judgment, could not give to one party the benefit of the agreement without depriving another party altogether of such benefit. *Beech v. Ford*, 7 Hare 208.

1. Where one insurance company, A., transferred all its business, property, effects, and liabilities to another company, B., on the terms of A., shareholders being indemnified, on a bill, by A. for specific performance of the agreement, the Court decreed such indemnity, and the other company, which was ordered to be wound up, having by its official manager filed a cross-bill, alleging fraud and misrepresentation; and that such agreement was *ultra vires*, the company, B., having had the benefit of the agreement:—Held, not to be entitled to object that the agreement was *ultra vires* and improperly entered into by the managing body. *Anglo-Australian Life Assurance Co. v. British Provident Society*, 3 Giff. 521; 8 Jur., N. S., 299; 4 De G. F. & J. 341.

2. In a suit by an assignor of a lease claiming from his assignee indemnity in respect of breaches of the covenants in the lease, the Court will direct merely payment on account of breaches of covenant already committed, and will not make a general declaration of the assignor's right to indemnity, giving liberty to apply from time to time in case of future breach. *Lloyd v. Dimmack*, 7 L. R., Ch. D., 398; 47 L. J., Ch., 398; 38 L. T., N. S., 173; 28 W. R. 458.

VIII. LOANS.

3 Where a person advancing money refuses after an absolute conveyance to execute a defeasance, the Court will relieve. *Walker v. Walker*, 2 Atk. 100.

4 A court of equity will not decree the specific performance of a contract to borrow a sum of money on mortgage. *Rogers v. Challis*, 27 Beav. 175; 6 Jur., N. S., 334; 29 L. J., Ch., 240.

The Court, notwithstanding 21 & 22 Vict., c. 27, has no jurisdiction to award compensation or damages against a person who has refused to accept a loan of money for which he had contracted. *Id.*

5. An agreement to join the firm as partner, or otherwise to lend the firm 5,000*l.* for two years on the acceptances of the firm, is not a contract which can be specifically performed. *Sichel v. Mosenthal*, 8 Jur., N. S., 275; 31 L. J., Ch., 386; 10 W. R. 283; 5 L. T., N. S., 784; 30 Beav. 371.

6. Whether in the simple case of an advance of money with an agreement to execute a bond for its repayment, such an agreement would be executed in this Court. *Quære. South Wales Railway Co. v. Wythes*, 1 Kay & J. 186; 24 L. J., Ch., 1; 3 W. R. 3; 3 Eq. Rep. 70. S. C. on appeal 3 W. R. 133; 24 L. J., Ch., 87; 3 Eq. Rep. 153.

7. A court of equity will not entertain a bill for the specific performance of an agreement, to pay in a certain event, which has happened,

an annual sum by quarterly instalments *Brough v. Odby*, 1 Russ. & M. 55; Tam. 215; 8 L. J., Ch., 23.

8. A Gibraltar firm entered into a contract with A., of Algeciras, in Spain, in consideration of property having been transferred to them, to open a credit in his favour to the extent of 9,400 dollars, and to honour his drafts to that amount. After advancing him some sums of money, they refused to accept a bill for 1,000 dollars, drawn upon them by him, and subsequently refused to make any further advances. Proceedings in equity were thereupon commenced by him in the Supreme Court of Gibraltar to enforce a specific performance of the contract, and to obtain an award of damages under 21 & 22 Vict., c. 27, for the non-performance of the contract:—Held, that a court of equity will not decree the specific performance of a mere agreement to advance money. Moreover, that that being so, it has no jurisdiction to award damages. However, the Court of Gibraltar might have proceeded with the case as if it had been commenced as an action. *Larios v. Gurety*, 5 L. R., P. C., 346.

On its being contended that the cause of action would be merely the breach of an agreement to pay a sum of money, and that accordingly nothing could be recovered by way of damage but the principal money contracted to be paid and interest:—Held, that inasmuch as the contract was a special one, whereby the firm became bound to honour, out of moneys agreed to be placed by them to his credit, the drafts of A. up to a certain amount, he was entitled to general and substantial damages for the breach of it. *Id.*

9. In an action to enforce specific performance of a parol agreement to execute a bill of sale of personal chattels, upon an *ex parte* motion before appearance of the defendant, there being evidence of immediate danger of the chattels in question being disposed of, an order was made appointing the plaintiff (without security) interim receiver for fourteen days, or until a receiver should be appointed under a reference to chambers for that purpose which the Vice-Chancellor had directed. The plaintiff undertook to deal with the property only under the direction of the Court, and to abide by any order which the Court might make as to damages or otherwise. *Taylor v. Eekersley*, 2 L. R., Ch. D., 302; 45 L. J., Ch. D., 527.

Agreements to give a Mortgage.] See MORTGAGE, I. IX.

IX. PERSONAL SERVICES.

10. The partners in certain brass works enter into articles with A., that he shall serve them as their manager and overseer during his life; and besides a stipulated yearly salary, he was to have 3*s.* 6*d.* for every hundredweight of brass wire made by him or any other person during his life. A. was afterwards discharged by the partners from their service, and on a bill brought for a specific performance of these articles, it was decreed that the plaintiff was entitled to all the advantages thereby stipulated for by him, except the

3s. 6d. payable to him for every hundredweight of brass wire made at the mills; which Lord Cowper conceived was intended as a reward attending the produce of the works, during such time only as the plaintiff supervised the same. But this part of the decree was reversed, and he was held to be entitled to this allowance during his life. *Bull v. Coggs*, 1 Bro. P. C. 140.

1. The Court cannot specifically perform an agreement, whereby A. agrees to compose and write reports of cases determined in a court of justice, to be printed and published by a particular individual for a stipulated remuneration, nor interfere by injunction to restrain the party from permitting reports written by him to be published by another person. The remedy, if any, is at law. *Clarke v. Price*, 2 Wils. 157.

2. A grant was made by Dr. Y., Bishop of Ely, in 1801, to P. for his life of the ancient office of receiver of the rents of the lands belonging to the see of Ely. For a long series of years the receiver for the time being had not only received the rents, but had prepared leases, surrenders, and counterparts of leases, had registered leases and assignments of leases in a register kept by the bishop, and had made searches in the muniment room in the residence of the bishop whenever requested by persons requiring information contained in the register and records belonging to the bishop, for all which duties he received fees. In 1836, Dr. A., immediately after his appointment as bishop, sent a notice to P. not to prepare any more leases, surrenders, or counterparts of leases, and not to receive any more rents. P. filed a bill against Dr. A., praying that it might be declared that P. was entitled to exercise all the duties and receive the perquisites hitherto exercised and received by the receiver, and that the bishop might be restrained from interfering with such exercise and enjoyment:—Held, that whatever might be the legal right of P. to the office, and to its alleged appurtenances, no relief could be given to him in equity, on the grounds of the hardship of forcing the services of a stranger in an office of trust upon the bishop and the want of mutuality, the nature of the duties and services asserted by the plaintiff being such as to preclude the possibility of a decree in this court against him compelling their specific performance. *Pickering v. Ely (Bishop)*, 2 Y. & Coll. C. C. 249; 12 L. J., N. S., Ch., 271; 7 Jur. 479.

3. Articles of agreement are executed between the crew of a vessel, of the one part, and the captain of the other part, containing a stipulation, that the seamen are not to have any demand against the owner of the ship: the owner subsequently acts under the agreement, and, in pursuance of it, makes payment to the seamen out of the proceeds of the cargo:—Held, that the owner, by such conduct, becomes a party to the agreement, and that a bill for the performance of the agreement may be maintained against him. *Gosling v. Smith*, 3 L. J., Ch., 5.

4. A bill was filed for the specific performance of an agreement, by which the plaintiff was to receive a percentage upon a certain number of bottles of mineral water, imported by the defendant from the Duchy of Nassau, in consideration of personal services rendered by

him to defendant for procuring the right of exportation. An agreement was also made that a deed should be executed to carry out the terms of the agreement. The defendant appeared to the bill, and applied for an extension of time to answer. The defendant then died, and upon a bill of revivor and supplement being filed against his personal representative a general demurrer was put in:—Held, that the Court might direct the execution of a deed for carrying out an agreement of this nature, but at all events, the demurrer could not be sustained, since the original defendant had applied for further time to answer, and his representative was bound by that act, and was precluded from demurring. *Granville v. Betts*, 18 L. J., N. S., Ch., 32.

5. The Court has no jurisdiction to order the cancellation of articles of apprenticeship, and the return of a portion of the premium, on the ground of the wrongful refusal of the master to continue to instruct his apprentice in his trade, according to his agreement. *Webb v. England*, 29 Beav. 44; 7 Jur., N. S., 153; 30 L. J., Ch., 222; 9 W. R. 183; 3 L. T., N. S., 574.

A bill for the specific performance of articles of apprenticeship cannot be maintained. The proper remedy is to sue at law for damages. *Ib.*

6. An owner of a coal wharf agreed to let it, and at the same time agreed to act as agent in the coal business for the tenant, and not to act for any other person:—Held, that these agreements were inseparable, and that specific performance of the agreement to let would not be decreed, because the Court could not enforce performance on the other side. *Ogden v. Fawcett*, 9 Jur., N. S., 288; 32 L. J., Ch., 73; 11 W. R. 128; 7 L. T., N. S., 515.

The fact of the agreement having been acted on for some time made no difference. *Ib.*

7. The plaintiff, being owner of certain patents, entered into a written agreement with other persons to form a company for working these patents, he agreeing on his part to sell the patents in foreign countries, and to give his whole services to the company for two years, and to do his best to improve the invention, and to impart such improvements to the company:—Held, that he could not obtain specific performance of this agreement against his co-promoters, because from the nature of his own part of the agreement, the Court could not compel specific performance of it by him. *Stocker v. Wedderburn*, 3 Kay & J. 393; 26 L. J., Ch., 713.

8. Specific performance of an agreement between four persons, regulating the right to all their future inventions, refused, on the following grounds: first, that it was too vague and uncertain as to its duration; secondly, that it involved a contract for personal services of an uncertain duration; thirdly, the want of mutuality in regard to one of the stipulations; and fourthly, that the position of the parties had been materially varied by the assignment by one, to a stranger, of all his interest under the agreement. *Firth v. Ridley*, 33 Beav. 516.

9. A suit cannot be sustained which seeks to enforce an agreement for the continuance of the plaintiff's duties or personal services to the defendant, inasmuch as those services

might be rendered in a manner productive of injury rather than benefit to the latter; and the Court does not possess the means of compelling a person to fulfil his duty to his employer under such a contract. Therefore, when it was agreed that the respondent should "continue to employ the petitioner as salesman," for the purpose of disposing of his stock in trade, on certain terms, some of which tended to show that a sale of that stock to the petitioner was thereby intended, but others positively showed that a relation approaching to that of shopman and owner was for a time to exist between the parties, a petition praying that the agreement might be specifically performed and carried into execution was dismissed. *Fitzpatrick v. Nolan*, 1 Ir. Ch. R. 671.

Semble, that *vice versa*, the employer could not have maintained a suit to oblige the other party to discharge his duty according to the agreement. *Ib.*

Semble, also, that where a date has not been specified in the agreement, although intended to be so, as that at which an important obligation is to arise, this would of itself be, on the ground of uncertainty, an adequate reason for not enforcing the contract. *Ib.*

1. Specific performance cannot be enforced of an agreement, the essence of which is that it is one for personal services. *White v. Boby*, 37 L. T., N. S., 652; 26 W. R. 133.

A plaintiff will not obtain damages instead of specific performance, unless he can show that he had an equity at the time of issuing the writ. *Ib.*

2. Where a person agrees with auctioneers for the sale by them of property in a particular manner, and he then changes his mind, the rule is that, subject to the claims of the auctioneers for their expenses incurred, the Court will not enforce such an agreement. *Chinnock v. Sainsbury*, 6 Jur., N. S., 1318; 9 W. R. 7; 3 L. T., N. S., 258; 30 L. J., Ch., 409; 5 N. R. 185.

In consideration of the plaintiffs (auctioneers) having advanced to the defendant a sum of money, the defendant agreed in writing, to deposit with them for sale the whole of his collection of pictures, upon the understanding that the amount of advances and the commission were to be deducted from the proceeds of the sale. The defendant deposited only a portion of the collection, which, however, the plaintiffs proceeded to sell, but it realised a very much smaller sum than was anticipated; in fact, not more than half the amount of the advances. The defendant refused to deposit for sale the remaining portion of the collection, and the plaintiffs filed a bill for specific performance of the agreement. A demurrer to the bill was allowed. *Ib.*

3. A contract by plaintiff to take the management of baths at a fixed salary, and a percentage on the profits, and a guarantee of a sum for life in the event of the baths failing or being disposed of:—Held, *inter alia*, that, the contract being for personal services, the Court would not decree performance of it. *Gillig v. McGhee*, 13 Ir. Ch. R. 48.

4. A railway company agreed with contractors that the contractors should work the line and keep the engines and rolling plant in

repair at a specified remuneration, and that the contract should be in force for seven years, but with a proviso for its determination if the contractors did not, within forty-eight hours after notice given by the company, obey the instructions given in such notice:—Held, that the agreement was not of such a kind as to be enforceable by injunction restraining the company from determining the contract and resuming the possession of their line for non-compliance with impracticable requisitions. *Quere*, whether such an agreement is consistent with public policy. *Johnson v. Shrewsbury & Birmingham Railway Co.*, 3 De G. M. & G. 914; 17 Jur. 1015; 22 L. J., Ch., 921.

Observations on the application of the principle of specific performance to contracts respecting personal services. *Ib.*

5. An agreement had been entered into by carriers and a railway company, by which duties were to be performed by the carriers in loading and unloading goods at the termini of the railway. It was declared and understood between the parties that it was not the intention of the company to take such duties into their own hands, unless their interests should appear to them absolutely so to require, in consequence of such duties not having been performed satisfactorily by the agents (the carriers), or by the servants under their control. The company came to a resolution that the system of dealing with the goods traffic inside the then station and other London stations of the company was unsatisfactory, and that the interests of the company required that the loading and unloading of the goods traffic in such stations should be performed by the company themselves:—Held, that the Court would not interfere by injunction to restrain the company from acting up to their resolution—the agreement involving personal service, and as such being one of which the Court was not in the habit of granting a decree for specific performance. *Chaplin v. North-Western Railway Co.*, 5 L. T., N. S., 601.

6. The Court will not interfere by injunction to restrain a railway company from determining, even upon a notice which may be irregular and insufficient, an agreement with contractors for the performance of certain duties in reference to the goods traffic of the line; the agreement involving personal service, and as such being one of which the Court would not grant specific performance. *Horne v. London & North-Western Railway Co.*, 10 W. R. 170.

7. The plaintiff being dismissed by the defendants from their service, filed his bill for an injunction to restrain the defendants from excluding him from the management:—Held, discharging the injunction which had been granted by the Vice-Chancellor, that the contract being of hiring and service, was one of which specific performance could not be enforced. *Stocker v. Brocklebank*, 3 Macn. & G. 250; 20 L. J., N. S., Ch., 401; 15 Jur. 591.

8. The defendant had agreed to act as servant to the plaintiff, and no other person, for seven years, with power to either party to determine the agreement on payment of 500*l.*, and subsequently engaged himself to another

master without paying the 500*l*. An injunction having been granted by the Vice-Chancellor, on appeal, it was dissolved on the defendant bringing into court 600*l*. *Thornton v. Kendall*, 11 W. R. 352.

1. The Court will not decree specific performance of a simple contract of hiring and service: and if one party abandons such a contract, however wrongfully, he will not be restrained from committing a breach of a negative covenant which was part of the contract. *Brett v. East India & London Shipping Co.*, 3 N. R. 688; 2 Hem. & M. 404.

2. The plaintiffs claimed the specific performance of an agreement for the composition of a literary work by the defendant, alleging that the agreement was contained in three written documents. At the trial the first and third of the documents were proved; the second was not produced, nor was any evidence given of its contents. The defendant, by his statement of defence, denied that he had agreed with the plaintiffs as alleged by them with reference to the second document:—Held, that the plaintiffs were not entitled to specific performance of the agreement contained in the first and third documents, or to damages for the breach of it. *Post v. Marsh*, 16 L. R., Ch. D., 395; 50 L. J., Ch., 287; 43 L. T. 628; 29 W. R. 198.

See also ACTOR, AUTHOR, AND PUBLISHER.

Remedy by Injunction in General.] See V. ante.

X. SHARES.

1. *Suits between Company and Shareholder*, 6560.
2. *Suits between Transferor and Transferee*, 6561.
3. *Effect of Companies Act, s. 35*, 6562.
4. *Indemnity against Calls*. See COMPANY, XIII. VII. 10.
5. *Sales subject to Stock Exchange Customs*. See STOCK EXCHANGE, IV. AND V.

1. Suits between Company and Shareholder.

3. The defendant agreed in writing to take shares in a joint-stock company (which were transferable), "and to execute the deed of settlement when required." Specific performance was refused. *Sheffield Gas Consumers' Co. v. Harrison*, 17 Beav. 294.

4. Where there is a clear contract to accept shares, and the remedy at law is shown to be inadequate, the Court will decree specific performance. *Oriental Inland Steam Co. v. Briggs*, 2 John. & H. 625.

But where the validity of a contract to accept the shares was doubtful, and the inadequacy of the legal remedy not clearly made out, and there having been an unexplained delay of two years, a demurrer to a bill for specific performance of a contract to accept shares was allowed, with costs. *Id*.

A shareholder in a company applied to the directors for an allotment of new shares, which

they were authorised to issue, and signed an undertaking to accept the same or any less number that might be allotted to him, to pay the calls thereon when due, and to sign the articles of association when required. The shares applied for were duly allotted; and in the notification of allotment he was informed that the articles of association must be signed by him, and in default the shares and deposit would be forfeited to the company. The articles of association contained no clause authorising the forfeiture of the shares for such a cause. The allottee having refused to sign the articles of association, or to pay the calls which were from time to time made upon the shares, the company filed a bill for specific performance of the undertaking contained in his application for the shares:—Held, that the contract had been varied by the notification of allotment, and that the bill could not be sustained. 8 C. 8 Jur., N. S., 201; 31 L. J., Ch., 241; 10 W. R. 125; 5 L. T., N. S., 477; 4 De G. F. & J. 191; 31 L. J., Ch., 241.

The company having delayed filing a bill for two years after the allottee's refusal to sign the articles:—Held, that such delay was not in itself fatal to their case. *Id*.

5. A bill by a company alleged that the defendant had agreed to accept shares. The articles of association were silent as to the mode of acceptance, and the Joint Stock Companies Act 1856, s. 9 and schedule B, applied, by which the acceptance must be in writing signed. Defendant had never signed any acceptance. This fact and the statute were set up by the plea:—Held, that the agreement was a good agreement to do that which the statute required. *New Brunswick, etc., Co., v. Muggeridge*, 4 Drew. 686.

6. Parts of an agreement can be separately enforced if an intention to separate the parts appears in the agreement. *Odessa Tramways Co. v. Mendel*, 8 L. R., Ch. D., 235; 47 L. J., Ch., 505; 38 L. T. 731; 26 W. R. 887. Affirming 37 L. T. 275.

The fact that an agreement is carried out by two instruments affords a presumption that the contracts in the two instruments are separable. *Id*.

A company was, by its articles of association, prohibited from issuing shares below par without the sanction of a general meeting. M. agreed to subscribe for 2,000 shares in the company, which should be taken up and paid for in full by him, in such numbers and at such times as should be required for the purposes of the company. On the same day on which he entered into this agreement, the board of directors agreed to pay him 4,000*l*. in consideration of the services rendered by him in connection with the company. The company failed. On an action brought by the company against M. for specific performance of his agreement:—Held, that, as M. had acted in collusion with the directors to defraud the company, he could not be heard to set up this fraud for the purpose of invalidating the agreement to take the shares; that as the parties had contemplated a piecemeal performance of the agreement, the Court could decree specific performance of a part of it; and that in the absence of *mala fides* the resolution of the directors to call up the shares was conclusive evidence that the money was

required for the purposes of the company.
Id.

7. The owners of an English patent, and of certain foreign patents obtained for the same invention, agreed with A., in consideration of pecuniary advances made by him to them, to procure the transfer to him of certain fully paid-up shares in a proposed company, to be formed with the object of purchasing their English and foreign patents, and which were to be allotted to them in part payment of their interests in the patents. The company was to be called the Non-Radiating Steam Engine Company, and was to have a capital of 220,000*l.* The patentees also appointed A. their agent for the sale of a certain number of the shares that were to be allotted to them in such company, and it was arranged that the shares which A. should obtain for his advances should be applied towards fulfilment of the contracts which he, as their agent, should enter into with purchasers of shares. Under these arrangements A. became entitled to 847 shares, and sold 224 shares to different persons. The scheme of the company, as at first proposed, was abandoned, and the patentees brought out a company called the Patent Steam Engine Company, with a capital of 100,000*l.*, and formed with the object of purchasing the English patent only. The patentees then refused to transfer any of the shares which they had acquired in the second company to A., and the several persons to whom he had sold shares. On a bill by A. and the several purchasers of shares from him to enforce specific performance of the arrangements which had been entered into between A. and the patentees:—Held, that the second company comprehended, in effect, the substance of the contract which existed between the parties, and that an objection for want of mutuality in the contract could not be sustained. *Turner v. Moy*, 32 L. T., N. S., 56.

Held, also, that an objection for multifariousness, on the ground of misjoinder of plaintiffs, and that each plaintiff ought separately to make out his own case, could not, under the circumstances, be supported.
Id.

1. Directors of a company had power, on non-payment of calls, to sue for them, or forfeit and sell the shares. They proposed to a shareholder to relieve him from further liability, on his consenting to an absolute forfeiture. He assented, but the directors, having afterwards discovered that he was in good circumstances, refused to complete:—The Court declined to compel the directors specifically to perform the contract. *Harris v. North Devon Railway Co.*, 20 Beav. 384.

2. In 1814 the Grand Canal Company created certain stock with peculiar advantages to the subscribers, the legality of which was doubtful. In 1831 they empowered the Court of Directors to exchange for new stock such stock of 1814 as the holders thereof were willing to bring in, upon certain terms. The plaintiffs, one of whom was a director and the other a stockholder, and both subscribers to the stock of 1814, refused to accede to the terms offered by the resolution of 1831; but having so acted that by their conduct they might have induced other stockholders of

1814 to accept of the arrangement proposed by the resolution of 1831, upon a bill filed for a specific performance of the terms of the resolution in 1814, they were refused relief in respect of the stock of 1814. *Corballis v. Grand Canal Co.*, 3 Ir. Eq. R. 29.

2. Suits between Transferor and Transferee.

3. The Court will decree a specific performance of an agreement for the sale of a certain number of shares in a railway company. *Dunouff v. Albrecht* 12 Sim. 189.

4. A plaintiff asserted that he had contracted to purchase some shares from the defendant, but the contract was not in writing; the fact was contested, and it was proved by the plaintiff alone. There was, however, proof that the plaintiff had paid the defendant money, but on what account did not appear, and that the defendant had admitted, in writing, that the shares belonged to the plaintiff, though they had not been transferred for fourteen years:—Held, that the contract was sufficiently proved. *Parish v. Parish*, 32 Beav. 207.

5. The plaintiff agreed to transfer certain shares to the defendant, who agreed to take the same, and accept a transfer thereof, and to indemnify the plaintiff from future calls. No deposit had been paid by the plaintiff on the shares. A bill, filed for specific performance of the agreement, demurred to on the ground of no consideration. The decision of Romilly, M. R. (4 Jur., N. S., 576; 6 W. R. 576), allowing the demurrer, overruled. *Cheale v. Kenward*, 4 Jur., N. S., 984; 27 L. J., Ch., 784; 3 De G. & J. 27; 6 W. R. 810.

6. Specific performance was decreed of a contract to sell shares in a company, although the deed of settlement provided, that no shareholder should be at liberty to transfer his shares except in such manner as the board should approve; and the board refused to give its consent to the transfer. *Poole v. Middleton*, 7 Jur., N. S., 1262; 9 W. R. 758; 4 L. T., N. S., 631.

7. The deed of settlement of a company provided that the liability of a vendor of shares in the company should cease after the approval of the purchaser by the directors, and entry of his name in the share register book. A. verbally agreed with B. to sell him certain shares in the company, and received the purchase money for them, but the deed of transfer was not executed until after an order had been made for the winding up of the company. The official assignee refused to acknowledge the purchaser as proprietor of the shares:—Held, that the agreement was conditional on the approval of the purchaser by the directors, and that the vendor could not enforce specific performance of it. *Seamble*, that in the absence of special stipulations, the payment of the purchase money did raise a constructive trust, so as to entitle the vendor to indemnity from the purchaser against liabilities incurred in respect of the shares. *Birmingham v. Sheridan, Re Waterloo Life, etc., Insurance Co.*, 33 Beav. 660. S. C. *nom. Birmingham v. Sheridan, Re Waterloo Life Insurance Co.*, 10 Jur., N. S., 415; 33 L. J., Ch., 571; 12 W. R. 658; 10 L. T., N. S., 256.

8. W. S., being a provisionally registered

shareholder in a railway company for 100 scrip certificates for shares, through a broker, employed auctioneers to sell them by public auction. R. F., the defendant, became the purchaser of twenty-five shares, and other persons purchased the remainder. Shortly afterwards, and without the concurrence of W. S., the defendant, through the medium of the same auctioneers, sold the shares at an advanced price to J. C. J. C.'s name was furnished to the plaintiff's stockbroker as the purchaser of the shares, and a transfer deed of the shares from the plaintiff to J. C. was executed by the plaintiff. The deed of transfer was never registered by the company under seal, but the shares continued provisionally registered in the name of the plaintiff. After several calls had been made by the company in respect of the shares, some of which the plaintiff paid, a bill was filed praying that the defendant might be ordered to execute a proper deed of transfer from the plaintiff, and to reimburse him the payments made in respect of the calls, and to indemnify him against costs and expenses; and on reference to the master, he found that the plaintiff could not make a good title to the twenty-five shares. On further directions, the Court held, first, that the plaintiff had no title; and, secondly, that the privity of contract between the plaintiff and the defendant was broken by the transfer to J. C.; and the bill was dismissed, with costs. *Shaw v. Fisher*, 1 Jur., N. S., 971; 2 De G. & Sm. 11; 3 W. R. 601. Affirmed 1 Jur., N. S., 1064; 4 W. R. 35; 5 De G. M. & G. 596.

1. An arrangement having been made between a managing director of a bank and S., that the managing director should procure the transfer of 4,000 shares to S. or his nominees, the shares to be paid for by S. W., one of the shareholders who had acceded to this agreement transferred his shares to K., a nominee of S., by a deed, reciting a contract for sale by W. to K., and acknowledging the purchase money to have been paid. K. took this transfer at the request of and as a trustee for S., and on the faith of the acknowledgment in the deed, and the assurance of S. that the purchase money had been paid. The money was never in fact paid:—Held, that W. was entitled to recover it from K. by suit in equity. *Wilson v. Keating*, 4 De G. & J. 588; 5 Jur., N. S., 815; 28 L. J., Ch., 895; 27 Beav. 121.

2. A *bonâ fide* sale of shares in a company made after the presentation of a petition to wind up, but before advertisement of it, the parties being ignorant of the position of the company, may be supported by the Court in the exercise of its discretion given by the Companies Act of 1862, s. 153. But the Court will not compel a purchaser to complete the sale and register the shares in his name if the transaction is incomplete. *Emmerson's case*, 36 L. J., Ch., 177.

3. Although, in the sale of shares in mining concerns, the question of title is not the same as of so much land, the vendor is, nevertheless, bound to show a sufficient title for the satisfaction of the purchaser, considering the nature of the property sold: and a review of the report of the Master (made, as the Court thought, on erroneous grounds) was directed, varying the judgment below. *Curling v. Flight*,

2 Ph. 613; 17 L. J., N. S., Ch., 359; 12 Jur. 423. Varying 6 Hare 41; 17 L. J., N. S., Ch., 79; 12 Jur. 91.

Indemnity against Calls.] See COMPANY, XIII. VII. 10.

See also STOCK EXCHANGE.

3. Effect of Companies Act, s. 35.

4. The Court has no jurisdiction under the Companies Act of 1862, s. 35, to grant specific performance of an agreement to transfer shares or to enforce against the company an equitable claim to be registered as a shareholder; but where an applicant has a legal title the Court will compel the company to enter his name on the register, although his title is disputed by the person registered as holder. *Exp. Sargent, Re Tahiti Cotton and Coffee Plantation Co.*, 43 L. J., Ch., 425; 17 L. R., Eq., 273; 22 W. R. 815.

5. A shareholder in a limited company sold his shares, and the purchaser sold them to a sub-purchaser. The vendor executed transfers—first, to the purchaser, and secondly, to a nominee of the sub-purchaser; but, owing to disputes between the purchaser and the sub-purchaser, neither transfer was registered; and at the date of a winding-up order subsequently made against the company, the name of the original vendor remained on the register as the holder of the shares, and he was placed on the list of contributories. An order made by the Master of the Rolls, removing the name of the original vendor, and substituting that of the sub-purchaser, was discharged by the Lord Justices,—by Turner, L. J., on the ground, that the jurisdiction to rectify the register depended on the Companies Act 1862, s. 35, and, being decretory, ought, under the circumstances, not to be exercised; and, by Cairns, L. J., on the ground, that the company being in no default in the matter, the jurisdiction under the Act could not be exercised. *Ward's case*, 36 L. J., Ch., 462; 2 L. R., Ch., 431; 15 W. R. 569; 16 L. T., N. S., 254.

Semble, the jurisdiction to rectify errors in the register is generally applicable in all cases of error, whether occasioned by default of the company or otherwise. *Id.*

Semble, the object of s. 35 is to provide for the correction of errors in the register caused by the default of the company, and of such errors alone. *Id.*

6. A shareholder in a company whose articles of association contained a clause prohibiting the directors from carrying on the business of the company or making calls, until all the shares were taken up, except after a resolution to continue the company, successfully resisted an action for calls, on the ground that the whole of the shares were not taken up, and that no such resolution had been passed. He then applied to have his name removed from the register:—Held, that the power of the Court to remove a shareholder's name from the register only existed in the two cases of his name having been improperly entered, and of his having ceased to be a member; and that

neither circumstance occurred here. *Exp. Ward*, 37 L. J., Ch., 83; 18 L. T., N. S., 445; 16 W. R. 763.

1. When articles of association require transfers of shares to be executed by both parties, the Court has no power under the Companies Act 1862, s. 35, to rectify the register by removing the name of a transferor, unless the transfer has been executed by the transferee. *Muggrave and Hart's case*, 5 L. R., Eq., 193; 37 L. J., Ch., 161; 16 W. R. 247.

XI. STOCK.

2. A bill in equity will not lie for specific performance of an agreement to transfer stock; *secus*, where the thing contracted for may be particularly commodious to the party. *Cud or Cudde v. Rutter*, 1 P. W. 570; 5 Vin. Abr. 538, pl. 21.

A bill in equity will not lie for specific performance of covenant to transfer South Sea stock. *Id.*

3. No specific performance of agreement for transfer of stock. *Nutbrown v. Thornton*, 10 Ves. 161; *Mason v. Armitage*, 13 Ves. 37.

4. Bill will lie for specific performance of agreement to purchase Government stock, where it prays delivery of certificates which give legal title to stock. *Doleret v. Rothschild*, 1 Sim. & S. 590; 2 L. J., Ch., 125.

5. If an agreement or contract for South Sea Stock be executed, the Court will not break into it; if it be executory, the plaintiff must seek his remedy at law. *Cappur v. Harris*, Bunb. 135.

6. Bill for a specific performance of a contract for 1,000l. York Buildings stock, at 105l. per cent., dismissed, for equity will not execute these contracts, but leave the parties to their remedy at law. *Dorison v. Westbrook*, 5 Vin. 510, pl. 22.

7. On a bill to compel specific performance of an agreement, to transfer 5,000l. York Buildings stock at 7l. 5s. per cent., defendant demurred; but demurrer overruled, for the case might be attended with such consequences as would make it just to decree specific performance of the parties' own agreement, or at least to pay the difference. *Colt v. Nctervill*, 2 P. W. 304.

The judges equally divided upon this question, whether a contract for stock be within the Statute of Frauds, which mentions goods, wares, and merchandise, so as to require the contract to be in writing, or earnest money to be paid. *Id.* 308.

8. One is bound to transfer 300l. East India stock before the 30th September then next; though the stock was much risen, yet the defendant decreed to transfer the 300l. stock in specie, and to account for all dividends from the time it ought to be transferred. *Gardner v. Pullen*, 2 Vern. 394.

XII. OTHER CONTRACTS.

9. Agreement to procure A. to convey to B., decreed to be performed in specie. *Bradshaw v. Sutton*, Colles' P.C. 25.

10. A bill for an execution of agreement, it

appearing by proof that the agreement was only to quit the possession, and not extending to convey the lands, the bill was dismissed. *Gerrard v. Vauz*, 1 Vern. 121.

11. A court of equity will not entertain a bill for the specific performance of an agreement, to pay in a certain event, which has happened, an annual sum by quarterly instalments. *Brough v. Oddy*, 1 Russ. & M. 55; Taml. 215; 8 L. J., Ch., 23.

12. Bill for specific performance of an agreement to grant a deputation of the office of register of a consistory court. *Wheeler v. Trotter*, 3 Swan. 174.

13. Bill for a specific performance of a covenant, whereby the plaintiff was solely to have a pit in the defendant's ground, for digging black stones. Proved that the defendant had for above sixty years been in quiet possession of another pit for digging black stones. Bill dismissed. *Scholefield v. Whitehead*, 2 Vern. 127.

14. P. being seized of an estate in a lease of lives renewable for ever, subject to a head-rent equal in amount to a rent which a sub-tenant of a moiety thereof held at, executed an agreement in writing to let the other moiety thereof, which was in his own possession, to D., his brother, for the lives of D. and two others, and the life of the survivor, free from rent and assessments during D.'s life, and after that to be subject to a yearly rent of 350l.; leases to be executed at the request of either party. There was evidence that the object of this gift was to enable D. to qualify as member of Parliament for the city of Cork, where the lands lay. P. died intestate, in possession, and without having executed the lease:—Held, by the Lords, affirming the decrees of Chancery, that this agreement could not be enforced against the heir of P., the object of it being to give D. a qualification for Parliament, and that there was no agreement for valuable consideration, and that as an imperfect gift the Court of Equity could not enforce it. *Callaghan v. Callaghan*, 8 Cl. & F. 374. And see S. C. 4 Ir. Eq. R. 441.

Courts of equity do not decree specific performance of incomplete gifts. *Id.*

Courts of equity will not decree specific performance of an agreement, the object of which is uncertain. *Id.*

15. A judge's order giving liberty to sign judgment, with a stay of execution in the event of certain conditions being performed, is not an agreement to perform those conditions; and even if the terms are ordered substantively to be performed, the remedy for default is in the court where the order was made, and not by a bill for specific performance. *Thames Iron Works Co. v. Patent Derrick Co.*, 1 John. & H. 93; 6 Jur., N. S., 1013; 29 L. J., Ch., 714.

Therefore, where shipbuilders had built a ship according to contract, and retained her by virtue of their lien for the balance of price unpaid, and had, in an action, obtained by consent a judge's order for the amount, with a stay of execution in case the defendant should pay half, and give a mortgage on the ship for the remainder, to a bill alleging these facts, and that the retainer of the ship involved great expense, and praying a sale, or

specific performance of the conditions of the judge's order, a demurrer was allowed. *Ib.*

1. Auctioneers advanced a sum of money to S., who agreed to put a miscellaneous collection of property in their hands for sale, from the proceeds of which they were to retain the money advanced. A part only of the property was delivered and sold, but it realised less than the sum advanced; S. refused to part with the remainder of his collection:—Held, that the Court would not compel the performance of the contract for an agency; that S. if he satisfied the claims of his agents, was at liberty to countermand the sale of his property, that the advance of the money to S. was not made on the security of the property mentioned in the contract, and that the claims of the agents must be determined in a court of law. *Chinnock v. Sainsbury*, 30 L. J., Ch., 409; 6 Jur., N. S., 1318; 9 W. R. 7; 3 L. T., N. S., 258.

2. The sole and exclusive privilege of selling books and publications, etc., at such of the stations upon a line of railway as he should think proper, was granted to A. B., by a railway company, with a covenant on the part of the company that all books and publications, etc., sent by A. B., to be sold pursuant to the privilege thereby granted, should be conveyed over all or any portion of the lines of railway and branches to any station without charge:—Held, that under this provision A. B. was not entitled to establish a general agency at the various stations for the supply of the neighbouring towns with books and publications, but that the sale (and privilege of free carriage) must be confined to persons *bonâ fide* at the stations for the purpose of travelling themselves or meeting their friends. In a suit for a specific performance of an agreement it is not the course of the Court to make declarations of right, or to put a construction upon the various clauses of the agreement, except so far as may be necessary to provide against its infringement. *Holmes v. Eastern Counties Railway Co.*, 5 W. R. 870; 3 Kay & J. 675; 3 Jur., N. S., 737.

3. The unstamped memorandum or slip, which by the practice of Lloyd's is initialised by the underwriters before granting a policy of marine insurance, is not enforceable in equity as a contract to grant a legal policy. *Morocco Land Co. v. Fry*, 5 N. R. 234; 11 Jur., N. S., 76; 13 W. R. 310; 11 L. T., N. S., 618.

4. A railway company contracted with A. to purchase not less than eight acres of his land, for which they were to pay at the rate of 1,000*l.* an acre over and above the compensation to be awarded to him for severing and otherwise injuring his estate. The company took more than the eight acres, for which they paid him the price agreed for, and also 2,660*l.*, being the amount awarded for injuring and severing his property. Some years after the railway was made A. alleged that by the true construction of the agreement he was entitled to receive payment at the above rate of 1,000*l.* an acre, for portions of his roads, amounting to about three roods, over which the railway company had thrown bridges:—Held, that, assuming the construction of the agreement to be as A. contended, it was such a contract as the Court would not decree specific performance of, but would leave A. to his legal

remedy. *Ingram v. Midland Railway Co.*, 3 L. T., N. S., 533.

5. On the 13th March A. commenced an action against B. to enforce specific performance of an agreement to execute a bill of sale of the chattels and effects in an inn. On the 16th March, A., on his *ex parte* application, was appointed interim receiver, pending a reference for the appointment of a receiver, and the same day he took possession of the inn, and left a man in charge. The same night B. left the inn, and the next day filed a liquidation petition. The trustee under the liquidation claimed the chattels and effects in the inn on the ground that the agreement was void as against him under the Bills of Sale Act, and that the chattels and effects were in the apparent possession of B. at the commencement of the liquidation:—Held, that the Bills of Sale Act did not apply, that the agreement created a good equitable charge in favour of A., and that the possession taken by A. as interim receiver took the chattels and effects out of the order and disposition of B. *Taylor v. Eckersley*, 5 L. R., Ch. D., 740; 36 L. T. 442; 25 W. R. 527.

6. Specific performance of an agreement to purchase the business of an attorney refused upon a bill by the vendor, there being no express stipulations by which the Court might be enabled to carry it into effect on his part, in return for the defendant's purchase money; and there being no condition generally applicable to transactions of this nature, so as to come within the description of "usual clauses" to be inserted in an instrument to be drawn up in pursuance of the agreement. *Bowen v. Farlon*, 1 Meriv. 459.

Whether such an agreement void at law, upon ground either of morality or of public policy. *Ib.*

Quære, if legally a valid agreement, whether it is of such a nature as is capable of being enforced in equity. *Ib.*

7. A., having a general shop in the country, agreed with B., against whom he had obtained a verdict in ejectment, and had other actions pending, to abandon them on condition that B. should execute a bond not to be concerned in any trading establishment within a certain range:—Held, good, and that A. having withdrawn his actions, he was entitled to a specific performance. *Avery v. Langford*, 2 Eq. Rep. 1097; 1 Kay 663; 18 Jur. 905; 23 L. J., Ch., 837.

Held, also, that B. having entered into the arrangement by advice of his solicitor, could not be regarded as acting under duress. *Ib.*

XI. Defences to Suits for.

I. *Delay and Laches*, 6565.

II. *Felony*, 6568.

III. *Forfeiture or Breach of Trust*, 6568.

IV. *Hardship*, 6570.

V. *Illegality*, 6573.

VI. *Inadequacy or Want of Consideration*, 6574.

VII. *Insolvency*, 6575.

VIII. *Misrepresentation and Misdescription*, 6576.

- IX. *Mistake*, 6580.
- X. *Want of Mutuality*, 6586.
- XI. *Other Defences*, 6589.
- XII. *Abandonment of Contracts*. See ABANDONMENT, I.—LANDLORD AND TENANT, I. II. 1.
- XIII. *Vagueness and Uncertainty*. See LANDLORD AND TENANT, I. I. 2.—VENDOR AND PURCHASER, I. III.
- XIV. *Contracts relating to Land. When concluded, and Effect of Statute of Frauds*. See LANDLORD AND TENANT, I. I.—VENDOR AND PURCHASER, I.
- XV. *Misdescription and Misleading Conditions and Particulars and Matters of Title*. See LANDLORD AND TENANT, I. II. AND VI.—VENDOR AND PURCHASER, VI. AND XI.

I. DELAY AND LACHES.

1. Specific performance refused, on account of the laches of the plaintiff, the vendor. *Guest v. Homfrey*, 5 Ves. 818.
2. Where time was not the essence of the contract, and great delay on the part of the purchaser, the plaintiff, yet specific performance was decreed. *Reynolds v. Nelson*, 6 Madd. 290; *id.* 18.
3. Under the circumstances of gross laches on part of purchaser, his bill for specific performance was dismissed. *Harrington v. Wheeler*, 4 Ves. 686.
4. Where one party to an agreement trifles, or shows a backwardness in performing his part of it, equity will not decree a specific performance in his favour; especially if the circumstances and situation of the other party are materially altered in the meantime. *Hayes v. Carryll*, 1 Bro. P. C. 126.
5. Specific performance decreed against purchaser without reference as to title on ground of possession, a correspondence, and no objection to title till two years after delivery of abstract. *Anspach (Marquis) v. Noel*, 1 Madd. 310.
6. Specific performance, the lapse of time being trifling and the result of fraud. *Savage v. Brocksopp*, 18 Ves. 335.
7. The time at which a contract is to be performed, is not essential in equity as at law. The relief against the lapse of time, is in the discretion of the Court upon the circumstances, as if the contract is abandoned. *Radcliffe v. Warrington*, 12 Ves. 326.
8. When a contract has lain dormant for many years, and nothing done by either party in pursuance of it, a court of equity ought not to decree a specific performance. *Wingfield v. Whaley*, 1 Bro. P. C. 200.
9. Lapse of time, if not an essential object of the contract, is no objection to a specific performance. *Hearne v. Tenant*, 13 Ves. 287.
10. Bill for specific performance of an agreement, dismissed upon the lapse of time without proceeding in the performance. *Ally v. Deschamps*, 13 Ves. 225.
11. The time of valuation is of the essence of a contract to sell at a price to be fixed by that valuation, but defendant cannot take advantage

of it, if he improperly occasioned the delay. *Morse v. Merest*, 6 Madd. 26.

12. A vendor cannot come at any distance of time for a performance; but upon a bill filed fourteen months after the correspondence upon the objection to the title ceased by the defendant's returning no answer to the last letter, calling for a distinct answer, and threatening a bill; and the auctioneer not having been called on to return the deposit, it was referred to the Master. *Hertford (Marquis) v. Boore*, 5 Ves. 719.

13. When time is not the substance of a contract, a specific performance will be decreed, though the period for its completion have elapsed. *Jessop v. King*, 2 Ball & B. 91.

14. Equity will not decree specific execution of agreement upwards of fifteen years after it is dated, under which plaintiff had never been in possession, nor paid any consideration, more especially where there had been several conveyances in the interval, and the tenants had made expensive improvements, with plaintiff's knowledge. *Gill v. Fleming*, 1 Ridgw. P. C. 420.

15. Vendor being in possession for upwards of fifty years, and purchaser having done acts inconsistent with the notion of his being the owner, specific performance of agreement to sell was refused, as amounting to a waiver. *Ross (Earl) v. Stirling*, 4 Dow 442.

16. Great delay in the completion of a contract is no defence to a purchaser who has himself been accessory to that delay. *Gunter v. Halsey*, Amb. 386.

Where a contract of purchase is made, and delay is occasioned by the purchaser, and during that delay the legal estate descends to an infant heir, the purchaser cannot avail himself of that difficulty in the title to protect himself from specific performance. *Id.*

17. *Quere*, whether the descent of the legal estate to an infant heir, after the contract, will prevent the Court from decreeing specific performance, where there has been no improper delay on the part of the purchaser. *King v. Turner*, 3 L. J., Ch., 58.

18. Specific performance of an agreement to purchase may be decreed after considerable delay, if the vendee has not demanded his deposit or shown a determination not to proceed in the purchase. *Pincke v. Cartels*, 4 Bro. C. C. 329.

19. Under two agreements for sale (one of which was to be completed on the 1st June, and the other on the 29th September, both in 1846), disputes arose upon the title, and upon certain valuations incident to the purchase. The conveyances were engrossed on the 4th January 1847; and the vendor made two requisitions to the purchaser to complete the first on the 11th January, and the second on the 25th January 1847, and intimated that non-compliance with the requisitions would be treated by the vendor as a breach of the agreements. The purchaser did not comply, but his solicitors reiterated claims to certain deductions and abatements. The disputes continued until after the 13th February 1847, when the purchaser filed a bill seeking specific performance.—Held, that the circumstances and delay did not constitute a case of such default by the plaintiff as to preclude him

from a title to specific performance; but it appearing on the correspondence that the claims of deduction and abatement had not been the cause which delayed the completion of the purchase, but that want of means on the part of the purchaser to pay even so much purchase money as, according to his view, he had to pay, was the cause of the delay up to and until after the date of filing of the bill, the Court held that the purchaser had so acted as to have lost the right to enforce a specific performance, and dismissed his bill; but the Court declined giving the costs, except upon the terms of his returning the deposit. *Gee v. Pearce*, 2 De G. & Sm. 325.

1. After bill, answer, and replication, no further steps were taken in a cause for upwards of twenty years. This is not of itself sufficient ground for refusing specific performance, there being acquiescence on both sides. But a good reason for refusing costs. *Cane v. Allen* (Lord), 2 Dow 289.

2. A bill for specific performance of an agreement is an application to the discretion, or rather the extraordinary jurisdiction, of the Court, which cannot be exercised in favour of persons who have slept on their rights, or acquiesced for a long time in a title and possession adverse to their claim. In cases seeking a specific execution, laches is equally as strong against a plaintiff in not prosecuting as in not commencing suit. *Moore v. Blake*, 1 Ball & B. 69.

A. conveys or assigns his interest in lands to B., in consideration, among other things, that B. shall make or give a lease back again to A. of half a portion of the lands, and, in consideration also of a loan of 200*l.* by B. to A., B. covenants to execute the lease accordingly, subject to the repayment of 200*l.*, for which B. has a judgment; no lease actually made, but A. remains in possession of his portion upon his equitable title; B. lends further sums of money to A., and obtains judgments for these sums, and then conveys the lands, and assigns the judgment to C. C. issues writs of *f. fa.* on the judgments, and in 1781 procures a sale by the sheriff of A.'s equitable interest, and on ejectment brought on the demises of the purchaser and of C., A. is turned out of possession. A., in 1782, files his bill in chancery for relief and execution of a lease to him according to the agreement, but from embarrassment in his circumstances does not further prosecute the suit till 1801; no steps taken between 1782 and 1801 to dismiss the bill. In 1808 the bill dismissed below, but House of Lords reversed decree, and decreed specific performance. 8 C. 4 Dow 230, reversing 1 Ball & B. 62.

3. Where the object of one of the parties contracting would be defeated by delay in the execution of it, if the other party delay, he shall not afterwards be allowed to insist on performance. So, if the delay were injurious to one of the parties. *Crofton v. Ormsby*, 2 Sch. & Lef. 604.

4. If the purchaser demand his deposit at the day for completing the contract, and the vendor has not delivered his abstract before that time, and also neglects to deliver it until after an action brought for the deposit, it is evidence of an abandonment of the contract by the vendor, who shall not be entitled

afterwards to a specific performance. *Lloyd v. Collett*, 4 Bro. C. C. 469.

Motion for an injunction to restrain an action against the auctioneer for the deposit, refused where there had been great delay on the part of the vendor. *Id.*

5. Bill for performance of articles for the purchase of an estate dismissed with costs, the title not having been laid before the vendee's counsel within the time limited, and the South Sea stock, from whence the money was to be raised, having fallen in the meantime 168 per cent. *Lewis v. Lechmere* (Lord), 10 Mod. 503.

6. B. contracts for purchase of estate, and is let into possession. The estate being greatly incumbered, B. pays off some of the incumbrances. Great delay is used on part of vendor in clearing other incumbrances, and making good title:—Held, not sufficient to discharge purchaser from contract. *Smith v. Dolman*, 6 Bro. P. C. 291.

7. Laches will not be imputed to a vendor on account of delay, however long, in filing his bill for specific performance, where negotiations respecting the title have been going on the whole time. *Murray v. Spicer*, 16 W. R. 332; 5 L. R., Eq., 527; 37 L. J., Ch., 505.

8. An estate was sold by auction, and the purchase was to be completed in two months according to the conditions of sale. The buyer died soon afterwards, and suits were instituted both in the Spiritual Court and Chancery respecting his affairs, which prevented the completion of the contract. Four or five years after the sale, the vendor filed his bill to have the contract rescinded, and the affairs of the buyer still remaining unsettled, the Court rescinded the contract, and gave the plaintiff his costs out of the deposit. *Mackreth v. Marlar*, 1 Cox 258.

9. A contracts for the purchase of an estate, and is let into possession; the estate being greatly incumbered, A. pays off some of the incumbrances; great delay is used on part of vendor in clearing off the incumbrances and making a good title:—Held, not sufficient to discharge purchaser from contract. *Smith v. Dolman*, 6 Bro. P. C. 291.

10. H., in 1839, contracted with I. for the purchase of a piece of land, and subsequently sold his bargain to M. In May 1839 the abstract of title was delivered. The draft conveyance was prepared in July, and approved in August following. A covenant, not in the draft, was inserted in the ingrossment by the vendor, and objected to on behalf of the purchaser; and a correspondence on the subject, between their respective solicitors, was carried on at intervals down to 1843, when H. and M. filed a bill for specific performance:—Held, that there had been no abandonment of the contract. *Moskay v. Inderwick*, 11 Jur. 837.

11. The tendency of the Court in modern cases has been to restrict the exercise of its jurisdiction in enforcing specific performance of contracts to those cases in which the plaintiff has been prompt in seeking his equitable remedy. *Southcomb v. Esoter* (Bishop), 6 Hare 213; 16 L. J., N. S., Ch., 378; 11 Jur. 725.

A contract for the sale of the vendor's interest in a manor, under a lease for lives, was made on the 16th October 1840. Objections

were taken to the title, and a correspondence between the solicitors of the vendor and purchaser took place, and continued until the 20th August 1841, when the purchaser gave notice to the vendor that, the title being defective, he rescinded the contract. The correspondence with reference to the title still proceeded (the purchaser's solicitor claiming his right to insist upon the notice, but giving the vendor two months more to complete the title), until the 17th January 1842, when the purchaser intimated that he should fall back to his position under the rescinded contract. The bill was filed on the 30th August 1843:—Held, that the interval between the 20th August 1841 and the 17th January 1842, ought not to be regarded in the question of laches, but that the delay, after the 17th January 1842, before the bill was filed, precluded the vendor from sustaining his suit for specific performance. The fact that the purchaser allowed the deposit to remain in the possession of the vendor from the time he (the purchaser) declared the contract to be rescinded, until shortly before the bill was filed, when he brought his action to recover it, did not affect the question of laches. The possession of part of the property comprised in the contract, taken under a mutual arrangement, and in ignorance of the objection to the title, which was afterwards discovered and relied on, did not affect the question of laches. *Id.*

1. The plaintiff, the vendor, having notice from the purchaser that the latter abandoned his contract, did not file his bill for specific performance till about a year afterwards; the bill was dismissed on the ground of unreasonable delay. *Watson v. Reid*, 1 Russ. & M. 236.

2. In June 1846 A. agreed to sell his share in a mine to B., and four months afterwards he agreed to sell it to C., who paid part of the purchase money. In the month following, A., having given notice to B. that he repudiated the first contract, conveyed to C. No steps were taken by B. for ten and a half years, when a suit was instituted against C. alone, to have a declaration that C. was a trustee, and for a conveyance:—Held, that the right was barred by lapse of time and laches. *Allway v. Braine*, 26 Beav. 575.

Held, also, that the result would have been the same if the subject had been ordinary instead of mining property. *Id.*

A specific performance will not be decreed after a delay of ten years, when nothing has been done in the meantime. *Id.*

3. A railway company contracted to purchase lands, agreeing to pay interest on the purchase money from the day they should commence their works on the lands till the purchase money should be paid. The company did not enter into possession, or commence works, for two years: suit for immediate specific performance dismissed. *Bodington v. Great Western Railway Co.*, 13 Jur. 144.

4. Lands being settled to one for life, remainder to her ten children in fee, all parties agree to endeavour to effect a sale, in order, if possible, to increase the income of the tenant for life. W., one of the ten children, takes upon himself to act for all the others, and contracts in April 1851 to sell to F. No deposit is made, nor any step taken. An abstract is first asked for by the purchaser

in February 1852, and delivered by W. on behalf of all parties. B., another of the children (who had certain liens on the shares of four others, which he perfected after April 1851), denied altogether the authority of W. to act for him. The tenant for life died in September 1852, and in the same year R., one of the four children whose interests B. had so got in for his benefit, confirmed the sale to F. No other step was taken against B. till May 1854, when K., having got five of the shares, filed a bill against B. for a conveyance of the other five:—Held, apart from the question as to the agency of W., that, on the ground of delay, the purchaser was not entitled to a specific performance against B., except as to the share of R. Bill dismissed, with costs, as to B.'s original share; no costs as to the other shares. *Firth v. Greenwood*, 1 Jur., N. S., 866; 3 W. R. 358.

5. In 1827, A. wrote to B., that he had credited B.'s account with 220*l.*, in consideration of an agreement by B. to convey two houses. The abstract was delivered, but there was no acceptance in writing on the part of B. Five years afterwards, B. filed a bill against A. for specific performance. A. swore, and it was not denied, that in 1827 he abandoned the contract, and that in 1829 it was considered broken off by both parties. It appeared, however, that B. had, in the meantime, the benefit of the credit for 220*l.* The Court dismissed the bill on the ground of the delay. *Williams v. Williams*, 17 Beav. 213.

6. A delay from May to December in filing a bill for specific performance, is sufficient to deprive a vendor of his right to have the contract enforced. *Colby v. Gadsden*, 34 Beav. 416.

A purchaser was let into the receipt of rents before completion, and without payment of his purchase money. Great delay having occurred, and no payment having been made to the vendor, he gave notice to the tenants, and prevented any further receipt of the rents by the purchaser:—Held, that this did not deprive the vendor of his right to have the contract specifically performed. *S. C.* 5 N. R. 456; 11 Jur., N. S., 760; 12 L. T., N. S., 197.

7. Claim filed in November 1853 for specific performance of a contract to purchase made in February 1852, dismissed (without costs) on the ground of plaintiffs' laches in taking no steps in the meanwhile to compel completion of the contract. *Lloyd v. Wilkes*, 2 W. R. 501; 2 Eq. Rep. 1081.

8. Specific performance refused on ground of delay for three years and a half. *Eads v. Williams*, 4 De G. M. & G. 674; 1 Jur., N. S., 193; 3 Eq. Rep. 244; 3 W. R. 98. Reversing 2 W. R. 506.

9. Bill by a company for smelting and manufacturing iron against proprietors of coal mines adjoining their works, for specific performance of an agreement to sell to the company, at a fixed price per ton, all of certain beds of coal, estimated to contain from 120,000 to 150,000 tons, to be raised and delivered by the defendants at the rate of 500 tons per week, and the company to drain the beds; and for an injunction to restrain defendants from selling any part to other persons. The bill averred that the coal was very conveniently situated with reference to the com-

pany's iron works, which adjoined thereto, and that the company had the power, by means of their engines and pits, to drain the beds, and had occasion for a large quantity of coal of that particular description. Demurrer allowed, mainly on ground of laches, the company having neglected to file their bill until eleven months after they discovered that defendants had ceased to deliver the coal, and were referred by defendants to their solicitors. *Pollard v. Clayton*, 1 Kay & J. 462; 1 Jur., N. S., 342.

In contracts relating to commodities fluctuating from day to day in market price, the Court expects persons to be unusually vigilant and active in asserting their right to specific performance, which it is inequitable to grant after such an interval, and when the parties may be no longer in the same position. *Ib.*

Such a contract is a positive contract, and does not give jurisdiction to restrain sale to other parties. *Ib.*

Leave to amend and account for laches refused, on the ground that the agreement, notwithstanding it was to be performed, not immediately, but by instalments, and at intervals extending over a long period, and notwithstanding the circumstances averred as to the vicinity of the coal and its convenience with reference to the company's works, and the importance to them of coal of that particular description, was an agreement the works of which the Court could not undertake the superintendence; for the application to the Court would be incessant to secure due industry and exertion on the part as well of plaintiffs as defendants; and *semble*, upon this ground alone the demurrer would have been allowed. *Ib.*

Semble, the benefit to be derived from vicinity of defendant's coal to company's iron works, is one which can be estimated by damages, and, taken alone, is not a ground for specific performance. *Ib.*

Observations on *Taylor v. Neville*, and the reports of *Buxton v. Lister* (3 Atk. 383). *Ib.*

1. Long delay may prevent a party to an agreement from calling for specific performance of it. *Ridgway v. Wharton*, 6 H. L. Ca. 238; 27 L. J., Ch., 46.

2. Delay and laches, on the part of the plaintiff, are a good defence to a suit for specific performance; but they are inapplicable where the contract, though incomplete, has continued to be acted on, as where, under a contract for a lease, possession is taken and rent paid for a series of years. *Sharp v. Milligan*, 22 Beav. 606.

3. Delay, after the parties were at arm's length, of three calendar months and thirteen days, in filing a bill for specific performance of a contract for the sale and purchase of a colliery:—Held, a bar to relief. *Glasbrook v. Richardson*, 23 W. R. 51.

4. Delay of ten weeks held on bar to relief. *Rummen v. Robins*, 14 L. T., N. S., 717; 11 Jur., N. S., 631; 13 W. R. 979; 3 De G. J. & S. 88.

5. A vendor, under a power reserved to him by the contract, gave notice to the purchaser, on the 7th April 1869, that, as he could not comply with the requisitions made by the purchaser, he rescinded the sale. The purchaser filed a bill for specific performance on the 30th August 1870:—Held, that the delay was fatal to his claim for relief. *Rick v. Gale*, 24 L. T., N. S., 745.

There is no distinction between laches on the part of a vendor and laches on the part of a purchaser as a bar to a suit for specific performance. *Ib.*

6. When a plaintiff to a bill for specific performance has allowed five months to elapse after the defendant has rescinded the contract before filing his bill, it is not a sufficient explanation of the delay to state that the defendant's solicitor was suffering from mental aberration. Leave, however, to amend may be given. *Husham v. Llewellyn*, 21 W. R. 766.

7. Misrepresentation, whereby one has been induced to enter into an agreement, may afford a good defence to a suit for specific performance of the agreement, although it is not such a clear and direct misrepresentation as would afford a good ground for a suit to set the agreement aside or for an action for damages upon it. *Lamare v. Dixon*, 6 L. R., H. L., 414; 43 L. J., Ch., 203; 22 W. R. 49.

If the plaintiff in a suit for specific performance has delayed for a length of time to enforce the agreement, acquiescence in a breach of the agreement, or in a misrepresentation on the faith of which the defendant entered into the agreement, will not be imputed to the defendant by reason of a similar delay on his part in repudiating it, though accompanied by possession. *Ib.*

A decree for specific performance of a contract cannot be accompanied by directing an inquiry whether a matter which was a consideration for entering into the contract has been, or can be, properly performed. *Ib.*

When a suit is instituted for specific performance of a contract, and the defence set up is, that the contract was made in consideration of certain promises which the plaintiff has not fulfilled, a delay to defeat that defence must be such as amounts to an acquiescence in the non-fulfilment of the alleged promises. *Ib.*

Held, also, that as there had been delay on both sides, though the plaintiff's bill ought to be dismissed, it must be dismissed without costs. *Ib.*

See also LANDLORD AND TENANT, I. II. 3.

Where Time Essence of the Contract.] See VENDOR AND PURCHASER, X.

In Case of Options and Pre-emptions.] See VENDOR AND PURCHASER, XXIII. II.

II. FELONY.

8. The Court will not execute an agreement to grant a lease to a man who has committed a felony. *Willingham v. Joyce*, 3 Ves. 169.

III. FORFEITURE OR BREACH OF TRUST.

9. The provision in a contract for the sale of the property of a bankrupt, entered into by the creditor's assignees, that the purchase money is to be received by the solicitor of the assignees, is not a breach of trust which would induce the Court to refuse specific performance of the contract. *Hughes v. Morris*, 9 Hare 636. See S. C. 16 Jur. 603; 21 L. J., Ch., 761.

10. The Court will not enforce a contract involving a breach of trust. *Wood v. Richardson*, 4 Beav. 174; 5 Jur. 623.

11. The Court will not decree a specific performance which involves a breach of trust. *Maw v. Topham*, 19 Beav. 576.

1. Where act of sale by trustees takes place, under circumstances of breach of trust, Court will not decree specific performance in favour of *bona fide* or innocent purchaser. *Ord v. Noel*, 5 Madd. 438.

2. Contract by trustees under power of sale, though by subsequent events it cannot be executed under the power, shall be made good in equity by the effect of the interest acquired on the estate bound by the contract. *Mortlock v. Buller*, 10 Ves. 315. Affirmed 2 Dow 518.

3. By the 9 & 10 Vict., c. 87, s. 27 (Irish), similar to 9 & 10 Vict., c. 74, s. 271, the town council of a borough, or the commissioners of a city or town, are empowered, from time to time, to contract for the purchasing or renting of any lands necessary for the purposes of the Act, and to contract for the purchase or lease of any baths and washhouses, already or thereafter to be built and provided in any such borough or such city or town, and appropriate the same to the purposes of the Act, and the baths and washhouses so purchased or leased shall be deemed to be within the provisions of the Act, as fully as if they had been built or provided by the council or town commissioners; "lands" are defined to mean lands, tenements, or hereditaments, of whatsoever nature or tenure. The town council of a borough contracted to purchase baths and washhouses which had been commenced by a private society, and were held under a sub-lease of a portion of lands comprised in a lease of lands demised by the owner of the fee, and which were thus subject to a rent in addition to the rent reserved in the sub-lease, and to the covenants and conditions in the original lease:—Held (affirming 8 Ir. Ch. R. 204), that it would be a breach of trust for the town council to purchase lands, the interest in which might be lost by the default of others, and that specific performance ought not to be enforced. *Mulholland v. Belfast Corporation*, 9 Ir. Ch. R. 292.

4. An agreement by trustees of two properties held on different trusts for a mining lease of both at a rent of so much per acre worked:—Held, a breach of trust, and specific performance at the suit of the trustees refused. *Tolson v. Sheard*, 46 L. J., Ch. D., 815; 36 L. T., N. S., 756; 5 L. R., Ch. D., 19; 25 W. R. 667.

5. Trustees not to be compelled to perform an agreement entered into under mistake, to sell for an inadequate consideration. *Bridge v. Rice*, 1 Jac. & Walk. 74.

6. Bill for the execution of a covenant contained in a renewed lease granted by trustees dismissed, the covenant being *ultra vires* of the trustees. *Bellringer v. Blagrove*, 1 De G. & Sm. 63; 11 Jur. 407.

7. Equity will not decree a specific execution of a contract, the terms of which are uncertain as to its extent. Nor will equity decree specific execution against a party not lawfully competent to execute the contract. *Harnett v. Yielding*, 2 Sch. & Lef. 549.

8. Under a power to lease at the best rent, the very highest rent that can be obtained is not required; and the true criterion is, whether the rent has been fairly obtained without any private advantage to the donee of the power: and therefore an agreement which the Court

treated as subject to the same rule was enforced, though the rent obtained was below the offers made by less solvent tenants, and below the average at which the lands were valued, where the agreement was fairly made and was a prudent one. The cases on this subject reviewed. *Harnett v. Yielding* (2 Sch. & Lef. 29) commented on. *Dyas v. Cruise*, 8 Ir. Eq. R. 407; 2 J. & L. 460.

9. A contract made, by trustees for sale, for the sale of the trust property, conjointly with property not subject to the same trusts, will not be decreed to be specifically performed unless it appears to the Court, both that due precautions have been taken for preventing injury to the trust premises by the conjunction, and also that the terms of the contract furnish means of ascertaining clearly the proportion of the proceeds of the sale to be attributed to the trust premises. *Rede v. Oakes*, 34 L. J., Ch., 145; 13 W. R. 303; 11 L. T., N. S., 549; 4 De G. J. & S. 505.

10. One of two executors erroneously believing that he was acting with the authority of the other, contracted to sell a leasehold house, part of the testator's estate:—Held, that the purchaser could not enforce a specific performance of the contract. *Sneesby v. Thorne*, 7 De G. M. & G. 399; 1 Jur., N. S., 1058.

Quare, whether he could have done so if the executor had been under no misapprehension. *Id.*

11. A trustee, without the authority of his co-trustees, signed an agreement for the sale of trust property. In an action for specific performance, to which the co-trustees were not parties:—Held, that specific performance could not be ordered either as to the whole or as to the part in which the contracting trustee had a beneficial interest. *Naylor v. Goodall*, 47 L. J., Ch., 53; 37 L. T. 422; 26 W. R. 162.

12. It is no defence to a suit for specific performance against trustees of a turnpike road, that the land they have contracted to sell is liable to pre-emption by the owner of the adjoining land under the General Turnpike Act, 3 Geo. 4, c. 126, s. 39, even where the offer required has not, through inadvertence, been made to such owner, and it is in evidence that the owner insists on his right, the purchaser making no objection to the title, and being content to take such estate as the trustees could convey. *Barrett v. Ring*, 2 Sm. & G. 43.

13. A contract in writing had been entered into for sale of land by trustees to a Roman Catholic priest. The written contract did not specify the use that was to be made of the land, but the vendors represented, and the Court was satisfied by the evidence, that there had been an understanding that a church should be built on it. Before completion the purchaser contracted to sell the land to a third party, who intended to erect a manufactory on it, and the trustees then refused to complete:—Held, on a bill filed against the trustees, that the Court would not, under the circumstances, compel them to complete the contract. *Trappes v. Cobb*, 16 W. R. 117.

14. Where the acts of the party to a contract are such as would have worked a forfeiture of all benefit of the contract if it had been executed, the Court will not decree a specific performance. But when there is a doubt as

to whether there has been any breach of the contract, and the evidence is conflicting, or the breaches of the agreement are nominal, the Court may make a decree, leaving the plaintiff to his remedy at law. *Cartan v. Bury*, 10 Ir. Ch. R. 387.

1. Agreement to grant a lease of copyhold premises for twenty-one years, and to put the same in repair, there being no evidence that to grant such lease would work a forfeiture, or that the licence of the lord could not be obtained:—Decreed, to be specifically performed. *Puaton v. Newton*, 2 Sm. & G. 437.

Though the Court will not ordinarily decree specific performance of an agreement to repair, it is the habit of the Court to decree specific performance of agreements involving the execution of leases or other instruments containing covenants to repair. *Id.*

2. Although a court of equity will not in general decree specific performance of an agreement, of which the forfeiture of a lease will be the consequence, it will not allow a person to set that consequence up as a defence to a decree for specific performance, where the act creating the forfeiture is one which he might himself have guarded against. *Helling v. Lumley*, 5 Jur., N. S., 301; 28 L. J., Ch., 249; 3 De G. & J. 493.

A., being lessee of the Opera House, assigned his lease to B., "subject to the right of possession of A., his executors, administrators, and assigns, to the box numbered 124," during the residue of the term thereby assigned, and the renewed term to be granted under a covenant for renewal contained in the lease to A. B., in pursuance of such covenant, subsequently took a renewal of such lease, and in the renewed lease the lessee was empowered to select such forty-one boxes as he might please, and to lease them otherwise than from year to year, and from season to season; and it contained a power of re-entry by the lessor in case the lessee should, without licence, lease more than forty-one boxes otherwise than as before mentioned. B. accordingly selected forty-one boxes, but the box numbered 124 was not included in such selection. A. thereupon filed a bill for obtaining a declaration that he was entitled to the box numbered 124, or to an equivalent in money or otherwise for the same, for the residue of the renewed term of years granted to B. B. declining to make the compensation prayed by the bill, A. was entitled, as against B., to the benefit of the reservation of the box numbered 124, contained in the assignment of A.'s lease to B. *Id.*

3. A trustee entered into a contract for the sale of trust property, and it was agreed that the purchaser should, out of the purchase money, retain a private debt due to him from the trustee. On a bill by the trustee:—Held, that this Court would not decree the specific performance of such a contract. *Thompson v. Blackstone*, 6 Beav. 470.

4. The Court will not compel a defendant specifically to perform an agreement when the result would be to compel him to commit a breach of a prior agreement with another person. *Willmott v. Barber*, 15 L. R., Ch. D., 96; 43 L. T. 95; 28 W. R. 911.

5. To a suit for specific performance by the purchaser against the vendor of a leasehold

interest, it is not a defence that the lease contains a covenant against alienation without the consent of the landlord, and that it does not appear that the consent of the landlord has been obtained. *Leitch v. Simpson*, 5 Ir. R., Eq., 613.

In Agreements for Leases.] See LANDLORD AND TENANT, I. II. 8.

IV. HARDSHIP.

6. On the question of executing an agreement, hardship cannot be regarded, unless it amounts to a decree of inconvenience and absurdity so great as to afford judicial proof that such could not be the meaning of the parties. *Prebble v. Boghurst*, 1 Swans. 329.

7. The Court will not give any assistance to a party seeking to enforce a hard bargain. *Kimberley v. Jennings*, 6 Sim. 340; 5 L. J., N. S., Ch., 115. And see *Faine v. Brown*, cited 2 Ves. 307; *Talbot v. Ford*, 13 Sim. 173.

8. Specific performance refused of covenants in dean and chapter leases of long standing. *Ely (Dean) v. Stewart*, 2 Atk. 44; Barn. 170.

9. Where father is possessed of advowson, which he apparently intended for his son, and is prevailed on, when in an infirm state, to enter into articles for sale of it. Specific performance was refused, though no fraud was imputed to purchaser. *Bell v. Howard*, 9 Mod. 302.

10. In cases of specific performance, courts of equity exercise a discretion. In cases of great hardship they will not interfere, but will leave the plaintiff to his remedy by recovery of damages at law. Trustees joined their *cestui que trust* in a contract for sale, and personally agreed to exonerate the estate from any incumbrances thereon. There were considerable incumbrances, and it did not appear whether the purchase money would be sufficient to discharge them, or what would be the extent of the deficiency. The Court refused to decree a specific performance against the trustees so as to compel them to exonerate the estate, but left the purchaser to his remedy by action for damages. *Wodgewood v. Adams*, 6 Beav. 600.

11. B. treats with A. for a piece of land, having an intention to build a mill, to which the consent of the corporation is necessary; but A. refuses to treat on condition. B. fails in obtaining consent: this failure in his speculation is no defence against a bill for specific performance. *Adams v. Weare*, 1 Bro. C. C. 567.

12. Where land is conveyed in fee by deed of feoffment, subject to a perpetual ground rent, and the feoffee covenants for himself, his heirs and assigns with the feoffor, the owner of adjoining lands, his heirs, executors, administrators, and assigns, not to use the land in a particular manner, with a view to the more ample enjoyment by the feoffor of such adjoining lands, and the subsequent acts of the feoffor, or of those claiming under him, have so altered the character and condition of the adjoining lands, that with reference to the land conveyed, the restriction in the covenant ceases to be applicable according to the intent and spirit of the contract, a court

of equity will not interpose to enforce the covenant, but will leave the parties to law. Whether upon such a covenant there could be any remedy at law against the assignees of the covenantor, *quære. Bedford (Duke) v. Trustees of British Museum*, 2 Myl. & K. 552; 2 L. J., N. S., Ch., 129.

1. If a person contracts to do a thing which he may do himself, or has the means of compelling others to do, equity will compel him to do it, unless it be highly unreasonable, in which case the other party shall not be held to the contract. If in that case the other party refuses to give up the contract, equity will not enforce a specific execution of it, but leave him to recover damages at law. *Costigan v. Hastler*, 2 Sch. & Lef. 166.

A contract for a lease by mortgagor cannot be enforced against the tenant, without obtaining a reconveyance of the mortgage, or procuring the mortgagee to confirm same. Tenant holding under such contract cannot compel landlord to pay off the mortgage to give effect to the contract. *Id.* 160.

2. Specific performance of an agreement refused on the ground of want of specific mutuality of laches, misapprehensions in the party or parties of its nature and effect, inequality, improvidence, and other circumstances appearing in the case. *Hamilton v. Grant*, 3 Dow 33; 1 Bli. N. S. 594.

3. Bill for performance of written agreement, parol evidence read of different agreement, dismissed with costs; and plaintiff cannot resort to agreement set up by defendant; parol evidence allowed where a hard agreement, or in part executed. *Legal v. Miller*, 2 Ves. 299.

4. The fact that the performance of an agreement has, owing to circumstances which have subsequently occurred, become hard in its consequences to one of the parties, or that he is called upon to perform it under circumstances which he had not contemplated, is no objection to the specific performance of the contract in equity, there being nothing doubtful in the meaning of the agreement, and nothing hard or oppressive in its terms at the time it was made, *semble. Webb v. Direct London & Portsmouth Railway Co.*, 9 Hare 129; 20 L. J., N. S., Ch., 566; 15 Jur. 697. Reversed 1 De G. M. & G. 521; 21 L. J., N. S., 1337; 16 Jur. 323.

The promoters of a railway company, in consideration of a landowner's opposition to the bill being withdrawn, agreed to pay him 4,500*l.* as the purchase money of land, not exceeding eight acres, to be taken by the company for the formation of this railway, and for consequential damage. The Act was obtained, and the agreement adopted by the company in consideration of the landowner releasing the promoters from their covenant. The agreement was so framed, as to render it doubtful whether it was not to be contingent on the formation of the railway. The railway was abandoned, and, after the expiration of the time limited for the acquisition of land for the purposes of the undertaking by the company, the landowner filed a claim for specific performance of the agreement:—Held, to be a case in which a decree would produce more injustice than justice, and a specific performance was therefore refused. S. C. 3

De G. M. & G. 521; 21 L. J., N. S., Ch., 337; 15 Jur. 323.

5. A court of equity will not decree specific performance of an agreement more favourable to the plaintiff than to the defendant, involving hardship upon the defendant and damage to his property, if he entered into it without advice or assistance, and there is reasonable ground for doubting whether he entered into it under intoxication, *i.e.*, without a knowledge and an understanding of its nature and consequences. In such a case the plaintiff will be left to his remedy at law. *Vivers v. Tuck*, 9 L. T., N. S., 554; 1 Moo. P. C., N. S., 516.

6. The fact that a party was considerably in liquor when he entered into an agreement, is no reason for the Court refusing a decree for specific performance, if there was no fraud. *Lightfoot v. Heron*, 3 Y. & Coll. 586.

7. In a suit for specific performance of a contract for sale of certain leasehold property, the defence raised was, that at the time the contract was entered into the vendor was so intoxicated that he was not conscious of what he was doing. No fraud was alleged:—Held, that such a defence was of no avail, and specific performance decreed with costs. *Semble*, that if a person by habitual intoxication so entirely destroys his mental powers as to render him incompetent to understand any transaction, any document executed by him would be invalid. *Shaw v. Thackray*, 17 Jur. 1045; 1 Sm. & Giff. 537.

8. Whether the existence of a nuisance in the neighbourhood of a house contracted to be purchased for a residence, which nuisance is known to the vendor, and is one which a provident purchaser could not discover, is a ground for refusing a decree for specific performance of the contract, and whether otherwise if the nuisance be not known to the vendor. *Quære. Lucas v. James*, 7 Hare 410; 18 L. J., N. S., Ch., 329; 13 Jur. 912.

9. A grant was made by Dr. Y., bishop of Ely, in 1801, to P. for his life of the ancient office of receiver of the rents of the lands belonging to the see of Ely. For a long series of years the receiver for the time being had not only received the rents, but had prepared leases, surrenders, and counterparts of leases, had registered leases and assignments of leases in a register kept by the bishop, and had made searches in the muniment room in the residence of the bishop whenever requested by persons requiring information contained in the register and records belonging to the bishop, for all which duties he received fees. In 1836 Dr. A., immediately after his appointment as bishop, sent a notice to P. not to prepare any more leases, surrenders, or counterparts of leases, and not to receive any more rents. P. filed a bill against Dr. A., praying that it might be declared that P. was entitled to exercise all the duties and receive the perquisites hitherto exercised and received by the receiver, and that the bishop might be restrained from interfering with such exercise and enjoyment:—Held, that whatever might be the legal right of P. to the office, and to its alleged appurtenances, no relief could be given to him in equity, on the grounds of the hardship of forcing the services of a stranger in an office of trust upon the bishop and the want of mutuality, the nature of the duties

and services asserted by the plaintiff being such as to preclude the possibility of a decree in this court against him compelling their specific performance. *Pickering v. Ely (Bishop)*, 2 Y. & Coll. C. C. 249; 12 L. J., N. S., Ch., 271; 7 Jur. 479.

1. *Quare*, whether a court of equity will decree the specific performance of a contract by a railway company to purchase land, if the company should afterwards so exercise their powers as to disable themselves from taking the same land; and whether the vendor has any and what remedy in such a case. *Tomlinson v. Manchester & Birmingham Railway Co.*, 2 Rail. Ca. 104.

2. Where a man, in a building lease, covenants to new build the brick messuages on the premises, rebuilding some and repairing others is not a sufficient performance of the covenant; for the lessee must rebuild the whole; neither is pulling down and re-building the fore and back fronts a rebuilding within the covenant; for upon such a covenant, the lessors are entitled to a specific performance. *Sed secus* of a covenant to repair. In this case, however, the Court, instead of decreeing a specific performance, left it to a jury to ascertain the damages sustained, and directed an issue accordingly. *London (City of) v. Nash*, 1 Ves. 12; 3 Atk. 512.

3. Where the equitable title is complete, a legal conveyance will be decreed, though the property may have been much enhanced or depreciated in value. Subsequent events will not in equity vary a contract fairly entered into. *Revell v. Hussey*, 2 Ball. & B. 287.

Renewal decreed against a tenant under a bishop's lease, without any contribution from his sub-lessee, he having covenanted that, as often as the bishop should renew, he would renew without fine with his sub-lessee. The tenant and his lessor are necessary parties, the sub-lessee deriving his title from their covenants. *Id.* 280.

4. A. holding under a corporation (of which he was a member), and in the habit of obtaining renewals on favourable terms, demised to B. at a certain rent, with a covenant to renew at the same rent, as often as the corporation should renew to him. The corporation at length raised the rent payable by A. A. was bound, notwithstanding, to renew to B. on the former terms. *Evans v. Walsh*, 2 Sch. & Lef. 519.

5. A sub-lessee of a bishop's lease, demised to the plaintiff, covenanting to renew, and to use his best endeavours to obtain a renewal from his immediate lessor. He afterwards purchased his immediate lessor's estate. The bishop refused to renew, except at a greatly increased fine, which he paid:—Held, that he was bound to renew to the plaintiff without any contribution, in consequence of the increase of the bishop's fine. *Lawder v. Blackford*, Beat. 522.

6. A contract was entered into for the sale of a piece of land described as arable land, not stating anything as to the existence of a right of way to it. It turned out that it was extremely doubtful whether there was any right of cartway to it:—Held, that specific performance ought not to be decreed at the suit of the vendor, in the absence of any conduct on the part of the purchaser precluding his taking

the objection. *Donne v. Light*, 3 Jur., N. S., 627; 26 L. J., Ch., 459; 8 De G. M. & G. 774.

7. A mortgagee, with power of sale, obtained a foreclosure decree, and then entered into an agreement to sell the estate, with a clause providing that as the vendor was mortgagee, with power of sale, she would only enter into the usual covenant that she had not incumbered. The purchaser objected to the validity of the foreclosure decree, and insisted upon having the conveyance under the power of sale; and on the vendor declining to convey in that form, instituted a suit for specific performance, in which the vendor adduced evidence, showing that the above-mentioned clause was inserted by inadvertence, and that she never intended to incur the risk of opening the foreclosure by conveying under the power:—Held, that the misapprehension was a sufficient defence to the enforcement of a conveyance under the power. *Watson v. Marston*, 4 De G. M. & G. 230.

8. A bill in Parliament to authorise a railway company to grant a lease in perpetuity to another railway company of certain projected lines was opposed by a third railway company, who withdrew their opposition on an agreement being come to that during the continuance of any lease to be authorised by the Act the companies should participate in portions of each other's profits, and that the two former companies should not take traffic on specified portions of their lines:—Held, differing from the opinion of Lord Cottenham on a demurrer (2 Macn. & G. 324), that the agreement was *ultra vires*, and ought not to be decreed to be specifically performed. Held, also, on the construction of the whole agreement, that if valid, it would have come into operation, although only a portion of the projected lines was completed. *Shrewsbury & Birmingham Railway Co. v. London & North Western Railway Co.*, 4 De G. M. & G. 115; 17 Jur. 845; 22 L. J., Ch., 682; 6 H. L. Ca. 113.

The directors of a railway company are trustees (in an important sense of the word) of their statutory powers, and an agreement entered into by the company amounting to a breach of trust will not be enforced to the prejudice, or not according to the views of all or some of the shareholders, at the instance of parties cognisant of the circumstances. This proposition is not inconsistent with *Hawkes v. Eastern Counties Railway Co.* (1 De G. M. & G. 737). *Id.*

9. Leasehold property was sold by auction on the 8th June 1858, with a condition for completion on the 20th June following. The title was accepted by the purchaser on the 16th of July, but owing to disputes as to the value of the fixtures, the meeting for completion did not take place till the 26th August. The purchaser then discovered that the vendors had renewed the insurance, which expired on the 24th June, for one month only, so that the property became uninsured on the 24th July, and thereupon became forfeited to the lessors. On the 7th September the purchaser absolutely repudiated the contract. The vendors subsequently renewed the insurance, and obtained a waiver of the forfeiture from the lessors, and the purchaser refusing to complete, they filed a

bill for specific performance:—Held, that, although the vendors were not bound to renew the insurance, yet having done so in so unusual a manner, the Court would not decree specific performance, and the bill was dismissed, but without costs. *Dowson v. Solomon*, 1 Drew. & Sm. 1; 29 L. J., Ch., 129.

1. A person contracting for the lease of a mine, cannot resist its performance, on the ground of his ignorance of mining matters, and of the mine turning out worthless. *Haywood v. Cope*, 25 Beav. 140; 4 Jur., N. S., 227; 27 L. J., Ch., 468.

Taking possession of a mine by intended lessee:—Held, not to be an acceptance of the title. *Id.*

A. had worked the coal under his estate, but abandoned it as unprofitable. Twenty years afterwards, B. cleared the pit and examined the coal in the shaft with two other persons, and subsequently contracted for a lease. The colliery turned out worthless:—Held, that B. could not resist a specific performance on the ground of A. not having communicated the fact of his having worked the mine and found it unprofitable. *Id.*

2. A contract in writing had been entered into for sale of land by trustees to a Roman Catholic priest. The written contract did not specify the use that was to be made of the land, but the vendors represented, and the Court was satisfied by the evidence, that there had been an understanding that a church should be built on it. Before completion the purchaser contracted to sell the land to a third party, who intended to erect a manufactory on it, and the trustees then refused to complete:—Held, on a bill filed against the trustees, that the Court would not, under the circumstances, compel them to complete the contract. *Trappes v. Cobb*, 16 W. R. 117.

See also VI. *infra*.

Contracts made in a State of Intoxication. Effect in General.] See DRUNKENNESS.

When Contract becomes incapable of Performance.] See ACCIDENT—CONTRACT, VII.

V. ILLEGALITY.

3. Where an equal agreement cannot, by reason of a subsequent Act of Parliament, or some other lawful impediment, be performed in the whole, yet the same shall be specifically executed in such part of it as remains lawful. *Bettesworth v. St. Paul's (Dean)*, 1 Bro. P. C. 240.

4. A court of equity will not enforce an agreement against a party, who was induced to enter into it, in order to save his sons from a threatened prosecution for felony. *Dewar v. Elliott*, 2 L. J., Ch., 178.

5. A clause in an agreement, providing that, if it should become necessary to stamp it and to pay any penalty for that purpose, the creditor may charge it against the debtor, is an evasion of the Stamp Acts, and the Court will not enforce it. *Abbott v. Stratton*, 9 Ir. Eq. R. 233; 3 J. & L. 603.

6. If an instrument contains distinct engagements, by which a party binds himself to do certain acts, some of which are legal and some illegal at common law, the performance

of those which are legal may be enforced, though those which are illegal cannot. *Australasia (Bank) v. Breillat*, 6 Moo. P. C. 152. S. C. *nom. Australasia (Bank) v. Australia (Bank)*, 12 Jur. 189.

7. When the plain intent of an agreement is unobjectionable, this Court will decree specific performance of it according to such intent, though in its terms the agreement was contrary to a statute; thus an agreement for a lease with a covenant by the tenant to pay all composition for tithes, entered into after the 2 & 3 Will. 4, c. 119, will be enforced by decreeing a lease to be executed, reserving a rent compounded of the rent agreed upon, and the rent-charge in lieu of tithes, where such is the intention of the parties. *Daly v. Duggan*, 1 Ir. Eq. R. 311.

8. The purchase of an estate for the purpose of setting aside a previous agreement affecting the property on the ground of fraud, partakes of the nature of champerty, and will not be enforced in equity. *De Hoghton v. Money*, 2 L. R., Ch., 164.

A purchaser cannot, before completing his contract, enforce any equities attaching to the property against persons not parties to the contract. *Id.*

Therefore, where a purchaser filed a bill for specific performance, and added as parties persons claiming under a previous agreement which the bill sought to impeach:—Held, that the bill could not be sustained. *Id.*

9. A "Government securities trust," or combination of more than twenty persons, formed on the principle of investing the subscriptions of the members and dividing the capital fund and profits among themselves, by means of certificates, convertible by annual drawings by lot into preference dividend bonds bearing interest, with a bonus, is an "association for the acquisition of gain" within the meaning of s. 4 of the Companies Act 1862, and is, therefore, unless registered under that section, an illegal association. *Semble*, the mode of distribution was a lottery, and therefore illegal under the Lottery Acts. A member of such an association, which had never been registered under the Companies Act 1862, but which was regulated by a trust deed, brought an action against the trustees named in the deed to have the trust administered by the Court, and to make the trustees liable for alleged breaches of trust whereby part of the trust fund had been lost. A demurrer by one of the defendants, a retired trustee, was allowed, on the ground that the association was illegal, and that the trust deed therefore constituted an illegal contract which the Court would not enforce. *Sykes v. Beadon*, 11 L. R., Ch. D., 170; 48 L. J., Ch., 522; 27 W. R. 464; 40 L. T. 243.

10. In an action for specific performance of an agreement for the composition of a literary work by the defendant, the plaintiffs alleged that the defendant had agreed that his name should not appear on the title-page of a work as the author of it; the defendant alleged that it was part of the agreement that his name should so appear. The plaintiffs proposed to publish the book with a title-page, stating that it was edited by K. (assisted by M., the defendant). K. was known as having published other books of a similar description,

and had allowed the plaintiffs to make use of his name, but he had taken no part whatever in the compilation:—Held, that the proposed title-page would be a fraud on the public, and that on this ground the plaintiffs were disentitled to relief. *Post v. Marsh*, 16 L. R., Ch. D., 395; 50 L. J., Ch., 287; 43 L. T. 628; 29 W. R. 198.

See also CHAMPERTY—CONTRACT, VI.—OFFICES—PENSIONS AND PAY, and other SPECIFIC TITLES.

VI. INADEQUACY OR WANT OF CONSIDERATION.

1. It was determined to enforce a specific performance of an agreement for a purchase, if the price was reasonable at the time of the sale, however disproportionate after accidents might make it; but in the principal case the price agreed for was forty years' purchase. The Lords therefore reversed the decree of the Court of Exchequer enforcing specific performance. Upon mutual articles there ought to be mutual remedies: and therefore the vendor may come into equity as well as the vendee. *Keen v. Stukeley*, Gilb. Eq. Rep. 155.

2. Trustees not to be compelled to perform an agreement entered into under mistake, to sell for an inadequate consideration. *Bridge v. Rice*, 1 Jac. & Walk. 74.

3. Inadequacy of consideration is not sufficient for refusing specific performance of purchase by auction, without something more, as fraud or surprise, etc. *White v. Damon*, 7 Ves. 30.

4. Inadequacy of consideration is not of itself a sufficient ground for refusing specific performance. *Coles v. Trecothick*, 9 Ves. 348; 1 Smith 233.

5. It is incumbent on purchaser of reversionary interest from a person in situation of an expectant heir, seeking specific performance of contract, to make out a case of adequacy of consideration. *Ryle v. Swindells*, 1 M'Cl. 519; 13 Price 758.

6. Inadequacy of value is not an objection to decreeing specific performance, unless the inadequacy is so great as to prove fraud, or that the parties could not have intended to execute the contract. *Callaghan v. Callaghan*, 8 Cl. & F. 374. See S. C. 4 Ir. Eq. Rep. 441.

7. Where, by a memorandum of agreement, the defendant agreed to sell certain cottages and gardens, lately purchased by him, to the plaintiff for an annuity payable to the defendant during his life, which was to be charged on the premises, and the defendant was empowered to sell for the purpose of raising any arrears:—Held, that the vendor was entitled not only to the security of the charge, but also of the covenant of the purchaser for payment. Held, also, that the consideration being dependent on the uncertainty of life, although gross inadequacy might be a ground for refusing a specific performance, yet that a difference of 7 or 8 per cent. was not such inadequacy; and performance of the agreement decreed. *Bower v. Cooper*, 2 Hare 408; 11 L. J., N. S., Ch., 287; 6 Jur. 681.

8. A wife who had been deserted by her

husband, became entitled to a share of an intestate's property amounting to 3,600*l*. The husband, whilst he was ignorant of the amount of the share, assigned it in trust for his wife and children, subject to the payment of 10*s*. a week to himself for his life. Although the deed recited that the intestate's estate was very considerable, yet as the administrators, who were the wife's brothers, and parties to the transaction, did not disclose to the husband the amount of the share, the deed was set aside. *Groves v. Perkins*, 6 Sim. 576.

9. Mere inadequacy of price, where it cannot be used as evidence of fraud, is not itself sufficient to prevent the Court from decreeing a specific performance of an agreement for the purchase of land. *Collier v. Brown*, 1 Cox 428.

10. Where a written agreement is entered into for the purchase of an estate at a price far beyond its value, but without any circumstances of fraud or surprise, the Court will not decree a specific performance of such a contract, but, on the other hand, will not rescind it. *Day v. Newman*, 2 Cox 77.

11. Specific performance will not be decreed of an agreement to sell certain property at a price to be settled by two persons who are named, if the Court sees reason to believe that the price subsequently fixed by these persons is considerably below the real value of the property. *Parken v. Whitby*, T. & R. 366.

12. M. being in embarrassed circumstances, in consideration of a loan of 900*l*. makes a lease to D., with covenant for perpetual renewal of lands of yearly value of 450*l*., at rent of 150*l*., subject to private parol agreement, that M. might redeem within two years, on payment of 1,300*l*. S. knowing circumstances, with consent of M. purchases from D. his interest, to whom S. pays the 1,300*l*. S. afterwards purchases the whole interest of this and other lands of M., for additional sum of 3,700*l*. The clear profit rent at which the lands were let the year following being 600*l*. a year and other advantages:—Held, binding on M. *Meredith v. Saunders*, 2 Dow. 515.

13. Specific performance of agreement refused under circumstances of inadequate consideration. *Underwood v. Hitchcock*, 1 Ves. 279.

14. Inadequacy of consideration no ground for resisting the execution of a contract to sell, the vendor not being under any incapacity, deficiency of judgment, or led by accident or design into a misapprehension of the value. *Western v. Russell*, 3 Ves. & B. 187.

15. Contract executed though the consideration was inadequate; not amounting to fraud; but without costs. *Burrows v. Lock*, 10 Ves. 470.

16. A court of equity will not decree a specific execution of articles where they appear to be unreasonable, or founded on fraud. *Young v. Clerk*, Pre. Ch. 538. And see *Tilly v. Peers*, cited 10 Ves. 301.

17. A deed which incorrectly recites the consideration of a contract on which a conveyance was executed, does not thereby warrant a suit in equity to set aside the contract, but only to reform the conveyance. *Harrison v. Guest*, 8 H. L. Ca. 481.

Where no fiduciary relation exists between two parties dealing for the sale and purchase of an estate, mere inadequacy of consideration,

or irregularity in the statement of it in the conveyance, is not sufficient to impeach the contract. *Ib.*

1. A. B., being desirous of raising money to enable him to prosecute his claim to a fund in court, applied to a solicitor for that purpose. An agreement was executed, by which the solicitor agreed to lend 1,000*l.*, and A. B. agreed to purchase from him some land for 6,000*l.* (ten times its value). The land was conveyed, and the funds in court mortgaged by A. B. for the 6,000*l.*; but the 1,000*l.* was not advanced at the time. The Court, on the ground of the gross inadequacy of value, coupled with the other circumstances of the case, set aside the whole transaction with costs. *Cookell v. Taylor, Collett v. Preston, Preston v. Collett*, 15 Beav. 103; 21 L. J., N. S., Ch., 545.

Inadequacy of value, though it is not by itself a sufficient ground for avoiding a sale, is yet of great weight when coupled with circumstances of oppression. *Ib.*

The Court looks with suspicion at the evidence of value derived from the mere opinion given by surveyors, unsupported by any other circumstances. *Ib.*

2. Inadequacy of value is not in itself sufficient to set aside a contract. *Griffith v. Spratley*, 1 Cox 383.

3. Where a purchaser, after viewing a farm, and being informed of the rent at which it was let, agreed to buy at 5,000*l.*:—Held, that the difference between this price and 3,500*l.*, which the Court considered to be the value of the property, was not so great as to shock the conscience and thus constitute of itself a defence, on the ground of exorbitance, to suit for a specific performance. *Abbott v. Swooder*, 4 De G. & S. 448; 22 L. J., Ch., 235; 3 N. R. 623; 12 W. R. 615; 10 L. T., N. S., 49.

4. A purchase of a contingent reversionary interest was set aside chiefly on the ground of inadequacy of value, the consideration being an annuity for the life of the vendor, whose life was a bad life, and was better known to the purchaser than to the vendor to be such. *Davies v. Cooper*, 5 Myl. & C. 270.

5. Principles upon which the Court acts in considering the question of value. *Brinkley v. Hams*, 1 Dr. 175.

6. Observations on the true consideration not appearing upon purchase deeds. *Holman v. Loynes*, 18 Jur. 829; 23 L. J., Ch., 529.

7. Specific performance is a matter of discretion, to be exercised, however, according to fixed rules, and the mere inadequacy of consideration is not a ground for exercising such discretion by refusing a specific performance. *Haywood v. Cope*, 25 Beav. 140.

8. But mere inadequacy of price is a sufficient reason to refuse specific performance of a contract. *Flacke v. Gray*, 5 Jur., N. S., 645; 29 L. J., Ch., 28; 4 Drew. 651.

9. A party who, under a misapprehension of his legal rights, parts with his property for a *bona fide* and valuable, but not an adequate, consideration, cannot have the transaction set aside on the mere ground of mistake. *Marshall v. Collett*, 1 Y. & C. 232.

10. A creditor applied to his debtor to give security for a balance of account, and the debtor promised to give such security, but afterwards refused to fulfil his promise. The creditor filed a bill for specific performance:—

Held, on demurrer, that the implied forbearance of the creditor was a sufficient consideration for the promise. *Alliance Bank (Limited) v. Broom*, 5 N. R. 69; 2 Dr. & Sm. 289; 34 L. J., Ch., 256; 13 W. R. 127; 11 L. T., N. S., 332; 10 Jur., N. S., 1121.

11. The executrix of a lessee agreed to sell to A. the residue of her term (except a day) and the fixtures on the premises for 400*l.* This agreement was entered into by the executrix without advice, and there was no memorandum of it except a letter written by the executrix to her own solicitor a few hours afterwards. Subsequently the landlord, knowing that there had been a negotiation, if not an agreement, between the executrix and A., agreed with her for the purchase of the residue of the term for 550*l.* A., on hearing of this, offered the executrix, if she would complete her contract with him, 1,000*l.* as purchase money, and indemnity against any proceedings on the part of landlord. She accepted the offer, and demised the premises to A. for the whole term, wanting a day:—Held, that the original agreement (if any) with A. was such in its nature and circumstances as not to be of any validity in equity, unless the price was shown to be equal or more than equal to the value of the property; and that as this was not shown the landlord was entitled to a specific performance of his agreement, not only against the executrix, but against A. *Goodwin v. Fielding*, 4 De M. & G. 90.

12. Plaintiff agreed to transfer to defendant ten shares in a railway company, on which nothing had been paid, and defendant agreed to accept the transfer, and indemnify the plaintiff from future calls. Bill by plaintiff for specific performance. Demurrer by defendant, allowed by the Master of the Rolls on the ground of no consideration, overruled on appeal. *Cheale v. Kenward*, 6 W. R. 810; 3 De G. & J. 27; 4 Jur., N. S., 984; 27 L. J., Ch., 784. Reversing 4 Jur., N. S., 576; 6 W. R. 494.

13. If a vendor of real estate dies before conveyance, intestate, and his heir-at-law contests the sufficiency of the consideration for the purchase, he ought to file a bill to have the agreement for sale set aside, and not rest upon inadequacy of consideration as a defence to a bill for specific performance. *Hodder v. Pugh*, 10 Jur., N. S., 534; 12 W. R. 782; 10 L. T., N. S., 446; 33 Beav. 489.

On Sales at a Valuation.] See VENDOR AND PURCHASER, V.

See also ANNUITY, I. AND III.—CONTRACT, III.—FRAUD, I. II. 12. and II.—HEIRS, EXPECTANTS AND REVERSIONERS, I. 3.—LANDLORD AND TENANT, I. I. 5.

VII. INSOLVENCY.

14. Purchaser discharged on motion upon affidavit of imprisonment for debt and insolvency. *Hodder v. Ruffin*, 1 Ves. & B. 544.

15. Bankruptcy of a person who has agreed to purchase does not discharge the contract. *Brooke v. Hewitt*, 3 Ves. 255.

16. An act of bankruptcy and a docket struck, though no commission issued, a suffi-

cient objection to a bill for specific performance of a previous contract for the sale of an estate to the plaintiff, in a case even where part of the money had been paid, and sub-contract for sale of part entered into by the plaintiff; and the defendants had agreed to convey accordingly. *Franklyn v. Brownlow (Lord)*, 14 Ves. 550.

1. A., being in insolvent circumstances, suffers another person to become the apparent owner of his farm (though under a secret trust for him), A. shall not have, against the landlord, a specific execution of an agreement made by him with the trustee, the landlord supposing the trustee to have been the rightful owner, and confiding in his solvency. *O'Herlihy v. Hedges*, 1 Sch. & Lef. 123.

2. A trader makes a conveyance of all his real and personal property to trustees, to sell for the benefit of his creditors, under which the trustees contract to sell certain lands to defendant. The contract not being completed, they file a bill against defendant for specific performance; but, before answer, the trader becomes bankrupt, and his assignees file a supplemental bill to enforce the contract:—Held, that although the conveyance to the trustees was an act of bankruptcy, the assignees may compel the performance of the contract made under it. *Goodwin v. Lightbody*, Dan. 123.

See also LANDLORD AND TENANT, I. I. 13.—
I. II. 6.

VIII. MISREPRESENTATION AND MISDESCRIPTION.

1. *Misrepresentation and Misdescription*, 6576.
2. *Concealment*, 6579.
3. *As a Ground for Rescission*. See VENDOR AND PURCHASER, VII. I.
4. *In Particulars and Conditions of Sale*. See VENDOR AND PURCHASER, VI.
5. *In Agreements for Leases*. See LANDLORD AND TENANT, I. II. 7.
6. *Fraud and Misrepresentation Generally and by Fiduciary Persons*. See FRAUD.

1. Misrepresentation and Misdescription.

3. Misrepresentation, though in a slight degree, is an objection to a specific performance. Distinction upon a bill to rescind the contract. *Cadman v. Horner*, 18 Ves. 13.

4. Specific performance of agreement refused on ground of want of mutuality, of laches, misapprehensions in the parties of its nature and effect, inequality, improvidence, and other circumstances. *Hamilton v. Grant*, 3 Dow 33; 1 Bli. N. S. 594.

5. Unless it appear that the party seeking a specific execution of an agreement has acted not only fairly, but in a manner clear of all suspicion, equity will not interfere; for if there be a reasonable doubt on the transaction, the party will be left to his legal remedy for

non-performance of the contract. *O'Rourke v. Percival*, 2 Ball & B. 58.

6. A court of equity will not decree a specific execution of articles where they appear to be unreasonable, or founded on fraud. *Young v. Clerk*, Pre. Ch. 538.

7. Where the manner of obtaining an agreement is not strictly just and regular, a court of equity ought not to decree a specific performance, although the agreement be in part executed. *Rockford v. Creswick*, 1 Bro. P. C. 171.

8. Equity will not decree an execution of articles unless fairly obtained, and without surprise or circumvention. Thus, when A. articles for the purchase of B.'s estate, pretending he bought it for one whom B. was desirous to oblige, but in truth bought it for another, and by that means got the estate at a less value; equity will not decree the execution of these articles. *Phillips v. Bucks (Duke)*, 1 Vern. 227, 229.

9. When A. has refused to sell to B., except for ready money, and C. clandestinely attempts to purchase for B., and money is not ready, Court will not enforce agreement. *Popham v. Eyre*, Loft. 786.

10. Where a person having a clear title to 12l. for rent, and claiming the property of the land, is induced, by the representations of two professional persons, that he had no right to either rent or land, to agree to accept 10l. in full, for rent and land, the Court will not entertain a bill for the specific performance of the agreement. *Stanley v. Robinson*, 1 Russ. & M. 527.

11. If A. in contracting with B. falsely represents himself to be the agent of C., and thereby obtains better terms, the Court will, notwithstanding, enforce the contract, unless A. knew that such would be the effect of the misrepresentation. *Fellows v. Gwydyr (Lord)*, 1 Sim. 63; 5 L. J., Ch., 43. Affirmed 1 Russ. & M. 83.

12. A purchase obtained by fraud would be, in effect, no purchase, and could not acquire any validity by the Confirming Statute, 54 Geo. 3, c. 173, and 57 Geo. 3, c. 100. *Beaden v. King*, 2 Hare 523.

13. There may be a degree of unfairness in obtaining articles for the purchase of an estate, for which this Court will not set them aside; but will refuse its aid to carry them into execution. And if the party who obtained such articles hath been in possession, and made lasting improvements, he shall be allowed for them on consenting to deliver up the articles and account for the profits; otherwise, if he go to law, and fails there. *Savage v. Taylor*, Forrest 234.

14. Specific performance was decreed in favour of a purchaser, though no solicitor acted for the vendor, and though the contract was executed under circumstances which might easily have led to fraud, no fraud being proved in the vendor or his agent. *Lightfoot v. Heron*, 3 Y. & Coll. 586.

15. A party contending for specific performance must show that his conduct has been fair. If he has made material misrepresentations to the defendant, it is no answer to say that the defendant might have found out that they were misrepresentations. Specific performance is not of course, because there

is a contract, but a relief in the nature of indulgence peculiar to the jurisdiction of equity. *Cox v. Middleton*, 2 Drew. 209; 22 L. J., Ch., 618.

1. The Court will not apply the maxim, *caveat emptor*, to cover a false and positive representation, essentially material to the subject. *Lomdes v. Lane*, 2 Cox 363.

2. Party obtaining an agreement by a partial misrepresentation, not entitled to a specific performance, on waiving the part affected by the misrepresentation. The effect of partial misrepresentation is not to alter or modify the agreement, *pro tanto*, but to destroy it entirely, and to operate as a personal bar to the party who has practised it. *Clermont (Viscount) v. Tasburgh*, 1 Jac. & Walk. 112.

3. Specific performance refused on the ground of representations having been made at the sale on the part of the vendor, of improvements, affecting the value of the premises, intended by him, which were not carried into effect. *Beaumont v. Duques*, Jac. 422.

4. Misrepresentation of value of estate sufficient ground to refuse specific performance. *Walls v. Stubbs*, 1 Madd. 80.

5. Parol evidence of declaration of auctioneer at sale, warranting quantity, received as defence to bill for specific performance, on ground of fraud, though not for purpose of enforcing specific performance. *Winch v. Winchester*, 1 Ves. & B. 375.

6. In a case depending on allied misrepresentation of value, there cannot be a more effectual bar to the plaintiff than by showing that he was from the beginning cognisant of all the matters complained of, or after full information of them continued to deal with the property. *Vigers v. Pike*, 8 Cl. & F. 650.

7. Wilful misrepresentation of the yearly value of an estate, is a good reason for a court of equity to refuse decreeing a specific performance of a contract for the sale of it. *Brereton v. Conper*, 1 Bro. P. C. 211.

8. On a sale by auction of a life interest in certain funds, the life was described in the particulars of sale to be that of a very healthy gentleman, aged forty-eight. In a subsequent part of the particulars, the life was described as that of a healthy gentleman, aged forty-eight, whose life was insurable. At the sale, an insurance was guaranteed at five guineas per cent. On a bill by the vendors for a specific performance of the contract, it was proved that, shortly before the sale, the vendors had insured the life at a premium of 4l. 17s. 10d. per cent., though, according to the evidence of the actuary of the office where the life was so insured, the highest rate per cent. charged in London for a healthy life of that age was 4l. 6s. —Held, that, with the knowledge of this fact, the vendors were not justified in describing the life as a healthy life, and that the guarantee did not do away with the effect of this description, though the purchaser admitted he knew five guineas to be more than the premiums usually charged; and the bill was dismissed with costs. *Brealey v. Collins*, Younge 317.

9. A purchaser, offering to perform his part of the contract, required, by notice, the

vendor to complete within a month:—Held, that the purchaser could not afterwards set up, as a defence to suit for a specific performance, misrepresentation of the vendor, of which he was aware at the time of giving the notice. *Macbryde v. Weeks*, 22 Beav. 533; 2 Jur., N. S., 918.

10. Where a purchaser can show that he entered into a contract in reliance on the truth of representations which turn out to be false, and without resort to other means of information, he will not be compelled to perform it; but if, not satisfied with the representations, he investigate and inquire for himself, and has a fair opportunity of testing the accuracy of them, the vendor is relieved from responsibility. *Clarke v. Mackintosh*, 4 Giff. 134; 9 Jur., N. S., 114; 7 L. T., N. S., 558; 11 W. R. 183; 1 N. R. 160. Afterwards compromised on appeal, 11 W. R. 652.

Therefore, where representations were in some respects vague and inconsistent, and required investigation, and the purchasers had books produced to them, saw the property, and had every facility for a full investigation into the accuracy of the representations, and subsequently entered into a formal contract, which was altered and approved by their solicitor, the Court decreed specific performance, with costs, and dismissed a cross-bill by the purchasers, praying that the agreement might be declared void. *Ib.*

11. The jurisdiction of the Court to decree specific performance will not be exercised in favour of the vendor who fails to satisfy the Court that he has done all he can to avoid misrepresentation. *Turquand v. Rhodes*, 37 L. J., Ch., 830; 18 L. T., N. S., 844; 16 W. R. 1074.

In dismissing a bill for specific performance by a vendor, the Court has jurisdiction to order a return of the deposit. *Ib.*

12. A. agreed to purchase part of an estate, on the faith of representations made to him by the vendor's agent, that the vendor would do certain acts on the remainder of the estate. Those acts, however, were not done; in consequence of which the value of the land purchased was considerably diminished. A bill for specific performance, filed by persons claiming under the vendor, was dismissed with costs. *Myers v. Watson*, 1 Sim., N. S., 523.

13. A solicitor contracts to purchase from A. B., not at that time his client, and being ignorant of his legal position, an estate at a low price, informing A. B. that the nature and title of the property were such as that no one but a professional man would purchase it—such representation not being justified by the state of the property, and no solicitor having been employed on behalf of A. B. in the transaction. Specific performance of the contract refused to the solicitor. *Davis v. Abraham*, 5 W. R. 465.

14. The mere assertion by a vendor that he has a good title, on the faith of which the purchaser relies without investigating the title, is not necessarily such a misrepresentation as will preclude the vendor from enforcing the contract. *Hume v. Pooook*, 1 L. R., Ch., 379; 12 Jur., N. S., 445; 35 L. J., Ch., 731; 14 W. R. 681; 14 L. T., N. S., 386.

Representations, which a purchaser has

chosen to accept from the vendor's agent on the subject of the vendor's title, and which turn out, in fact, but not when made, to have been known by the agent to be untrue, do not amount to such fraud as absolves a purchaser from his contract. *Ib.*

1. Purchase at an auction of leaseholds stated to be sold "by order of executors;" the vendor was really administrator *de bonis non cum testamento annexo durante absentia* A., who was the next of kin to the testator, and also to his last surviving trustee and executor, A. being in Canada. Bill for specific performance by the vendor dismissed, and interest on the deposit ordered to be paid. *Webb v. Kirby*, 5 W. R. 189; 26 L. J., Ch., 145; 3 Jur., N. S., 73. Reversing 4 W. R. 770.

2. Leaseholds were described in the particulars of sale as in the occupation of a company under a lease of which ten and a half years were unexpired at Lady Day 1856. At the sale C., who attended to purchase, asked to see the lease, which was not produced, but he was informed by the vendors' solicitor that he did not remember the name of the lessees, but believed N. and M. to be two of them. C. became the purchaser. The lease had been in fact granted to N., M., and another as trustees for the company. C. refused to complete on the ground of misrepresentation. Specific performance decreed against C. *Farebrother v. Gibson*, 1 De G. & J. 602.

3. A purchaser cannot be compelled to complete a contract entered into by him, on the faith of a balance sheet produced by the vendor, as being, though subject to slight errors, substantially correct; the errors being, in fact, so serious as to amount to nearly 1,480*l.*, and reducing the balance of 1,500*l.* stock in favour of the business to some 20*l.* or 30*l.*, and showing that the concern was barely solvent. *Charlesworth v. Jennings*, 11 L. T., N. S., 439.

4. C. and M., by verbal agreement, cause a lease to be prepared of a house and stable in consideration of 600*l.*, and 5*l.* a year ground rent, which is only executed by C.; but C. and M. subsequently agree in writing that M. shall give 625*l.* for the premises, C. paying the expenses of the lease to the occupant. M. then objects to complete, on the grounds that, C. having represented the house to be substantially and well built, it was seriously defective. C. files a bill for specific performance, denying the representation, but, on his examination under the new practice, merely saying he was never asked. M., by his answer, swears such representations were made, and his statement is corroborated:—Held, that the written agreement was not sufficiently definite to satisfy the statute, and the misrepresentations of the plaintiff were proved. Bill dismissed with costs. *Cow v. Middleton*, 2 W. R. 284; 2 Drew. 209; 23 L. T. 6; 2 Eq. Rep. 631.

5. A real estate was devised to trustees to sell, invest the produce, and pay the dividends to a husband and wife for life, and after the death of the survivor to her children as she should appoint. The estate was not sold, and the wife, having nine children, appointed it to the six younger, and all the nine joined with the husband and wife in raising money

upon annuities, and, finally, in selling the estate to the annuitant. The trustee refused to join in any of the deeds, but he paid the rent of the estate to the purchaser during the life of the surviving tenant for life; after whose death he refused to make any further payments. Upon a bill by the purchaser against the trustee and the *cestuis que trustent*, to obtain a conveyance of the legal estate, they alleged that the deed was executed by them under pressure, that none of the children received any part of the money paid for the annuities or for the purchase of the reversion; that the youngest was under age at the time she executed the purchase deed, and that she had refused to confirm it:—Held, that the purchaser must prove the transaction fair and perfect, before the Court will interfere to give a complete title; that there was no proof of the owners of the reversion having received any consideration; that it was not necessary to consider whether the youngest child was of age, and the bill was dismissed against the defendants, without costs, but as against the trustee with costs. *Hannah v. Hodgson*, 30 L. J., Ch., 738; 9 W. R. 129.

6. A. agreed to purchase all B.'s interest in a coal and fire-clay pit, in the belief that B. had some lease from R., owner of the mine; and A. had been let into possession, and had worked the mine for four years under the agreement. At the date of the agreement B. had no lease from R., but only a memorandum of an agreement for a lease, which was never shown to A., but two years after the agreement with A., B. obtained a lease of the mine from R.:—Held, that the agreement could be specifically enforced against A., subject, however, to the Court finding on an inquiry that B. had made no substantial misrepresentation to A. as to the area of the workings. *Southern v. Harriman*, 12 W. R. 704.

Held, also, that an offer by A. to give up possession upon certain terms not acceded to by B. was no abandonment of the contract. *Ib.*

Held, also, that a question of misrepresentation as to the area of the workings round a coal pit is not waived by the purchaser taking possession and working the pit. *Ib.*

7. Where a misrepresentation has been made by a vendor, the Court applies the rule *caveat emptor* with great caution. *Colby v. Gadsden*, 15 W. R. 1185; 17 L. T., N. S., 97.

Where a purchaser agreed to buy an estate upon a statement that it lay upon coal, which coal afterwards proved to have been mostly worked out, and subsequently the purchaser entered into an agreement with a third party to sell the colliery at a price implying the existence of a considerable quantity of coal, and then afterwards discovered the exhaustion of the coal:—Held, that the transaction between the purchaser did not invalidate his defence of misrepresentation to a bill by the vendor for specific performance. *Ib.*

Property was sold which was represented as standing on a fine vein of anthracite coal:—Held, that the doctrine of *caveat emptor* applied, and that it was the business of the purchaser to inquire as to the extent to which the coal had already been worked. *S. C.* 34 Beav. 416.

8. The owners of a house with outhouses

and curtilage, which adjoined a yard communicating with it by an open doorway and used by the tenants of the house, the whole being enclosed by a wall, put up a notice on the premises that they were to be sold. An intending purchaser having inspected them, and being under the impression that the whole formed the property which was to be sold, made an offer. Before any contract was entered into an abstract was sent by the owner's solicitors to the solicitor of the intending purchaser, in which the property was described as a dwelling-house, curtilage, coal-house, outhouses and garden, and a piece of ground between the dwelling-house, coalhouse and garden on the one side and the river and ditch on the other, except a small piece of land, part thereof, lately sold to a person named in the abstract. The purchaser's solicitor required to be informed of the particulars of the excepted piece of land, and that it should be marked on the plan. The vendors' solicitor replied that the premises were too distinctly defined to admit of any mistake, and were bounded in by walls. He afterwards filled in a blank, left to be filled in by him in the draft contract, with the above description, adding, "and which premises are sufficiently distinguished by boundaries," and the agreement was so signed. The vendors had no title to the yard, which in fact was the piece of land sold to the person named in the abstract:—Held, that the purchaser was not bound to inquire further as to this excepted piece, nor to blame for supposing the yard was comprised in the agreement; and that, as the representation of the vendors' solicitor had tended, not to remove, but to confirm the error, a bill by the vendors for a specific performance ought to have been dismissed with costs. *Mozey v. Bigwood*, 4 De G. F. & J. 351; 8 Jur., N. S., 803; 6 L. T., N. S., 450. Affirmed 10 Jur., N. S., 967; 12 W. R. 811; 10 L. T., N. S., 466.

1. B. signed a written contract with R. to purchase a brickfield. In the negotiations B. asked R. whether he had ever put the property into the hands of an agent to sell for less money than he was then asking, saying that he fancied, as the fact was, that it must be the same as had been offered to him for less. R. falsely answered, "No:—"Held, that this was such a material misrepresentation as to prevent the Court enforcing the contract in an action brought by R. *Roots v. Snelling*, 48 L. T. 216.

2. An agent, commissioned by a vendor to find a purchaser, has authority to describe the property, and to state any fact or circumstance which may affect the value, so as to bind the vendor: and if an agent so commissioned makes a false statement as to the description or value (though not instructed so to do), which the purchaser is led to believe, and upon which he relies, the vendor cannot recover in an action for specific performance. A surveyor was employed by the owner of a leasehold house to find a purchaser. He represented to the defendant that another person, H., was ready to buy the property for 700*l.*, and that if the defendant were to give 50*l.* more, he would make a clear profit of 7 per cent.; that H. had further offered to rent the property at 300*l.*, or the ground floor

only at 200*l.* The defendant, relying on the above representations and others, which were unauthorised by the vendor, and untrue, contracted to purchase for 750*l.*; but afterwards, finding out the falsehood, refused to complete. The vendor himself also made a misleading statement to the purchaser:—Held (independently of the statement made by the vendor himself), that the false statements made by the agent, being within his authority, were sufficient to vitiate the contract; and specific performance refused. *Mullens v. Miller*, 22 L. R., Ch. D., 194; 52 L. J., Ch., 380; 48 L. T. 103; 31 W. R. 559.

2. Concealment.

3. Specific performance not decreed where there is a concealment on the part of the vendor. *Shirley v. Stratton*, 1 Bro. C. C. 440.

4. A contract having been made for sale of an estate, it afterwards appeared that there were several outgoings from the estate which were not disclosed at the time of the contract, yet these being matters which lie in compensation, the contract shall be carried into execution, with an allowance only to the purchaser for those particulars which diminish the value. *Homland v. Norris*, 1 Cox 59.

5. A small incumbrance which may be the subject of compensation, no objection to a specific performance. *Guest v. Homfray*, 5 Ves. 818.

6. Where a purchaser (who was a solicitor), after viewing a farm, and being informed of the rent at which it was let, agreed to buy at 5,000*l.*:—Held, first, that the difference between this price and 3,500*l.*, which the Court considered to be the value of the property, was not so great as to shock the conscience, and thus constitute of itself a defence, on the ground of exorbitancy, to a suit of the vendor for a specific performance. Secondly, that the omission on the part of the vendor to inform the purchaser of the result of a late valuation, or of the tenant having complained of the rent being excessive, and of the full amount not having been exacted, did not constitute a defence to such a suit. Thirdly, that the refusal by the defendant to complete having arisen from a cause other than that of insufficiency of title, he ought to pay the general costs of the suit, although the original decree directed an inquiry when the title was first shown, and the report found it to have been first shown in the Master's office. *Abbott v. Swoorder*, 4 De G. & Sm. 448; 22 L. J., Ch., 235; 3 N. R. 623; 12 W. R. 615; 10 L. T., N. S., 49.

7. It is not generally the duty of a purchaser to inform a vendor of any circumstances which may make it desirable for him to purchase such as a contract for re-sale at a higher value. *Dolman v. Nokes*, 22 Beav. 402.

8. An estate was put up to sale by auction. The conditions of sale were drawn out in manuscript, but were not printed or circulated. They were shown in this state to B., a solicitor for a person who was likely to be a purchaser. He objected at once to one of the conditions of sale, as one which the contemplated purchaser could not be advised to assent to. The auction took place, and the

objection to this condition was publicly noticed by an indifferent attendant at the sale. The property was bought in. On the following day the proprietor of the estate called upon the contemplated purchaser, and persuaded him to sign an agreement for the purchase of the estate, as it was alleged, at a most exorbitant price, and containing a reference to the objected condition of sale:—Held, that, under such a state of circumstances, specific performance of the agreement could not be enforced. *Lee v. Dawson*, 4 L. T., N. S., 464.

1. In a suit for specific performance of an agreement for a lease of clay, sand, and other substances, of which the defendant had recently become the owner, it was alleged by the defendant that there had been misrepresentation and concealment as to value:—Held, that the bill could not be sustained on that ground, but as there was evidence that the defendant had been taken by surprise, and had been induced by the plaintiff to sign the agreement in ignorance of the value of his property, and upon the representation that the defendant would make a fair allowance should the property turn out more valuable, the bill was dismissed. *Walters v. Morgan*, 4 L. T., N. S., 758; 3 De G. F. & J. 718.

There being no fiduciary relation between a vendor and a purchaser in a negotiation, the purchaser is not bound to disclose any fact exclusively within his knowledge, which would influence the price of the subject sold. *Ib.*

Simple reticence does not amount to legal fraud; but if a purchaser in any manner induces a vendor to believe the existence of a non-existing fact, which might influence the price of the subject contracted to be sold, the contract cannot be supported. *Ib.*

Where, therefore, an intended lessor and lessee of minerals were in the above position as to knowledge, and the intended lessee brought to the lessor a lease ready prepared, without previous negotiation as to the details of it, and induced the latter to sign it, saying that he might trust to the proposed lessee for making a fair allowance if the minerals turned out more valuable than was supposed:—Held, that a bill for specific performance by the intended lessee, offering to make a fair extra allowance, could not be sustained, and its dismissal was confirmed on appeal. *Ib.*

2. The owners of a colliery entered into a contract with an adjoining landowner for the purchase of his estate, without disclosing the fact, of which he was ignorant, that they had, without authority, gotten a considerable quantity of coal from under it:—Held, that the Court would not enforce the contract at the suit of the purchasers, though the sale was not shown to be at an undervalue. *Phillips v. Homfray*, 6 L. R., Ch., 770.

3. Property was sold by auction on the 15th June. The principal conditions of sale, which were read aloud before the sale, were—(3) that the abstract of title was to be delivered to the purchaser within ten days from the day of sale; (4) that no objection was to be made in respect of the title prior to a lease of the 10th April 1809; (6) that all requisitions and objections in respect of the title or matters appearing on the abstract should be sent in writing within ten days after the delivery of

the abstract to the purchaser or his solicitor otherwise it shall be considered that all such requisitions or objections were waived by the purchaser, and that he had accepted the title, and for that purpose time should be deemed of the essence of the contract; (8) that the purchaser shall not object to the title in connection with the sale of the premises to B., to whom the assignment of them, dated the 29th January 1870, was made, but should assume that B. acquired under and by virtue of the deed a valid title to the premises by the deed expressed to be assigned to him; (9) that the purchaser should not object to the title because L., in 1858, as a trustee for B., purchased from the trustees of the then owners, B. being one of the last-mentioned trustees. The purchaser's solicitor had not been furnished with any copy of the conditions before the day of sale, though he had asked for them, and had only hastily perused them in the vendor's solicitor's office on the morning of that day, and had no knowledge of the title or its defects. The abstract of title, which was very long and complicated, was delivered to the purchaser's solicitor on the 25th June, and he sent the abstract and a case to counsel on the 26th. The purchaser's solicitor received the opinion of counsel that the title was bad on the 8th July. The title was bad on the ground that R., the assignee of the deed of 1870, had purchased the premises sold for X. and others, X. being one of the trustees for sale of the property so bought, and also on the ground that L., the assignee in the deed of 1858, had purchased for B., who was also a trustee for sale:—Held, in a suit for specific performance by the vendor, first, that whatever opinion might be entertained as to the ninth condition, the eighth condition was so framed as to deceive the purchaser, and entirely throw him off his guard by unwarrantably suppressing and masking a fatal defect in the title. *Boyd v. Dickson*, 10 Ir. R., Eq., 239.

Held, secondly, that, having regard to the object and frame of the eighth and ninth conditions, and the length and complication of the title, the vendor could not avail himself of the sixth condition, as he could not be heard to say that an objection should be sent in within the limited time, which his other conditions showed could never have been made. *Ib.*

IX. MISTAKE.

— *Rescission of Contracts of Sale for.* See VENDOR AND PURCHASER, VIII. I.
— *Generally.* See MISTAKE.

4. A. agrees to be bound in a bond as a surety to B., and signs and seals it accordingly; but, by the neglect of the clerk, A.'s name was not inserted. The obligee shows the condition, and his name and seal, demands payment, and threatens to sue him unless he would give fresh security, which A. agrees to, but after finding the mistake, refused, not being bound by law; yet equity will compel him. *Crosby v. Middleton*, Pre. Ch. 309.

5. Specific performance of an agreement which is clearly worded, cannot be resisted on the ground that other terms must have been

in contemplation of the parties, shown by the improvidence of the express contract; and was decreed, notwithstanding the act upon which the right depended appeared under the circumstances to have been done *diverso intuitu*. *Sullivan v. Jacob*, 1 Moll. 473.

1. Parol evidence admissible in opposition to specific performance of written agreement upon heads of mistake or surprise, as well as of fraud, and upon such evidence the bill was dismissed. Another bill for specific performance of agreement, contracted according to the same evidence, contradicted by answer, was also dismissed. *Townsend v. Stangroom*, 6 Ves. 328.

2. Specific performance of an agreement the subject of discretion, refused in the case of mistake, though no fraud. *Mason v. Armitage*, 13 Ves. 25.

3. Though a defendant to a bill for specific performance of a contract may have a decree for performance, according to his construction, if adopted by the Court, without a cross-bill, the decision being, not according to his construction, but only that he had contracted under a mistake, created by the plaintiff, the bill was merely dismissed. *Higginson v. Clowes*, 15 Ves. 516.

4. Trustees not to be compelled to perform an agreement entered into under mistake, to sell for an inadequate consideration. *Bridger v. Rice*, 1 Jac. & Walk. 74.

5. Where a party by mistake bid for the wrong lot, and was declared the purchaser:—Held, that as it was a clear mistake, the Court would leave the party to his remedy at law, and the bill for a specific performance dismissed, without costs. *Malins v. Freeman*, 2 Keen 25; 6 L. J., N. S., Ch., 133.

6. A vendor contracted to sell a certain leasehold messuage, but through a mistake in the parcels actually conveyed the next door to it, which also belonged to him:—Held, on an application to compel the purchaser to accept the title and pay the purchase money into court, that the purchaser had no reason for refusing to do so. *Grissell v. Peto*, 2 W. R. 178; 2 Sm. & Gif. 39; 18 Jur. 591.

7. Where one party seeks the execution of a contract which is still *in fieri*, the other may show that the contract was not conformable to the real intention of the parties. *Law v. Warren*, 1 Dr. 31; 6 Ir. Eq. R. 299.

But where the contract has been executed, it is not open to a party, by way of defence, to allege that the instrument does not truly ascertain the real contract of the parties. *Ib.*

To sustain such a defence, the defendant must file a bill to reform the contract. *Ib.*

8. Verbal declarations of an auctioneer at the time of sale not to be received in contradiction to the printed particulars. But *quære* as to the effect of personal information of a mistake in the particular. *Ogilvie v. Folyjambo*, 3 Meriv. 53.

9. The Court will not decree a specific performance against a party who has mistaken a material fact in the agreement. Where, on an agreement for the sale of a garden, it was clear that the vendor could never have intended that buildings which had been erected on part of the garden, and necessary to the enjoyment of his own premises, were within the agreement, and formed part of the premises

to be conveyed, a specific performance was refused. *Neap v. Abbott*, C. P. C. 333.

10. Premises were advertised to be sold according to certain printed particulars and conditions of sale. Before the sale took place several of the printed copies were altered by the vendor's solicitor, who introduced in writing a reservation of a right of way to other premises belonging to the vendor. Several of the altered copies of the particulars were laid on the table in the auction room without any remark with regard to the alteration; and an altered copy was delivered to the auctioneer, who read the same aloud before the biddings commenced; but the party who became the purchaser did not hear or notice the alteration. The contract was signed by the auctioneer (inadvertently) and by the purchaser on a copy of the particulars of sale not containing the reservation. After the purchase money was paid and possession given, the purchaser filed his bill for a specific performance of the contract by a conveyance from the vendor, without a reservation of the right of way; and the bill was dismissed without costs. *Manser v. Bach*, 6 Hare 443.

11. Specific performance of a written agreement refused, on parol evidence that one term of the actual agreement was omitted. *Garrard v. Grinling*, 2 Swan. 244; 1 Wils. 460.

12. The proof must be very clear which should induce a court of equity to refuse to enforce a written agreement, upon the ground that a term of the real agreement between the parties has been omitted by mistake. *Clay v. Rufford*, 8 Hare 281; 19 L. J., N. S., Ch., 295; 14 Jur. 803.

13. Equity has jurisdiction to compel the specific performance of a complete contract, but cannot supply any term not agreed on. *Ormond v. Anderson*, 2 Ball & B. 369.

14. When a contract is composed of an offer by letter and an acceptance of the offer by letter, if the offer is clear and unambiguous, and the party who answers it wishes to add to it any condition or qualification, the onus rests upon him of stating clearly and precisely what that condition or qualification is; if the answer, though ambiguous, is capable of being construed as an acceptance, pure and simple, of the offer, the party making the offer is justified in acting upon it in that sense. *English and Foreign Credit Co. v. Arduin*, 5 L. R., H. L., 64; 40 L. J., Exch., 108.

15. In applying the rule of *caveat emptor* to the case of lessees of coal mines, it must be remembered that every one acquainted with that kind of property is aware that coal mines are liable to be interrupted by faults. *Ridgway v. Sneyd*, 1 Kay 627.

If all the coal had been gotten by ancient workings, that might be a case for equitable relief. *Ib.*

16. A contract for the sale and purchase of an uncertain thing, the extent and value of which is understood to be unknown to both parties, is valid, and neither party can resist completing, merely because the reality has turned out to be different from what was anticipated. *Bazendale v. Seale*, 19 Beav. 601; 1 Jur., N. S., 581; 24 L. J., Ch., 385.

But where something different from what is claimed by the purchaser was intended to be

sold by the vendor, the Court will not compel the latter specifically to perform the contract, which, in substance, though not in terms, is really different from that which was entered into. *Ib.*

Where the terms of a contract are ambiguous, and, by adopting the construction of the purchaser, would compel the vendor to convey property not intended, or believed by him to be included in the contract, the Court will not decree a specific performance. *Ib.*

The Court will not decree specific performance of a contract for the sale of a manor, with the lord's rights indefinitely stated, so as to include therein valuable rights not intended to be sold by the vendor, and discovered only in consequence of inquiries made, at the instance of the vendee, as to what the lord's rights were. *Ib.*

1. The defendant S., being the owner of a newly built public-house called "The Q.," sent to the plaintiffs W. (who were brewers) a letter, in which he stated the terms for a twenty-five years' lease to be 30*l.* the first year, and 68*l.* from the time of obtaining the licence. The plaintiffs thereupon sent an agent to view the premises, who saw the defendant there, and accepted those terms. The plaintiffs were thereupon let into possession, and commenced alterations and additions. The engrossed lease contained a covenant on the part of the lessees to pay, in addition to the above rent, a premium of 500*l.* on obtaining a licence which the defendant insisted had been mentioned *visà voce* at the interview with the plaintiff's agent, and taken down by him in writing in the defendant's presence. This turned out to be an entire misapprehension, although positively sworn to by the defendant. But in the defendant's letter containing the first offer of terms to the plaintiffs, there was the following passage: "I am giving to all the brewers who have left cards the offer in rotation;" and it was proved, that immediately before the offer to the plaintiffs, the defendant had offered the premises to another brewer on the same terms as those in the ingrossed lease to the plaintiffs, viz., the same as in the letter, with the additional term of the 500*l.* premium:—Held, that this was sufficient evidence of a mistake by the defendant in accidentally omitting the premium in the terms first mentioned to the plaintiffs. *Wood v. Scarth*, 1 Jur., N. S., 1107; 2 Kay & J. 33; 4 W. R. 31.

The defendant was not prevented from setting up the defence of mistake in his original proposition because he had also set up the defence (which failed) that the plaintiffs had agreed to vary the terms of that original proposition. *Ib.*

2. Principles on which the Court proceeds in refusing specific performance in cases of mistake. *Swaisland v. Dearsley*, 29 Beav. 430.

When the description of property sold is ambiguous, and the purchaser swears he made a mistake, and this is not disproved, the contract will not be enforced; but if there appears no ground on the particulars for the mistake, it is not sufficient for the purchaser to swear that he has made a mistake. *Ib.*

Where, upon a sale by public auction, there was in the description of the property something about which a person might *bonâ fide*

make a mistake, and the purchaser swore positively that he did make a mistake, the Court refused to enforce specific performance of the contract against him. 8 C. 7 Jur., N. S., 984; 30 L. J., Ch., 652; 9 W. R. 526; 4 L. T., N. S., 432.

3. Where a vendor made a *bonâ fide* mistake as to the authority which he had given to an auctioneer, and the property was knocked down to a purchaser for a less sum than that at which the vendor considered that he had instructed the auctioneer to sell, the Court refused to decree specific performance of the contract at the instance of a purchaser. *Day v. Wells*, 7 Jur., N. S., 1004; 9 W. R. 857; 30 Beav. 220.

4. A., by letter, offered to sell some property to B. for 1,250*l.* B., by letter, accepted the offer. A. had by mistake inserted 1,250*l.* instead of 2,250*l.* in his letter, and he immediately gave notice of the error. The Court refused to enforce the contract. *Webster v. Cecil*, 30 Beav. 62.

5. A defendant, being the owner of a cotton mill or factory, and also of a small piece of land lying between it and a canal, agreed to sell the factory to the plaintiff. By the Canal Act, owners of land within twenty yards of the canal were authorised to draw water for the sole purpose of condensing steam. In 1808 the owners of the mill purchased the intermediate plot, and laid down pipes, and the canal water was used for the general purposes of the mill until 1857, but the legality of this use of the water was at various times disputed by the proprietors of the canal. At the date of the contract, all the machinery was removed from the mill, which was used solely as a warehouse. The contract was silent as to the right to the water; but the plaintiff alleged that he bought on the faith of having the water, while the defendant alleged that he never intended to sell it. The defendant removed some of the underground pipes from the intermediate plot, and then offered a conveyance with the usual general words. The plaintiff filed a bill for a mandatory injunction as to the pipes, and a specific performance of the agreement, including the right to the water:—Held, that he was not entitled to a decree for specific performance, as it was a case of mistake, the plaintiff intending to buy what the defendant never intended to sell. *Buttornorth v. Walker*, 13 W. R. 168; 11 L. T., N. S., 436.

6. It is a settled principle, that if a purchaser contracts under a *bonâ fide* mistake, not attributable to any negligence of his own, the Court will not enforce specific performance; and if that mistake is in any degree occasioned or confirmed by erroneous statements on the part of the vendor, although innocently made, the Court will not decree a specific performance. *Mosey v. Digwood*, 8 Jur., N. S., 803; 6 L. T., N. S., 460; 4 De G. F. & J. 351. Affirmed 12 W. R. 811; 10 L. T., N. S., 466.

Where a purchaser contracts under a natural mistake, which is not attributable to any negligence on his part, it is the duty of the vendor to relieve him from that mistake. *Ib.*

Where a purchaser, after an inspection of some property, had entered into a contract under a mistake that a piece of ground was to form part of the conveyance, and the mistake

was not attributable to any neglect upon his part, but was in some degree occasioned by statements of the vendor, in answer to inquiries as to boundaries:—Held, that the vendor was not entitled to have a specific performance of the contract. *Id.*

1. Where a contract cannot be performed specifically, the Court will not interfere, in the absence of any step taken to reform the agreement, so as to make a new contract, even although there has been a virtual mistake, but will leave the plaintiff to his relief in damages, to be ascertained either by a jury at law, or by directing an inquiry. *Raphael v. Thames Valley Railway Co.*, 12 Jur., N. S., 656; 14 W. R. 750; 34 L. J., Ch., 659; 14 L. T., N. S., 652.

2. In the draft articles of an agreement a mistake of a name had been made; a bill was filed for the specific performance of those articles. The Court of Chancery, on a consideration of what appeared in the bill and answer, and on a consideration of the articles themselves, directed the specific performance of them according to what appeared to be their plain intention:—Held, that the decree of the Court of Chancery was correct. *Wilson v. Wilson*, 23 L. J., Ch., 697; 5 H. L. Ca. 40. Affirming 11 Jur., N. S., 124; 34 L. J., Ch., 241; 13 W. R. 361; 2 De G. J. & S. 475; 11 L. T., N. S., 692; 5 N. R. 692; 34 Beav. 187; 10 Jur., N. S., 1064; 13 W. R. 4; 11 L. T., N. S., 327.

3. The plaintiff and the defendant, farmers occupying their own small farms, which adjoined each other, met at ten o'clock at night at a public-house, where the plaintiff drew out an agreement between the defendant and himself for the sale and purchase of forty-five acres of land for 2,000*l.* The agreement, which was almost illegibly written, was executed by both parties and attested by two witnesses, and a cheque for 200*l.* deposit was drawn by the plaintiff on a plain piece of paper. This was the next day exchanged for one drawn on the banker's ordinary form. No abstract was asked for for nearly four months, and three months after that the defendant asked for a copy of the contract, and he then objected that he had only thirty-five acres to sell, and was so drunk when he entered into the agreement that he did not know what he was doing, and he offered to sell for the 2,000*l.*, or give up the agreement and return the deposit. This was refused, and an abatement claimed in respect of the ten acres short, and a bill filed for specific performance:—Held, that on the evidence the defendant was incapable of contracting at the time, and the circumstances were such as to bring the case within the rule of surprise and mistake, and bill dismissed with costs. *Cow v. Smith*, 19 L. T., N. S., 517.

4. A plaintiff filed a bill for a specific performance of an agreement into which he had entered with the defendant. The parties disputed the construction of one of the clauses in the agreement, the defendant swearing that his intention at the time of executing the agreement was not according to the construction contended for by the plaintiff. The Court was of opinion that the defendant's construction was plainly the correct one, but independently of that, being satisfied that there had been no concord between the parties, dismissed the bill. *Griffin v. Coleman*, 28 L. T., N. S., 493.

5. A. offered for sale a plot of land fronting the street, 176 feet deep, possessing a frontage of about 40 feet, which he described as well adapted for bank or insurance buildings, a public institution, carriage factory, or any building requiring space, or two good houses or shops. B. contracted to purchase it as a site for a carriage factory, but subsequently discovered that he would not be able to build within 62 feet 3 inches of the street, by reason of the restriction placed on building beyond the general line of buildings in the street by the Metropolis Local Management Act, 25 & 26 Vict., c. 102, s. 75:—Held, that B. was at liberty to resist a suit for specific performance on the ground that he had purchased under a misapprehension. *Bray v. Briggs*, 20 W. R. 962; 26 L. T., N. S., 817.

6. Specific performance of a contract will not be enforced where the defendant has contracted under a mistake to which the plaintiff has by his acts even unintentionally contributed. *Bascomb v. Beckwith*, 38 L. J., Ch., 536; 17 W. R. 812; 20 L. T., N. S., 862; 8 L. R., Eq., 100.

The owner of an estate put up the whole estate, except a small piece of land, for sale in lots, subject to conditions which provided that no public-house should be built and no trade carried on upon the property. In the particulars of sale the property was described as the M. estate, and there was nothing to show that any part of the vendor's estate was not included, and in the plan annexed to the particulars the different lots were coloured, and the excepted piece of land was uncoloured, but was not marked with the vendor's name, though the names of the adjoining owners were printed. It was improbable that a public-house would be built on any of the adjoining estates:—Held, that a purchaser of one of the lots, consisting of a mansion-house a hundred yards distant from the excepted piece of land, who had purchased in the belief that the whole of the vendor's estate was included in the particulars of sale, and consequently would be subject to the restrictive conditions, could not be compelled to complete his purchase unless the vendor would enter into restrictive covenants as to the excepted piece of land. *Id.*

7. Upon the sale of a property, one of the terms of the contract was that the purchaser should assume that A. was at the time of his death seised in fee simple of a certain lot, and should not require the production of or investigate or make any objection in respect of the prior title to the lot. Before completion of the contract, the purchaser discovered from documents supplied by the vendor, not to him, but to a sub-purchaser from him, that the lot was in fact the purchaser's own property, and he thereupon declined to complete, although he had accepted the vendor's title. In a suit for specific performance by the vendor:—Held, that the purchaser was not precluded by the condition from raising the objection, and an inquiry was directed as to the title to the lot at the date of the contract. *Jones v. Clifford*, 24 W. R. 979; 45 L. J., Ch. D., 809; 3 L. R., Ch. D., 779; 32 L. T., N. S., 93.

Semble, that the Court will, even in the case of a completed contract, give relief against a common mistake without fraud. *Id.*

1. Plaintiff being the lessor of a public-house subject to a covenant against Sunday trading, put the same up for sale, having previously obtained from the freeholder a letter which was stamped as an agreement offering to release the restrictive covenant. Defendant at the sale became the purchaser, both parties being under the impression that the freeholder could alone release the covenant. The abstract delivered to the purchaser showed that the plaintiff held under an underlease by demise, a reversion of one day being vested in A. and B., whose consent to a release of the covenant was necessary, which fact was overlooked by the purchaser, he taking an underlease at an increased rent, in which the covenant was omitted, and he paid his purchase money partly by a cheque and entered into possession. The day after, the mistake as to the parties to release the covenant was discovered, and the defendant stopped payment of the cheque. The plaintiff had offered to rescind the contract:—Held, that the defendant, not having discovered the mistake till after completion through his own negligence, was too late in taking his objection, and specific performance was decreed. *Allen v. Richardson*, 49 L. J., Ch., 137; 28 W. R. 318; 41 L. T. 614; 13 L. R., Ch. D., 524.

2. Property was put up for sale under the description of "All that inn with the brew-house, outbuildings, and premises known as The Ship, together with the saddler's shop and premises adjoining thereto, situate at N., Nos. 454 and 455 on the tithe map, and containing by admeasurement twenty perches more or less." In the sale-room were plans of the property, which consisted of the closes numbered 454 and 455 on the tithe map. At the back of the property were two pieces of garden ground containing together about twenty perches, not belonging to the vendors, one of which had for many years been occupied with the inn and the other with the saddler's shop, and which were but slightly fenced off from the premises with which they were occupied. The defendant, who was acquainted with the property, and knew that the gardens were occupied together with the inn and saddler's shop, did not look at the plans, and bought in the belief that he was buying the whole of the property in the occupation of the tenants:—Held, that the purchaser could not resist specific performance on the ground of mistake. *Tamplin v. James*, 15 L. R., Ch. D., 215; 43 L. T. 520; 29 W. R. 311.

Where specific performance is refused on the ground of mistake by the defendant, so that under the old practice a bill for specific performance would have been dismissed without prejudice to an action, the Court will proceed to consider the question of damages. *Id.*

3. In 1866 A. purchased a house of residence and grounds from B. The conveyance was prepared by the purchaser's solicitor, but by a mistake the minerals under the house were excepted from it. The purchaser entered into possession, and expended money in repairs and improvements; the vendor afterwards discovered the mistake, and attempted to deal with the minerals; thereupon, five years after the purchase, the purchaser filed a bill against him, praying for specific performance of the original agreement, and to have the conveyance

rectified; the vendor had died, and the suit had been renewed against his legal personal representative:—Held, that she must have the option either of having the conveyance rectified or having the whole purchase set aside, she repaying the purchase-money, with interest at 4 per cent. per annum, and all sums expended by the purchaser in repairs and permanent improvements, and he being charged with an occupation rent. *Bloomer v. Spittle*, 41 L. J., Ch., 369; 13 L. R., Eq., 427; 20 W. R. 435.

4. On a sale of a small residential property the plan exhibited showed the western side as bounded by a strip of ground covered with a mass of shrubs or trees. An intending purchaser went with the plan in his hand, inspected the property, found on the western side a belt of shrubs bounded on the west by an iron fence, and including three magnificent trees. He then bid for the property, believing that he was buying everything up to the fence. He afterwards discovered that the three trees and the iron fence stood on the glebe land which adjoined this property, the real boundary being denoted by stumps, which were so shrouded by the shrubs as not easily to be seen. The plan represented in a conspicuous way all the detached trees standing on the property, none of which were nearly so large as the trees in question, but did not show these trees. The existence of these trees was a material element in the value of the property as a residence:—Held, that the purchaser inspecting the property with the plan in his hand would naturally conclude the iron fence to be the boundary; that there was nothing to put him on inquiry whether it was not; that he had been misled by the fault of the vendors; and that specific performance could not be decreed against him. *Denny v. Hancock*, 6 L. R., Ch., 1; 23 L. T., N. S., 686; 19 W. R. 54.

Held, also, that whether the purchaser's motive for resisting specific performance was that he objected to having the property without the trees, or that for some other totally distinct reason he wished to escape from his bargain, was a question with which the Court had no concern. *Id.*

5. The Court will not refuse to decree the specific performance of an agreement on the ground that one of the contracting parties has mistaken its legal effect. *Powell v. Smith*, 14 L. R., Eq., 85; 41 L. J., Ch., 734; 20 W. R. 602.

Therefore, where a lessor's agent had contracted to grant a lease for seven or fourteen years, which the lessor understood to mean a lease determinable at the lessor's option, and alleged that the agent had acted without authority:—Held, that the lessee was entitled to have the agreement specifically performed, and to have a lease for fourteen years, determinable at his own option at the end of seven years. *Id.*

Held, also, that the lessee having been put into possession of the farm under the agreement, the lessor was precluded from disputing the agent's authority. *Id.*

6. It is no answer to a suit for specific performance for the defendant to say that though he understood what the words of the agreement were he was under a mistake as to their legal effect. *Hart v. Hart*, 18 L. R., Ch.

D., 670; 50 L. J., Ch., 697; 45 L. T. 13; 30 W. R. 8.

1. Where an agreement is in writing and is unambiguous, it is the duty of the Court to construe it quite independently of the ideas of the parties as to what it means, but where an agreement is ambiguous or capable of two constructions, *semble*, it would be very strange indeed if a plaintiff, who had always acted on the one construction, should succeed in persuading the Court to grant specific performance on the footing that it ought to bear the opposite construction. *Marshall v. Berridge*, 19 L. R., Ch. D., 241; 61 L. J., Ch., 329; 45 L. T. 599.

2. Where a written agreement has been signed, though it is in some cases a defence to an action for specific performance according to its terms that the defendant did not understand it according to what the Court holds to be its true construction, the fact that the plaintiff has put an erroneous construction upon it, and insisted that it included what it did not include, does not preclude the plaintiff from waiving the question of construction and obtaining specific performance according to what the defendant admits to be its true construction. *Preston v. Luck*, 27 L. R., Ch. D., 497.

A negotiation took place as to the sale by L. to P. of a British patent and certain foreign patents for the same invention, and ultimately an offer was made for sale at 500*l.* and accepted by letter, though it was not quite clear whether the offer and acceptance related to all the patents or to the English patent only. P. brought an action for specific performance, and moved for an injunction as to the British patent only:—Held, that an injunction should be granted, for that where a written agreement has been signed, the fact that the plaintiff has put a wrong construction upon it, and insisted that it included what it did not include, does not prevent there being a contract, nor preclude the plaintiff from waiving the question of construction and obtaining specific performance according to what the defendant admits is its true construction. *Id.*

3. In an agreement for the sale of seventeen undivided shares of a coal mine there was an article stating two conveyances by which six undivided shares of the land, beneath which the coal lay, had been conveyed to the vendors' predecessor in title, but stating that there was no express mention in the conveyances of the minerals under the land, and requiring that the purchasers should assume that six undivided shares of the minerals passed by the conveyances of the land, and thereby became absolutely vested in the vendors' predecessor in title. In the abstract of the vendors' title sent to the purchasers, mention was made of a certain indenture, but nothing further was said about it. The purchasers' solicitor inquired of the vendors' solicitor what this deed was, and was told that it could not be found, and no abstract of it or information about it could be furnished, but that it was believed not to affect the property sold. The vendors' solicitor also said, as he really believed to be the case, that though the title to the six undivided shares could not be strictly proved, yet the vendors had a good holding title to them. After these transactions the purchasers entered into the

agreement, and paid the deposit money. Subsequently, the deed which was supposed to have been lost, was found, when it was discovered that by virtue of it the six undivided shares of the mine belonged to some person quite different from the vendors, and that neither they, nor their predecessor in title, had ever had any title to those shares. The purchasers refused to proceed with the agreement, whereupon the vendors brought this action for specific performance of it. The purchasers contended that without these six shares the mines would be useless to them, and claimed to be entitled to be released from the agreement:—Held, that as there had been no fraud in the matter, but the vendors had acted under a *bonâ fide* mistake, and the purchasers had had the fact that there was a doubt as to the title brought to their notice before entering into the agreement, and had thought fit to run the risk of taking the property without having the matter cleared up, specific performance of the agreement ought to be decreed, but that a deduction must be made from the purchase money as compensation to the purchasers for the loss of the six shares. *English v. Murray*, 49 L. T. 35; 32 W. R. 84.

4. Vendors in September issued particulars of sale, headed, "particulars and conditions of sale, first edition." The document contained no conditions, and stated that the property would be sold on October 18th. Lot 8 was therein described as a corner public-house and cottages, without mention of any mortgage. Shortly before the time fixed for the sale the vendors found that a mortgage for 800*l.* upon lot 8 could not be paid off for some years, and thereupon issued a second edition of particulars which postponed the sale till the 16th November, and stated that lot 8 would be sold subject to the mortgage for 800*l.* The sale took place on the 16th November; the defendant, who had the day before received a copy of the first edition of particulars from a friend of his own, attended with that copy in his hand, and bought lot 8. The contract was signed upon a copy of the second edition, from which the auctioneer read the particulars of lot 8. It was also proved that he stated, in answer to special questions, in the defendant's hearing, that lot 8 would be sold subject to the mortgage. The defendant refused to complete his contract, on the ground that he had supposed the lot to be free from incumbrances:—Held, that, if he had made any mistake, it was owing to his own gross negligence, and the vendor was entitled to specific performance. *Goddard v. Jeffreys*, 51 L. J., Ch., 57; 45 L. T. 674; 30 W. R. 269.

Both editions of the particulars stated the rents of lot 8 at a sum not then actually received, but which would, as notice had been given to the tenants, be payable upon the completion of repairs then contracted to be finished before the day fixed for completion. The particulars described the public-house as let to a responsible tenant for a term of which seventeen years were unexpired. It appeared that only fifteen years of the term were unexpired, and it was determinable in 1881 or 1888, at the option of the tenant:—Held, that neither of these statements was such misrepresentation as to entitle the purchaser to resist specific performance of his contract. *Id.*

1. Where a vendor instructed an auctioneer to sell certain premises, and where according to the evidence, by mistake on the part of the vendor, such instructions were wide enough to take in certain premises to which the vendor had no title, and a person who heard the particulars read at the auction became the purchaser, in the belief that he would obtain the whole of the premises, and brought an action for specific performance or damages:—Held, that mistake in such circumstances was no defence to the action. *Dyas v. Stafford*, 7 L. R., Ir., 590.

X. WANT OF MUTUALITY.

2. The written undertaking of any party will be enforced, although the other party is not mutually bound by writing. *Palmer v. Scott*, 1 Russ. & M. 391; 1 Taml. 488; 8 L. J., Ch., 127.

3. Where damages in action for breach of contract to sell chattel, would be insufficient remedy for purchaser, though sufficient for vendor, specific performance decreed, as remedy must be mutual. *Withy v. Cottle*, 1 Sim. & S. 174; T. & R. 78; 1 L. J., Ch., 117.

4. A., on the marriage of his daughter to B., covenants that B. should have his land, called C., for 1,500l. less than any other would give for it, and afterwards devises the premises to his grandson for life, with remainder over, and dies. Court refused to decree a specific performance of this agreement, by reason of the uncertainty and want of mutuality in it. *Bromley v. Jefferies*, 2 Vern. 415; Pre. Ch. 138.

5. Specific performance of agreement refused on ground of want of specific mutuality, of laches, misapprehensions in the parties of its nature and effect, inequality, improvidence, and other circumstances. *Hamilton v. Grant*, 3 Dow 33; 1 Bli. N. S. 594.

6. An infant cannot sustain a suit for the specific performance of a contract, because the remedy is not mutual. *Flight v. Bolland*, 4 Russ. 298.

7. Husband and wife may maintain a suit for specific performance of an agreement by them with a third party, for the sale to him of lands whereof the husband is seised in right of the wife. *Fennelly v. Anderson*, 1 Ir. Ch. R. 706.

8. A feme covert, one of several devisees in trust for sale, cannot bind herself to convey the estate, and a bill by the purchaser to enforce specific performance of a contract by such trustees was dismissed. *Avory v. Griffin*, 6 L. R., Eq., 606.

9. Equity will not decree a specific execution of contract, the terms of which are uncertain as to its extent. Nor will equity decree specific execution against a party not lawfully competent to execute the contract. *Harnett v. Fielding*, 2 Sch. & Lef. 549.

10. Specific performance refused on the ground of want of specific mutuality and other circumstances. *Hamilton v. Grant*, 3 Dow 33; 1 Bli. N. S. 594.

11. Where nothing has been done under an agreement, the Court ought not to decree a specific performance, except when the right to compel it exists both in plaintiff and defendant. *Lawrenson v. Butler*, 1 Sch. & Lef. 13.

12. Equity will not decree the specific per-

formance of a covenant by the mesne landlord with his lessee for the renewal of the lease after the lessee has wilfully neglected or refused to renew, and the non-payment after demand of the fine which the mesne landlord has paid to the superior landlord, amounts to such neglect or refusal. *Chestorman v. Mann*, 9 Hare 206.

13. Specific performance of a contract for sale of an estate in fee-simple decreed (subject to the usual inquiry as to title) in favour of a vendor, who, at the time of the contract, was tenant for life only; the purchaser not having rejected the purchase as soon as he had ascertained the real position of the vendor, and the vendor being able by means of the consent of the parties interested in remainder to make a good *prima facie* title to the fee-simple at the hearing. *Salisbury v. Hatcher*, 2 Y. & Coll. C. C. 54; 12 L. J., N. S., Ch., 68; 6 Jur. 1061.

14. Where lessees of way-leaves (colliery) entered into a correspondence with the tenant for life with power of leasing for a new lease, proposed as a renewal of the former, which contained a usual clause giving the lessees an option of determining the lease on notice, but the correspondence was silent as to the insertion of such a clause:—Held, that the lessees might reasonably have understood (whether it were mutual or not) that the new lease was to contain such a clause, and that they ought to be compelled to accept the lease without it:—Held, also, that the tenant for life not having under the will a power to grant such a lease, the reversioner, although able to do so, was not entitled to enforce a specific performance of it. *Ricketts v. Bell*, 1 De G. & Sm. 355; 11 Jur. 918.

15. Litigation of a complicated character was carried on both in this country and in Peru, between the plaintiff and the defendant, and also two sons of the plaintiff, who had acted as his agents. An agreement was afterwards signed in England between the plaintiff and the defendant, whereby it was agreed that a patent, standing in the name of the plaintiff, but the right to which was claimed by the defendant, should be held for their mutual benefit, the defendant to pay 100l. towards the expenses of taking out the patent. The plaintiff agreed to "raise" all proceedings here and in Peru by the plaintiff and his sons, each party paying his own costs, "it being agreed that all claims between the defendant and the plaintiff and his sons are settled up to this date; the eight pianofortes in litigation in Peru to be delivered up by the defendant to the plaintiff, or his representatives." The differences continuing, the defendant was suing the plaintiff at law. The plaintiff filed a bill for specific performance of the agreement. By a letter of the plaintiff's solicitor, it appeared that the plaintiff intended that a release should be executed by the defendant and himself, and also by his sons. The defendant demurred:—Held, that the agreement was such an one as the Court would decree the performance of; and that it was not bad on any of the grounds urged, viz., neither for uncertainty, nor for want of mutuality, nor for that the Court could not enforce some of the stipulations, nor for that adequate remedy and compensation could be had at law. *Marsh v. Milligan*, 3 Jur., N. S., 979.

16. Specific performance refused because lien

of remedy was not mutual. *Armiger v. Clarke*, Buhb. 111.

1. The rights of parties to agreements to enforce a specific performance in equity are not co-extensive, for their respective rights depend upon their conduct; and the conduct of one may give him the right to apply to the Court, where the conduct of the other may debar him from that right. *South Eastern Railway Co. v. Knott*, 10 Hare 122.

2. The circumstance that an agreement of which specific performance is sought in equity, contains stipulations on the part of a plaintiff which could not themselves be specifically enforced, affords no valid objection to making a decree in favour of the plaintiff if the intention of the parties was, that the performance of those stipulations should be secured by covenant only. *Wilson v. West Hartlepool Harbour & Railway Co.*, 11 Jur., N. S., 124; 34 L. J., Ch., 241; 13 W. R. 361; 5 N. R. 289; 2 De G. J. & S. 475; 11 L. T., N. S., 692. Affirmed 23 L. J., Ch., 697; 5 H. L. Ca. 40. Affirming 34 Beav. 187; 10 Jur., N. S., 1064; 13 W. R. 4; 11 L. T., N. S., 327.

A., an officer of a company, but whether the general or only the traffic manager was disputed, proposed, by a letter referring to a prior agreement which was not produced, terms for the sale by the company of some of its lands to B., one of the terms being that B. should use the railway "whenever reasonably practicable, and for the longest distance it is reasonably capable of use." B. accepted the terms unconditionally, and thereupon took possession of the land; and as might be inferred from the facts, with the connivance, if not with the co-operation of the directors, put it to various uses. On the subsequent repudiation of the contract by the company, after the death of A., on the ground that no valid contract was ever made by the company, a decree was made for specific performance of the contract made by A. with B. *Ib.*

3. The Court will not entertain a bill for specific performance of an agreement, which contains terms that cannot be enforced against the plaintiff, where the effect of a decree would be that, on the plaintiff refusing to perform his part of the contract, the defendant could not be restored to his former position. *Stocker v. Wedderburn*, 3 Kay & J. 393; 26 L. J., Ch., 713; 5 W. R. 671.

The plaintiff, being owner of certain patents, entered into a written agreement with other persons to form a company for working these patents, he agreeing on his part to sell the patents in foreign countries, and to give his whole services to the company for two years, and to do his best to improve the invention, and to impart such improvements to the company:—Held, that the plaintiff could not obtain specific performance of this agreement against his co-promoters, because from the nature of his own part of the agreement, the Court could not compel specific performance of it by him. *Ib.*

The difference in the cases where a negative term of an agreement has been enforced by injunction, although the rest of the agreement could not have been specifically performed in equity, is, that the Court could, at any time, upon a breach of any other term in the agreement, restore the parties to their former

position, or nearly so, by dissolving the injunction; but if in such a case as the above the Court were to compel the defendants to become a registered company, that could not afterwards be undone, if the plaintiff were to fail in his part of the agreement. *Ib.*

4. When the terms of a contract are such that the Court cannot superintend so as to secure the performance by a plaintiff on his part, it will not decree specific performance. *Peto v. Brighton, Uckfield, & Tonbridge Wells Railway Co.*, 11 W. R. 874; 9 L. T., N. S., 227; 1 Hem. & M. 468.

If, on non-performance by a plaintiff, both parties cannot have equal justice it will not, in the absence of an express negative covenant, grant an injunction to restrain acts, the doing of which is inconsistent with the maintenance of the contract. *Ib.*

5. A defendant agreed to become tenant to the plaintiff, of a shop, with a right to lease for a term when he desired it. He wished to take possession speedily. At the date of the contract the plaintiff, who was lessee of the premises, was unable to make the lease, but after bill filed, and before the hearing, he acquired power to do so:—Held, that he could not enforce specific performance. *Farrer v. Nash*, 11 Jur., N. S., 789; 14 W. R. 8; 6 N. R. 361.

6. An agreement by which a father stipulated that the mother of his deceased wife should have the custody of the infant children during three months of every year is bad for want of mutuality, and cannot be enforced against the deceased wife's mother, as she could not compel the father to deliver up the children to her for the stipulated period, nor restrain him from removing them out of the jurisdiction. *Kennedy v. May*, 11 W. R. 358; 7 L. T., N. S., 819.

7. Where a bill was filed for the specific performance of an agreement, and the whole scope and object of the bill were for a purely money demand, the amount of which, if ascertained, the plaintiff would be entitled to recover by an action at law, and compensation in money being sought on the footing of an account, the Court held that relief under the jurisdiction of specific performance could not be granted. *Ord v. Johnston*, 1 Jur., N. S., 1063.

The Court never interferes in support of a purely voluntary agreement, or where no consideration emanates from the individual seeking the performance of the agreement. *Ib.*

8. A foreign contract, though valid in the country where it is made, will not be enforced here if it infringes the laws and policy of England; nor will the fact that the only part of it remaining to be performed is legal induce the Court to enforce that part of it. *Hope v. Hope*, 3 Jur., N. S., 454; 26 L. J., Ch., 417; 22 Beav. 351; 8 De G. M. & G. 731; 4 W. R. 583.

9. A railway company, wishing to obtain a bill for another railway, with a diverging line, which latter they could not make without the purchase of a particular property, which by their Act they had not the power to obtain, entered into an agreement with the tenant for life to purchase the same, and to perform all such acts as might enable him and the

parties in remainder to sell the estate. All opposition to the proposed bill was withdrawn, and it passed, but with the omission of the diverging line, and the powers to buy this property. The tenant for life filed a bill for the specific performance of the agreement; and the company objected, that the plaintiff, being only tenant for life, had no title. The objection was overruled, and a decree for specific performance was made, and the defendants were ordered to pay the purchase money into court. *Hawkes v. Eastern Counties Railway Co.*, 20 L. J., N. S., Ch., 243; 15 Jur. 979. Affirmed 22 L. J., N. S., Ch., 77; 16 Jur. 1051. And see *S. C. nom. Eastern Counties Railway Co. v. Hawkes*, 5 H. L. Ca. 331; 24 L. J., Ch., 601.

1. In a contract for sale of land, the vendor, being a tenant for life, with a proviso against alienation, agreed to apply for an Act of Parliament to enable him to convey; the Court refused, upon demurrer, to stop a suit for specific performance on the ground that the Act of Parliament had not been yet obtained. *Devenish v. Brown*, 2 Jur., N. S., 1043; 26 L. J., Ch., 23.

2. A tenant for life under a settlement, with an ultimate reversion to himself in fee, enters into an agreement by himself as absolute owner to sell part of the settled land. This agreement, the trustees of the settlement, who had a power to sell at the request and by the direction of the tenant for life, refused to adopt. Upon a bill filed against them and the tenant for life, it being held that the Court could not control the discretion of the trustees, a decree against the tenant for life for such performance as was in his power, was refused, on the ground that it would be prejudicial to the other parties interested in the settlement. *Thomas v. Dering*, 1 Keen 729; 6 L. J., N. S., Ch., 267; 1 Jur. 211, 427.

3. A., by deed, contracted with B., in consideration of 100*l.*, to maintain, educate, and apprentice B.'s child, and if he had no child of his own, on B.'s child attaining twenty-one years to give him all his real and personal estate at his death, subject to a life interest for his widow. It appeared, from the circumstances of the case, probable, that the apparent consideration of 100*l.* was not, in fact, paid, or intended by either party to be paid, and that it was stated in the deed *pro forma* only. There was some evidence that the child was at A.'s house after the date of the deed, but it appeared doubtful whether the child ever lived with A. in the manner provided by the contract, and he soon after was residing with his father (B.), and the Court was satisfied that A. and B., by agreement between themselves, abandoned the contract, and that the status of the child had not been altered by anything done by A. in pursuance of the contract. Upon a bill filed by the child after the death of A.:—Held, that the contract, having been abandoned by the contracting parties, could not be enforced by the child. *Hill v. Gomme*, 5 Myl. & C. 250; 9 L. J., N. S., Ch., 54; 4 Jur. 165. Affirming 1 Beav. 540; 6 L. J., N. S., Ch., 350.

Whether this Court would perform a contract by which a person, for a sum of money, deprives himself of the possibility of realising property which he can dispose of by will, and

thus destroys an active motive for bettering his condition in life, *quære*. *Id.*

Whether, if the contract had been so acted on by A. as to alter the status of the child, the child could have enforced the contract, *quære*. *Id.*

4. By a grant or patent, dated in 1801, the then Bishop of Ely having, as the grant stated, "confidence in the probity, fidelity, care, and industry of P., granted to P.," who was a solicitor, "the office of receiver of all issues, profits, sum and sums of money, arising and issuing" from the possessions of the see, to hold to P. by himself or his sufficient deputy or deputies, to be approved of by the bishop and his successors, for his life. The office of receiver was an ancient office, and had been exercised before the restraining statute of 1 Eliz., c. 19. P. held the office under three successive bishops, during the whole of which time he not only received the rents, but negotiated the renewal of leases, and prepared the leases of the see, and likewise attended all searches for records in the bishop's muniment room, of which he kept a key, for the performance of which acts he received fees and emoluments. It appeared also that his predecessor in office, who had held the office since 1875, had done the same. Upon the accession of A. to the bishopric in 1836, he refused to admit P.'s claim of right to perform these last-mentioned acts; upon which P. filed his bill against the bishop, praying a declaration of the rights in question in his favour, that he might be quieted in the possession of the office, and that the bishop might be restrained by injunction from obstructing the plaintiff in the exercise of such rights, and from doing acts in contravention of them:—Held, first, that the plaintiff's claim was not of such a nature as to induce this Court to interfere to protect them, without being well satisfied (which the Court was not) that his legal remedy was insufficient to do him complete justice; and, secondly, that the relief sought being analogous to the specific performance of an agreement, the bill must fail on the ground of want of mutuality; the nature of the duties and services asserted by the plaintiff being such as to preclude the possibility of a decree in this Court against him, compelling their specific performance. *Pickering v. Ely (Bishop)*, 2 Y. & Coll. C. C. 249; 12 L. J., N. S., Ch., 271; 7 Jur. 479.

5. The owners of an English patent, and of certain foreign patents obtained for the same invention, agreed with A., in consideration of pecuniary advances made by him to them, to procure the transfer to him of certain fully paid-up shares in a proposed company, to be formed with the object of purchasing their English and foreign patents, and which were to be allotted to them in part payment of their interests in the patents. The company was to be called the Non-Radiating Steam Engine Company, and was to have a capital of 220,000*l.* The patentees also appointed A. their agent for the sale of a certain number of the shares that were to be allotted to them in such company, and it was arranged that the shares which A. should obtain for his advances should be applied towards fulfilment of the contracts which he, as their agent, should enter into with purchasers of shares. Under

these arrangements A. became entitled to 847 shares, and sold 224 shares to different persons. The scheme of the company, as at first proposed, was abandoned, and the patentees brought out a company called the Patent Steam Engine Company, with a capital of 100,000*l.*, and formed with the object of purchasing the English patent only. The patentees then refused to transfer any of the shares which they had acquired in the second company to A., and the several persons to whom he had sold shares. On a bill by A. and the several purchasers of shares from him to enforce specific performance of the arrangements which had been entered into between A. and the patentees:—Held, that the second company comprehended, in effect, the substance of the contract which existed between the parties, and that an objection for want of mutuality in the contract could not be sustained. *Turner v. Moy*, 32 L. T., N. S., 56.

1. The plaintiffs had entered into an agreement with the defendant's vendor to become lessees of premises with the option of purchasing within a given period at a sum fixed. A second memorandum was afterwards signed by the lessor alone, prolonging the term, and giving the plaintiffs the chance of purchasing during the enlarged term, but not fixing any price:—Held, that the Statute of Frauds being out of the question, the agreement was not void for want of mutuality, but was in all respects good and valid. *Heys v. Astley*, 12 W. R. 64; 9 L. T., N. S., 356; 4 De G. J. & S. 34.

Where the plaintiff has acted upon an agreement, want of mutuality is not a sufficient ground for refusing specific performance. S. C. 3 N. R. 19.

2. Where a contract is made which both parties to it know at the time cannot be carried out without the act or consent of a third party, and that act or consent is done or given by the third party within a reasonable time, and he does nothing inconsistent with such act or consent, want of mutuality at the time of contract is no bar to its performance. *Blackburn Union v. Brooks*, 26 W. R. 57.

See also VII. *ante*.—X. III. *ante*.

Sufficiency of Contracts within Statute of Frauds when signed by one Party Only.] See VENDOR AND PURCHASER, I. IV. 3.

Contracts under Leasing Powers.] See POWER, XX.

XI. OTHER DEFENCES.

3. In equity there is a marked distinction between what is necessary to resist a suit for specific performance of a contract, and a suit founded on a contract executed. *Vigers v. Pike*, 8 Cl. & F. 645.

4. A defendant to a bill for specific performance of a clear contract for a specific sum, cannot resist it by way of set-off, on the ground that, on an account between him and the plaintiff in respect of antecedent transactions affecting the subject matter, there would be a balance due to the defendant. *Phippes v. Child*, 3 Drew. 709.

5. A bill for specific performance of a con-

tract against the heir-at-law of a vendor was dismissed without costs, and the parties left to their remedy at law, the Court not being satisfied with the evidence as to the circumstances under which the contract was signed by the vendor. *Valentine v. Dickinson*, 7 Jur., N. S., 857; 9 W. R. 625.

6. B. treats with A. for a piece of land, having an intention to build a mill, to which the consent of the corporation is necessary; but A. refuses to treat on condition. B. fails in obtaining consent: this failure in his speculation is no defence against a bill for specific performance. *Adams v. Wear*, 1 Bro. C. C. 567.

7. A purchase upheld which was agreed to on the vendor's death-bed, and in consideration of an annuity for his life, the vendee having afterwards acquired the legal estate, and the agreement having been in pursuance of a contract made out by letters written some months previous to the final agreement. *Barry v. O'Grady*, 9 Ir. Eq. R. 550.

8. *Per* Lord St. Leonards. It is no objection to the specific performance of an agreement that collateral circumstances necessarily flowing out of the agreement are not mentioned in it. *Ridgway v. Wharton*, 5 W. R. 804; 2 Eq. Rep. 839; 6 H. L. Ca. 238; 27 L. J., Ch., 46. And see S. C. 3 De G. M. & G. 677.

9. A bill for an execution of an agreement, it appearing by proof that the agreement was only to quit the possession, and not intending to convey the lands, the bill was dismissed. *Gerrard v. Vaux*, 1 Vern. 121.

10. A railway company arranged by private contract the price of the interest of a tenant in lands they required, there being a covenant in his lease not to assign without the consent of his landlord. The contract provided an apportionment of rent:—Held, that the company could not resist specific performance, because the lessor was not a party to such apportionment. *Slipper v. Tottenham & Hampstead Junction Railway Co.*, 36 L. J., Ch., 841; 4 L. R., Eq., 112.

11. It is no defence to a suit for specific performance against trustees of a turnpike road, that the land they have contracted to sell is liable to pre-emption by the owner of the adjoining land under the General Turnpike Act, 3 Geo. 4, c. 126, s. 39, even where the offer required has not, through inadvertence, been made to such owner, and it is in evidence that the owner insists on his right, the purchaser making no objection to the title, and being content to take such estate as the trustees could convey. *Barrett v. Ring*, 2 Sm. & G. 43.

12. A conveyance of one moiety of an estate being set aside, a contract for the sale of the other moiety, to the same party, based on the previous conveyance of the first moiety, cannot be supported. *Reynell v. Sprye*, *Sprye v. Reynell*, 8 Hare 222. Affirmed 21 L. J., N. S., Ch., 633.

13. It is not a defence to a purchaser's suit for specific performance that the vendor's solicitor and agent in the sale had a short time previously been professionally employed by the purchaser in relation to his intended purchase. *Hesse v. Briant*, 2 Jur., N. S., 922.

14. Where three joint lessees of an ecclesi-

astical manor agreed with M., upon the expiration of a subsisting grant, by copy of court-roll to make a fresh grant to him, and entered into a bond for performance of the agreement; one of the lessors afterwards conveyed his interest subject to the agreement, and afterwards died, leaving the plaintiff his executor, who, pending a suit against him, and the co-lessors impeaching the title of the lessors, were unable to make the grant pursuant to the agreement, upon which several actions on the bond were respectively brought against the plaintiff and the other lessors, but a consolidation rule was obtained to abide the event of one of the actions:—Held, that M., being a party to the rule, and the question as against him being the same at law and in equity, he could not maintain a suit for specific performance of the agreement; and the suit was dismissed without prejudice to the question of contribution as between the obligors. *Hole v. Pearce*, 5 Hare 408.

1. Specific performance refused of agreement to purchase, no good title being made to a small part which was essential to enjoyment of the rest, and on the ground of defendant having been let into possession and turned out again by plaintiff. *Knatchbull v. Grueber*, 1 Madd. 153. Affirmed 3 Meriv. 124.

2. A vendor let a purchaser into possession of the rents of an estate before the completion of the contract; but subsequently, after the time fixed for completion of the contract, he, in consequence of the non-payment of the purchase money, turned the purchaser out of possession:—Held, that he did not thereby abandon his right to a specific performance of the contract. *Knatchbull v. Grueber* (3 Meriv. 124) explained and distinguished. *Colby v. Gadsden*, 11 Jur., N. S., 760; 12 L. T., N. S., 197; 5 N. R. 456.

3. A purchaser raised valid objections to the title, which the vendor refused to satisfy. The vendor gave notice that if the purchaser refused to complete within five days, he should re-sell and charge the purchaser with the expenses. The purchaser thereupon gave the vendor notice that he should bring an action for the deposit if the requisitions were not complied with within a week. The action was commenced, and the vendor some time subsequently agreed to satisfy the requisitions at the purchaser's expense; upon the purchaser's refusal, a bill was filed by the vendor for a specific performance:—Held, that the notice by the vendor of an intention to resell, was equivalent to a declaration that he would not seek specific performance of the contract, and that the purchaser's action to rescind was effectual, and the bill was dismissed with costs. *Royon v. Paul*, 28 L. J., Ch., 555.

4. Directors having entered into a contract, *ultra vires*, and which was not binding on the company:—Held, that it could be neither specifically performed, nor could the Court order them to make good their representations. *Ellis v. Colman*, 25 Beav. 662; 4 Jur., N. S., 350; 27 L. J., Ch., 611.

5. Certain moneys and benefits were secured to A. under an agreement with the provisional trustees of a projected company. A mortgaged his interest in the moneys secured by this agreement:—Held, that the assignees of A.'s mortgagee could sustain a bill for specific

performance of the agreement against the company for the purpose of enforcing their charge. Specific performance of the agreement was, however, refused; the benefits stipulated to be furnished to the company by A. not having been obtained through his medium, while the provisional directors had, *ultra vires*, introduced clauses as to the application of the capital, etc., of which the future shareholders had received no notice, and by which they could not be bound—while the saving clause introduced into the Act of incorporation at the instance of A. had not the effect contended for of confirming the agreement and curing its defects. *Brown v. London Necropolis & National Mausoleum Co.*, 6 W. R. 188.

XII. Parties to Suits.

I. *General Principles. Party to Contract*, 6590.

II. *Where Sale in Lots*, 6591.

III. *Derivative Purchaser*, 6591.

IV. *Parties Interested*, 6592.

V. *Real or Personal Representatives*, 6593.

VI. *Other Cases*, 6593.

VII. *Auctioneer*. See VENDOR AND PURCHASER, III. v.

VIII. *Parties to Suits. In General*. See PRACTICE (PARTIES).

I. GENERAL PRINCIPLES. PARTY TO CONTRACT.

6. To a bill founded on a contract, the parties to the contract are in general the only necessary parties. *Humphreys v. Hollis*, Jac. 75.

7. To a common bill for the specific performance of a contract of sale, the parties to the contract are the only proper parties. *Wood v. White*, 4 Myl. & C. 460; 8 L. J., N. S., Ch., 209; 3 Jur. 117; 2 Keen 664; 7 L. J., N. S., Ch., 203.

8. A person, not a party to the contract, ought not to be made party to a suit for specific performance. *Peacock v. Penson*, 11 Beav. 355; 18 L. J., N. S., Ch., 57; 12 Jur. 954; 14 *id.* 518.

9. Though in general none but the persons who sign the contract ought to be parties to a bill for specific performance, yet a purchaser may, under special circumstances, make other persons, who are interested in the estate, defendants to the bill. *Tasker v. Small*, 6 Sim. 633; 5 L. J., N. S., Ch., 321. Reversed 3 Myl. & C. 63.

10. Entire strangers to an agreement, and claiming under an adverse title to it, cannot be parties to a suit for its specific performance. *De Houghton v. Money*, 15 W. R. 214; 15 L. T., N. S., 403.

11. If a person, not originally a party to an agreement, acts under it, and professes to render accounts and make payments according to its provisions, a bill for the performance of it may be maintained against him, even though the original agreement stipulated that it was not to extend to create any demand

against him. *Cochell v. Whiting*, 3 L. J., Ch., 6.

1. Five persons contracted to sell an estate in land, and a formal agreement was prepared, but before execution it was discovered that the entirety belonged to four only; and accordingly it was verbally agreed that the fifth should not be required to execute. The agreement was executed by the four only as vendors and by the purchaser, but as an alteration was made in the body of the agreement it still purported to be an agreement by the five to sell and convey:—Held, that the four who executed could not maintain a bill for specific performance against the purchaser. *Hornby v. Bird*, 38 L. J., Ch., 244; 17 W. R. 367.

2. It is a rule of equity that specific performance can only be decreed against parties to the original contract, or persons claiming under them. *Lumley v. Tinsley*, 21 W. R. 319; 28 L. T., N. S., 157.

A lessee of premises covenanted with an under-lessee that in case he should obtain an extension of the term, or renewal of his lease, he would grant to the under-lessee a renewal of his under-lease for such extended term. The lease having been renewed in the name of a trustee for the separate use of the wife of the lessee, the under-lessee filed a bill against the lessee, his wife and her trustee, charging that the taking the lease in the name of the trustee was a scheme to defeat his rights, and praying that the wife of the lessee and her trustee might be decreed to grant a lease to the plaintiff for the extended term:—Held, that no relief could be granted, the suit being virtually one for specific performance against persons not parties to the original contract. *Id.*

II. WHERE SALE IN LOTS.

3. A bill brought by a purchaser for the specific performance of an agreement to sell lot A. as described in the particulars of sale, was resisted by the vendors on the ground (stated in their answer) that by an arrangement, to which the plaintiff was a party, part of lot A., as described, was deducted from that lot, and added to lot B.:—Held, that the plaintiff, on amending his bill, and putting in issue this averment, was bound to make the purchasers of lot B. defendants to the suit. *Mason v. Franklin*, 1 Y. & Coll. C. C. 239.

4. Two houses, held under one lease, were sold in separate lots, and it was stipulated that the purchasers should be parties to each other's assignment:—Held, that the purchaser of lot 2 was not a necessary party to a suit for specific performance against the purchaser of lot 1. *Paterson v. Long*, 5 Beav. 186.

5. The plaintiff sold and conveyed some land to a building society, retaining an equitable mortgage on it for the purchase money. The land was divided and sold in lots to the members:—Held, that the plaintiff could not maintain a suit against the purchasers of some of the lots to recover his debt, in the absence of the purchasers of the other lot. *Peto v. Hammond*, 29 Beav. 91.

6. Contracts for sale of different parts of an estate held under the same title had been entered into with different purchasers by a father and son who had a joint power of

appointment under a settlement. The son died before the conveyances were executed. The legal estate under the settlement thereupon became vested in the father for life, with remainder in tail to an infant. A bill was filed by one of the purchasers, on behalf of himself and all other purchasers, etc., for the purpose of having the several contracts carried into effect. The cause coming on to be heard before Turner, L. J., when V.-Ch., he declined to make a decree against the infants in a suit of that form, but suggested his willingness to do so if the bill were amended by making the several purchasers parties as co-plaintiffs, and the defendants undertook not to raise the objection of multifariousness. The bill having been amended accordingly, the decree was now made, and directions given for the completion of the several purchases against the infants and unborn persons claiming under the settlement. *Hargreaves v. Wright*, 1 W. R. 408.

7. Particulars of sale described lot 5 as consisting of a leasehold house, No. 20, of a certain description, with a yard, at the end of which were a coachhouse and stable, and small yard beyond, with extra stable; and stated that the house was occupied by W., the yard, coachhouse, etc., by H. Lot 6 was described as a leasehold house, "No. 21, adjoining lot 5, and of similar design and accommodation, is now, and has been for years, in the occupation of T." The two houses were built on adjoining strips of land, each held under a separate lease. The small yard and extra stable lay behind No. 21, and were comprised in the lease of lot 6. The occupation was as stated in the particulars. The plaintiff purchased lot 5, H. lot 6. The plaintiff took an assignment from the vendor of the property in the lease of lot 5, and no more. H., on the following day, took an assignment of all the property comprised in the lease of lot 6, thus obtaining the legal estate in the small yard and extra stable:—Held, that the plaintiff was entitled to an assignment from H. of the small yard and extra stable, for that, according to the true construction of the particulars, H. had not contracted to purchase them, but the plaintiff had. *Leuty v. Hillas*, 2 De G. & J. 110; 27 L. J., Ch., 534. S. C. (before Kindersley, V.-Ch.) 4 Jur., N. S., 1166.

Held, that the vendor was not a proper party to the suit. *Id.*

8. Where an estate is vested in trustees who sell in plots for building subject to restrictive covenants, each purchaser has an equity against the others to compel the observance of the covenants. In a suit to enforce such an equity the trustees are necessary parties, and the remaining purchasers ought to be represented on the record. *Eastwood v. Lever*, 12 W. R. 195. S. C. *nom.* *Eastwood v. Levers*, 33 L. J., Ch., 355; 9 L. T., N. S., 615.

III. DERIVATIVE PURCHASER.

9. An original vendee of an estate is not a necessary party to a bill against his assignee for specific performance of an agreement to purchase. *Hall v. Laver*, 3 Y. & Coll. 191.

10. H., in 1839, contracted with J. for the

purchase of a piece of land, and subsequently sold his bargain to M. In May 1839 the abstract of title was delivered. The draft conveyance was prepared in July, and approved in August following. A covenant, not in the draft, was inserted in the engrossment by the vendor, and objected to on behalf of the purchaser; and a correspondence on the subject between their respective solicitors was carried on at intervals down to 1843, when H. and M. filed a bill for specific performance:—Held, that H. and M. were not improperly made co-plaintiffs. *Mowhay v. Inderwick*, 11 Jur. 837.

1. *Quere*, in what cases successive purchasers are properly made parties to a suit for specific performance. *Nelthorpe v. Holgate*, 1 Colly. 208; 8 Jur. 551. See cases stated, 1 Colly. 228. n. et seq.

A. entered into a written agreement with B. for the purchase of certain premises. This agreement was entered into by A. at the request of C.; which circumstance, however, was not known to B. By a subsequent agreement, A. agreed to sell the premises to C., upon the same terms, etc., under which he had contracted to purchase of B. D., the mother of B., had a life estate in the premises; which circumstance, though known to B. and his solicitor, was not known to either A. or C. D. did not, in respect of her life estate, sanction the agreement. A. and C., as co-plaintiffs, filed their bill against B. and D. for a specific performance of the original agreement. After that bill had been answered, but before either party had gone into evidence, A. died intestate, and C. then filed a bill of revivor and supplement against the original defendants and the heir-at-law and personal representative of A. Upon these two bills, no answer to the latter having been filed, the parties joined issue:—Held, first, that A. and C. were not improperly co-plaintiffs in the original bill, and that, after the former's death, the suit was properly revived by the latter. *Ib.*

2. Bill for specific performance of an agreement to purchase against the original vendee and assignee of his contract, dismissed as against the former, the plaintiff being held, by delivery of abstract and offer to execute a conveyance, to have accepted the latter as purchaser. *Quere*, if the bill had been filed against the original purchaser only. *Holden v. Hayn*, 1 Meriv. 47.

3. A party claiming an interest in a purchase by virtue of a contract, as having been entered into on his behalf, is a proper party to a suit by the vendor for the specific performance of the contract; otherwise, if he claim merely as a sub-purchaser, *semble*. *Chadwick v. Maden*, 9 Hare 188; 21 L. J., Ch., 876.

4. B. agreed to sell property to W., who, before the completion of the agreement, contracted to sell a portion of the property to F. Subsequently F. filed a bill against B. and W., praying for the specific performance of his agreement, and of so much of the agreement between B. and W. as related to the property comprised in his agreement:—Held, that B. was a proper party to the suit. *Fenwick v. Bulman*, 21 L. T., N. S., 628; 9 L. R., Eq., 165; 18 W. R. 179.

5. The Mid-Kent Railway Company entered

into a contract for the purchase of land, but did not pay the purchase money, and subsequently thereto an Act of Parliament was passed, transferring all the property of that company to the South-Eastern Railway Company. On bill against both companies for the specific performance of the contract, a demurrer by the South-Eastern Railway, on the ground that they ought not to have been made parties, was overruled, with costs. *Hacker v. Mid-Kent Railway Co. & South-Eastern Railway Co.*, 11 Jur., N. S., 634.

IV. PARTIES INTERESTED.

6. Specific performance decreed at the instance of a person entitled to the benefit of an agreement, though not a party to it. *Hook v. Kinnear*, 3 Swan. 417.

7. In a bill to compel performance of covenant to surrender copyhold estate to A. in trust for others, A. must be a party. *Cope v. Parry*, 2 Jac. & Walk. 538.

8. Upon a bill for the specific performance of a covenant with A. for the benefit of B., A. must be a party. *Cooke v. Cooke*, 2 Vern. 36.

9. A party claiming an interest in a purchase by virtue of a contract as having been entered into on his behalf, is a proper party to a suit by the vendor for the specific performance of the contract; otherwise if he claim merely as a sub-purchaser, *semble*. *Chadwick v. Maden*, 9 Hare 188; 21 L. J., Ch., 876.

10. A purchaser may, under special circumstances, make other persons than the parties to the contract who are interested in the estate parties to a bill for specific performance. *Tucker v. Small*, 6 Sim. 633; 5 L. J., N. S., Ch., 321. Reversed 3 Myl. & C. 63.

11. Plaintiff, having become surety for the defendant for due payment of an annuity granted by the latter, and defendant, who was tenant in tail in remainder of certain freehold premises, expectant on the death of his father, by indenture, dated in 1823, covenanted with the plaintiff, that, on the decease of his, the defendant's father, he would suffer a recovery of the entailed premises for the benefit of the plaintiff, as a security against any payment or expenses he, the plaintiff, might make or be put to in respect of the annuity. Upon a bill being filed in 1847, after decease of defendant's father, for a specific performance of the contract by the execution of a disentailing deed by the defendant, the defendant objected, by his answer, that certain creditors, upon judgments entered up against the defendant subsequently to the date of the indenture of indemnity, but before the death of the defendant's father, had, by the operation of the stat. 1 & 2 Vict., c. 110, s. 13, acquired charges upon the entailed premises prior in point of date to the plaintiff's claim under the deed, and submitted, that such creditors were necessary parties to the suit:—Held, overruling the objection, that, whether the interest of the judgment creditors were prior or subsequent, in point of date, to the plaintiff's claim, the objection went to the relief, and not to the want of parties. *Petre v. Duncombe*, 17 L. J., N. S., Ch., 370; 12 Jur. 261.

1. Although a person claiming land by title paramount is not a proper party to a suit for specific performance, a person who, by virtue of an antecedent agreement with the vendor, claims to be interested in the purchase money, is a proper party to a suit by the purchaser to have the right to the purchase money ascertained, and for specific performance against the vendor. *West Midland Railway Co. v. Nisom*, 1 Hem. & M. 176.

2. Vendors, to their bill against their purchaser for specific performance of, or for rescinding the agreement, made a sub-purchaser a defendant; and the sub-purchaser afterwards filed a bill against his vendor for specific performance of his agreement, and made the original vendors defendants. A demurrer by the original vendors to the sub-purchaser's bill was overruled, on the ground that they had made him a defendant to their bill. *Fenwick v. Bulman*, 9 L. R., Eq., 165; 21 L. T. 628; 18 W. R. 179.

V. REAL OR PERSONAL REPRESENTATIVES.

3. To a suit by the personal representative of a vendor of real estate for specific performance of the contract, the real representative of the vendor is a necessary party. *Roberts v. Marchant*, 1 Ph. 370; Hare 547; 13 L. J., N. S., Ch., 56.

4. A bill for specific performance of a contract for the sale of real estate was brought against the heir of a purchaser, alleging that he in his ancestor's lifetime took upon himself the contract. To this suit the administratrix of the purchaser, who died many years before the filing of the bill, was made a defendant, and upon her death (after alleging by her answer that the intestate's estate had been duly administered) the suit was revived against the grantee of limited letters of administration, *de bonis non* of the effects of the purchaser, the plaintiff not seeking any general administration; *quære*, whether such grantee was a proper and sufficient party to the revived suit; or whether the general personal representative of the purchaser ought to have been made a party. *Cave v. Cork*, 2 Y. & Coll. C. C. 180; 12 L. J., N. S., Ch., 156; 7 Jur. 461.

Where the purchaser dies before completion, his real and personal representatives are necessary parties, unless not interested in the subject matter. 8 C. 6 Jur. 385.

5. Bill by devisees in trust to sell for specific performance of an agreement to purchase, that the heir of the deviser is not a party to the suit, is not matter of exception to the report in favour of the title. *Wakeman v. Rutland (Duke)*, 3 Ves. 234.

6. A vendor of a real estate died before completion, intestate as to his real estate:—Held, that the legal personal representatives of the vendor might maintain a bill against the vendor's heir and the purchaser for a specific performance, although the interest of the vendor was equitable and the purchaser had since got in the legal estate. *Hoddel v. Pugh*, 33 Beav. 489; 10 Jur., N. S., 534; 12 W. R. 782; 10 L. T., N. S., 446.

VI. OTHER CASES.

7. A. agreed to sell to B. a piece of land in the occupation of his tenant, and to buy up the tenant's interest. B. having entered on the land before payment of his purchase money, A. and his tenant served him with notices not to trespass, and afterwards A. filed a bill against B. for a specific performance, and to restrain the trespass:—Held, that the tenant was not a necessary party to the suit. *Robertson v. Great Western Railway Co.*, 10 Sim. 314; 9 L. J., N. S., Ch., 17; 1 Rail. Ca. 459.

8. Whether the owner of the inheritance is a necessary party to a suit, against tenant for life, for specific performance of an agreement for a lease for lives renewable for ever, *quære*. *Lovry v. Dufferin*, 1 Ir. Eq. R. 281.

9. A party having purchased land, and signified at the time that he made the purchase on behalf of the trustee in his marriage settlement, who had money vested in him to be laid out in land, and a bill being filed against him for specific performance, the Court would not allow the case to proceed until the trustee was made a party, and the cause stood over for that purpose. *Wynnias v. Lindo*, Tam. 512.

10. Claim for specific performance of an agreement of a railway company to purchase land from trustees:—Held, that persons beneficially interested in the land were not necessary parties to the suit. *Potts v. Thames Haven Dock & Railway Co.*, 15 Jur 1004.

11. An agreement by trustees of a will to grant an underlease of their testator's property, is *prima facie* inconsistent with a trust for sale of it. There may, however, be circumstances to justify the agreement, but the Court cannot enter into the consideration of those circumstances in a suit for specific performance between the trustees and the underlessee, the *caveat que trustent* not being parties to it. *Evans v. Jackson*, 8 Sim. 217; 6 L. J., N. S., Ch., 8.

12. To a suit by the directors of a joint-stock company on behalf of themselves and all other the shareholders, seeking to have the benefit of an agreement entered into by an agent of the company, it is not necessary that all the shareholders should be made parties. *Taylor v. Salmon*, 4 Myl. & C. 134.

A person who sets up a title adverse to the company, may be properly made a defendant in such a suit, although he also sustains the character of a shareholder. *Ib.*

13. To enforce specific performance of an agreement entered into by the directors of a company, it is sufficient to make the company a defendant. *Scott v. Oakley*, 4 N. R. 258; 10 Jur., N. S., 648; 33 L. J., Ch., 612; 10 L. T., N. S., 801; 12 W. R. 897.

14. A bill was filed for the specific performance of a contract, by one of two joint purchasers, against the other purchaser and the vendor. An objection taken by the defendant, the vendor, on the ground of multifariousness, and that the plaintiff could not support his bill, unless the joint purchaser joined him as a co-plaintiff therein, was overruled. *Mackreth v. Dunn*, 10 L. J., N. S., Ch., 367.

15. Tenant for life, who is restricted by

the instrument under which he holds from alienating his estate, or from agreeing or attempting so to do, contracts to sell a portion of the property to the visitors of the County Lunatic Asylum, and agrees to take such steps as may be necessary to enable him to convey by Act of Parliament or otherwise. Upon a bill by the vendor for specific performance, the Court refused to stop the suit by allowing a demurrer, although the title was not such as could be forced upon an unwilling purchaser at the institution of the suit, the plaintiff being entitled to fair opportunity for application to Parliament to cure the defect in the manner suggested upon the contract. The clerk of the Visitors of the County Lunatic Asylum is a sufficient party to a suit for specific performance of an agreement by them to purchase, without making the treasurer of the county in respect of the money voted and raised by the Court of Quarter Sessions for the purpose of carrying out the agreement, he being a trustee of the money which has come to his hands, and bound to pay it over to the clerk. *Devenish v. Brown*, 4 W. R. 783.

XIII. Pleading.

- I. *Allegations in Bill*, 6594.
- II. *Answer or Statement of Defence*, 6594.
- III. *Admission of Contract by Answer*. See LANDLORD AND TENANT, I. I. 4.—VENDOR AND PURCHASER, I. IV. 9.
- IV. *Statute of Frauds. How Pleaded*. See PRACTICE (PLEADING).
- V. *Generally*. See PRACTICE.

I. ALLEGATIONS IN BILL.

1. Bill alleging a written agreement, may be sustained by evidence of a parol agreement. *Spurrier v. Fitzgerald*, 6 Ves. 548.

2. Where letters are stated in bill as the agreement, no testimony *aliunde* is admissible; otherwise, where stated as evidence of the agreement only. *Bird v. Bletchley*, 6 Madd. 17.

3. The terms of an agreement sought to be specifically executed must be accurately stated, and the case must be proved as stated on the record. *Ormond v. Anderson*, 2 Ball. & B. 270.

4. If bill for specific performance of agreement state that agreement was in writing, signature will be presumed. *Rist v. Hobson*, 1 Sim. & S. 543; 2 L. J., Ch., 86.

5. Where the want of signature to an agreement for the sale of lands clearly appears on the bill, the objection may be taken advantage of by general demurrer, but the statements of this bill not being inconsistent with a signature by the party to be charged, and containing allegations of part performance, a general demurrer thereto was overruled. *Field v. Hutchinson*, 1 Beav. 599; 3 Jur. 792.

6. An allegation in a bill by a purchaser for specific performance, that he was informed by his agent that a written agreement was

executed, followed by statements referring to the agreement as actually made, is a sufficient allegation of the execution of a written contract. *Heard v. Pilley*, 4 L. R., Ch., 548; 38 L. J., Ch., 718; 21 L. T., N. S., 68; 17 W. R. 750.

7. Where a joint contract of sale is alleged, a joint contract must be proved, and if a contract by some only of the alleged contracting parties be proved, the claim must be dismissed as to all. *Wollaston v. Osborn*, 1 W. R. 163; 22 L. J., Ch., 274.

8. Bill by a vendee for specific performance, insisting that the vendors could not make a good title, dismissed with costs. *Nielson v. Wordsworth*, 2 Swan. 365.

9. In a suit for specific performance of an agreement to take a lease, it must be alleged and charged in the bill that the defendant has waived the production of the lessor's title, if such waiver is intended to be relied on; and it is not enough to allege such facts as, if proved, would amount to a waiver. *Gaston v. Frankum*, 2 De G. & Sm. 561; 13 Jur. 739.

10. A bill by a vendor for specific performance of a contract to sell, stating or showing by reasonable inference that the vendor cannot give a valid conveyance, is demurrable; otherwise, where the allegations only disclose difficulties in the mode of conveyance. *Beaufort (Duke) v. Glynn*, 3 Sm. & G. 213.

II. ANSWER OR STATEMENT OF DEFENCE.

11. Where answer to bill for specific performance raises other objections to performance besides defect of title Court will not, on motion by plaintiff for reference of title after answer, decide whether other objections are frivolous or not, *semble*. *Withy v. Cottle*, 1 Sim. & S. 174; 1 L. J., Ch., 117. S. P. *Gordon v. Ball*, 1 Sim. & S. 178.

12. If defence to bill for specific performance of agreement for a purchase depends merely on want of title in vendor, defendant ought to rest on his answer, and not file a cross-bill to have it delivered up or to prevent an action, for plaintiff cannot succeed at law. *Hilton v. Barrow*, 1 Ves. J. 284.

13. Bill for specific performance of a parol agreement to renew, plaintiff having built a house; the only witness for the plaintiff proved an agreement different from that in the bill; two defendants by an answer stated an agreement different from both: in strictness the bill ought to be dismissed, but specific performance was decreed according to the answers, with costs against the plaintiff. *Mortimer v. Orchard*, 2 Ves. J. 242.

14. The former practice, which, in a suit for specific performance, required the authority of an agent to enter into a binding contract on behalf of his principal to be specially pleaded, still prevails. *Vale of Noath Colliery Co. v. Furness*, 45 L. J., Ch., 276; 34 L. T., 231; 24 W. R. 631.

When, therefore, a plaintiff in his statement of claim alleged that the defendant "duly authorised J. to act as his agent in and about the purchase" of a colliery, that J. acting as such agent wrote a letter to B., "who was

then duly authorised to act in the matter of the sale of the colliery as agent for the plaintiff," offering 6,000*l.* for the colliery, and that B. by the plaintiff's direction by letter accepted the offer, adding, "I will send you draft contract in due course:"—Held, that there was no sufficient allegation that J. and B. were duly authorised to sign a binding contract on behalf of their principals. *Ib.*

The words, "the property," in reference to a colliery, are not sufficient description of the colliery plant and stock on which to found an action for specific performance. *Ib.*

1. In an action for specific performance of an agreement made by an agent, the statement of defence, after alleging unsoundness of mind of the principal, denied that any agreement had been entered into by a person lawfully authorised, and claimed the benefit of the Statute of Frauds:—Held, that the defendant had not put in issue the question of the authority of the agent, and was only entitled to adduce evidence with respect to the unsoundness of mind. *Byrd v. Nunn*, 7 L. R., Ch. D., 284; 47 L. J., Ch., 1; 37 L. T. 585; 26 W. R. 101.

XIV. Practice.

- I. *Trial or Hearing*, 6595.
- II. *Inquiries. In General*, 6595.
- III. *Reference as to Title*. See VENDOR AND PURCHASER, XI. VIII.
- IV. *Generally*. See PRACTICE.

I. TRIAL OR HEARING.

2. In suits for specific performance, all questions as to the validity of the contract, and whether it is such as ought to be specifically enforced, must be raised upon the hearing. *Hood v. Oglander*, 11 Jur., N. S., 498; 34 L. J., Ch., 528; 34 Beav. 513.

3. On a bill for specific performance, the questions whether time was originally of the essence of the contract, and whether, being so, the defendant has done any act whereby he has waived it as a ground of objection to the performance, are questions depending on evidence, and not to be decided except upon the hearing. *Levy v. Lindo*, 3 Meriv. 81.

4. It is the duty of the Court, in a bill for specific performance arising out of a doubtful point of law, to settle the law on the subject. *Bell v. Holtby*, 15 L. R., Eq., 178; 42 L. J., Ch., 266; 28 L. T. 9; 21 W. R. 321.

5. In a suit for a specific performance of a contract for the sale to the plaintiff of certain bonds, the plaintiff cannot at the bar abandon his case as to the particular bonds, and ask specific relief by the delivery of other bonds of the same kind, admitted by the defendant to be in his hands. *Simpson v. Malherbe*, 13 W. R. 887; 13 L. T., N. S., 112; 6 N. R. 245.

6. Where a plaintiff sought the specific performance of an agreement, and the defendant set up by his answer a different agreement, the terms of which the plaintiff had always repudiated:—Held, that the plaintiff was not entitled, upon the hearing, to have the agree-

ment set up by the defendant specifically performed. *Jeffery v. Stephens*, 6 Jur., N. S., 947; 8 W. R. 427.

7. Where a plaintiff has failed at the hearing to prove his title to a decree for a specific performance on a point not raised by the pleadings, the Court dismisses the bill, without prejudice to any other bill that the plaintiff may be advised to file. *Clay v. Rufford*, 5 De G. & Sm. 768.

8. Bill for specific performance dismissed, although an issue had been tried and had resulted in a verdict for the plaintiff, the Court being of opinion that the agreement was one of which specific performance could not be decreed, and that the issue ought not to have been directed. *Morrison v. Barron*, 1 De G. F. & J. 633.

9. In a suit for specific performance of an agreement to let a house for a short term, the plaintiff should apply to have the cause advanced so that it may be heard before the term has expired. *De Brassac v. Martyn*, 11 W. R. 1020; 9 L. T., N. S., 287.

II. INQUIRIES. IN GENERAL.

10. Bill for specific performance against vendor, the vendor being in possession, and an account being necessary of the vendee's personal estate, referred to the Master to fix a short day for the payment of the purchase money, otherwise the bill to be dismissed as against those defendants, with costs. *Lowther v. Andover*, 1 Bro. C. C. 396.

11. Where contract for the purchase of an estate is not complete in the lifetime of the ancestor, the terms of it not being ascertained, heir is not entitled to have the personal estate applied in payment of the purchase money. A reference or issue will not be granted to ascertain the terms of the contract. The application of the personal estate by the heir, in completing the contract for purchase by the ancestor, but not binding on him, raises no trust in the lands for the next of kin. The money so laid out is a charge on the purchased lands. *Savage v. Carroll*, 1 Ball & B. 265.

12. If, in the course of proceedings in a suit for specific performance, there comes out a fact, not put in issue in the cause by either party, which affects the legality of the contract, or tends to show that the contract is not fully stated in the bill, the Court will direct an inquiry into the fact so disclosed. *Parken v. Whitty*, T. & R. 366.

13. *Semble*, in a suit for specific performance of a written agreement, a parol variation, not set up by the answer, but coming out on the cross-examination of the defendant's agent, who was one of the plaintiff's witnesses, is a proper subject for inquiry before the Court finally disposes of the case. *London & Birmingham Railway Co. v. Winter*, Cr. & Ph. 57.

14. Where a parol agreement, varying the terms of the written agreement, is set up by the defendants in a suit for specific performance, and supported by evidence affording presumption or suspicion of its existence, an inquiry will be directed. *Van v. Corpe*, 3 Myl. & K. 269; 6 L. J., N. S., Ch., 208; 1 Jur. 101, 149.

1. Decree for specific performance of an agreement to grant a lease, rejecting one item for such conditions, etc., as shall be judged proper by J., and substituting reference to the Master, the agency of J. not being of the essence of the contract. *Gourlay v. Somerset (Duke)*, 10 Ves. 429.

2. When estates and other property forming a mixed fund are settled, subject to a power of appointment there, the Court, where the parties entitled to this mixed fund are numerous, will not, as against a purchaser of part of the mixed fund in which purchase one of its objects acquiesced, act as against that purchaser without knowing all the dispositions of that mixed fund, and will direct inquiries accordingly. *Thompson v. Simpson*, 1 Dr. & War. 459.

3. If the common decree for specific performance and for inquiry as to title be made, and no special directions, the purchaser may under it raise objections which he had abandoned before suit. *Curling v. Austin*, 2 Drew. & Sm. 129; 10 W. R. 682.

The Court will not add any special inquiry on the subject to the decree, or direct the chief clerk to state special circumstances. *Ib.*

And on further consideration the Court will not, upon the question of costs or interest, look at any evidence but that in the cause, and will not look at the proceedings and evidence in chambers or on interlocutory motion. *Ib.*

Reference as to Title.] See VENDOR AND PURCHASER, XI. VIII.

XV. Relief after Judgment.

I. *Rescission by Vendor after Judgment*, 6596.

II. *Writ of Execution*, 6596.

III. *Injunction in Aid of Decree*. See V. III. ante.

IV. *Enforcing Lien*. See VENDOR AND PURCHASER, XIV. v. 5.

I. RESCISSION BY VENDOR AFTER JUDGMENT.

4 After a decree in a suit for specific performance, the defendant, the purchaser, refused to complete by payment of the purchase money. At the instance of the plaintiff, who had executed the conveyance, which had been approved in chambers, an order was made appointing a time and place for the defendant to pay the purchase money on delivery to him of the conveyance executed by the plaintiff. *Morley v. Clavering*, 9 W. R. 801; 30 Beav. 108.

5. A decree for specific performance was made against a purchaser. Not having paid the purchase money, he was ordered, on motion, to pay it within a limited time, and in default, that the contract should be rescinded and all proceedings stayed. He was also ordered to pay the costs of the motion. *Simpson v. Terry*, 34 Beav. 423.

6. After a decree for specific performance of a contract to purchase for payment, and an attachment for default, on motion by the plaintiff, the Court ordered the contract to be rescinded, and all proceedings stayed, except as to such application to the Court as might

be made by the plaintiff to assess the damages occasioned by the breach of contract by the defendant. *Sweet v. Meredith*, 4 Giff. 207; 32 L. J., Ch. 147; 7 L. T. N. S., 664.

7. After decree against a purchaser for specific performance, the defendant made default in payment of the purchase money:—Held, that the vendor was entitled to rescind the contract. *Foligno v. Martin*, 16 Beav. 586.

8. A decree for specific performance was made against a purchaser in possession, but he was unable to complete the purchase. The Court rescinded the contract and ordered the purchaser to pay to the vendor the rents received by him, together with the costs of suit and those occasioned by the non-completion of the purchase. *Clark v. Wallis*, 35 Beav. 460.

9. When a purchaser by decree in a suit for specific performance was decreed to pay the purchase money within a specified time, and failed to do so, the Court, on the application of the vendor, ordered the contract to be rescinded, and stayed all proceedings in a suit with costs, to be paid by the purchaser, and refused to make an order for the return of the deposit to him. *Dunn v. Vere*, 23 L. T. 432; 19 W. R. 151.

10. A plaintiff in a specific performance suit may obtain a rescission of the contract on the defendant's default to obey the decree. *Watson v. Coar*, 42 L. J., Ch., 279; 21 W. R. 310; 27 L. T., N. S., 814; 15 L. R., Eq., 219.

A decree was made for specific performance of an agreement to take a lease of a house, and an order on further consideration for payment of a sum of money by the defendant, and thereupon for the execution of the lease. The defendant having made default and absconded, an order was made on the plaintiff's motion for rescission of the contract, and the stay of all proceedings in the suit except as to his costs and damages. *Ib.*

11. After a decree for specific performance of an agreement against a purchaser who was unable to complete,—on a motion by the plaintiffs that the agreement might be rescinded, and all further proceedings in the action stayed except as to any application which might be made to the Court to award and assess the damages which the plaintiffs had sustained by the breach of the agreement:—Held, that the plaintiffs were only entitled to have the agreement rescinded, and could not at the same time claim damages for its breach. *Henty v. Schröder*, 12 L. R., Ch. D., 666; 48 L. J., Ch., 792; 27 W. R. 833.

II. WRIT OF EXECUTION.

12. Where a covenant in an agreement for a lease was broken, and a verdict obtained for 1,500*l.* as damages for the breach, but the plaintiff in the action died before the judgment was perfected, so that the damages were lost at law, the Court, on a bill by his representatives for specific performance of the agreement, refused a writ of *ne exeat regno* for the amount. *Jenkins v. Parkinson*, 2 Myl. & K. 5; Coop. temp. Brough, 179; 3 L. J., N. S., Ch., 36.

13. When a person has been directed to execute a lease, but refuses to do so, the Court can only enforce such execution by

attachment, the Trustee Act 1850, having omitted to provide for such a case. *Grace v. Baynton*, 25 W. R. 506.

XVI. Costs.

- I. *Of Suits for Specific Performance where Title Doubtful*, 6597.
- II. *Of Suits for Specific Performance on Death or Insanity of Vendor*, 6599.
- III. *Other Defences or Conduct of the Parties*, 6601.
- IV. *Set-off*, 6603.
- V. *Other Cases*, 6604.
- VI. *Of Investigation of Title and Reference as to Title*. See VENDOR AND PURCHASER, XX. I.
- VII. *Costs and Expenses of Conveyance*. See VENDOR AND PURCHASER, XX. II.
- VIII. *Generally*. See PRACTICE (COSTS).

I. OF SUITS FOR SPECIFIC PERFORMANCE WHERE TITLE DOUBTFUL.

1. *General Principles*, 6597.
2. *Liability of Vendor for*, 6597.
3. *Liability of Purchaser for*, 6598.

1. General Principles.

1. The fact of a title having been perfected in the Master's office does not determine the question of the costs of a suit for specific performance, which depends upon whether the defects which have been removed there were the occasion of the suit. *Soones v. Morrell*, 1 Beav. 251.

2. The rule, that the costs of a suit for specific performance depend upon when the title was first shown, is to be strictly adhered to. *Wilkinson v. Hartley*, 15 Beav. 183.

3. The rule which makes the costs of a suit for specific performance depend upon when the title was first shown relaxed; first, where the requisition was not made until after a bill was filed; and, secondly, where, although the requisition was made before the bill was filed, the non-compliance was attributable to the circumstance of the purchaser having claimed abatement or compensation, in respect of which his bill had been dismissed with costs. *Lyle v. Yarborough (Earl)*, 1 Johns. 70.

4. The costs of a suit for specific performance do not depend upon when a good title was first shown, but upon the conduct of each party in causing the litigation. *Parr v. Lovogrove*, 4 Jur., N. S., 600.

5. A purchaser having unsuccessfully insisted that an instrument of republication did not sufficiently refer to the will so as to identify it, no costs were given on either side on a bill for specific performance by vendor, who had not made out his title. *Weddall v. Nison*, 17 Beav. 160; 17 Jur. 642; 22 L. J., Ch., 939.

2. Liability of Vendor for.

6. Vendor not making good title when bill

filed, pays costs till report of good title. *Harford v. Purrier*, 1 Madd. 532.

7. If vendor can make a good title at hearing, on further directions, it is sufficient for specific performance, vendor paying costs. *Paton v. Rogers*, 6 Madd. 256.

8. Vendor not making a good title ordered to pay costs, though he was only a trustee to sell. *Edwards v. Harvey*, Coop. 40.

9. Where a Master's report is against the title, a vendor's bill may now be dismissed with costs upon motion. *Bennett College v. Carey*, 3 Bro. C. C. 390.

10. Purchaser brought into court on a doubtful title ought to be discharged with costs. *Blosse v. Clannorris*, 3 Bligh 62.

11. Specific performance without costs, the suit being occasioned by the refusal of the vendor to produce documents insisted on by the purchaser, some of which were necessary and others not. *Nevall v. Smith*, 1 Jac. & Walk. 263.

12. On the report against vendor's title, his bill for specific performance dismissed with costs on motion. *Walters v. Pym*, 19 Ves. 351.

13. Costs to a purchaser; the vendor having established his title before the Master, after contest, upon a different ground from that in the abstract delivered. *Felder v. Higginson*, 3 Ves. & B. 142.

14. Title established before Master not being clear on abstract, vendor pays costs. — v. *Collinge*, cited 3 Ves. & B. 143 n.

15. Specific performance decreed without costs, the abstract delivered not containing a satisfactory title. *Wilson v. Clapham*, 1 Jac. & Walk. 36.

16. A vendor seeking a specific performance, should have his title prepared, and therefore, where the abstract delivered is imperfect, he pays the costs of the suit up to the time of the defects being supplied. *Wilson v. Allen*, 1 Jac. & Walk. 623.

17. Where a vendor does not show a good title till after the commencement of the suit, he must pay the costs, though specific performance be decreed. *Townsend v. Champenone*, 3 Y. & Coll. 505.

18. Where in a suit by a vendor, for specific performance, the Master reported in favour of the title, but the Court, on an exception taken by the purchaser, deemed the title doubtful, an order was made, dismissing the bill without costs, but neither allowing nor disallowing the exception. *Willcos v. Bellaers*, T. & R. 491.

19. A vendor filed a bill for specific performance, alleging that the defendant had accepted the title; the defendant resisted it, on the ground that the bankruptcy, under which the plaintiff claimed, was invalid. Neither allegation turned out correct, and, though a good title was first shown in the Master's office, the decree was made without costs. *Sidbotham v. Barrington*, 5 Beav. 261.

20. Where it appears on the face of a bill for a specific performance, that the plaintiff could not convey, according to the agreement, without the direction of the Court, he will not have the costs up to the hearing; but if the defendant insists on inquiries into the title, and fails in them, the plaintiff's costs incurred in these inquiries, and at the hearing on further directions, must be paid by the defendant. *Allen v. Currie*, 1 L. J., Ch., 135.

1. In a doubtful case of title, where the doubt is only removed at the hearing by an act of the plaintiffs, the plaintiffs must pay the defendant's costs. *Ashley v. Waugh*, 9 L. J., N. S., Ch., 31; 4 Jur. 572.

2. Vendor not making a good title ordered to pay costs, though he was only a trustee to sell. *Edwards v. Harvey*, Coop. 40.

3. Bill by purchaser for specific performance ordered to be dismissed for defect of title, a necessary party not choosing to concur in conveying; order to dismiss without costs, it being against the principles of the Court to order the defendant to pay the plaintiff his costs in such case. *Lewis v. Loaham*, 3 Meriv. 429.

4. A bill for a specific performance of an agreement was made necessary by trustee refusing to join in the conveyance. The Court being of opinion that the trustees ought to pay all the costs of the suit, the decree was, that the plaintiff should pay the costs of all the other defendants (although he had a decree against them), and recover over the whole costs from the defendant, the trustee. *Jones v. Lewis*, 1 Cox 199.

5. Where the Court has declared, in a suit for specific performance by a vendor, that the concurrence of judgment creditors was necessary, that being the substantial ground of the litigation, although a question of conveyance and not of title, the vendor plaintiff falling must pay the costs of the suit. It is the duty of the vendor plaintiff who has a defective title, when the objection is removed, to offer the purchaser the costs up to that time, and to give him a conveyance. *Freer v. Hesse*, 23 L. J., Ch., 338; 1 Eq. Rep. 336; 2 Eq. Rep. 13.

6. The purchaser of a house in London having taken various objections to the title, the vendor filed a bill for specific performance, and obtained a reference as to title. The objections were overruled; but before the certificate had been signed the purchaser discovered in a long blank wall, which formed one side of the house and fronted on a street, a stone with an inscription, dated in 1776, stating that the wall had been built by and belonged to the East India Company, who had thrown the adjoining ground into the street. It turned out that the wall had been rebuilt in 1831 by the tenant of the house, and the stone set up again; but under what circumstances did not appear. No rent had from that time been paid to the company, or any acknowledgment of their title given; but their successors in title, on being applied to, claimed the wall as theirs, and the vendor obtained a release from them:—Held, that the vendor had not a good title when the bill was filed, for that there was no ground for holding a title to have been gained by possession adversely to the East India Company. *Phillipson v. Gibbon*, 6 L. R., Ch., 428; 40 L. J., Ch., 406; 24 L. T. 602; 19 W. R. 661.

Held, that the vendor was to blame, as he might, with reasonable diligence, have informed himself of this defect before selling, and that, therefore, although he had been right on all points which arose before the bill was filed, he ought not to receive costs. *Id.*

3. Liability of Purchaser for.

7. Purchaser making fair objection to title,

does not pay costs. *Aislalie v. Rice*, 3 Madd. 256.

8. If purchaser makes frivolous objections to title, he pays costs, but not otherwise. *Thorpe v. Freer*, 4 Madd. 466. And see *Litchfield v. Brown*, 23 L. J., Ch., 176.

9. Specific performance decreed with costs in a case when the defendant, objecting to title, had been served with notice of a prior decision in a different cause in favour of the same title, against a similar objection. *Biscoe v. Wilks*, 3 Meriv. 456.

10. A tenant having by his conduct made his title to a renewal doubtful, and thereby rendering a suit for it necessary, was, on obtaining a renewal, decreed to pay all the costs. *Barrett v. Pearson*, 2 Ball & B. 189.

11. In a suit for specific performance by a vendor, the costs will be thrown upon the purchaser, though the Master reports that a good title was not shown till after the filing of the bill, if that finding proceeded on the ground that certain evidence had not been previously furnished, which the vendor had offered to produce, but which had not been actually produced, before the institution of the suit, in consequence of the purchaser insisting upon other unsubstantial objections. *Long v. Collier*, 4 Russ. 269.

12. Purchaser after long possession and vexatious objections to complete the purchase:—Held, to have waived his right to an investigation of the title, and decreed to perform the agreement specifically, to pay interest at 4 per cent. on the unpaid purchase money from the time of taking possession, and to pay the costs of the suit. *Hall v. Laver*, 3 Y. & Coll. 191.

13. To a bill by a vendor for the specific performance of a contract for the sale of property, the defendant raised three objections, and at the hearing failed in two; the usual reference was made to inquire if the plaintiff could make a good title:—Held, that the defendant ought to pay so much of the costs of the suit as had been occasioned by his unsuccessful objections. *Smallwood v. Cotty*, 6 L. J., N. S., Ch., 265.

14. In a suit for specific performance, where an objection to the contract had been overruled at the hearing, and the defendant had afterwards raised an objection to the title in the Master's office, and that objection was cleared up, the Court ordered that the costs after the decree should be paid by the defendant, but that up to the decree on the hearing there should be no costs on either side. *Woodward v. Miller*, 16 L. J., N. S., Ch., 16. S. C. 10 Jur. 1027.

15. If a defendant questions the title of a plaintiff and fails, and by that course puts the plaintiff to any costs, such defendant should pay so much of the costs as has been occasioned by the objection; but where such objection has caused so trifling an increase of expense to the plaintiff, that the inquiry would cost him more than the amount he would have to receive, the Court will not direct. *Jones v. Morral*, 2 Sim., N. S., 254; 21 L. J., N. S., Ch., 630.

16. Bill by purchaser for specific performance, insisting that the vendors could not make a good title, dismissed with costs. *Nicolson v. Wordsworth*, 2 Swan. 365.

17. Where, on a reference as to title in a suit

for specific performance, the plaintiff, the vendor, showed a good title, in the opinion of the Master, from the time of producing certain evidence, the existence of which was well known to the defendant, but it had formed the subject of dispute between him and the vendor:—Held, that the plaintiff was entitled to the costs of the suit. *Monro v. Taylor*, 3 Macn. & G. 713; 21 L. J., N. S., Ch., 525. Affirming 8 Hare 51.

1. Where a bill for specific performance is filed by a purchaser, and it turns out that the vendor cannot make a good title, the bill is dismissed, but without costs. *Malden v. Fyson*, 9 Beav. 347.

2. Where, upon a contract to purchase, a third party puts in a claim, which is not merely a frivolous one, but upon which there is a reasonable doubt, the Court will not decree specific performance against the purchaser. Where a third person, not a party to a suit for specific performance for a contract for sale, made such a claim independently of vendor and purchaser, the bill was dismissed without costs. *Heseltine v. Simmons*, 6 W. R. 268.

3. Bill by purchaser for specific performance ordered to be dismissed for defect of title, a necessary party not choosing to concur in conveying; order to dismiss without costs, it being against the principles of the Court to order the defendant to pay the plaintiff his costs in such case. *Lewis v. Loxham*, 3 Meriv. 429.

4. When a vendor succeeds in a suit for specific performance, he is entitled to costs, notwithstanding the title was first shown in the Master's office, if the suit was occasioned solely by the conduct of the defendant. *Peers v. Sneyd*, 17 Beav. 151.

5. A purchaser was ordered to pay all the costs, though a good title was not shown until after the institution of the suit by the production of a declaration which was not the cause of dispute, and had not been previously required. *Bridges v. Longman*, 24 Beav. 27.

6. Plaintiffs in a suit for specific performance, in which the only question was one of title, which was decided against them, ordered to pay the costs, though a decree was made in their favour. *Hood v. Oglander*, 6 N. R. 57.

7. No costs given against the purchaser who had failed in his objections, the error having occurred in the vendor's deed. *Lecoy v. Mogford*, 4 W. R. 805; 2 Jur., N. S., 1084.

8. Where a purchaser objects to specific performance of contract for sale upon other grounds than those of title, and fails, and the vendor does not make out his title until after decree, the purchaser is liable to the costs of the vendor's suit for specific performance, except the costs of making out the vendor's title. *Abbott v. Caltou*, 22 L. J., Ch., 936.

9. On a sale of real estate by a trustee under a will open to suspicion as having been obtained by undue influence, the title was approved; but before the actual completion of the contract, the heir-at-law gave notice that he intended to dispute the will, and brought an action against the tenant for rent; the purchaser having thereupon refused to complete, a bill for specific performance was filed; but before it came to a hearing the action brought by the heir was tried, and a verdict given against the heir. A reference as

to title was then directed, and the Master having reported in favour of the title, a decree was made for specific performance. On appeal, however, by the purchaser, the Lord Chancellor (Lord Cottenham) ordered the case to stand over generally, with liberty for the vendor to take such proceedings for establishing the will as he should be advised. The vendor then instituted a suit against the heir, which resulted in the will being established. The Lord Chancellor (Lord Truro) thereupon confirmed the decree for specific performance, and directed the purchaser to pay interest from the time when under the contract the sale ought to have been completed, and also to pay the costs of the suit subsequently to the hearing, when the reference as to title was directed. His lordship held, that at that time there had been such reasonable inquiry into the title as ought to have satisfied the purchaser, and that therefore the consequences of the further proceedings by which the will was established, both in reference to the costs of the suit for specific performance and the payment of interest, must fall on the purchaser. *Grove v. Bastard*, 1 De G. M. & G. 69.

The judgment of Lord Cottenham in this case (2 Phil. 619) observed upon. *Id.*

II. OF SUITS FOR SPECIFIC PERFORMANCE ON DEATH OR INSANITY OF VENDOR.

1. *Infant devisees or Infant Heir*, 6599.
2. *Insanity of Vendor*, 6600.

1. Infant Devisees or Infant Heir.

10. Where a party who had contracted for the sale of certain lands died previously to the execution of the conveyance, having, by a will antecedent to the contract for sale, devised all his real estate to trustees (who took the legal estate) upon trust for A. for life, remainder to B. for life, remainder to C., an infant in tail; a suit for the completion of the contract having been rendered necessary by reason of the infancy of C., the Court decreed specific performance, with costs of the suit. *Heard v. Cuthbert*, 1 Ir. Ch. R. 369.

11. A vendor, after the contract, and before the conveyance to the purchaser, died, without having devised the legal estate in the premises in trust to complete the purchase, and a suit for a specific performance of the contract against the trustees and the infant devisees of interests in his estate having become necessary, the Court made the decree without costs, there having been no default on either side. *Hinder v. Streeten*, 10 Hare 18; 16 Jur. 650.

12. Where, after contracting to sell land, the vendor devises to parties, some of whom are infants at his decease, his estate must bear the costs of the suit which he has thus voluntarily rendered necessary to a completion of the contract, and a mere devise of trust estates does not in such a case avoid the necessity of a suit. *Purser v. Darby*, 4 Kay & J. 41.

13. Distinction in this respect between suits rendered necessary by the voluntary act of the

deceased and those caused by the mere act of God, as where the deceased has died intestate, leaving an infant heir. *Id.*

1. A testator had granted to the plaintiff the right of pre-emption of an estate which he had previously devised to an infant. The plaintiff exercised his option after the testator's death, and filed his bill against the infant and executor for specific performance. The Court gave no costs against the defendants. *Hale v. Bushill*, 35 Beav. 343; 12 Jur., N. S., 243; 35 L. J., Ch., 381; 14 W. R. 495; 14 L. T., N. S., 246.

2. A suit for specific performance being necessary in consequence of a vendor having died, and the property becoming vested in his infant children, a small sum for costs was allowed to the purchaser. *Williams v. Glenton*, 35 L. J., Ch., 284; 12 Jur., N. S., 175; 14 W. R. 294; 13 L. T., N. S., 727. Affirming 34 Beav. 528; 11 Jur., N. S., 801; 13 W. R. 1030; 13 L. T., N. S., 10.

3. Testatrix devised a freehold property, in which she had an equitable estate in fee, to A. for life, with remainder to B. for life, with remainder to the family of B. (who were infants) in strict settlement; she then contracted to sell part of the estate, and died before conveyance. After her decease, the legal estate was got in, and the owners of it, together with the tenants for life, were willing to complete the purchase.—Held, nevertheless, that in order to give the purchaser an immediate estate in fee, both legal and equitable, a decree for specific performance of the contract, under the stat. 11 Geo. 4, and 1 Will. 4, c. 60, s. 17, was necessary, and that as this was a question of title, and the vendor had contracted to deduce a good title at her own expense, and there were no laches on either side, the costs of the suit must be paid out of the vendor's estate. *Farrar v. Winterton (Earl)*, 4 Y. & Coll. 472.

4. A., who was under an obligation to convey land to a railway company, died, having devised his property to his children (of whom some were infants) equally, without giving any sufficient power of sale to trustees. The company having filed a bill for specific performance.—Held, that the suit was necessary, and that each party must bear his own costs. *London & South Western Railway Co. v. Bridger*, 12 W. R. 948; 4 N. R. 261.

5. On a decree for specific performance against the infant heir-at-law of a vendor, the Court, where there has been no default on either side, will give no costs on either side. *Hanson v. Lake*, 2 Y. & Coll. C. C. 328. And see *Bannerran v. Clarke*, 3 Drew. 632; 26 L. J., Ch., 77.

6. After decree in a suit for specific performance against the infant heir of the vendor, a petition must be presented under 11 Geo. 4, and 1 Will. 4, c. 60, for an order that the infant may convey to the purchaser. The costs of the suit were ordered to be paid out of the purchase money. *Prytharch v. Havard*, 6 Sim. 9.

7. A petition in a cause for a conveyance under the Trustee Act having been presented by a party in the cause, in his character of purchaser, the Court refused him his costs. *Robinson v. Wood*, 5 Beav. 246.

8. Where a vendor of real estate contracted for a sale and died before completion, having by his will (dated prior to the contract) de-

vised the estate to an infant:—Held, that in a suit instituted for the purpose of obtaining a conveyance, each party must bear his own costs. *Mudin v. Patey*, 1 N. R. 566.

9. Where a person having contracted to sell or lease an estate dies leaving a will, which renders the institution of a suit for specific performance necessary, his estate must bear the costs—*Secus*, if he dies intestate. *Sanderson v. Chadwick*, 2 N. R. 414.

10. A., having devised his real estate to B., contracted to sell a portion to the plaintiffs, and died before the contract was completed, leaving B. his infant heir and devisee:—Held, on the authority of *Hinder v. Streeten* (10 Hare 18), that the heir was entitled to his costs up to the hearing of a suit by the plaintiffs for specific performance. *Midland Counties Railway Co. v. Rice*, 2 Eq. Rep. 1109.

11. A contract for the sale of real estate had been entered into, but before completion, the vendor died intestate, leaving an infant heir-at-law:—Held, that in a suit instituted by the purchaser for specific performance, no costs of suit would be given on either side, otherwise if the estate had been devised by the vendor. *Hodson v. Carter*, 7 L. T., N. S., 504; 1 N. R. 179.

12. A vendor died intestate, and it became necessary to file a bill to make his infant heir a trustee:—Held, that each party must bear his own costs. *Scott v. Scott*, 11 W. R. 766; 8 L. T., N. S., 450.

13. If a vendor dies before completion, his infant heir, not disputing the contract, is entitled to be paid out of the purchase money his costs and expenses of a suit to carry the contract into effect. *Barker v. Venables*, 11 Jur., N. S., 480; 34 L. J., Ch., 420; 13 W. R. 803; 12 L. T., N. S., 796.

14. The heir-at-law of a vendor, who refused to convey to the purchaser an estate sold by his ancestor, was ordered to pay costs of a suit to compel him. *Hoddel v. Pugh*, 33 Beav. 489; 10 Jur., N. S., 534; 12 W. R. 782; 10 L. T., N. S., 446.

Costs of Applications under the Trustee Acts.
See TRUSTEE ACTS.

2. Insanity of Vendor.

15. Where, by reason of one of several vendors becoming of unsound mind before the purchase money is paid, a suit for specific performance becomes necessary, no costs of the suit will be given on either side. *Cresswell v. Haines*, 8 Jur., N. S., 208; 21 L. J., Ch., 237.

Several owners of shares in a copyhold estate agreed to sell it. The purchase money was made payable by instalments, and the surrender of the premises by the vendors was, by arrangement, delayed until the whole should have been paid. Before the last instalment was payable, one of the vendors became of unsound mind, but was not found lunatic by inquisition, and therefore a bill for specific performance of the contract became necessary:—Held, that as the delay of the surrender had been for the convenience of both parties, there ought to be no costs given on either side up to the hearing. *S. C.* 10 W. R. 121.

16. On a claim by vendor for specific performance by purchaser found by inquisition to

have been lunatic at the time of the contract, the Court declared the contract to have been null and void, and ordered the residue of the deposit, after deducting the vendor's costs, charges, and expenses, to be repaid to the committee of the lunatic's estate. *Frost v. Beavan*, 17 Jur. 369; 22 L. J., Ch., 638.

III. OTHER DEFENCES OR CONDUCT OF THE PARTIES.

1. The vendors having by their misrepresentations occasioned the suit, were ordered to pay all the costs. *Harrison v. Coppart*, 2 Cox 319.

2. The costs of a suit for specific performance do not depend upon when a good title was first shown, but upon the conduct of each party in causing the litigation. *Parr v. Lovegrove*, 4 Jur., N. S., 600.

3. In conditions of sale of leaseholds it was stated, that the purchaser should have possession on a certain day; "all outgoing" up to that day being cleared by the vendors. The vendors refused to pay half a quarter's rent which had accrued due between the last quarter day and the date fixed for completion. The purchaser, after several attempts at accommodation, declined to complete:—Held, that the vendors were entitled to specific performance, subject to paying the half-quarter's rent; but that, as the purchaser had refused to accede to inexpensive modes which had been proposed for adjusting the dispute, there should be no order as to costs. *Lames v. Gibson*, 11 Jur., N. S., 873; 14 W. R. 25; 13 L. T., N. S., 316.

4. Devises in trust for sale contract to sell in the ordinary form; an abstract of title is delivered, when the counsel for the purchaser advises him to claim indemnity against covenants not to build, etc., not set out in the contract but contained in the testator's purchase deed. Answers are returned to these requisitions not touching the question of indemnity, and a draft conveyance tendered, when the vendors insert a proviso embodying the covenants in the conveyance, and the purchaser objects to execute it in that form. On claim for specific performance of the contract:—Held, that the disclosure of the covenants on the draft conveyance brought the contract down to that date, and the purchaser had the option to rescind or give the covenants. Claim dismissed without costs. *Lukey v. Tiggs*, 3 W. R. 306; 1 Jur., N. S., 200; 3 Eq. Rep. 510; 24 L. J., Ch., 495.

5. A contract was entered into for the purchase of property as to which the vendor, whose interest was subject to his wife's dower, stated that she would release her dower. The wife refused to join, and the purchaser obtained a decree for specific performance with the usual reference as to title. At the hearing, on further consideration, the purchaser asked for specific performance with compensation in respect of the wife's interest:—Held, that it was a case in which the purchaser was entitled to specific performance with compensation, and that there was nothing in respect to the compensation now asked inconsistent with the relief originally prayed or decreed so as to deprive the purchaser of his costs upon further consideration. *Wilson v. Williams*, 3 Jur., N. S., 810.

6. In a suit by a vendor for specific performance against a purchaser, if the contract stipulated that the possession should be given at a specified day, it is competent for the purchaser to insist that both time and a vacant possession are the essence of the contract, and the Court will receive as evidence that such was the purchaser's object statements made by the agent of the purchaser at the time of signing the contract. Where a purchaser has consented to enlarge the time for completion, and where a vacant possession was of the essence of the contract, it is competent for him to object to complete at the expiration of such enlarged time, if the possession is not then vacant, and if he has done no act towards completion of the contract after he had notice that vacant possession could not be given at the day. But where a purchaser had by his acts waived the time for completion in the first instance, and had gone on for some time inducing the vendor to incur expenses to perfect his title, and suddenly, upon the discovery that vacant possession could not be given according to stipulation, declined to complete, the Court, although it dismissed a bill filed against such a purchaser for specific performance, dismissed it without costs. *Nokes v. Kilmorey*, 1 De G. & Sm. 444.

7. If the purchaser, in his answer, besides insisting on the want of title in the vendor, sets up a defence that he was seduced into the contract by fraud and misrepresentation, and that defence is not supported by evidence, he will be loaded with so much of the expense of the suit as was occasioned by those improper allegations. *Wright v. Howard*, 1 L. J., Ch., 94.

If the defendant, in such a cause, files a cross-bill to have the agreements cancelled, not relying merely on the vendor's want of title, but charging him with fraud and misrepresentation (which charges are disproved), though the agreements will be decreed to be cancelled yet no costs will be given. *Id.*

8. A. and B. having entered into a verbal treaty for the purchase of certain premises belonging to A., and not being able to agree as to the amount of the purchase money, A. addressed a letter to C., a third person, stating that he would take a certain sum from B. for the premises, reserving a small portion of same for his sister, if C. approved of it; B. subsequently lodged the sum named by A. with C., of which lodgment C. made a memorandum on A.'s letter, with a remark that it was "a great price." During the period of this negotiation between A. and B., A. entered into a contract with D. for the sale of the same premises, and although notice of the agreement between A. and B. was given to D., actually conveyed the premises to D.:—Held, on a bill filed by B. for the specific performance of her agreement, that C. must be considered the agent of A., and that as he had signed the contract acknowledging the receipt of the purchase money, A. was bound to perform the agreement. Also that D. having had notice of the agreement between A. and B., the conveyance to him must be considered fraudulent, and should be delivered up to be cancelled, and that the conduct of A. having been very fraudulent, the costs of B. should in the first place be paid out of the funds lodged by him in the hands of C. *Field v. Boland*, 1 Dr. & Wal. 37.

1. In a suit for specific performance, a purchaser, who set up a defence which prevented the plaintiff obtaining, on motion, a reference as to title, and failed in establishing it, was ordered to pay the costs up to, and inclusive of the hearing. *Hyde v. Dallaway*, 4 Beav. 606; 6 Jur. 119.

2. In a suit for specific performance, where the purchaser insisted that the contract was abandoned and he was decreed to complete the contract on a good title being shown, he must pay the costs of the suit up to the hearing, the litigation up to the hearing having arisen out of the question whether the contract was abandoned. *Taylor v. Brown*, 2 Beav. 180; 9 L. J., N. S., Ch., 14.

3. Specific performance of an agreement refused, under the circumstances, but the costs occasioned by the defendant setting up the Statute of Frauds were disallowed. *Cornell v. Watts*, 2 H. & Tw. 224.

4. A claim of compensation being the sole cause of suit, plaintiff to pay the costs; bill dismissed without costs against subsequent purchaser, with notice of plaintiff's contract, who had formally abandoned, but given plaintiff no notice thereof. *Fenster v. Turner*, 11 L. J., N. S., Ch., 161; 6 Jur. 144.

5. A landlord who does not litigiously oppose a covenant for renewal shall be entitled to his costs. *Doneraile v. Chartres*, 1 Ridgw. P. C. 137; *Jones v. Lewis*, 1 Cox 137.

6. A bill for specific performance was dismissed with costs in the court below. On appeal, the defendant, whose harsh and unreasonable conduct had made the suit necessary, was ordered to pay the whole costs, including the costs of the appeal. *Lillie v. Legh*, 3 De G. & J. 204.

7. Bill to have execution of articles for the sale of some copyhold lands to plaintiff, on payment of 538l. to defendant R., a guinea being paid in part, and to compel the lord of the manor to admit plaintiff in fee, according to the agreement, which was decreed; but there being no tender of a surrender to the lord, and consequently no refusal, he was to have his costs. *Sayle v. Reeves*, Gilb. Eq. Rep. 188.

8. A purchaser, who had altogether denied the vendor's right to a specific performance, ordered to pay the costs of a suit, instituted by the vendor for that purpose, down to the hearing, although the title was not finally completed until after the decree, but where since that time both parties claimed what they were not entitled to, no costs on either side were given. *Carrodus v. Sharp*, 20 Beav. 56.

9. Party having contracted with person, since dead, for the purchase of advowson, but had taken no steps during the life of vendor to enforce contract, and for a considerable time after his death (objecting to title on ground of outstanding judgment and creditors' suit pending):—Held, not entitled as against devisee to present, if a vacancy occur in the meanwhile, though he insists on completion of contract; and if, in consequence of his insisting on such right, bill to ascertain it become necessary, a decree for plaintiff will carry costs as far as his claim comes in question, though it be part of decree that, subject to next presentation, he be permitted to complete the contract. *Wyrill v. Exeter (Bishop)*, 1 Price 292.

10. Where the plaintiff (vendor) has shown a good title according to the conditions of sale prior to the hearing, but has been the means of great expense being incurred in prosecuting the inquiry at chambers, whither the cause was referred, instead of having the question decided at the hearing, the Court will, in decreeing a specific performance, give him his costs up to the hearing only. *Gould v. White*, 2 Eq. Rep. 1100.

11. The defendants' solicitors, two days before a bill for specific performance was filed, but while the bill was in course of being printed, wrote to the plaintiff's solicitor, to propose an early day for completing the purchase, and the plaintiff's solicitor, on the very day on which the bill was filed, wrote to accept the appointment, but afterwards claimed the costs of the suit, which the defendants refused to pay:—Held, that the plaintiff must pay the costs of the suit. *Chester v. Metropolitan Railway Co.*, 13 W. R. 333; 11 L. T., N. S., 699.

12. On a bill for a specific performance of an agreement for the sale of a house, the plaintiff made out his case; but it appeared that the defendant had actually sold the house to another person for a valuable consideration. The Court directed the Master to inquire what damages the plaintiff had sustained by the non-performance of the agreement, and that such damages, together with the costs of the suit, should be paid by defendant. *Denton v. Stewart*, 1 Cox 258.

13. In a suit for specific performance and damages, an issue was directed to be tried at common law to ascertain the amount of damages. The plaintiff set up a very large claim based on special user, but this claim was disallowed, and only a much smaller claim for common user allowed. On the cause being brought back into chancery the plaintiff was disallowed the extra costs occasioned by the excessive claim. *Cory v. Thames Iron Works & Ship Building Co.*, 16 W. R. 475.

14. A lease contained a covenant by the lessor to grant a further lease, and a stipulation that the lease should be prepared by the lessor's solicitor. The lessor's solicitor raised various untenable objections, and put the lessee to considerable expense. The lessee required the lessor to pay the costs occasioned thereby, and threatened to file a bill for specific performance of the covenant. The lessor then wrote, withdrawing all his objections, but refused to pay the costs occasioned by them. The lessee filed a bill the day afterwards:—Held, that the lessor's solicitor was bound to prepare a proper lease, and the lessor was ordered to pay the costs of the suit, and of the dispute occasioned by him. *Mappin v. Savory*, 20 L. T., N. S., 777.

15. When in a suit against a vendor for specific performance of a contract the refusal to complete arose from a claim made by the defendant T. under a prior contract, but which claim T. was held to have abandoned in favour of the plaintiff, a decree was made with costs against both defendants, but with a declaration that as between the defendants the costs should be borne by T. *Wilson v. Thomson*, 23 W. R. 744; 44 L. J., Ch., 527; 20 L. R., Eq., 744.

16. A verbally agreed with B., his solicitor,

for the sale of land to B. This agreement, which was never reduced to writing, provided that B. should bear all expenses of making out the title, that possession should be at once given, and that the purchase money should be paid at a fixed future date, with interest in the meantime. B. entered into possession, but took no further steps in completion of the purchase, and, before the purchase money became due, died. In a suit by A. for specific performance against the executor of B.:—Held, that B., as A.'s solicitor, ought to have had an agreement in writing prepared, and that the executor was bound to complete the purchase and pay the costs of the suit. *Brafield v. Scriven*, 22 W. R. 202.

1. By a contract T. Watts agreed to sell an estate to a purchaser with the following reservation: T. Watts "reserves the necessary land for making a railway through the estate to Prince Town."—Held, on suit for specific performance by the purchaser, that the contract was too uncertain for the Court to make a decree for specific performance of it. The vendor might have raised the defence by demurrer, which he had not done. But held, that, notwithstanding, he was entitled to full costs, and the bill was dismissed with costs. *Pearce v. Watts*, 20 L. R., Eq., 492; 44 L. J., Ch., 492; 23 W. R. 771.

2. When, after a contract for the sale of land has been entered into, a notice is given to make time of the essence of the contract, the question whether the notice is reasonable or not must be judged of as at the date when it is given. The plaintiff held a lease from the defendant which gave him an option of purchasing the demised property at any time during the term, on giving the lessor three months' previous notice in writing. On the 24th March 1877, the plaintiff gave the defendant notice of his intention to exercise the option. There were some difficulties in completing the defendant's title to the property, and an abstract of title was not delivered to the plaintiff's solicitor till the 17th June 1878. The plaintiff's solicitor not having acknowledged the receipt of the abstract, and having neglected to answer several letters from the defendant's solicitors, they, on the 16th September, wrote to the plaintiff himself, asking whether he intended to complete the purchase. The plaintiff replied the next day that he would write at once to his solicitor. On the 24th September 1878, no further communication having been received from the plaintiff or his solicitor, the defendant gave the plaintiff a notice in writing, requiring him to complete the purchase, and stating that, unless he completed it on or before the 31st October 1878, the defendant would treat the contract as rescinded, and that in that respect time should be deemed of the essence of the contract. On the 26th September 1878, the plaintiff acknowledged the receipt of the notice, and said that he had seen his solicitor, who had promised to proceed as soon as possible. On the 1st November 1878, no further communications having been received from the plaintiff or his solicitor, the defendant's solicitors wrote to the plaintiff that the defendant, in pursuance of his notice, declared the contract at an end; and they requested the return of the abstract, and

demanding payment of rent for the property. The plaintiff had been in possession of the property ever since his notice to purchase, but had refused to pay any rent after the 24th June 1877. On the 21st November 1878 the plaintiff commenced his action for the specific performance of the contract to purchase:—Held, that the notice of the 24th September fixed an unreasonably short time for the completion of the purchase, and was therefore invalid. Specific performance was decreed, and the defendant was ordered to pay the costs of the action up to and including the trial. *Cramford v. Tboogood*, 13 L. R., Ch. D., 153; 49 L. J., Ch., 108; 41 L. T. 549; 28 W. R. 248.

3. Property was put up for sale, and in the particulars, which were advertised, was described as being an absolute reversion in a freehold estate, falling into possession on the death of a lady in her seventieth year; and by the conditions of sale, which were read for the first time at the auction just previously to the commencement of the biddings, the property was stated to be sold subject to two mortgages, and his solicitor paid the deposit on his behalf after having read the conditions. On a bill by the purchaser at the auction, who stated that he was deaf, and did not understand that by the conditions he was buying only an equity of redemption in the property:—Held, that though in an ordinary case, inasmuch as the purchaser's carelessness had contributed to the mistake, he would not have been entitled to the costs of the suit, he might have them on account of having, previously to the commencement of the suit, offered, on condition of having the contract rescinded and the deposit returned, to pay the costs of the sale. *Torrance v. Bolton*, 14 L. R., Eq., 124; 41 L. J., Ch., 643; 20 W. R. 718; 27 L. T., N. S., 19. Affirmed 21 W. R. 134; 42 L. J., Ch., 177; 8 L. R., Ch., 118; 27 L. T., N. S., 738.

4. A purchaser refused to complete his contract to buy real estate, on the grounds that the original title was at least doubtful, and that *lis pendens* was a charge on the property. The *lis pendens* was afterwards decided to form no charge on the property; after which the vendor offered to stay all further proceedings if the purchaser would complete his contract and pay the costs up to the time of the offer. He refused to do so:—Held, that the vendor was entitled to a decree for specific performance, and with costs up to and inclusive of the hearing. *Bull v. Hutchons*, 9 Jur., N. S., 954; 11 W. R. 866; 8 L. T., N. S., 716.

IV. SET-OFF.

5. One of the terms of an agreement was, that the contract should be void if the purchaser's counsel should be of opinion that a marketable title could not be made good by a certain time. The counsel being of that opinion, a bill by the purchaser for a specific performance, with a compensation, was dismissed with costs; and an application afterwards made by the plaintiff that his deposit might be set off against the defendant's costs, and the surplus (if any) paid to him, was refused with costs. *Williams v. Edwards*, 2 Sim. 78.

1. An estate was sold by auction, and the purchase was to be completed in two months, according to the conditions of sale. The buyer died soon afterwards, and suits were instituted both in the Spiritual Court and the Court of Chancery respecting his affairs, which prevented the completion of the contract. Four or five years after the sale the vendor filed his bill to have the contract rescinded, and the affairs of the buyer still remaining unsettled, the Court rescinded the contract, and gave the plaintiff his costs out of the deposit. *Mackreth v. Marlar*, 1 Cox 259.

2. A vendor brought an action claiming a declaration that his contract for sale was at an end. The purchaser made a counter-claim for the specific performance of the contract. Judgment was given for the defendant, with costs, on both claim and counter-claim:—Held, that the defendant was entitled to deduct his costs from his purchase money in priority to a mortgage of the plaintiff, whose mortgage had been created after the contract for sale, but before the commencement of the action. *Green v. Sevin*, 13 L. R., Ch. D., 589.

V. OTHER CASES.

3. Agreement for a lease of a farm, referred to a paper containing the terms, bill for specific performance according to such clauses as had been read to the plaintiff; parol evidence to prove that was refused, and the bill dismissed. Bill being dismissed without costs as a hard case, parties made trustees without their knowledge, and as such being necessary parties to the bill, cannot have costs against plaintiff, but left to their remedy against their principal; otherwise, perhaps, if plaintiff had prevailed, because then those costs might have been given over against other defendants. *Brodie v. St. Paul*, 1 Ves. J. 326.

4. Upon a bill for specific performance, the Court thought that it would press too severely on the defendants, who were mere trustees, to make a decree. The Court held that, in dismissing the bill, it had no authority to give the plaintiff his costs. *Wedgwood v. Adams*, 8 Beav. 103.

5. A trust to sell with all convenient expedition, and within five years:—Held, to authorise a sale after the five years. Costs of specific performance not given. *Pearce v. Gardner*, 1 W. R. 98; 10 Hare 287.

6. A trustee having power to sell land in order to raise 600*l.* and the expenses, put it up to sale in two lots, and sold the first for 600*l.*, and the second for 510*l.* The second lot consisted of more than three acres of land, and was described in the particulars of sale as readily convertible into building ground:—Held, that the sale of the second lot was not improper, and that the purchasers must pay the costs of a suit for specific performance brought against them by the trustee. *Thomas v. Townsend*, 16 Jur. 736.

7. Where plaintiff's bill for specific performance of an agreement for sale was dismissed, plaintiff must pay the costs, though he was only a trustee for sale. *Edwards v. Harvey*, Coop. 40.

8. Interpretation of a subsequent correspondence, in reference to the original contract. The agreement is not impaired nor altered by

proposals which the purchaser makes subsequently, with a view to an amicable arrangement. Such proposals may have an influence on costs. *Bunning v. Bunning*, 1 L. J., Ch., 56.

9. Although time is not of the essence of the contract, yet, where there is unnecessary delay, the purchaser has a right to limit by notice the time for completing it, or to abandon the contract; where the purchaser failed in this defence:—Held liable to costs up to the hearing, and the usual reference ordered. *Taylor v. Brown*, 2 Beav. 180; 9 L. J., N. S., Ch., 14.

10. Where there was a sufficient part-performance to take a parol contract for sale out of the Statute of Frauds, and the purchaser became bankrupt:—Held that the vendor, wishing to have effect given to his lien for unpaid purchase money, was entitled to have his costs out of the estate sold. *Exp. Cooper, Re Taylor*, 3 M. D. & De G. 717.

11. A vendor resisted a bill for specific performance. He became bankrupt, and his assignee afterwards continued the resistance, but failed at the hearing:—Held, that the assignee must pay the plaintiff's costs of suit incurred subsequently to the bankruptcy. *Fozzwell v. Grotorez*, *Fozzwell v. Turner*, 33 Beav. 345.

12. *Semble*, where a decree has been made for specific performance, and an objection is subsequently raised for the first time, which the Court cannot get over, the proper course is to dismiss the bill without costs. *Jenkins v. Green*, 5 Jur., N. S., 304; 28 L. J., Ch., 820.

13. Purchaser *pendente lite*, on filing supplemental bill, is liable to all costs from beginning of suit. *Anon.*, 1 Atk. 89.

14. A defendant, a purchaser, demurred to a bill for specific performance, and his demurrer was overruled. He then asked for a case to be sent to a court of law, which was granted, and the opinion of the judges was against him. Ultimately, however, the bill was dismissed with costs:—Held, that the defendant was entitled to his costs at law as well as in equity. *Forbes v. Peacock*, 12 Sim. 528; 13 L. J., N. S., Ch., 46; 7 Jur. 688. And see S. C. 6 Jur. 476.

15. W. lets premises to V. upon a contract written in pencil by V., and signed by him in a notebook belonging to W.; both act under the contract, but V. ultimately alleges non-performance by W. of certain things not contained in it, and W. makes like charges. On a claim for specific performance, decree for specific performance made without costs. *Waller v. Vigurs*, 2 W. R. 51.

16. In suits as to the specific performance of a contract to purchase large colliery works, the purchasers alleged as a defence misrepresentation by the vendors as to the value. As to several allegations the purchasers were held to have failed, and specific performance was decreed, but with compensation to the purchasers in respect of an alleged misrepresentation as to the amount of stores consumed in the collieries, and a consequent excess in the statement of income. An inquiry was directed as to such compensation, and it was found that there was a large excess in the statement of income beyond its true amount:—Held, that the purchasers were entitled to a deduction from their purchase money bearing

the same proportion to the whole purchase money as the excess bore to the income stated. *Powell v. Elliot*, 10 L. R., Ch., 424; 33 L. T. 110; 23 W. R. 777.

Held, also, that as no direction as to costs was given by the original decree in the suits, and that as the purchasers were held to be entitled to a considerable abatement, the vendors must pay the costs of the suits, and could not on the hearing on further consideration be relieved from payment of any part of the costs on account of the failure of the purchasers as to parts of their case on the original hearing. *Id.*

1. In a suit by the purchasers of certain mines to set aside a sale, a decree with costs was made in favour of the plaintiffs. The House of Lords reversed the decree, and remitted the cause to the Court below. The Court directed the costs to be repaid to the defendants, but without interest. *Small v. Attwood*, 3 Y. & Coll. 105; 8 L. J., N. S., Exch. Eq., 67.

2. In the absence of special circumstances, a court of equity will not enforce specific performance of a contract for the purchase of land which is silent as to the means of access to it, when it is reasonably uncertain whether any means of entering on the land at all times can be conferred on the purchaser. And where the circumstances of such a case did not appear to the Court sufficient to constitute a waiver of the objection, a bill for specific performance was dismissed with a fixed amount of costs. *Denne v. Light*, 8 De G. M. & G. 774; 26 L. J., Ch., 459; 3 Jur., N. S., 627.

SPEECHES OF COUNSEL.

See PRACTICE (TRIAL OR HEARING).

SPEEDING CAUSE.

See PRACTICE (DISMISSAL OF BILL UNDER PRACTICE BEFORE THE JUDICATURE ACT).

SPIRITUAL COURTS AND PERSONS.

See ECCLESIASTICAL PERSONS AND PROPERTY—JURISDICTION, III.

SPOILIATION OF DEEDS AND OTHER INSTRUMENTS.

See TITLE DEEDS, II.

STAGE PLAYS.

See ACTOR—COPYRIGHT, III.—THEATRE.

STAKEHOLDER.

See AUCTION AND AUCTIONEER, II.—GAMING AND WAGERING—INSURANCE, II. VIII. 2—INTERPLEADER—PRACTICE (PAYMENT INTO COURT)—TRUSTEE RELIEF ACTS.

3. The Court will grant an interim injunction to restrain a stakeholder from paying over a fund, *in medio*, to the principal possessing the legal interest in it, although that principal is absent, and not amenable to its jurisdiction. *Gladstone v. Musurus Bey*, 1 N. R. 178; 9 Jur., N. S., 71; 32 L. J., Ch., 155; 11 W. R. 180; 7 L. T., N. S., 477.

4. A stakeholder may pay money into court under the Trustee Relief Act. *Re United Kingdom Life Assurance Co.*, 11 Jur., N. S., 424; 34 L. J., Ch., 554; 13 W. R. 645; 12 L. T., N. S., 441.

STAMPS.

— *Evidence. Objections as to Stamp.* See PRACTICE (EVIDENCE).

— *Payments of Court Fees by.* See PRACTICE (FEES OF COURT).

See also REVENUE.

I. ON WHAT INSTRUMENTS, 6605.

II. AGREEMENT TO EVADE THE STAMP ACTS, 6606.

III. OTHER MATTERS, 6606.

I. ON WHAT INSTRUMENTS.

5. It is not in violation of the Stamp Act to comprise several lettings in court in one instrument: and where a lease was made to one tenant of the entire lands, with an agreement that he should continue the other tenants in their holdings at the same rent, instead of separate leases, Lord Chancellor held there was no objection on the statute or on principle; and with respect to fees to officers on separate leases, that it was the duty of the Court to cut down the expense of persons dealing under its administration of suitors' property, without regard to that consideration. *Anon.*, 1 Moll. 438.

6. Where plaintiffs were mortgagees in fee of freeholds in M., and of a lease for lives of a rectory, etc., in B., and had appointed H. and W. as receivers as to both, but the defendant, as tenant of the tithes, etc., in B. under an agreement with the mortgagee, was allowed to receive them, and, being in arrears, the mortgagee by letter directed him to pay a sum, part of the arrears, to H. and W., and charge it in the account of the year's tithes, etc.:—Held, to be, in effect, an order to pay money due from the defendant to the mortgagee as arrears, and not as receiver to the mortgagees; and, therefore, void for want of a stamp. *Braybrooke (Lord) v. Meredith*, 13 Sim. 271; 12 L. J., N. S., Ch., 287; 7 Jur. 144.

7. An order, signed by A., addressed to his bankers, directing them, out of the balance due to him on the final arrangement of his account, to pay to B. a certain sum, and which order was forthwith placed in the hands of B., who, accompanied by A., immediately proceeded

to the banking-house, and delivered it to the bankers:—Held, to be an instrument requiring a bill stamp within the stat. 55 Geo. 3, c. 184; held, also, that, although the intention of A. and B. was that the order should be forthwith delivered to the bankers, yet the fact that the order was, according to the agreement, delivered by A. to B. (the payee) brought it within the provisions of the Stamp Act applicable to an instrument of that character. *Parsons v. Middleton*, 6 Hare 261.

1. A., being entitled to the sum of 365*l.*, payable to him by B., addressed the following note to B. "I hereby authorise you to pay to C. the sum of 365*l.*, being the amount of my contract:—Held, that this document did not require a stamp, as "an order for the payment of a sum of money out of the particular fund," etc., in the schedule to the 55 Geo. 3, c. 184. *Diplock v. Hammond*, 23 L. J., Ch., 550; 2 Eq. Rep. 783; 2 W. R. 500. Affirming 2 W. R. 287; 2 Sm. & G. 141; 2 Eq. Rep. 409.

2. M., being indebted to the plaintiffs, gave them an unstamped document addressed to C., who was trustee of his father's will, in the following words:—"I hereby authorise and direct you to pay to the plaintiffs on their order the sum of 140*l.* out of the moneys now due or hereafter to become due to me under the will of my late father, and before making any payment to me thereout:—Held, that such document was an equitable assignment and not a bill of exchange under s. 48 of the Stamp Act 1870, and could, therefore, be produced in evidence on the payment of the proper duty and penalty. *Buck v. Robson* (3 L. R., Q. B. D., 686; 48 L. J., Q. B., 250; 39 L. T. 325; 26 W. R. 804) followed. *Fisher v. Calvert*, 27 W. R. 301.

3. An agreement made between two persons residing in Calcutta, relating to property in Calcutta, need not necessarily be written on stamped paper. *Gilchrist v. Herbert*, 20 W. R. 348; 26 L. T., N. S., 381.

4. Objection to an award to be ready to be delivered in writing to the parties by a certain day as not having a deed stamp overruled. *Blundell v. Brettargh*, 17 Ves. 232.

5. Securities given on account of a benefit building society are within the exemptions of the statute, notwithstanding the required formalities may not be fully completed till after the dates of the securities. *Williams v. Hayward*, 22 Beav. 220.

6. An order of the Court making a settlement should bear the usual settlement stamp. *Re Gowan, Gowan v. Gowan*, 17 L. R., Ch. D., 778; 50 L. J., Ch., 248.

7. The taxing master ought not to require a receipt stamp to be affixed to counsel's signature to a fee before allowing the charge on taxation. *Re Beavan*, 5 De G. M. G. 40; 23 L. J., Ch., 536; 2 W. R. 299.

[On Other Instruments.] See BILLS OF EXCHANGE, PROMISSORY NOTES AND CHEQUES, V.—VENDOR AND PURCHASER, XX. III.—and other SPECIFIC TITLES.

II. AGREEMENT TO EVADE THE STAMP ACTS.

8. The Court cannot sanction an agreement between the parties that an objection for

want of a proper stamp shall be waived; if, therefore, the objection comes to the knowledge of the Court, no decree will be made until the instrument duly stamped is produced to the registrar. *Owen v. Thomas*, 3 Myl. & K. 353; 3 L. J., N. S., Ch., 205.

9. An agreement that, if it should become necessary to stamp a document, and pay any penalty for doing so, one of the parties to it should be at liberty to charge the other with the expense of stamping it, is an evasion of the Stamp Act, and will not be enforced by the Court as to the penalty. *Abbott v. Stratton*, 3 J. & L. 603; 9 Ir. Eq. R. 233.

III. OTHER MATTERS.

10. Deeds, altered by consent, require re-stamping. — *v. Lee*, 2 Eq. Abr. 414.

11. A bond is valid though not duly stamped till after the death of the obligor. *Handley v. —*, 8 L. J., Ch., 49.

12. Distinction between an agreement that may be stamped, paying the penalty, which the party will be permitted to stamp, pending the cause, and one upon which no action can be brought unless stamped. *Huddleston v. Briscoe*, 11 Ves. 595.

13. Held, a stamp was equal to a seal in the execution of a power which requires sealing. *Sprange v. Bernard*, 2 Bro. C. C. 585.

14. In a pressing case, leave was given to file a written copy of a bill without any stamp, where the stamp-office was closed for the day, on the undertaking by the plaintiffs' solicitor to stamp the copy bill the next day. *Kershaw v. Kalow*, 1 Jur., N. S., 974.

STANNARIES.

See CORNWALL—MINES AND MINERALS, V.

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STATEMENT OF CLAIM UNDER JUDICATURE ACT.

See PRACTICE (STATEMENT OF CLAIM.)

STATEMENT OF DEFENCE UNDER JUDICATURE ACT.

See PRACTICE (STATEMENT OF DEFENCE).

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- *How Pleading.* See PRACTICE (PLEADING).
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- *How Pleading.* See PRACTICE (PLEADING).
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STATUTES.

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I. WHAT ARE.

1. In the reign of Richard 2, an earldom was created of an apparently non-descendible dignity. The earl was beheaded by Henry of Lancaster when he invaded England, and before he received or even claimed the crown. There was no evidence whether there had been any trial, or form of trial, before the beheading. When Henry was declared king a proceeding took place in Parliament in which the Commons were represented to have prayed that all that was done in the pursuit, arrest, and judgment of the earl might be declared good for the common profit of the realm. The king, with the assent of the lords temporal, declared that it was so. This proceeding was entered on the *placita coronæ* in Parliament, but not on the rolls of Parliament. *Semble*, that this was not an Act of Parliament. *Wilkes Peerage*, 4 L. R., H. L., 126.

But it was a solemn declaration pronounced by the king in open Parliament at the prayer of the Commons, and with the advice of the Lords, and must be taken as a parliamentary declaration that, whatever had been the nature of the grant to the earl, it was wholly at an end. *Id.*

II. HOW CITED.

2. The statute written in the statute book under the year *secundo (vulgo primo)* Jac. 1, c. 15, ought to be pleaded as of the first year. *Bryant v. Withers*, 2 M. & S. 123; 2 Rose 8.

III. OPERATIVE PARTS.

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2. *Recitals*, 6608.
3. *Preamble*, 6608.
4. *Interpretation Clause*, 6609.
5. *Exceptions and Proviso*, 6609.

1. Title and Marginal Notes.

1. The title of an Act of Parliament is no part of the Act. *Att.-Gen. v. Weymouth*, Ambli. 22. S. P. *Rea v. Williams*, 1 W. Black. 95.

2. The title cannot be resorted to for the purpose of construing the provisions of an Act of Parliament. *Hunter v. Nockolds*, 1 Macn. & G. 640; 1 H. & Tw. 644; 19 L. J., N. S., Ch., 177; 14 Jur. 256. And see S. C. 18 L. J., N. S., Ch., 407.

3. The enacting part of an Act is not to be controlled by the title or recitals unless the enacting part is ambiguous, and then the title and recitals may be referred to for the purpose of ascertaining the intention of the Legislature. *Bentley v. Rotherham Local Board*, 46 L. J., Ch., 284; 4 L. R., Ch. D., 588.

4. The headings of different portions of a statute are to be referred to in order to determine the sense of any doubtful expression in a section ranged under any particular heading. *Hammersmith and City Railway Co. v. Brand*, 4 L. R., H. L., 171.

5. *Semble*, the marginal notes to an Act now form part of the Act, and may be used for the purpose of interpreting it. *Re Venour's Settled Estates*, *Venour v. Sellon*, 2 L. R., Ch. D., 522; 45 L. J., Ch., 409; 24 W. R. 752. But see *Att.-Gen. v. Great Eastern Railway*, 11 L. R., Ch. D., 449; 48 L. J., Ch., 429; 40 L. T. 265; 27 W. R. 759.

6. The dictum in *Re Venour's Settled Estates*, *Venour v. Sellon* (2 L. R., Ch. D., 525), is not correct, and the marginal notes to the sections of an Act of Parliament are not to be taken as part of the Act. *Sutton v. Sutton*, 22 L. R., Ch. D., 513; 52 L. J., Ch., 334; 48 L. T. 96; 31 W. R. 370

2. Recitals.

7. The recitals in the Disabling Statute do not limit the force of the subsequent enactment to cases in which the mischief by the alienation is done to the personal interest of the successor of the alienor; for it is evident from the enactment that the legislature intended to apply the prohibition to the case of persons who were seised either as mere trustees, or in a great measure in trustees, and among other persons to the master or guardian of an hospital. *York (Dean) v. Middleborough*, 2 Y. & J. 196.

8. A clear and explicit enactment is not to be cut down by a more limited preamble or recital; but if the enactment is not explicit in itself, it may be explained and cut down by the preamble or recital. *Hughes v. Chester and Holyhead Railway Co.*, 1 Dr. & Sm. 524; 9 W. R. 760.

9. A recital in an Act will not bind those who are not within its enacting part. *Edinburgh and Glasgow Railway Co. v. Linlithgow (Magistrates)*, 3 Macq. H. L. Ca. 704.

10. *Semble*, that the recitals in private Acts of Parliament of recent date are not evidence of the facts stated in them, such recitals being no longer submitted to the previous approval of the judges. *Shremsbury Peerage*, 7 H. L. Ca. 1.

11. The object of the Act 32 & 33 Vict., c. 46, is to abolish the distinction between specialty

and simple contract debts, and the recital of the Act is that that alone is the object. The Act must therefore be read as corresponding with the express recital of its object; and if words are found that may be carried further, they must be read with reference to the mischief intended to be remedied, and to the express recital of the Act. *Crowder v. Stenart*, 16 L. R., Ch. D., 370; 50 L. J., Ch., 136; 29 W. R. 331.

12. The enacting part of an Act is not to be controlled by the title or recitals unless the enacting part is ambiguous, and then the title and recitals may be referred to for the purpose of ascertaining the intention of the legislature. *Bentley v. Rotherham Local Board*, 4 L. R., Ch. D., 588; 46 L. J., Ch., 284.

3. Preamble.

13. The preamble of an Act of Parliament is proper to explain the general body of it. *Cope-man v. Gallant*, 1 P. W. 317. But see *Ryall v. Rowles*, 1 Ves. 365; 1 Atk. 175.

14. If the enacting part of a statute will bear only one interpretation, the preamble shall not confine it; but if it is doubtful, the preamble may be applied to throw light upon it. *Mason v. Armitage*, 13 Ves. 36.

15. The preamble of an Act of Parliament, though it may assist ambiguous words, cannot control a clear and express enactment. *Lee v. Summersgill*, 17 Ves. 508.

16. By the preamble of the Registry Act, the object of the legislature appears to be to secure purchasers, and to prevent forgeries, fraudulent gifts, and conveyances; but a judgment creditor is not a purchaser, and does not fall within the provision of the preamble. *Crymble v. Adair*, Beat. 124.

The preamble is a good mean to find out the meaning of the statute, and is a key to open the understanding thereof. *Id.*

17. Enacting words, if they take in the mischief, shall be extended for that purpose, though the preamble does not warrant it; and where a new statute is made to alter the law, the judges should so mould their practice as to render it conformable to the legislature. *Basset v. Basset*, 3 Atk. 207.

18. The enacting part of a statute extends further than the preamble in many instances, even in criminal matters. The 33 Hen. 8, c. 23, for trying treasons, etc., within the King's dominion or without, has been extended to trials in the West Indies. *Kinaston v. Clark*, 2 Atk. 205.

19. A clear and explicit enactment is not to be cut down by a more limited preamble or recital; but if the enactment is not explicit in itself, it may be explained and cut down by the preamble or recital. *Hughes v. Chester & Holyhead Railway Co.*, 1 Dr. & Sm. 524; 9 W. R. 760.

20. Though the preamble of one Act may appear to be directed against a particular evil, and though another Act may be passed to aid its application, the enactments of the second Act are not necessarily to be confined to the special purpose which seemed to be the particular object that the first had in view. Its own words must be considered as explaining and defining its objects and its means. *Copland v. Davies*, 5 L. R., H. L., 358; 21 W. R. 1.

1. The preamble of an Act of Parliament cannot be resorted to in order to ascertain the intention of the Act unless there is an ambiguity in the enacting part. *Taylor v. Oldham Corporation*, 4 L. R., Ch. D., 395; 25 W. R. 178.

2. In construing an Act, the Court is at liberty to regard the state of the law at the time, and the facts which the preamble or recitals of the Act prove to have been the existing circumstances at the time of its preparation. *Att.-Gen. v. Powis (Earl)*, 1 Kay 186.

3. *Semble*, the Court ought not to restrict a section in an Act of Parliament by the preamble or general purview of the Act where the section is not inconsistent with the spirit of the Act. *Sutton v. Sutton*, 22 L. R., Ch. D., 521; 52 L. J., Ch., 338; 48 L. T. 98; 31 W. R. 372.

4. *Semble*, the Court ought to give effect to the preamble to this extent, namely, that it shows what the Legislature are intending; and if the words of enactment have a meaning which does not go beyond that preamble, or which may come up to the preamble, in either case that meaning should be preferred to one showing an intention of the Legislature which would not answer the purposes of the preamble or which would go beyond them. To that extent only is the preamble material. *West Ham (Overseers) v. Iles*, 8 L. R., App. Cas., 387; 52 L. J., Q. B., 650; 49 L. T. 206; 1 W. R. 928.

5. A market company obtained a special Act, the preamble of which recited that a convenient site might be obtained between certain streets on the east and certain other streets on the west, and which enacted that the Market and Fairs Clauses Act was incorporated therewith. The 24th section authorised the erection of a market-house on land described in the deposited plans, and by the 25th the company were enabled to alter and widen streets in the way pointed out on the deposited plans, and by the 30th to buy additional lands, not exceeding two acres. A. B. was the owner of land on the west side of one of the streets on the western boundary of the area spoken of in the preamble, and his land was described in the deposited plans, but it did not thereby appear that more was intended to be taken than enough to widen one of the streets named in s. 25. The company proceeded to take the whole land of A. B. compulsorily, and to build upon it a covered building, in addition to the market-house authorised by s. 24; whereupon A. B. filed his bill for an injunction, which was granted, the Master of the Rolls deciding that the company could only erect one market-house and not two, and that on the east side; and that although the preamble could not control the enactments, it might be resorted to to remove obscurity. The company appealed:—Held, that as the land of the plaintiff was described in the plan, and as therefore it might be wanted, the company were authorised to take it; and as by the general Act “the singular may mean the plural,” the company were not restricted by the word “market-house;” that the enactments of the special Act did not require a reference to the preamble to explain them, and the injunction must be dissolved, the company being the proper judges of what

lands were necessary for the works. *Richards v. Scarborough Public Market Co.*, 23 L. J., Ch., 110.

4. Interpretation Clause.

6. An interpretation clause in an Act should be understood to define the meaning of the word thereby interpreted in cases as to which there is nothing else in the Act opposed to or inconsistent with that interpretation. *Midland Railway Co. v. Ambergate, Nottingham, & Boston & Eastern Junction Railway Co.*, 10 Hare 359.

5. Exceptions and Proviso.

7. Where in a fiscal Act of Parliament (54 Geo. 3, c. 92, s. 6) there is a saving co-extensive with and therefore repugnant to the enactment, the enactment must prevail. The rule of law, that an exception must be of part of the thing only, and not of all, applies as well to Acts of Parliament as to deeds. *Cleland v. Ker*, 6 Ir. Eq. R. 35; 1 Dr. 227.

8. In general a right cannot be raised out of a mere salvo or an exception in an Act. *Advocate (Lord) v. Hamilton*, 1 Macq. H. L. Ca. 46.

IV. COMMENCEMENT, AND WHEN RETROSPECTIVE.

9. Before the 33 Geo. 3, c. 13, every Act, in which no particular time was specified for its commencement, operated and took effect from the first day of that session of Parliament wherein it was made. *Panter v. Att.-Gen.*, 6 Bro. P. C. 486.

10. An Act made to correct an error by omission in a former statute of the same session relates back to the time when the first Act passed, and both must be taken together as if they were one and the same Act. *Att.-Gen. v. Pougett*, 2 Price 381.

11. An Act is not to be construed as retrospective by inference, but only by express enactment. *Evans v. Williams*, 2 Dr. & Sm. 324.

12. Statutes are *prima facie* deemed to be prospective only. *Pettamberdass v. Thackoorseydass*, 5 Moo. Ind. App. 109; 7 Moo. P. C. 239; 15 Jur. 257.

13. The 3 & 4 Will. 4, c. 37, enacted that the Ecclesiastical Commissioners should make or cause to be made a valuation of all livings, etc., from which they were to deduct all rents, synodals, proxies, and other charges, and levy therefrom a yearly tax computed and imposed on such valuation, and to be paid on the 1st of July and 1st of January and that if the tax should be in arrear and unpaid more than a reasonable time after demand, the commissioners might apply to the Court by petition in a summary way for relief in that behalf:—Held, that the Court had no power to set aside or alter the valuation, and, the tax being fixed in respect of the valuation, was bound to make an order for payment. *Quære*, whether poor-rate, which was imposed by a subsequent statute (1 & 2 Vict., c. 56), is a charge which should be deducted from the valuation. By the 11 & 12 Vict., c. 80, after reciting that

doubts have arisen whether the commissioners were authorised to allow any sum for poor-rate, it was enacted that it should and might be lawful for the commissioners to deduct the poor-rate from any valuation made or to be made:—Held, that the Act was not declaratory, and did not apply to a tax made on a valuation, and due, prior to the Act:—Held, also, that the tax was due on the gale-day, though no demand was made. *Ecclesiastical Commissioners v. Armstrong*, 12 Ir. Eq. R. 445.

See also XI. 4 post.

V. REMEDY UNDER.

1. *Semble*, when a statute refers generally to powers to enforce obedience, and does not prescribe any procedure, those powers generally referred to would be the powers of the Court in which the proceedings are deemed to be taken. *Green v. Penzance (Lord)*, 6 L. R., App. Cas., 675; 51 L. J., Q. B., 25; 45 L. T. 353; 30 W. R. 218.

2. It is a settled rule that if a statute creates a new right and gives a particular remedy for enforcing it, there is no other remedy. *Semble*, *West v. Downman*, 14 L. R., Ch. D., 111; 42 L. T. 340; 29 W. R. 6. See also *Colley v. London & North-Western Railway Co.*, 5 L. R., Exch. D., 277.

3. Where a new offence and a penalty for it are created by statute, a person proceeding under the statute is confined to the recovery of the penalty, and no other relief can be asked for. This is true as a general rule, but there are two exceptions to this rule—(1) The ancillary remedy in equity by injunction to protect a right; that is, a mode of preventing that being done which if done would be an offence. (2) The remedy created by s. 25, sub-s. 8, of the Judicature Act. *Cooper v. Whittingham*, 15 L. R., Ch. D., 501; 49 L. J., Ch., 752; 43 L. T. 16; 28 W. R. 720.

4. As a general rule, where a penalty is affixed by an Act of Parliament to an act or omission, such penalty is the only punishment or loss incurred by the party guilty of such act or omission. *Re Knowle*, 37 L. T., N. S., 351; 25 W. R. 822; 46 L. J., Ch., 625.

VI. PRIVATE AND LOCAL.

1. *What are*, 6610.
2. *Construction. Principles of*, 6610.
3. *Judicial Notice of*, 6611.

1. What are.

5. An Act of Parliament contained a clause declaring it a public Act; but it related merely to the affairs of a particular corporation:—Held, that it was a private Act as to the public at large, but that the persons who had leased to a member of their body, being members of the corporation, had notice, and were bound by it. *Att.-Gen. v. Ball*, 10 Ir. Eq. R. 146.

6. An Act of Parliament for the formation of a railway, containing a declaration that it is to be judicially taken notice of as a public Act, cannot be treated or construed as a private assurance. *Hargreaves v. Lancaster & Preston Railway Co.*, 1 Rail. Ca. 416.

7. By the 43rd section of the Kirkcaldy and Dysart Waterworks Act 1867, it was provided that the commissioners under the Act "should be bound to make good to the Countess of Rothes and her heirs, etc., all damages which may be occasioned to her or them, by reason of or in consequence of any bursting, or flow, or escape of water from any reservoir, or aqueduct, or pipe, or other work connected therewith" which may be constructed by the commissioners. Per Lord Watson: Statutory provisions, such as here, in a local and personal Act must be regarded as a contract between the parties, whether made by their mutual agreement, or forced on them by the Legislature. *Roths (Countess) v. Kirkcaldy Waterworks Commissioners*, 7 L. R., App. Cas. (Sc.), 694.

8. Whether an Act of Parliament is to be deemed a public Act, binding on all the Queen's subjects, or merely a private Act, depends upon the nature and substance of the case, and not upon the technical consideration whether the Act does or does not contain a clause declaring that it shall be deemed to be a public Act. *Dawson v. Paver*, 5 Hare 415; 16 L. J., N. S., Ch., 274; 11 Jur. 766.

2. Construction. Principles of.

9. *Semble*, statutory provisions, as to compensation for damage in a local and personal Act, must be regarded as a contract between the parties, whether made by their mutual consent or forced on them by the legislature. *Roths (Countess) v. Kirkcaldy Waterworks Commissioners*, 7 L. R., App. Cas., 707.

10. The domestic statutes of a charitable foundation say, that the trustees "shall and may" turn out, etc. This shall be construed imperatively that they "must." *Att.-Gen. v. Lock*, 3 Atk. 164. S. P. *Stamper v. Miller*, 3 Atk. 212.

And the same words shall be construed imperatively in Acts of Parliament. *Id.*

11. Construction of charitable bequests with reference to a local Act of Parliament, concerning charitable bequests to the parish, etc. *Att.-Gen. v. Freeman*, 5 Price 425; Dan. 117.

12. A railway company caused a nuisance to their neighbours by the noise of the cattle received, detained, and forwarded by them at and from a cattle dock and siding on land outside their limits of deviation, but acquired under a parliamentary power to purchase land for that purpose by agreement. There was no negligence on the part of the company in managing the cattle traffic, but they brought no evidence to show that some other site might not have been selected where the nuisance would not be caused:—Held, that the company might be restrained from carrying on their cattle traffic on the premises in question so as to cause a nuisance. *Truman v. London, Brighton, & South Coast Railway*, 25 L. R., Ch. D., 423; 53 L. J., Ch., 209; 50 L. T. 89; 32 W. R. 364.

13. Construction of a private Act of Parliament. *Howard v. Shrewsbury (Earl)*, 17 L. R., Eq. 378; 43 L. J., Ch. 495; 22 W. R. 290; 29 L. T., N. S. 862.

14. In a proceeding against B. and C. to have it declared that they had been trespassers on the lands of A., it was pleaded to the effect that B. and C. had a right of way over these

lands as inhabitants of a neighbouring town and as two of the public. To this it was replied, that upon the true construction of an Act of Parliament (local and personal) the right of way, if any such had existed, which was denied, had been thereby extinguished:—Held, that such an Act of Parliament is not to be construed strictly as against the public, who were, in fact, no parties to the passing of the Act; and that the provisions of such Act and the works which had been constructed thereunder were not inconsistent with the existence of a public footpath over these lands. *Campbell v. Lang*, 1 Eq. Rep. 98; 1 Macq. H. L. Ca. 451.

Held, also, that issues directed to try the fact of the existence of such right of way were properly directed, and that notwithstanding the confluence of two rivers, the *locus ad quem* might or might not be held to be a public place. *Id.*

Consideration of what is a public place as the terminus of a public footway. *Id.*

1. A party interested in the subject matter of a private Act of Parliament will have his rights affected by its provisions, though it may have been introduced and passed without notice duly given to him. *Edinburgh Railway Co. v. Wauchope*, 8 Cl. & F. 710; 3 Rail. Ca. 233.

2. Where an Act interferes with private rights and private interests, it ought to receive a strict construction, so far as those rights and interests are concerned. *Hughes v. Chester & Holyhead Railway Co.*, 8 Jur., N. S., 221; 31 L. J., Ch., 97; 10 W. R. 219; 7 L. T., N. S., 197.

3. Construction of the Glamorganshire Canal Acts. Principles applicable to the construction of Acts of Parliament establishing public companies, with extraordinary powers, for the execution of works of local or general utility. *Blakemore v. Glamorganshire Canal Navigation*, 1 Myl. & K. 154; 2 L. J., N. S., Ch., 95.

4. An Act empowering a company to contract for purposes of public advantage ought not to receive a narrow construction. *Dover Gas Light Co. v. Dover (Mayor)*, 7 De G. M. & G. 545.

Therefore, in construing a gas company's Act, which, after requiring the consent of certain local commissioners to breaking up of the pavements, provided, that where any consent was required and should be obtained by the company to break any pavement, to lay down pipes, or for any other purpose which might be required under the Act, nothing in the Act contained should (after such consent obtained, and after twenty-four hours' notice) prevent the company from breaking up the pavement for the purpose of laying down pipes, or for any other purpose which might be required under the Act:—Held, that a construction *reddendo singula singulis* was not the correct one, and that the power to break the pavement was not to be confined to the particular purpose to which the consent had been expressly given. *Id.*

Waiver.] 5. A statute, or charter having the force of a statute, may be waived by the party for whose benefit it was enacted, so as to render the acts of persons disregarding it legal. *Goldmid v. Great Eastern Railway Co.*, 25 L. R., Ch. D., 511; 53 L. J., Ch., 371; 49 L. T. 717; 42 W. R. 341.

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3. Judicial Notice of.

6. A local Act must be judicially noticed, and must have all the operation of a public statute. *Aiton v. Stephen*, 1 L. R., App. Cas. (Sc.), 456.

VII. RULES.

7. The rules made in pursuance of the Act 3 & 4 Will. 4, c. 78 (the Slave Compensation Act), when allowed by His Majesty in Council, and declared to have the same force and effect as the Act, must, when made, be construed with reference to the provisions of the Act itself. The second and fifth rules of the commissioners of compensation to be construed and applied upon this principle. *Richards v. Jamaica (Att.-Gen.)*, 6 Moo. P. C. 381; 13 Jur. 197.

See also PRACTICE (RULES AND ORDERS).

VIII. SUCCESSIVE STATUTES.

See also IX. 9 *post*.

1. *Repeal of Public Acts*, 6611.
2. *Repeal of Private and Local Acts*, 6612.
3. *Operation inter se*, 6612.

1. Repeal of Public Acts.

8. No point is more clear, than that a subsequent affirmative statute may repeal a prior one, if the words are contrariant; but it is equally clear, that if there be two affirmative statutes made on the same subject, in all points in which they do not contradict each other, both shall stand; therefore, in every case where a banker commits an act of bankruptcy, and a commission of bankruptcy issues against him, it seems certain that the assignees under that commission will be bound by every clause in the Acts of 29 & 30 Geo. 2, not altered or repealed by the bankrupt laws, as fully and effectually as trustees would be bound by the same clauses acting under a deed of trust executed under the authority of the latter Act. So it is equally evident, that where the provisions of that Act do so attach upon the property of the bankrupt as to prevent the operation of the bankrupt laws, no commission of bankruptcy can issue against a banker; and that in such case, though bankers are expressly named in the bankrupt laws, they cease to be the objects of them. *Semble*, *Hayden v. Carroll*, 3 Ridgw. P. C. 592. And see *Hayden v. Rivers*, 1 Ridgw. P. C. 448. n.

9. Where two inconsistent Acts are passed at different times relative to the same subject matter, the last is to be obeyed and take effect, although it may subvert the former. *Ely (Dean) v. Bliss*, 5 Beav. 582; 11 L. J., N. S., Ch., 351; 6 Jur. 496.

10. An affirmative statute is not repealed by a subsequent affirmative statute, unless the two cannot stand together. *Exp. Warrington*, 3 De G. M. & G. 159; 17 Jur. 430; 22 L. J., Bky., 33.

11. If there are two affirmative statutes inconsistent and incompatible with each other, the earlier statute is repealed by the later one. *O'Flaherty v. M'Donnell*, 6 H. L. Ca. 142; 4 Jur., N. S., 33.

The 33 Geo. 2, c. 14, is repealed so far as banking companies in Ireland are concerned, by the Imperial Act, 6 Geo. 4, c. 45, though the former is not mentioned in the latter statute, the provisions of the two statutes being entirely incompatible with each other. *Id.*

1. Clauses which limit in any way the right of the Crown must be considered as repealed by subsequent statutes, unless expressly re-enacted. *Att.-Gen. v. Newman*, 1 Price 438.

2. No proceedings can be pursued under a repealed statute, though commenced before the repeal, unless by special exception. *Miller's case*, 3 Wils. 420; 1 W. Bl. 451.

3. Where an Act or part of an Act is repealed, it must, except as to transactions which are past and closed, be considered as if it had never existed. *Exp. Grisewood*, 5 Jur., N. S., 1191; 28 L. J., Ch., 769; 4 De G. & J. 544.

4. Effect of the repeal of a statute which modified a former statute considered. *Glaholm v. Barker*, 1 L. R., Ch., 223; 12 Jur., N. S., 82; 35 L. J., Ch., 259; 14 W. R. 296; 13 L. T., N. S., 653.

5. Observations upon the repealing effect of subsequent statutes. *London & Blackwall Railway Co. v. District (Board of Works)*, 5 W. R. 64; 26 L. J., Ch., 164; 3 Kay & J. 123.

6. A section in a private Act cannot by implication repeal a provision of the common law, or of a public statute. *The Clan Gordon*, 7 L. R., P. D., 190; 46 L. T. 490; 30 W. R. 691; 1 Asp. M. C. 513.

7. If a statute professes merely to repeal a former statute of limited operation, and to re-enact its provisions in an amended form, an intention to extend the operation of its provisions to classes of persons not previously subject to them is not to be presumed as a necessary inference, unless the intention to the contrary is clearly shown. *Brown v. McLachlan*, 4 L. R., P. C., 543; 42 L. J., P. C., 18; 21 W. R. 277; 9 Moo. P. C., N. S., 384.

See also IX. 9 *post*.

2. Repeal of Private and Local Acts.

8. The rule of law as to the construction of Acts of Parliament which, though declared public Acts, are substantially and in their nature private Acts, is, that one, though inconsistent with another prior in point of date, cannot operate as a repeal of such prior Act except by words which would operate as an express repeal thereof. *Birkenhead Docks (Trustees) v. Birkenhead Dock Co.*, 18 Jur. 883; 23 L. J., Ch., 457; 4 De G. M. & G. 732.

Where, therefore, a private Act gave power to commissioners to construct a sea wall, the property in which was to be vested in them, with liberty to proprietors of adjoining lands to purchase portions of the wall, and to make openings in it, under the superintendence of the engineer of the commissioners:—Held, that under a subsequent Act empowering a dock company to take some adjoining lands and to make such work for the purposes of their undertaking “as they might deem expedient,” the power thus conferred was subject to the provisions of the former Act. *Id.*

9. A local Act is not, in the absence of any

indication of intention to the contrary, repealed by a subsequent public general Act. *Fitzgerald v. Champneys*, 2 John. & H. 31; 7 Jur. N. S., 1006; 30 L. J., Ch., 777; 9 W. R. 850. *S. P. Parnell v. Wolverhampton Waterworks Co.*, 4 L. T., N. S., 513; 10 C. B., N. S., 576.

The rule of construction, that a general Act does not repeal or affect a prior special Act without express words of reference, applies to church building Acts. *Id.*

The insertion in a general Act of a saving clause, providing that the Act shall not apply to a special case which had previously been regulated by a special Act not otherwise referred to, will not prevent the application of the above rule of construction. *Id.*

3. Operation inter se.

10. An Act repealed existing statutes and gave certain powers “in terms of the said recited Acts,” which were the repealed statutes:—Held, that this phrase incorporated the provisions of the repealed statutes and consolidated them. *Blantyre (Lord) v. Clyde Navigation Trustees*, 6 L. R., App. Cas. (Sc.), 273.

11. A prior statute may operate upon the provisions of a subsequent one, without express words. *Re Perrin*, 2 Dr. & War. 147; 1 Con. & L. 567; 4 Ir. Eq. R. 362. Affirming 4 Ir. Eq. R. 89.

12. Where statute A. incorporates sections of statute B., and those sections in statute B. refer to a particular class of cases (*e.g.* Settled Estates), statute A. must not be construed as to these sections as only referring to the particular class of cases affected by statute B., but must be construed in a fair manner and not with any such restriction. *Re Barker*, 17 L. R., Ch. D., 241; 50 L. J., Ch., 334; 44 L. T. 33; 29 W. R. 873.

13. When a statute is incorporated in another, the effect is the same as if the provisions of the former were re-enacted in the latter for all its purposes; and the repeal of the former does not repeal its provisions so far as they have been incorporated in an Act which is not repealed, and which incorporation was for the purpose of providing for a subject matter not within the original statute. *Exp. Rossmore (Lord)*, 8 Ir. R., Eq., 366.

IX. PRINCIPLES OF CONSTRUCTION.

1. *General Rules and Canons*, 6612.
2. *General Words*, 6613.
3. *Particular Words*, 6614.
4. *Intention of Legislature*, 6616.
5. *Commissioners' Report*, 6616.
6. *In Pari Materia*, 6616.
7. *Usage*, 6616.
8. *Ancient Statutes (Contemporanea Expeditio)*, 6616.
9. *General and Special Acts*, 6617.

1. General Rules and Canons.

14. When a doubt arises upon the construction of the words of an Act of Parliament, it is the duty of the Court to remove the doubt

by deciding it; and when the Court has given its decision, the point can no longer be considered doubtful. *Bell v. Holby*, 15 L. R., Eq., 178; 42 L. J., Ch., 266; 28 L. T. 9; 21 W. R. 321.

1. When a clause in an Act which has received a judicial interpretation is re-enacted in the same terms, the Legislature is to be deemed to have adopted that interpretation. *Exp. Campbell, Re Cathcart*, 5 L. R., Ch., 703; 18 W. R. 1056; 23 L. T., N. S., 289.

2. *Semble*, when a statute enacts that something should be deemed to have been done which in fact was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to. *Exp. Walton, Re Levy*, 17 L. R., Ch. D., 756; 50 L. J., Ch., 662; 45 L. T. 1; 30 W. R. 395.

3. If upon ambiguous words or expressions the balance of hardship or inconvenience seems to be strongly against the public upon one construction, or strongly against a private person upon another construction, *semble*, it is consistent with all sound principles to have regard to the balance of inconvenience in determining the question of construction. *Dixon v. Caledonian Railway Co.*, 5 L. R., App. Cas. (Sc.), 827; 43 L. T. 513; 29 W. R. 250.

4. *Semble*, the proper course is to read a section of an Act, and to ascertain its meaning, and not to trouble about decisions upon a former Act. Any other course would be apt to lead us astray. If the later Act can clearly have only one meaning, we ought to give effect to it accordingly. If instead of doing that the Court compares it with the former Act, and says that it differs from it only to such and such an extent, and then considers the decisions upon the former Act, it might in that way go back to half-a-dozen older Acts, and, after considering the decisions on them, it might at last arrive at a conclusion exactly contrary to the later Act. *Exp. Blaiberg, Re Toomer*, 23 L. R., Ch. D., 258; 52 L. J., Ch., 463; 49 L. T. 16; 31 W. R. 906.

5. *Semble*, the Court ought to find out the meaning of a word from the section itself, and if it can do that, it need not have recourse to the use of the same word in the other sections of the Act. If it cannot find out the meaning of the word by reading the particular section, then it may look through the other sections to see in what sense the word is there used, for, as a general rule, a word is to be considered as used throughout an Act of Parliament in the same sense. *Spencer v. Metropolitan Board of Works*, 22 L. R., Ch. D., 262; 53 L. J., Ch., 252; 47 L. T. 465; 31 W. R. 351.

Semble, the Court construes a word in one statute by reference to its use in another, in which the context may be different. *Semble*, the Lord Chancellor in *Metropolitan District Railway Co. v. Sharpe* (5 L. R., App. Cas., 425) did not intend to lay down any general rule to the contrary. *Id.*

6. As a general principle, Acts of Parliament, especially when they alter the rights of parties, are not to be construed retrospectively, unless otherwise provided. *Hickson v. Darlow*, 52 L. J., Ch., 454; 31 W. R. 362. And see *Althusen v. Brooking*, 26 L. R., Ch. D., 564; 53 L. J., Ch., 520; 51 L. T. 57; 32 W. R. 657.

7. *Semble*, it is a well-settled rule that the Court is not to construe an Act to be retrospective, so as to alter existing rights, unless it finds from the Act itself that such was the intention of the Legislature. *Quilter v. Mapleson*, 9 L. R., Q. B. D., 672; 52 L. J., Q. B., 44; 47 L. T. 562; 31 W. R. 75.

8. In construing an Act of Parliament the Court is bound by the verbal construction of the section in question if plain and simple; but if there is doubt upon that, it is entitled to look, first, at the circumstances attending the passing of the Act; next, to the preamble; and, lastly, to the whole purport and scope of the Act, beyond the section immediately under consideration; that, *prima facie*, the Acts of an independent legislature must be supposed to deal with those matters only which are within its own jurisdiction. *Cope v. Doherty*, 4 Jur., N. S., 699; 27 L. J., Ch., 600; 2 De G. & J. 614. Affirming the 4 Kay & J. 367; 4 Jur., N. S., 451.

9. Ambiguous words occurring in an Act of Parliament ought not to be extended to institutions which are well known to exist, but are not named in the Act. *Re St. James's Club*, 16 Jur. 1075; 2 De G. M. & G. 383.

10. Observations as to the construction of doubtful passages of Acts of Parliament, as between a company and the public. *Exp. Eton College*, 20 L. J., N. S., Ch., 1; 15 Jur. 45.

11. Section 11 of the Mercantile Law Amendment (Scotland) Act 1856, is in the same terms with s. 6 of the corresponding English Act; and enacts that "no acceptance of any bill of exchange . . . shall be sufficient to bind or charge any person unless the same be in writing on such bill . . . and signed by the acceptor or some person duly authorised by him." On the 2nd March 1878, in *Hindlaugh v. Blakey* (3 L. R., C. P. D. 136), it was held, that an acceptance by the drawee was null by reason of there being no writing except the signature. On the 16th April 1878 the Bills of Exchange Act was passed, which, after reciting the above-quoted section of the Mercantile Law Amendment Act, and that "it is expedient that the meaning of the said enactment should be further declared," provides "that an acceptance of a bill of exchange is not and shall not be deemed to be insufficient under the provisions of the said statutes by reason only that such acceptance consists merely of the signature of the drawee written on such bill:"—Held, that the Act of 1878 was in effect a declaration by the Legislature, that the decision in the case of *Hindlaugh v. Blakey* was erroneous; and as no distinction whatever was made by the terms of the English enactment corresponding with the 11th section of the Scottish Act between one kind of acceptance and another, the effect of that declaration, although in terms confined to an acceptance by the drawee of a bill, was necessarily to displace the whole construction of the English statute on which that decision was founded. *Steele v. McKinlay*, 5 L. R., App. Cas. (Sc.), 754; 43 L. T. 358; 29 W. R. 17.

2. General Words.

12. General words in a statute must receive a general construction, unless there is in the

statute some ground for restraining their meaning by reasonable construction, not by arbitrary addition or retrenchment. *Beckford v. Wade*, 17 Ves. 91.

Where the words of a law in their ordinary signification are sufficient to include infants, the virtual exception must be drawn from the intention of the Legislature, manifested by other parts of the law, from the general purpose and design of the law, and the subject matter of it. *Id.*

Thus the Statute of Limitations would have bound infants, etc., without any express exception. *Id.*

1. General words in an Act do not always extend to every case which falls literally within them. *Cope v. Doherty*, 2 De G. & J. 614; 4 Jur., N. S., 699; 27 L. J., Ch., 600.

2. If an Act of Parliament, by general words, purports to confer a power upon several donees, one of whom possesses the same power more amply at common law as incident to his estate, the statute shall not be intended to apply to him, so as by implication to abridge his power; and acts of his, therefore, which the statute would have authorized, will be referred to his common law right. *Exp. Clayton*, 1 Russ. & M. 369.

3. Rules of construing a statute where a general enactment in it would override a particular one, and where two parts of it are contradictory. *Pretty v. Solly*, 26 Beav. 606.

4. Where one clause of an Act directs specific acts to be done, but such acts would be included in the general terms of a subsequent prohibitory clause, the former clause is not controlled by the latter. *De Winton v. Brecon (Mayor)*, 26 Beav. 533.

5. Where words have been long used in a technical sense, and have been judicially construed to have a certain meaning, and have been adopted by the Legislature as having a certain meaning prior to a particular statute in which they are used, the rule of construction requires that the words used in such statute should be construed according to the sense in which they have been so previously used, although that sense may vary from the strict literal meaning of the words. *Ruckmaboy v. Lallobhoy Mottickund*, 8 Moo. P. C. 4; 5 Moo. Ind. App. 234.

6. Where an Act empowers persons to deal with their own property, or with property in a place or district, or defined by a description, and does not by express words, or by necessary implication, import that the Legislature intended to affect the rights of other persons in other property, courts of law do not construe mere general words in the Act as affecting the rights of strangers as to property not within the description of that with which the Act expressly purports to deal. *Dawson v. Paver*, 5 Hare 415; 11 Jur. 766; 16 L. J., N. S., Ch., 274; 24 Rail. Ca. 81.

7. General provisions in an Act do not override special provisions; so that where an Act contains special provisions as to particular property, they must be read as exceptions from general provisions, whether contained in the same or any other Act. *Taylor v. Oldham Corporation*, 4 L. R., Ch. D., 395; 46 L. J., Ch., 105; 35 L. T. 696; 25 W. R. 178.

8. The general words of a statute are not to be so construed as to alter the previous policy

of the law, unless no sense or meaning can be put upon those words consistently with the intention of preserving the existing policy untouched; but the title and preamble of the General Inclosure Act, 8 & 9 Vict., c. 118, being quite general, the words of the 147th section appear to be so general as to make it impossible to limit them to exchanges of freeholds of the same species, notwithstanding inconveniences and seeming injustice to parties. *Minet v. Leman*, 20 Beav. 269; 24 L. J., Ch., 545.

These possible evils and inconveniences are provided for by the appointment of commissioners, whose duty it is to ascertain and approve of the propriety of the exchanges before they can be effected. *Id.*

9. The general law of the country is not altered or controlled by partial legislation, made without any special reference to it. *Denton v. Manners (Lord)*, 4 Jur., N. S., 151; 27 L. J., Ch., 199. Affirmed 4 Jur., N. S., 714; 27 L. J., Ch., 623.

The 13 & 14 Vict., c. 94, passed in general terms for a special object, without reference to the Mortmain Act (9 Geo. 2, c. 36), will not enable a society, when its purpose is the purchase of incorporeal hereditaments, to be applied for charitable purposes. *Id.*

10. *Semble*, as a matter of ordinary construction, where several words are followed by a general expression which is as much applicable to the first and other words as to the last, that expression is not limited to the last, but applies to all. *Great Western Railway Co. v. Swindon & Cheltenham Railway Co.*, 9 L. R., App. Cas., 787; 53 L. J., Ch., 1075; 32 W. R. 957.

11. One of the safest guides to the construction of sweeping general words which it is difficult to apply in their full literal sense is to examine other words of like import in the same instrument, and to see what limitations must be imposed on them. If it is found that a number of such expressions have to be subjected to limitations or qualifications, and that such limitations or qualifications are of the same nature, that forms a strong argument for subjecting the expression in dispute to a like limitation or qualification. *Blackwood v. Reg.*, 8 L. R., App. Cas., 94; 52 L. J., P. C., 14; 48 L. T. 441; 31 W. R. 645.

12. Though the word "street" may include the houses abutting or fronting upon a public thoroughfare, as well as the actual roadway or footways, yet the strict and *primâ facie* meaning of the word "street" is confined to the roadway and footways. See on the construction of the Holborn Valley Improvement Act 1864. *Galloway v. London (Mayor)*, *London (Mayor)*, *v. Galloway*, 1 L. R., H. L., 84; 12 Jur., N. S., 747; 35 L. J., Ch., 477; 14 L. T., N. S., 865; 2 De G. J. & S. 213.

3. Particular Words.

13. The meaning of particular words in a statute, in the absence of express definition, is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object that is intended to be attained. *Semble. The Lion, 6*

Moo. P. C., N. S., 163, 171; 2 L. R., P. C., 525; 38 L. J., Adm., 51. And see 1 B. & C. 136.

1. The words "insolvent circumstances" in 19 Geo. 2, c. 32, s. 1, are to be understood in the popular sense; and do not mean a state of utter and complete insolvency. *Teale v. Younge*, 1 McCl. & Y. 497. See *Biddlecombe v. Bond*, 4 Ad. & Ell. 332.

2. The word "insolvent" in 33 Geo. 3, c. 54, s. 10, means a person who has taken the benefit of an insolvent debtors' Act; and not one who has merely made an assignment of his effects for the benefit of his creditors. *Re Birmingham Benefit Society*, 3 Sim. 421.

3. *Quere*, the meaning of the words "shape or configuration" in the Act 6 & 7 Vict., c. 65. *Margetson v. Wright*, 2 De G. & Sm. 420.

4. "Now" to be construed retrospectively or prospectively in an Act of Parliament. See *Larpernt v. Bibby*, 5 H. L. Ca. 481; 24 L. J., Q. B., 301; and *Noble v. Gadban*, 5 H. L. Ca. 504.

5. In stat. 3 Will. & M., c. 11, the apparent meaning of the word "unmarried" is "not married at the particular time," contrary to its usual import. *Maberly v. Strobe*, 3 Ves. 452.

6. The 27 Geo. 3, c. 28, s. 5, by the word "square" meant all rectangular figures only. *Att.-Gen. v. Cast Plate Glass Co.*, 1 Anst. 39.

7. The word "near" in a penal case must be construed strictly, and is not equivalent to the word "next." *Rex v. Hervey*, 1 W. Bl. 20.

8. The words in 13 Geo. 3, c. 21, s. 3, are to be read, "aliens' duties, customs, and impositions," and not "aliens, duties, customs, and impositions"; and therefore the grandchild of a natural-born subject, born out of the Queen's allegiance, is entitled to the benefit of that statute in regard to holding lands as a natural-born subject, although he has not complied with the formalities specified in the third section. *Barrow v. Wadkin*, 24 Beav. 327.

9. The domestic statutes of a charitable foundation say, that the trustees "shall and may" turn out, etc. This shall be construed imperatively that they "must." *Att.-Gen. v. Lock*, 3 Atk. 164.

And the same words shall be construed imperatively in Acts of Parliament. *Id.* 166. *S. P. Stamper v. Miller*, 3 Atk. 212.

10. The presentation to certain livings was by an Act of Parliament vested in the corporation of Shrewsbury (for whom a body of trustees was afterwards substituted), with a direction that they should nominate a fit and proper person duly qualified according to law, with a proviso that "*ceteris paribus*" preference should be given to a favoured class.—Held, that the *cetera* were the qualifications mentioned before, and not the whole of the qualifications of a clergyman. That the words "fit and proper person, duly qualified," etc., were not thus rendered surplusage; and that every person whom a bishop would be bound to accept, if presented to him by a patron, would not necessarily be fit and proper within the meaning of the statute. *Att.-Gen. v. Powis (Earl)*, 1 Kay 186, 566.

11. There is a very serious consideration whether the word "convenient" in the 8th section of the Prescription Act can be altered by putting the word "easement" instead. That is a question which appears to be one of

very considerable difficulty. A judge may take the view that the 8th section as it stands is so absurd that the word "convenient" cannot stand there, but that does not quite conclude the question as to whether it is right to insert another word. *Semble. Laird v. Briggs*, 19 L. R., Ch. D., 33; 45 L. T. 238.

12. The Crown Lands Alienation Act 1861, of New South Wales, by s. 13, provides that, on and after the 1st day of June 1861, Crown lands, with certain exceptions, shall be opened for conditional sale by selection in manner following, viz.: "Any person may, upon any Land Office day, tender to the land agent for the district a written application for the conditional purchase of any such lands:—Held, that the word "person" in the above section is not limited to persons of the age of twenty-one years. *O'Shanassy v. Joachim*, 45 L. J., P. C., 43; 1 L. R., App. Cas., 82; 24 W. R. 792; 34 L. T., N. S., 265.

13. An action against the Melbourne Harbour Trust Commissioners is an action brought against a "person" within the meaning of s. 46 of the Melbourne Harbour Trust Act. *Union Steamship Co. of New Zealand v. Melbourne Harbour Trust*, 9 L. R., App. Cas., 365; 53 L. J., P. C., 59; 50 L. T. 337.

14. In modern times, when the Legislature has intended that the word "person" should in any particular statute include a corporation, it has been usual to introduce an interpretation clause, declaring that the word shall have such extended meaning. The other sections of the statute under discussion were also opposed to that meaning. *Pharmaceutical Society v. London and Provincial Supply Association*, 5 L. R., Q. B. D., 310; 49 L. J., Q. B., 338; 42 L. T. 569; 28 W. R. 608; 44 J. P. 408. Affirmed 5 L. R., App. Cas., 862; 49 L. J., Q. B., 736; 43 L. T. 389; 28 W. R. 957.

If a statute provides that no person shall do a particular act except on a particular condition, it is, *prima facie*, natural and reasonable to understand the Legislature as intending such person as by the proper means may be able to fulfil the condition; and not those who, though called "persons" in law, have no capacity to do so at any time, by any means, or under any circumstances whatever. *Id.*

15. In all cases where jurisdiction is given to a court of justice by Act of Parliament by the words "it shall be lawful," those words, unless they are controlled by other parts of the Act, give the Court a discretion in the exercise of that jurisdiction. *Re Bridgman*, 1 Dr. & Sm. 164.

16. The words in a statute "it shall be lawful" of themselves merely make that legal and possible which there would otherwise be no right or authority to do. Their natural meaning is permissive and enabling only. But there may be circumstances which may couple the power with a duty to exercise it. It lies upon those who call for the exercise of the power to show that there is an obligation to exercise it. *Julius v. Oxford (Bishop)*, 5 L. R., App. Cas., 214.

Enabling words are always compulsory where they are words to effectuate a legal right. *Semble. Id.*

Where an Act recites that the manner of proceeding in certain cases requires amendment, its provisions may be construed independently

of the practice under the previously-existing law. At all events, the previous practice is a matter of very slender and remote consideration. *Semble. Ib.*

1. Whatever meaning may be given to the word "on" in an Act of Parliament, it is very difficult to extend it to above a year. It is not necessary to express an opinion as to what time should be allowed, but it is not to be conceived that a period of more than a year can be included in the word "on." "On," if not confined to the time of making the decree, must mean shortly after. *Robertson v. Robertson*, 8 L. R., P. D., 96; 48 L. T. 591; 31 W. R. 652.

4. Intention of Legislature.

2. The intention of the Legislature must be ascertained from the words of a statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the statute. *Fordyce v. Brydges*, 1 H. L. Ca. 1.

3. The Court knows nothing of the intention of an Act of Parliament except from the words in which it is expressed, as applied to the facts existing at the time. *Logan v. Courtown (Earl)*, 13 Beav. 22; 20 L. J., N. S. Ch., 347.

4. The language of a statute taken in its plain ordinary sense, and not its policy or supposed intention, is the safer guide in construing its enactments. *Philpott v. St. George's Hospital*, 6 H. L. Ca. 338; 3 Jur., N. S., 1269.

5. The rule for the construction of Acts is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are of themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do, in such case, best declare the intention of the Legislature. *Semble. Sussex Peerage*, 11 Cl. & F. 86; 8 Jur. 793.

6. The Court cannot impute to the Legislature, in passing statutes confirming titles created by means of parliamentary powers, ignorance of the transactions which had taken place in exercise of such powers. *Headen v. King*, 9 Hare 522; 22 L. J., N. S., Ch., 111.

7. If the Court can fairly construe an Act so as to carry out what must obviously have been the intention of the Legislature, although the words may be a little difficult to deal with, and although they may possibly admit of more than one interpretation, it ought from those general considerations to adopt the interpretation which will make the law uniform, and will remedy the evil which prevailed in all the cases to which the law can be fairly applied. *Semble. Freme v. Clement*, 44 L. T. 399; 30 W. R. 3.

8. The more literal construction of a section of a statute ought not to prevail if it is opposed to the intentions of the Legislature as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated. *Semble. Caledonian Railway Co. v. North British Railway Co.*, 6 L. R., App. Cas., 122; 29 W. R. 685.

9. No court is entitled to depart from the intention of the Legislature, as appearing from the words of the Act, because it is thought unreasonable. But when two constructions

are open, the Court may adopt the more reasonable of the two. *Semble. Rother (Countess) v. Kirkcaldy Waterworks Commissioners*, 7 L. R., App. Cas., 702.

10. If an Act of Parliament uses the same language which was used in a former Act of Parliament referring to the same subject, and passed for the same purpose and for the same object, the safe and well-known rule of construction is to assume that the Legislature, when using well-known words upon which there have been well-known decisions, uses those words in the sense which the decisions have attached to them. *Semble. Greaves v. Tofteld*, 14 L. R., Ch. D., 563, 571; 50 L. J., Ch., 119; 43 L. T. 100; 28 W. R. 840.

11. Unless the Court is obliged to do so, it must not suppose that the Legislature intended to do a palpable injustice. *Semble. Exp. Corbett, Re Shand*, 14 L. R., Ch. D., 122.

12. *Semble*, a statute is not to be construed literally when a literal construction would end in an absurdity or inconsistency with the intention of the Legislature, as evidenced by the provisions of the statute, but is to be construed in harmony with common sense and the intention of the Legislature. *Exp. Walton, Re Levy*, 17 L. R., Ch. D., 756; 50 L. J., Ch., 662; 45 L. T. 1; 30 W. R. 395.

13. Where the Legislature have reproduced words upon which a case has been decided, they must be taken to have known the interpretation that had been put upon them in that case. *Clark v. Wallond*, 52 L. J., Q. B., 322.

5. Commissioners' Report.

14. Where a statute is supposed to have been founded on a report of commissioners appointed by the Crown, that report ought not to be referred to in a court of justice as a guide in construing the statute. *Martin v. Hemming*, 18 Jur. 1002. *S. P. Ewart v. Williams*, 3 Drew. 21, 24; *Arding v. Bonner*, 2 Jur., N. S., 763.

6. In Pari Materia.

15. It is a rule that several statutes on the same subject are to be read as one statute. *M. William v. Adams*, 1 Macq. H. L. Ca. 120.

16. A repealed statute *in pari materia* with an existing one may properly be referred to for the purpose of construing the latter. *Exp. Copeland*, 2 De G. M. & G. 914; 17 Jur. 121; 22 L. J., Bky., 17.

7. Usage.

17. Long usage is of no avail against plain statutory enactments; and it can be binding on parties only as the interpreter of a doubtful law, and as affording a contemporaneous exposition. *Dunbar (Burgh) v. Roxburghe (Duchess)*, 3 Cl. & F. 335.

Where a statute expressive as to some points is silent as to others, usage may well supply the defect, if not inconsistent with express directions of the statute. *Ib.*

8. Ancient Statutes (Contemporanea Expositio).

18. Ancient statutes are to be construed with

reference to the state of things at the time of their passing. *McWilliam v. Adams*, 1 Macq. H. L. Ca. 120.

1. The construction of an old Act may be cleared by *contemporanea expositio*, showing the conduct and understanding of parties at the time of its passing, and subsequently; and for this purpose the annals or histories of the period, and antiquarian researches, may be referred to. *Montrose Peerage*, 1 Macq. H. L. Ca. 401.

2. *Semble*, when there are ambiguous expressions in an Act passed one or two centuries ago, it may be legitimate to refer to the construction put upon these expressions throughout a long course of years, by the unanimous consent of all parties interested, as evidencing what must presumably have been the intention of the Legislature at that remote period. A recent statute should be construed according to its own terms, when these are brought into controversy, and not according to the views which interested parties may have hitherto taken. *Clyde Navigation Trustees v. Laird*, 8 L. R., App. Cas., 673.

9. General and Special Acts.

3. Rules of construing a statute where a general enactment in it would override a particular one, and where two parts of it are contradictory. *Pretty v. Solly*, 26 Beav. 606.

4. General provisions in an Act do not override special provisions; so that where an Act contains special provisions as to particular property, they must be read as exceptions from general provisions, whether contained in the same or any other Act. *Taylor v. Oldham Corporation*, 4 L. R., Ch. D., 395; 25 W. R. 178.

5. Where one clause of an Act of Parliament directs specific acts to be done, but such acts would be included in the general terms of a subsequent prohibitory clause, the former clause is not controlled by the latter. *De Winton v. Brecon (Mayor)*, 26 Beav. 533.

6. Where the Legislature has vested special powers in a particular body for special purposes, a general Act subsequently passed will not over-ride those special powers. *London & Blackwall Railway Co. v. Limehouse District Board of Works*, 3 Kay & J. 123; 26 L. J., Ch., 164.

7. Whether a special Act only incorporates "such parts of a general Act as are applicable to, and not inconsistent with, the special Act," or "the whole Act, except so far as its provisions are expressly varied by the special Act," makes no difference in the application of the general to the special Act. *Weld v. London & South-Western Railway Co.*, 1 N. R. 415.

8. The effect of the incorporation of a general Act of Parliament into the special Act of any such company is, that the general Act must be looked at with reference to the powers conferred upon companies of dealing with the land when required; but it is to the special Act that regard must be had for the purpose of ascertaining the contract between the landowner and the company, and the power which the company has of taking the land. *Simpson v. South Staffordshire Waterworks*

Co., 4 De G. J. & S., 679; 34 L. J., Ch., 380; 13 W. R. 729, 908; 11 Jur., N. S., 463; 12 L. T., N. S., 360.

9. If there is an inconsistency between the general Act and a subsequent special Act, the latter must prevail. *Yarmouth (Mayor) v. Simmons*, 47 L. J., Ch., 792; 38 L. T., N. S., 881; 26 W. R. 802.

10. In adjusting the general provisions in a general Act to the particular provisions of the special Act, considerations of reason and justice, and the universal analogy of such provisions in similar Acts of Parliament, are proper to be borne in mind, and ought to have much weight and force. *Semble. Metropolitan District Railway Co. v. Sharpe*, 5 L. R., App. Cas., 431; 50 L. J., Q. B., 16; 43 L. T. 130; 28 W. R. 617.

11. When a general Act of Parliament is incorporated with a special Act, if there is any contradiction between them, the special Act is to prevail. *Att.-Gen. v. Great Eastern Railway Co.*, 41 L. J., Ch., 505; 7 L. R., Ch., 475; 20 W. R. 599; 26 L. T., N. S., 749.

A special Act of Parliament, with which was incorporated the Railway Clauses Act, 1845, empowered a railway company to stop up all streets within a certain area in the city of London. The deposited plans showed that Sun Street, which was within the area, was not to be stopped up, but to be crossed by an arch. The same plans showed that other streets within the area were to be stopped up. Subsequently the company obtained another Act, authorizing them to make an underground instead of an aboveground railway, and re-enacting the powers given them by the previous Act:—Held, that the plans were not incorporated in the special Act, and that the power to stop up all streets within the area, including Sun Street, was an existing power and capable of being exercised. *Id.*

Representations made on plans deposited by the promoters of an intended railway in pursuance of the Standing Orders of the Houses of Parliament previously to an application for an Act do not bind the railway company after the Act is obtained nor give other persons any equity against the company, except so far as they are incorporated with the Act. *Id.*

12. *Semble*, it is now well settled, that a general enactment of a later Act cannot repeal a specific enactment in an earlier Act merely by implication. *Gard v. Commissioners of Sewers*, 49 L. T. 327.

X. CONSTRUCTION OF PARTICULAR STATUTES.

1. *Affecting Foreigners*, 6617.
2. *Prohibitory or Penal*, 6618.
3. *Remedial*, 6618.
4. *Fiscal*, 6618.
5. *Imposing Rates*, 6619.
6. *Imposing Tolls*, 6619.
7. *Statutory Powers*, 6619.
8. *Statutory Forms and Conveyances*, 6620.

1. Affecting Foreigners.

13. *Primâ facie* an English statute affects only English subjects, or foreigners who come

either permanently or temporarily within the allegiance of the English crown. *Exp. Blain, Re Savers*, 12 L. R., Ch. D., 522; 41 L. T. 46; 28 W. R. 334.

2. Prohibitory or Penal.

1. The 9 Geo. 2, c. 36 (Mortmain Act), is a prohibitory, not a penal, statute. *Philpott v. St. George's Hospital*, 6 H. L. Ca. 338; 3 Jur., N. S., 1269.

Prohibitory statutes must not be interpreted on a principle of tendency; if anything done is substantially that which is prohibited, the thing is void, not because of its tendency, but because it is, within the true construction of the statute, the thing prohibited. *Id.*

2. Subsequent statutes in the affirmative giving new penalties do not repeal former methods of proceeding ordained by previous Acts without negative words. *Middleton v. Crofts*, 2 Atk. 265 (Appendix).

3. Forbidding a thing under a penalty, to protect the revenue, does not make void the thing if done, nor prevent an action thereon. If a thing is prohibited for other than revenue purposes, no action lies thereon. *Swan v. Scotland (Bank of)*, 2 Mont. & A. 661.

4. Where a penalty is imposed by an Act of Parliament upon any transaction, the transaction will be illegal, though it is not expressly prohibited by the Act. *Re Cork & Youghal Railway Co.*, 4 L. R., Ch., 748.

5. Penal laws are not to be construed according to rules of equity. *Harrison v. Southcote*, 1 Atk. 537.

6. Statutes restrictive of the common law receive a restrictive construction. *Ash v. Abdy*, 3 Swans. 664.

7. Every statute which introduces a capital punishment must be construed strictly. *Re v. Harvey*, 1 Wils. 164.

8. When a statute inflicts a penalty for not doing an act provided for, the penalty enacted implies that there is a legal compulsion to do the act in question, and this principle is not affected by the fact that the penalty has a particular destination. *Redpath v. Allen*, 4 L. R., P. C., 511; 42 L. J., Adm., 8; 21 W. R. 276; 9 Moo. P. C., N. S., 340; 27 L. T., N. S., 725.

9. As a general rule, where a penalty is affixed by an Act of Parliament to an act or omission, such penalty is the only punishment or loss incurred by the party guilty of such act or omission. *Re Knowle*, 46 L. J., Ch., 626; 37 L. T. 351; 25 W. R. 822.

10. Where a penalty is created by statute and nothing is said as to who may recover it, and it is not created for the benefit of a party aggrieved, and the offence is not against an individual, it belongs to the Crown, and the Crown alone can maintain a suit for it. *Bradlaugh v. Clarke*, 8 L. R., App. Cas., 354; 52 L. J., Q. B., 505; 48 L. T. 681; 31 W. R. 677. Reversing 7 L. R., Q. B. D., 38; 50 L. J., Q. B., 342; 44 L. T. 667; 29 W. R. 516.

3. Remedial.

11. In the case of a remedial statute, everything is to be done in advancement of the remedy that can be done consistently with any

construction that can be put upon it. *Johnes v. Johnes*, 8 Dow. 15. S. P. *Atchison v. Everett*, Cowp. 391.

12. It is by no means unusual, in construing a remedial statute, to extend the enacting words beyond their natural import and effect, in order to include cases within the same mischief. *York (Dean) v. Middleborough*, 2 Y. & J. 196.

13. Statutes intended to remedy a grievance ought to be construed liberally, so as to afford the utmost relief which the fair meaning of their language will allow. *Daputo v. Wyllie*, *The "Pieve Superiore"*, 5 L. R., P. C., 482; 43 L. J., Adm., 20; 30 L. T. 887; 22 W. R. 777.

4. Fiscal.

14. Fiscal statutes must be construed strictly. *Partington v. Att.-Gen.*, 21 L. T., N. S., 370; 38 L. J., Exch., 205; 4 L. R., H. L., 100.

15. An intention to impose a charge on the subject must be shown by clear and unambiguous language. *Oriental Bank Corporation v. Wright*, 5 L. R., App. Cas., 842, 856; 43 L. T. 177.

16. Where the intention to impose a charge on the subject is doubtful, that meaning must be adopted which is most beneficial to the public. *Pryce v. Monmouthshire Canal & Railway Co.*, 4 L. R., App. Cas., 187; 49 L. J., Exch., 130; 40 L. T. 630; 27 W. R. 666.

The cases which have decided that taxing Acts are to be construed strictly, probably meant little more than this—that, inasmuch as there was not any *a priori* liability in any subject to pay any particular tax, or any antecedent relationship between the taxpayer and the taxing authority, no reason founded on any supposed relationship of the taxpayer and the taxing authority could be brought to bear upon the construction of the Act, and therefore the taxpayer had a right to stand upon a literal construction of the words used, whatever might be the consequences. *Semble*, this principle does not apply to any considerable extent where the payment spoken of in the Act is a payment to be made in return for services rendered, and above all in a case where Parliament does not step in to give the right to payment, but rather to moderate and limit a right to payment which otherwise might exist without limit, or, at all events, with only such limits as would be placed upon it by a *quantum meruit* assessment. *Id.*

The respondents had the preparation of their own measure, and were bound to see that it fitly expressed the purposes of Parliament. They were not forced to adopt the Act if they had reason to complain of its harshness or injustice; and it behoved them to have any terms favourable to themselves and involving burdens on the public explicitly and unequivocally stated. If they have not done so, the fault is theirs, and they must take the consequences. *Semble. Id.*

17. Decisions of the House of Lords upon questions of law, as to the construction of statutes, and especially of fiscal Acts, are binding on the House in subsequent cases. *Commissioners of Inland Revenue v. Harrison*, 7 L. R., H. L., 1; 43 L. J., Exch., 138; 30 L. T. 274; 22 W. R. 559.

5. Imposing Rates.

1. Whenever it is sought to impose a rate, the burden lies on those seeking to enforce it to show that the words used by the Legislature are clear and unambiguous in order to charge the subject. *Ingram v. Drinkwater*, 44 L. J., P. C., 83; 32 L. T. 746.

6. Imposing Tolls.

2. When an Act authorises the exaction of a toll, the accommodation for which the toll is authorised must be provided. *Aiton v. Stephen*, 1 L. R., App. Cas., 466.

7. Statutory Powers.

3. Persons authorised by Act of Parliament to cut a canal, and required to appropriate certain sums for the construction and maintenance of works to protect a harbour in which the canal was intended to terminate, not restrained from cutting through their own lands, at a distance from the harbour, in the event of a present insufficiency of funds for the completion of the undertaking, pending an application to Parliament for farther powers to levy money. *King's Lynn (Mayor) v. Pemberton*, 1 Swan. 244.

But persons authorised by Act of Parliament to cut canal, if their funds are insufficient for completion of undertaking, may, on the prompt application of the owner of lands through which they are cutting, be restrained from proceeding. *Id.* 250.

4. *Semble*, the case of *Ashbury Railway, etc., Co. v. Riche* (7 L. R., H. L., 653; 44 L. J., Exch., 185; 33 L. T., N. S., 451) appears to decide this, at all events, that where there is an Act of Parliament creating a corporation for a particular purpose, and giving it power for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited. *Att.-Gen. v. Great Eastern Railway Co.*, 5 L. R., App. Cas., 481.

5. When powers to make certain works are granted by Act of Parliament they can only be exercised once and for all, and the grantees have no power afterwards to enlarge such works. *Taylor v. St. Helens (Corporation)*, 46 L. J., Ch., 857; 6 L. R., Ch. D., 264.

6. In construing statutes creating bodies corporate, such as the corporation in question, the Legislature must be considered, unless the contrary appears, to intend that the corporate body shall have the same duties and liabilities as are imposed by the general law upon private persons doing the same things. *Mersey Docks & Harbour Board v. Penhallow*, *Mersey Docks & Harbour Board v. Gibbs*, 11 H. L. Ca. 686; 12 Jur., N. S., 571; 35 L. J., Q. B., 226; 14 W. R. 872; 14 L. T., N. S., 677.

7. *Semble*, if the Legislature prescribe that a public body shall provide hospital accommodation, no injunction could issue provided it were proved that the directions of the Act could not be complied with at all without creating a nuisance. And if a position has not been specified in the Act for the hospital, the onus of proof that the creation of a nuisance will be the

inevitable result lies on the persons seeking to justify the nuisance. The justification depends on their making good these two propositions, (1) that such are the imperative orders of the Legislature, and (2) that they cannot possibly obey those orders without infringing private rights. *Metropolitan Asylum District v. Hill*, 6 L. R., App. Cas., 208; 50 L. J., Q. B., 353; 44 L. T. 653; 29 W. R. 617.

8. *Primâ facie* nobody is authorised to commit a nuisance under an Act of Parliament unless it appears from express words or by necessary implication that the Act was to be done or might be done notwithstanding its tending to the creation of a nuisance. *Vernon v. St. James (Vestry)*, 16 L. R., Ch. D., 466; 50 L. J., Ch., 81; 44 L. T. 229; 29 W. R. 222.

9. A power to borrow money from the Public Works Loan Commissioners for the purpose of repairing churches must be exercised in exact accordance with the authority given, and the restrictions imposed, by the Act itself. *Reg. v. All Saints, Wigan (Churchwardens)*, 1 L. R., App. Cas., 611; 35 L. T. 381; 25 W. R. 128.

10. Where persons have special powers conferred on them by Parliament for effecting a particular purpose, they cannot be allowed to exercise those powers for any purpose of a collateral kind. *Galloway v. London (Mayor)*, 1 L. R., H. L., 34; 12 Jur., N. S., 747; 35 L. J., Ch., 477; 14 L. T., N. S., 865.

When a statute prohibits, under a penalty, any person from agreeing to pay certain expenses, an agreement to pay such expenses is invalid, and no action is maintainable upon it, although the statute does not expressly prohibit the other party obtaining the funds to carry its declared objects into effect, and in order to effect them it must not exceed the limits of its powers. *Id.*

A company authorized (making due compensation) to take compulsorily the lands of any person for a definite object may be restrained by injunction from any attempt to take them for another object. *Id.*

Where the Legislature has conceded power to a body of adventurers for a certain purpose (as, for example, the formation of a railway), such a body must show some ground for the concession, and the Legislature has no concern with its means for obtaining the funds to carry its declared objects into effect, and in order to effect them it must not exceed the limits of its powers. But the case is different where an existing public body, such as the corporation of a city, is entrusted by the Legislature with the duty of making public improvements in its city, and the powers thus entrusted to it for such a purpose will not be subject, as in the other case, to a strict and restrictive construction. *Id.*

Before the royal assent was given to an Act of this description, the corporation of London entered into a contract with a railway company to sell to the company certain lands which the corporation expected to be authorized by the Act to take. When the Act had been passed, notice to take the land was given, and the taking was resisted by the landowner. A subsequent Act recited the contract, and declared the company entitled to the benefit of it. Notice to take the land under this later Act was given by the corporation to the landowner,

but the notice expressly reserved to them all the rights under the former Act:—Held, that the original contract was valid, and that this later Act was a parliamentary recognition of it. *Ib.*

Where the promoters of a bill giving discretionary powers over property conditionally agree that, if the bill passes, they will dispose of the property to be acquired in a particular way, this anticipation of the possession of their powers does not deprive them of discretion to exercise those powers when obtained. *Ib.*

1. Whenever the Legislature has, by a special Act, conferred powers upon a corporation or a body of commissioners for an object of public benefit, those powers are not affected by a subsequent statute giving to other persons, for another public purpose, inconsistent powers, in terms which, from their generality, would seem to overrule the powers given by the former Act. *London & Blackwall Railway Co. v. Limehouse District Board of Works*, 3 Kay & J. 123; 26 L. J., Ch., 164.

A railway company was empowered by its special Act to widen a branch of the railway passing through London, and to build additional stations. In conformity with the powers so given, the company proceeded to erect a station on its land by the side of a highway, within the distance required to be left between buildings and highways in London by the Metropolis Management Act, which had passed shortly after the special Act of the company:—Held, that the powers conferred on the company by their special Act were not controlled by the later statute, and that the company was authorized so to build their station. *Ib.*

By a statute passed prior to the special Act, the trustees of the particular highway had power to prevent any building being erected so near to the road as the station was being built. The Metropolis Management Act repealed this statute, and vested this authority in the managing body thereby constituted:—Held, that the trustees of the road must be taken to have been present at the passing of the special Act, as well as of the Metropolis Act, and, therefore, the powers given by the railway Act must prevail. *Ib.*

2. Persons obtaining from the Legislature power to interfere with the rights of property are bound strictly to adhere to the powers so conceded to them, to do no more than the Legislature has sanctioned, and to proceed only in the mode which the Legislature has pointed out; but (except in a proceeding at the instance of the attorney-general) any one seeking the assistance of a court of equity, to restrain the violation of such a contract with the Legislature, is bound to show that he has a private interest in the matter. *Liverpool (Mayor) v. Chorley Waterworks Co.*, 2 De G. M. & G. 852.

3. When commissioners appointed by a private Act are authorized to do all things necessary for carrying out the object of the Act, that will not give them authority to apply to Parliament for a further Act, so as to allow their applying funds raised for the purposes of the first Act in discharging the expenses of obtaining the second Act. *Att.-Gen. v. West Hartlepool Improvement Commissioners*, 10 L. R., Eq., 152; 39 L. J., Ch., 624; 18 W. R. 686.

8. Statutory Forms and Conveyances.

4. If the Legislature prescribes formalities to be observed by parties contracting *inter se*, and one of them endeavours to avail himself of the want of such forms to postpone or avoid the completion of a contract entered into, the Court will itself ascertain whether the intentions of the Legislature have, in substance, been complied with; and if they have, it will carry the contract into effect. *Baker v. Metropolitan Railway Co.*, 32 L. J., Ch., 7; 11 W. R. 18; 7 L. T., N. S., 494; 31 Beav. 504; 9 Jur., N. S., 61.

5. By the Bedford Level Act, it was enacted, that all conveyances by indenture of the 95,000 acres allotted to the Earl of Bedford, or any part thereof, entered with the registrar of the Levels, should be of equal force to convey the freehold and inheritance as if the same were, for valuable considerations, enrolled within six months in one of the courts of record at Westminster; and that no lease, grant, or conveyance of or charge out of or upon the 95,000 acres or any part thereof, except leases for seven years or under in possession, should be of force but from the time it should be entered with the registrar. Conveyances were afterwards made of part of the 95,000 acres, but were not registered:—Held, that those conveyances were nevertheless valid for all purposes, except for entitling the grantees to the privileges conferred by the Act on the owners of lands within the Level, and for the other purposes of the Act. *Willis v. Brown*, 10 Sim. 127.

6. By a local and personal Act, transfers of debentures were to be by indorsement by deed, and in a given form, and were to be entered in the books of the company, and "after such entry, but not till then, the assignee was to be entitled to the benefit":—Held, that this did not apply to a transfer by act of law, as in the case of bankruptcy. *Lane v. Smith*, 14 Beav. 49; 15 Jur. 735.

7. A conveyance by the commissioners of the Court for the Sale of Incumbered Estates in Ireland is, under 12 & 13 Vict., c. 77, s. 27, "effectual to pass the fee simple discharged of all former estates," subject only to "such tenancies, leases, etc., as shall be expressed therein." Where such a conveyance is duly executed by the commissioners, it becomes under s. 49 conclusive evidence that everything required by the Act to be done has been rightly done. *Rorke v. Errington*, 7 H. L. Ca. 617; 9 Ir. C. L. R. 357; 5 Jur., N. S., 1227.

8. A conveyance made under 21 & 22 Vict., c. 72, is, by s. 85, for all purposes conclusive evidence that all previous proceedings leading to such conveyance have been regularly taken. Where, therefore, proceedings had been taken for the sale of estates, and their sale and resale had been directed in a manner which was declared by the House of Lords to be marked with great irregularity, but the party complaining had not brought the matter before the Court of Appeal until after the conveyances had been executed:—Held, that the House was precluded by the provisions of the statute from affording the appellant relief against the consequences of such irregularities. *Power v. Reeves*, 10 H. L. Ca. 645.

9. By 23 & 24 Geo. 3, c. 39 (Irish), for the

encouragement of planting timber trees, tenants for lives by settlement, impeachable for waste, or tenants for years exceeding fourteen unexpired, who should plant or cause to be planted any timber trees, might fell and dispose of them at any time during the term. To secure the landlords, s. 2 enacted, that "any tenant so planting," etc., "should within twelve calendar months after such planting lodge with the clerk of the peace of the county" "an affidavit," etc., "reciting the number and kinds of trees, and the name of the lands, in form following:—I, A. B., do swear that I have planted," etc., "on the lands of —, in the parish of —, held by me from —, the following trees [here reciting the number and kinds of trees.]" The form throughout was couched in the first person, and in fact, in its terms, was only applicable to a tenant for years. A lessee for three lives having planted many trees, his agent made the affidavit required in his own name, as agent for the lessee:—Held, that as the form given in the statute could not possibly apply to the majority of the cases which its provisions sought to meet, it did not mean that no one but the tenant was to make the affidavit; and that the form, if another person made the affidavit, might be varied. *Mountcashell (Earl) v. O'Neill (Viscount)*, 2 Jur., N. S., 1030; 5 H. L. Ca. 937.

1. By the 70th section of the Conveyancing Act, 1881, the title of the purchaser is protected even where an objection to the order appears on the face of it. *Re Hall Dare's Contract*, 21 L. R., Ch. D., 41; 51 L. J., Ch., 671; 46 L. T. 755; 30 W. R. 556.

See also LANDS CLAUSES ACTS, I. AND OTHER SPECIFIC TITLES.

XI. OPERATION.

1. *On Contracts*, 6621.
2. *Where Observance Optional*, 6622.
3. *Cumulative*, 6622.
4. *On Private Rights and Privileges*, 6622.

1. On Contracts.

2. Distinction between Acts of Parliament denying legal effect to instruments, as the Act for Inrolling Bargains and Sales, and the Registry Act, 7 Anne, c. 20, and Acts declaring instruments void to all intents, as the Annuity and the Ship Registry Acts; notwithstanding the former, the party is bound in equity by the contract. *Davis v. Strathmore (Earl)*, 16 Ves. 428.

3. Where an equal agreement cannot, by reason of a subsequent Act of Parliament, or some other lawful impediment, be performed in the whole; yet the same shall be specifically executed in such part of it as remains lawful. *Bettesworth v. St. Paul's (Dean)*, 1 Bro. P. C. 240.

4. The lessee of slaves entitled to claim a portion of the compensation money awarded under the Act for the Abolition of Slavery in respect of them, notwithstanding a covenant in the lease to refer to arbitration in case of loss by the abridgment of the labour of the slaves, or diminution of the returns of the lessee in consequence of any Act of Parliament

or regulation of the Colonial Legislature, the Act for the Total Abolition of Slavery not being contemplated by the parties, and not therefore within the meaning of the clause. *Gordon v. Bruce*, 2 Moo. P. C. 261.

5. A contract declared by a statute to be illegal is not made good by a subsequent repeal of the statute. *Jaques v. Withey*, 1 H. Bl. 65.

6. Where a corporation, previously to an Act giving them compulsory powers of taking land, entered into an agreement for the resale of certain lands if the Act should (as it did) authorise them to be taken:—Held, that such agreement was invalid, as being an abuse of the powers conferred by Parliament, and as fettering the discretion of the corporation as to the quantity of land necessary for the purposes of the Act. Subsequently an Act was passed by which it was enacted, that nothing therein contained should prejudice the rights under the agreement of the party taking under it, but that all its covenants and provisions should be as applicable to a purchase under that Act as to a purchase under the Act in contemplation of the passing of which the agreement was entered into:—Held, that by this Act the Legislature had recognised the agreement, and had removed the former objection to its validity. *Galloway v. London (Mayor)*, 1 L. R., H. L., 34; 35 L. J., Ch., 477; 11 Jur., N. S., 474; 13 W. R. 701; 12 L. T., N. S., 319.

7. A statute cannot make an act done in connection with a private contract an actionable wrong if it was not actionable independently of the statute. *Ward v. Hobbs*, 27 W. R. 114; 4 L. R., App. Cas., 13; 48 L. J., Q. B., 281; 40 L. T., N. S., 73.

8. Heads of agreement for a lease were sanctioned by majorities of three-fifths at meetings of the two companies without any certificate of the Board of Trade being obtained, and were acted upon for several years, but no formal lease, or agreement for a lease, was ever executed. The heads of agreement were also invalid as providing for payment of the rent out of profits not so applicable:—Held, that the arrangement was not ratified by references to it in subsequent local and personal Acts of Parliament not expressing any direct intention to confirm it. *Kent Coast Railway Co. v. London, Chatham, & Dover Railway Co.*, 3 L. R., Ch., 656; 19 L. T., N. S., 174; 16 W. R. 1027.

9. See as to effect of the subsequent Acts of Parliament not being retrospective, and not altering the effect of a previous bargain and conveyance. *Caledonian Railway Co. v. Sprot*, 2 Macq. H. L. Ca. 449; 2 Jur., N. S., 623.

10. The defendant let the basement of a store to the plaintiff, and covenanted to keep the premises in proper repair and condition, so that the same might be available for storing cartridges and for quiet enjoyment by the plaintiff. Other parts of the store were let to other persons for the storage of gunpowder. Soon afterwards the Explosives Act 1875 was passed, making it illegal to store cartridges and gunpowder in the same store, without a licence, under pain of forfeiture. On the Act coming into operation the defendant removed the cartridges which the plaintiff had deposited in the store, and gave notice that he would

inform the authorities if the plaintiff stored any more:—Held, that there had been a trespass but no eviction by the defendant, and that there had been no breach of covenant by the defendant, the covenant to keep the demised premises in proper condition for storing cartridges only referring to physical condition, and there being no obligation on the defendant to procure a licence to make the storage legal notwithstanding the Act. *Newby v. Sharpe*, 26 W. R. 685; 38 L. T., N. S., 583; 47 L. J., Ch., 617; 8 L. R., Ch. D., 39.

1. By an agreement between the N. Local Board and the C. Local Board, it was agreed that the N. board should make a sewer and allow the sewers of the C. district to drain into it, but the sewage of any other districts or places was not to be permitted by the C. board to pass into their sewers so as to discharge into the sewer to be made by the N. board. Under Acts of Parliament then in existence the owner of premises beyond the limits of a district had power to make a sewer to communicate with the sewers of the district, and by an Act subsequently passed similar powers were given:—Held, that the provisions of the agreement were overruled by the subsequent Act, and that the N. board could not restrain the C. board and the owners of premises beyond their district from making sewers which would discharge into the sewer of the N. district:—Held, also, that the agreement must be taken to have been made subject to the provisions of the law then existing, under which the owners of premises beyond the C. district had similar powers. *Newington Local Board v. Cottingham Local Board*, 12 L. R., Ch. D., 725; 41 L. J., Ch., 226; 40 L. T. 58.

2. Where Observance Optional.

2. Where an Act directs that, under certain circumstances, one or other of two matters shall be done, the party to do the act has the option of doing which act he pleases. *Reg. v. South-Eastern Railway Co.*, 3 H. L. Ca. 471; 1 C. L. R. 932; 17 Jur. 901.

3. A railway company obtained an Act for making a branch within seven years. They gave the usual notices. While their bill was before Parliament, they agreed to purchase the land of a certain owner. It was a term of this contract that it should not be enforced against the company within the seven years, and the purchase money was to be paid when the company, on obtaining their Act, should have "begun to execute the branch." The company obtained their Act, but never executed or began to execute the branch. The seven years expired:—Held, that permissive words in the Act of Parliament were not obligatory. *Edinburgh, Perth, & Dundee Railway Co. v. Philip*, 2 Macq. H. L. Ca. 514; 3 Jur., N. S., 249.

3. Cumulative.

4. An Act giving a summary remedy, though in terms apparently prescribing such remedy, is cumulative, and does not take away a previous right to sue by action. *Sharpe v. Warren*, 6 Price 131.

5. If an Act, by general words, purports to

confer a power on several donees, one of whom possesses the same power more amply at common law, as incident to his estate, the statute will not be intended to apply to him so as by implication to abridge his power; and acts of his, therefore, which the statute would have authorized, will be referred to his common-law right. *Exp. Clayton*, 1 Russ. & M. 369.

4. On Private Rights and Privileges.

6. No inference from a statute designed in favour of the liberty of the subject to the prejudice of that liberty. *Cromley's case*, 2 Swan. 68; Buck 264.

7. Where an equal agreement cannot, by reason of a subsequent Act of Parliament, or some other lawful impediment, be performed in the whole; yet the same shall be specifically executed in such part of it as remains lawful. *Bettesworth v. St. Paul's (Dean)*, 1 Bro. P. C. 240.

8. An affirmative statute, giving a new right, does not of itself and necessarily destroy a previously existing right, created by another statute to which it does not refer; but will do so if it appears to have been the intention of the Legislature that the two rights should not exist together. *O'Flaherty v. M'Dowell*, 6 H. L. Ca. 142.

9. A party interested in the subject matter of a private Act of Parliament will have his rights affected by its provisions, though it may have been introduced and passed without notice duly given to him. *Edinburgh Railway Co. v. Wauchope*, 8 Cl. & F. 710; 3 Rail. Ca. 233.

10. When an Act confers upon a landowner a private right creating a burden upon a railway and restraining the directors from regulating the traffic so as best to accommodate the public it must be construed strictly. *Turner v. London & South Western Railway Co.*, 17 L. R., Eq., 561; 43 L. J., Ch., 430.

11. A statute relating to the corporate property of a city, with the usual clause declaring that it shall be deemed a public Act, does not bind strangers with notice; and the mere probability of a purchaser knowing it, or precautions taken by him in a purchase of corporate property, will not fix him with constructive notice. *Att.-Gen. v. Marrett*, 10 Ir. Eq. R. 167.

12. When persons having, as a class, certain privileges, are by statute subjected to certain liabilities, their privileges being expressly reserved to them, and other persons having the same privileges are afterwards, as a class, subjected to the same liabilities, but nothing is said of their privileges, these privileges still continue to exist. *Newcastle (Duke) v. Morris*, 4 L. R., H. L., 661; 19 W. R. 26; 23 L. T., N. S., 569; 40 L. J., Bky., 4.

13. If a statute professes merely to repeal a former statute of limited operation, and to re-enact its provisions in an amended form, an intention to extend the operation of its provisions to classes of persons not previously subject to them is not to be presumed as a necessary inference, unless the intention to the contrary is clearly shown. *Brown v. McLaughlan*, 4 L. R., P. C., 543; 9 Moo. P. C., N. S., 384; 21 W. R. 277; 42 L. J., P. C., 18.

14. As a rule, existing customs or rights are not to be taken away by mere general words in an Act. But, without words especially abrogating them, they may be abrogated by plain directions to do something which is wholly inconsistent with them. And this may be the case though the Act is a private Act, and though the particular custom may have been confirmed, years before, by a verdict in a court of law. *Green v. Reg.*, 1 L. R., App. Cas., 513; 35 L. T., N. S., 495.

1. If a party *bonâ fide*, and not absurdly, believes that he is acting in pursuance of a statute, he is entitled to the special protection which the Legislature intended for him, although he has done an illegal act. *Spooner v. Juddon*, 6 Moo. P. C. 257; 4 Moo. Ind. App. 353.

2. A statute which refers to the matter of a common law liability and declares to whom it shall attach will not thereby create a new and extended application of that liability, unless it contains words expressly declaring such a purpose. *River Wear Commissioners v. Adamson*, 2 L. R., App. Cas., 743; 37 L. T., N. S., 543.

3. Where an Act of Parliament interferes with private rights and private interests, it ought to receive a strict construction, so far as those rights and interests are concerned. *Hughes v. Chester & Holyhead Railway Co.*, 8 Jur., N. S., 221; 31 L. J., Ch., 97; 10 W. R. 219; 7 L. T., N. S., 197.

4. *Prima facie* the general rule of construing Acts of Parliament is that they are prospective, and you are not to interfere with rights unless you find express words to that effect. *Allhusen v. Brooking*, 26 L. R., Ch. D., 564; 53 L. J., Ch., 520; 51 L. T. 57; 32 W. R. 657.

5. It is a well-settled rule that you are not to construe an Act to be retrospective, so as to alter existing rights, unless you find from the Act itself that such was the intention of the Legislature. *Quilter v. Mapleson*, 9 L. R., Q. B. D., 672; 52 L. J., Q. B., 44; 47 L. T. 562; 31 W. R. 75.

6. As a general principle, Acts of Parliament, especially when they alter the rights of parties, are not to be construed retrospectively, unless otherwise provided. *Hickson v. Darlow*, 52 L. J., Ch., 454; 41 W. R. 362. Affirmed 23 L. R., Ch. D., 690; 48 L. T. 449; 31 W. R. 417.

7. A statute must not be deemed to take away or extinguish the right of a subject, unless it appear by express words or by plain implication, that it was the intention of the Legislature so to do. *Western Counties Railway Co. v. Windsor & Annapolis Railway Co.*, 7 L. R., App. Cas., 188; 51 L. J., P. C., 34; 46 L. T. 351.

8. On those who seek to establish that the Legislature intended to take away the private rights of individuals lies the burden of showing that such an intention appears by express words or necessary implication. *Semble. Metropolitan Asylum District v. Hill*, 6 L. R., App. Cas., 208; 50 L. J., Q. B., 353; 44 L. T. 653; 29 W. R. 617.

Where the terms of a statute are not imperative, but permissive, the fair inference is that the Legislature intended that the discretion, as to the use of the general powers thereby conferred, should be exercised in strict conformity with private rights. *Semble. Ib.*

XII. JURISDICTION OF CHANCERY.

1. *In General*, 6623.
2. *By Injunction where Construction doubtful*, 6623.

1. In General.

9. Chancery cannot relieve against statute. *Cavendish v. Worsley*, Hob. 203.

10. Courts of law and equity can only enforce the rights of parties under Acts of Parliament by the application of their known rules and principles. If they are inadequate to the purpose, the Legislature alone can supply the defect. *Weale v. West Middlesex Waterworks Co.*, 1 Jac. & Walk. 371.

11. Relief cannot be given against a forfeiture created by Act of Parliament; but a court of equity will see that the proceedings working the forfeiture have been regular. *Blennerhassett v. Day*, 2 Ball & B. 128.

12. One Act giving final jurisdiction, and another Act giving jurisdiction subject to appeal, the Court cannot proceed on both Acts. *Re Bedford Charity*, 2 Swan. 518.

2. By Injunction where Construction doubtful.

13. *Semble*, where the construction of an Act of Parliament is doubtful, the Court will send the question to a court of law, in the meantime granting, continuing, or dissolving the injunction (as the case may be) in favour of the party who will sustain the greater injury. *Clarence Railway Co. v. Great North of England, Clarence, & Hartlepool Junction Railway Co.*, 2 Rail. Ca. 763; 6 Jur. 269.

14. The Court will not grant an injunction to restrain parties from proceeding to deal with property, whose right, if it exists, depends upon the construction of a doubtful statute, where the granting of the injunction would for ever deprive them of an opportunity of exercising the right, especially if no irreparable mischief is to be apprehended from allowing them to proceed. Principles of the Court with respect to *ex parte* injunctions. *Att.-Gen. v. Liverpool (Mayor)*, 1 Myl. & C. 171.

15. Where the construction of a particular section of an Act of Parliament is doubtful, the Court will not interfere by interlocutory injunction. *Dover Harbour (Warden and Assistants) v. London, Chatham, & Dover Railway Co.*, 9 W. R. 523.

It is highly inconvenient for the Court to grant an injunction to restrain the performance of works "in any other manner than authorised by the words of an Act of Parliament" unaccompanied by a statement of what, in the opinion of the Court, is the right mode of constructing those works. S. C. 30 L. J., Ch., 474.

16. Where a defendant claimed a right under an Act of Parliament to do the acts sought by a bill to be restrained, a perpetual injunction was granted by a Vice-Chancellor:—Held, on appeal, that it not being clear upon the construction of the Act of Parliament that it did not authorise what the defendant proposed to do, he was entitled to the opinion of a court of common law upon the question. *Cardiff (Mayor) v. Cardiff Waterworks Co.*, 4 De G. & J. 596.

STATUTES STAPLE.

1. Satisfaction ordered to be acknowledged on statute. *Exp. Marlborough (Duke)*, Dick. 340. *Exp. Munday*, id. 373.

Auditâ querelâ on statute staple shall be directed to chancery. Dyer 332, pl. 24.

2. If a statute be acknowledged in the name of A. by a stranger, A. shall have an action of *discheat* against him, but he cannot avoid statute. *Anon.*, Cary 22.

3. A creditor of S., by statute, if S. become bankrupt, and the statute not sued and executed before the bankruptcy, shall come in only *pro ratâ*, though there were lands in fee bound by the statute. *Newland v. —*, 1 P. W. 92.

See also MORTGAGE, VII. i. 3—NOTICE, IX. 2.

STATUTORY POWERS.

— *Sale under*. See POWER, XXI, AND CROSS REFERENCES THERE—SETTLED ESTATES ACTS.

— *Of Trustees*. See TRUSTEE ACTS—TRUSTEE RELIEF ACTS—TRUSTS.

— *Of Companies and Corporations*. See COMPANY—CORPORATION—LAND CLAUSES ACTS—LOCAL GOVERNMENT—NEGLECT—NUISANCE—RAILWAY—WORK AND LABOUR.

STAY OF PROCEEDINGS.

— *Generally*. See PRACTICE (STAY OF PROCEEDINGS)—INJUNCTION.

— *Stay of Advertisement in Gazette*. See BANKRUPTCY, XIII. ii.

— *Stay of Certificate*. See BANKRUPTCY.

— *Proceedings during Appeal*. See PRACTICE (STAY OF PROCEEDINGS).

— *Of Proceedings at Law*. See INJUNCTION. III.

STEWARD.

— *Of Manor*. See COPYHOLD.

See also PRINCIPAL AND AGENT.

STIPULATED DAMAGES.

See MORTGAGE, I. III. 2—PENALTY—TRADE, I. 5.

STOCK AND SHARES.

— *Mortgages of Stock*. See MORTGAGE, II. v.

— *Gift of when Specific*. See LEGACY, II. III.

— *Payment of Stock Legacy*. See LEGACY, XII. v.

— *Investment in by Trustees*. See TRUSTS.

— *When Passing by Will*. See WILL.

— *Gifts of Farming Stock and Stock in Trade*. See WILL.

— *Covenants to Settle*. See SETTLEMENT.

— *Bonus on Shares*. See ACCRETION AND BONUS—SETTLEMENT, IX. v. 3.

— *Duty of Trustee or Executor to Convert or Sell*. See LIFE, ESTATE FOR, VI.—TRUSTS.

— *Liability of Estate of Deceased Person for Calls*. See EXECUTOR AND ADMINISTRATOR.

— *Of Bankrupt*. See BANKRUPTCY, XVII. xxxii.

— *Proof on Contracts to Replace Stock*. See BANKRUPTCY, XXIV. xxxiii.

— *Specific Performance of Agreements respecting*. See SPECIFIC PERFORMANCE, X. xi.

— *Shares in Public Company generally*. See COMPANY—MINES AND MINERALS, V. and VI.

See also FORGERY—STOCK EXCHANGE—USURY.

I. UNCLAIMED STOCK. NATIONAL DEBT COMMISSIONERS, 6625.

II. DIVIDENDS, 6626.

III. TRANSFER, 6626.

1. *In General*, 6627.

II. *Under Power of Attorney*, 6627.

III. *By Bank of England*, 6627.

1. *In General*, 6627.

2. *Transfer by Executor*, 6628.

3. *Liability of Bank*, 6628.

4. *Practice and Evidence*, 6628.

5. *Costs*. See PRACTICE (COSTS).

IV. *Restraining Transfer*, 6629.

V. *Payment and Transfer of Stock, Funds, and Securities into Court*. See PRACTICE (FUNDS AND SECURITIES IN COURT)—PRACTICE (PAYMASTER AND ACCOUNTANT-GENERAL)—PRACTICE (PAYMENT INTO COURT)—PRACTICE (PAYMENT OUT OF COURT).

VI. *Payment of Trust Funds into Court*. See TRUSTEE RELIEF ACTS—TRUSTS.

VII. *Transfer under Trustee Acts*. See TRUSTEE ACTS.

VIII. *Of Stock of Married Woman*. See HUSBAND AND WIFE, XIV. III.

IV. DISTINGUISH, 6630.

V. CHARGING ORDER, 6631.

1. *Jurisdiction of Court of Chancery*, 6631.

II. *When Granted*, 6632.

1. *In General*, 6632.

2. *For Costs*, 6632.

3. *Rule as to Six Months*, 6632.

III. *What Property Charged*, 6632.

IV. *Effect of and Priorities*, 6633.

V. *Practice on Obtaining Order*, 6634.

VI. *Making Order Absolute*, 6635.

VII. *Costs*, 6635.

VIII. *Other Matters*, 6635.

IX. *When Concurrent with Stop Order.* See PRACTICE (STOP ORDER).

X. *By Solicitor on Property Recovered.* See SOLICITOR, XIV.

VI. WHETHER REAL OR PERSONAL ESTATE, 6635.

VII. OTHER MATTERS, 6636.

I. Unclaimed Stock. National Debt Commissioners.

1. Order made for a transfer of stock under the 56 Geo. 3, c. 60, without a reference. *Re Avery*, 1 Russ. & M. 356.

2. Court will not, under 56 Geo. 3, c. 60, order, on petition, a retransfer of unclaimed stock that has been transferred to sinking fund when title is disputed. *Exp. Lavell*, 2 Jac. & Walk. 397.

3. The proper form of proceeding to recover stock and dividends unclaimed for ten years, and carried over to the account of the Commissioners for the Reduction of the National Debt, under the statute 56 Geo. 3, c. 60, is by petition, to be served upon the attorney-general and the commissioners, and not by bill in the first instance; and if there be conflicting claims to the fund, the Court will then give directions for the trial of the rights of the parties between themselves, either by suit or otherwise. *Hunt v. Peacock*, 6 Hare 361; 17 L. J., N. S., Ch., 163; 12 Jur. 154.

To a suit by three out of four residuary legatees to recover three-fourths of a sum of stock which the executors had omitted to get in, and which had been transferred to the Commissioners for the Reduction of the National Debt, under the stat. 56 Geo. 3, c. 60, the legatee entitled to the other fourth part of the stock is a necessary party. *Id.*

4. Unclaimed dividends (which had been transferred to Commissioners for Reduction of National Debt) standing in name of A., who had become bankrupt and died, were claimed by A.'s assignees and B., who alleged A. to have held stock as trustee for B. Stock ordered to be transferred to the accountant-general, and reference directed to Master to ascertain who entitled to stock. *Exp. Gillett, Exp. Bacon*, 3 Madd. 28.

5. On petition, under the stat. 56 Geo. 3, c. 60, for a retransfer of an unclaimed stock that has been transferred to the sinking fund, the costs are in general to be paid out of the stock in question. *Exp. Martin*, Jac. 55.

6. The taxed costs of the attorney-general and the Commissioners for the Reduction of the National Debt, upon application under the 56 Geo. 3, c. 60, are, in the absence of special circumstances, to be paid out of the fund recovered. *Re Holland*, 1 Ph. 379; 13 L. J., N. S., Ch., 167; 8 Jur. 253.

7. A sum (stock) was standing in the name of a testatrix, which her executors overlooked, and the dividends remaining unclaimed, the stock was transferred to the National Debt Commissioners; afterwards one Sanders procured a probate in the name of T. Hunt of a forged will of the testatrix, and obtained a

transfer:—Held, that the probate did not authorise a payment to Sanders, and that a party giving faith to the probate was bound to see that the person claiming under it was a real T. Hunt. Under the above circumstances, a transfer from the aggregate fund in the name of the commissioners was ordered to be made to the real executor. Costs out of the fund. *Exp. Jolliffe*, 8 Beav. 168; 14 L. J., N. S., Ch., 134; 10 Jur. 818.

8. To obtain a retransfer of stock under the provisions of the 56 Geo. 3, c. 60, it is not necessary for the petitioners to show that they are beneficially entitled to it; it is sufficient if they prove their legal claim. *Re Bigge*, 1 Y. & Coll. 245; 4 L. J., N. S., Exch. Eq., 41.

9. When stock has been transferred to the Commissioners for the Reduction of the National Debt, in consequence of the dividends upon it not having been claimed for ten years, it is not a matter of course to order it to be retransferred to a person who subsequently makes out a legal title, upon which a transfer of the stock would have been made to him if the ten years had not elapsed. Thus, where stock had stood in the joint names of two persons, of whom one had survived the other upwards of ten years, but had not, during that time, claimed any dividends, the Court would not, upon the petition of the widow and personal representative of the survivor, order the stock to be transferred into her name, or into the names of the two deceased persons; but directed the Master to inquire who was entitled to the stock, with liberty to state special circumstances. *Exp. Ram*, 3 Myl. & C. 25; 1 Jur. 668.

10. The Court upon petition, under the stat. 56 Geo. 3, c. 60, will direct stock, which has been transferred to the sinking fund, to be retransferred to the petitioners where their title is clear without any reference to the Master to ascertain who is beneficially entitled to the stock. *Exp. Nicholl*, T. & R. 119.

11. Where stock which had been standing in the names of two persons had been transferred to the Commissioners for the Reduction of the National Debt, in consequence of the dividends not having been claimed for ten years, the Court, upon the petition of the administrator of the survivor of the two persons to have the stock transferred to him, directed a reference to inquire who was entitled to the stock. *Re Bishton*, 27 L. J., Ch., 168; 6 W. R. 289.

12. What evidence will be requisite in a petition under the 56 Geo. 3, c. 60, and 8 & 9 Vict., c. 62, *quære*. See *Howard v. Kay*, 4 Drew. 151.

13. Upon a petition for the transfer of stock, under 56 Geo. 3, c. 60, service on the commissioners, and also on the attorney-general, is required by the Act. The Court will presume, at the hearing of the petition, that the attorney-general represents not only the commissioners, and the Crown as *parens patriæ*, but also the Crown in its beneficial capacity. *Lawrence v. Maule*, 4 Drew. 472; 28 L. J., Ch., 682.

Therefore, where the testimony of a witness, since deceased, was received upon a petition under that Act, that testimony is receivable in a subsequent proceeding against an administrator nominated by the Crown, and the Crown by a party to the former proceedings, or his representatives. *Id.*

1. In 1806 S. B., in the names of herself, C. H., and H. B., purchased a sum of 47. per cent. annuities (subsequently reduced to 37. per cent.), the dividends of which were received by S. B. till her death in 1821, and by C. H. till his death in 1838. In consequence of no dividends having been received since 1838, the stock had been transferred into the names of the Commissioners for Reducing the National Debt. On a petition presented by H. B., showing that he was the survivor of the three persons, the Court ordered the stock to be retransferred, and the dividends paid to him, but subject to the payment of the costs of the petition. *Exp. Bouts*, 5 Jur., N. S., 951; 28 L. J., Ch., 648.

2. Where unclaimed stock has for some years been standing in the names of the Commissioners for the Reduction of the National Debt, the Court will not order a transfer to the personal representative of the party entitled without inquiry as to the parties beneficially interested. *Re Malony*, 1 John. & H. 249; 7 Jur., N. S., 42; 3 L. T., N. S., 465; 9 W. R. 68.

3. A fund was carried over, in 1847, to the separate account of B., a sailor, of whom nothing had been heard since 1844, although numerous inquiries had been made. In 1857 it was transferred, together with all accumulations on it, to the Commissioners for the Reduction of the National Debt. In 1860 administration of his estate was duly granted, and the administrator petitioned for payment of the fund and the accumulations to him:—Held, that there was not sufficient evidence of the death of B.; and the petition was ordered to stand over, with liberty to apply. *Woodhouselee (Lord) v. Dalrymple*, 7 Jur., N. S., 615; 30 L. J., Ch., 608; 9 W. R. 564; 4 L. T., N. S., 455.

4. A sum of 600*l.* consols standing in the name of a lady now of unsound mind, and residing abroad, having been transferred to the commissioners in consequence of the dividends having been unclaimed since 1839; the fund ordered, under the 56 Geo. 3, c. 60, to be transferred into the name of the attorney-general in trust in this matter, and the arrears of the dividends ordered to be paid to the "curator" of the lunatic. *Re Sargazurieta*, 1 W. R. 171.

5. A retransfer of stock which has been placed in the names of the Commissioners for the Reduction of the National Debt must be carried out in accordance with the terms of the 8 & 9 Vict., c. 62, and the practice of the Bank of England. *Rushworth v. Walden*, 18 W. R. 204.

6. A legacy to an infant was invested in stock in the names of two executors, and the dividends not having been claimed for ten years, the stock was transferred to the Commissioners for the Reduction of the National Debt. One of the executors having died, the survivor presented a petition for a retransfer of the stock:—The Court, without requiring the concurrence of the beneficiaries, made an order directing the stock to be transferred to him, and that he should thereout pay the costs of the attorney-general and the commissioners. *Re Ackland*, 26 L. T., N. S., 418.

7. When stock has been transferred to the Commissioners for the Reduction of the National Debt by reason of no application for

dividends having been made, a retransfer cannot be obtained, nor can inquiries be directed as to the beneficial title to the stock in the absence of a legal representative of the person in whose name the stock stood at the date of the transfer. *Re Ashmead*, 42 L. J., Ch., 314; 8 L. R., Ch., 113; 28 L. T., N. S., 1; 21 W. R. 65.

When a person establishes a right to the retransfer of stock which has been transferred to the Commissioners for the Reduction of the National Debt, he is only entitled to a retransfer of the stock and the payment of the amount of the dividends, but not to the invested accumulations of such dividends. *Id.*

8. When stock in the name of a trustee holding upon trust for a beneficiary has been transferred to the National Debt Commissioners, the retransfer will be ordered to be made, not to the beneficiary, but to the trustee. *Exp. Jameson*, 19 L. R., Eq., 430; 44 L. J., Ch., 480; 23 W. R. 591.

II. Dividends.

9. The purchaser of a life interest in stock, sold before a Master, is entitled to a dividend becoming due on the day following the sale. *Anson v. Towgood*, 1 Jac. & Walk. 637.

10. Dividends of bank stock being choses in action, cannot be sequestered. *McCarthy v. Gould*, 1 Ball & B. 387.

11. One is bound to transfer 300*l.* stock before the 30th of September, then next; though the stock was much risen, yet the defendant decreed to transfer the 300*l.* stock in specie, and to account for all dividends from the time it ought to have been transferred. *Gardener v. Pullen*, 2 Vern. 394.

12. It was proposed to make an order on the Bank of England to pay half the dividend on stock to the plaintiff, leaving the other half to be received by the defendant. The bank objected that this splitting of the dividend would cause confusion in the public accounts, and the Court yielded to the objection. *Skyner v. Pelichet*, 9 W. R. 191.

III. Transfer.

I. *In General*, 6627.

II. *Under Power of Attorney*, 6627.

III. *By Bank of England*, 6627.

IV. *Restraining Transfer*, 6629.

V. *Payment and Transfer of Stock, Funds, and Securities into Court*. See PRACTICE (FUNDS AND SECURITIES IN COURT)—PRACTICE (PAYMASTER AND ACCOUNTANT-GENERAL)—PRACTICE (PAYMENT INTO COURT)—PRACTICE (PAYMENT OUT OF COURT).

VI. *Payment of Trust Funds into Court*. See TRUSTEE RELIEF ACTS.

VII. *Transfer under Trustee Acts*. See TRUSTEE ACTS.

VIII. *Of Stock of Married Woman*. See HUSBAND AND WIFE, XIV. III.

I. IN GENERAL.

1. Where one person entrusted with sums of money to invest for the benefit of another, has signed an agreement admitting an amount due on investments made, equity will compel their transfer. *Stanton v. Percival*, 5 H. L. Ca. 257.

2. Where an intestate had executed transfers of railway shares and stock to a fictitious person, the Court, on a bill filed by his administrator, declared that the intestate used the fictitious name as another designation of himself, and that the administrator was entitled to transfer the shares and stock, and to receive the dividends. *Arthur v. Midland Railway Co.*; *Arthur v. London & North Western Railway Co.*, 3 Kay & J. 204.

3. On petition for transfer of stock standing in the name of the accountant-general, subject to the order of the Court, under a power in an Act of Parliament, the facts alleged being disproved, the petition is not dismissed, but an order made for the transfer to the persons appearing to be entitled. *Exp. Williams*, 1 Jac. & Walk. 89.

4. The Court will, in certain cases, permit an executor to transfer a principal sum of stock standing in bank to his name, purchased out of the testator's estate a considerable time before, without the dividends which have accrued in the meantime. *Della Cainea v. Hayward*, M'Clel. 16.

5. Where by a decree made thirty years ago, an account had been directed of a testator's personal estate, and of his debts and testamentary expenses, and an injunction had been granted to restrain the bank from permitting the transfer of a small sum of stock, belonging to the testator's estate, but no further proceedings had been had in the suit; the Court, upon the petition of the only party interested, dissolved the injunction, so that an immediate transfer of the stock might be made to the petitioners, without carrying the suit any further. *De Beaufort v. Archdeacon*, 1 Y. & Coll. 549; 5 L. J., N. S., Exch. Bq., 72.

6. An old woman was induced, without consideration, to transfer her stock into the name of another, who, by his answer, swore that there had been a gift of it to him, subject to a trust for the transferee for life.—An injunction to restrain the transfer and receipt of the dividends was continued. *Custance v. Cunningham*, 13 Beav. 363.

7. The Court has not authority under the Contempt Act to order one of the Masters to transfer stock standing in the name of a party committed for contempt in not making the transfer; the transfer being a ministerial act of the bank, and not of the party. *Cutler v. Comd.*, 6 L. J., N. S., Ch., 194.

8. One is bound to transfer 300l. stock before the 30th of September then next; though the stock was much risen, yet the defendant decreed to transfer the 300l. stock in specie, and to account for all dividends from the time it ought to have been transferred. *Gardener v. Pullon*, 2 Vern. 394.

II. UNDER POWER OF ATTORNEY.

9. On the 20th July 1840 M. K., being

seriously ill, duly executed and delivered to her sister, E. K., a power of attorney for transfer of stock into the name of E. K., intending the same to be for her benefit. On the 21st July 1840 she died, and two days subsequently thereto the stock was transferred into the name of E. K., who received the dividends to the period of her death, in September 1853. M. K. died intestate. The power of attorney contained a clause to the effect that if it were not acted on until after the death of the grantor, the transfer made thereunder should, so far as the Bank of England was concerned, be as binding on the personal representatives of the grantor as it would have been if such transfer had been made in her lifetime, unless notice of death had been previously given. Evidence was given of the intention of M. K. to give all her property to her sister, E. K., by her will, after giving legacies, bequeathed all the residue of her money, securities for money, and personal estate to the plaintiff. The next of kin of M. K. contended that the power of attorney, which was revocable in her lifetime, was by her death actually revoked, and that consequently the transfer was made without any valid authority, and the stock formed part of M. K.'s estate. On a bill filed by the residuary legatee of E. K.:—Held, that he was entitled to the stock. *Kiddill v. Farnell*, 3 Jur., N. S., 786; 26 L. J., Ch., 818; 3 Sm. & G. 428.

III. BY BANK OF ENGLAND.

1. *In General*, 6627.
2. *Transfer by Executor*, 6628.
3. *Liability of Bank*, 6628.
4. *Practice and Evidence*, 6628.
5. *Costs*. See PRACTICE (COSTS).

1. In General.

10. Bank having notice of bill, refused to permit transfer of stock, though no injunction; ordered that it should permit transfer on a certain day, unless plaintiff obtained injunction in the meantime. *Ross v. Shorer*, 6 Madd. 1.

11. Where money in the public funds is the subject of a suit to which the bank is made a defendant, the Court will not, on the application of the bank, make any order on the litigating parties to restrain them from proceeding at law against the bank to compel a transfer; but they must file a bill of interpleader. *Birch v. Corbin or Corbyn*, 1 Cox 144; 1 Bro. C. C. 571.

12. Where, by a decree made thirty years ago, an account had been directed of a testator's personal estate, and of his debts and testamentary expenses, and an injunction had been granted to restrain the bank from permitting the transfer of a small sum of stock belonging to the testator's estate, but no further proceedings had been had in the suit; the Court, upon the petition of the only party interested, dissolved the injunction, so that an immediate transfer of the stock might be made to the petitioners, without carrying

the suit any further. *De Beaufort v. Aroh-deacon*, 1 Y. & Coll. 549; 5 L. J., N. S., Exch. Eq., 72.

1. Where money had been invested by a bankrupt under a fictitious name, in order to defeat his creditors, the bank was ordered to erase such name, and insert the name of the bankrupt. *Green v. England (Bank of)*, 3 Y. & Coll. 722.

2. *Semble*, that the Court of Chancery cannot, under any circumstances, direct the Bank of England to transfer stock which has been invested in the names of an infant and other persons. *Bannister v. Rogers*, 2 Jur. 393.

3. Where a trust deed has been executed for the benefit of creditors, and registered, and the deed contains a general assignment of property to the trustees, the trustees are entitled to require from the Bank of England a transfer of bank stock standing in the name of the debtor and belonging to him without the debtor's concurrence in the transfer, or, in case of his death, without the concurrence of his legal personal representative. *Re Price, Exp. England (Bank of)*, 36 L. J., Bky., 24; 15 W. R. 1066; 16 L. T., N. S., 760; 2 L. R., Ch., 662.

Form of order for such transfer. *Id.*

2. Transfer by Executor.

4. Though a residue is specifically given, the bank has no right to restrain the executor from transferring the funds. *England (Bank of) v. Moffat*, 3 Bro. C. C. 260.

5. Bequest of stock to executor for life, remainder to W.; the executor having bought W.'s reversionary interest, and the bank refusing to allow a transfer, the Court ordered a transfer to be made accordingly, but nevertheless gave the bank its costs. *Pearson v. England (Bank of)*, 2 Bro. C. C. 529; 2 Cox 175. But see note there.

6. Specific bequest of stock to the executrix for life, and after her death to her daughter absolutely at twenty-one. The bank resisting a transfer according to an agreement to relinquish the life interest without direction of the Court is entitled to costs. *Austin v. England (Bank of)*, 8 Ves. 522.

7. The Bank of England is not to look beyond the legal title of the trusts of the will, and therefore cannot prevent the executor from selling out or transferring stock into his own name. *England (Bank of) v. Parsons*, 5 Ves. 665.

8. Demurrer allowed to a bill by the Bank of England for an injunction against the action of an executor, claiming a transfer of stock, considering the stock as specifically bequeathed (which was doubtful) to trustees in France, upon special trusts. If the executor cannot maintain the action, upon the nature of the bequest, or as having assented, the injunction is unnecessary; if he can upon his title to the stock, to be applied as the other property, there is no equity. *England (Bank of) v. Lunn*, 15 Ves. 569.

9. Although the bank is bound to allow the transfer to or by the executor of stock specifically bequeathed, if the executor has not assented to the legacy, yet it does not follow

that, if he has assented to the legacy, the bank is bound to transfer it to the legatee. *Humberstone v. Chase*, 2 Y. & Coll. 209.

10. Where a testator possessed of stock in the government fund bequeaths it specifically, the bank cannot refuse to permit the executor to transfer it, he not having assented to the legacy. The bank having, under these circumstances, refused to permit the executor to transfer, a decree was made against it with costs. *Franklin v. England (Bank of)*, 1 Russ. 575; 4 L. J., Ch., 214.

3. Liability of Bank.

11. The bank stands in relation to stock, as a depositary of goods in relation to the goods. The bank, therefore, can only be made responsible for a transfer of stock, after distinct notice given to them of an existing claim upon the stock. *Humberstone v. Chase*, 2 Y. & Coll. 209.

8. made a specific bequest of the dividends of certain stock to W. and his wife for their lives; the principal, after the decease of the survivor of them, to go to such of his children as should attain twenty-one, and, in default of such children, to sink into the residue. Upon the death of the testatrix, the various bequests of the will were appropriated to the respective legatees, and W. regularly received the dividends, the principal stock still standing in the name of the testatrix. Afterwards the wife of W. died, leaving one child by W. In consequence of this event, the executrix of S. colluding with W., and other interested parties, applied to the Bank of England to have part of the stock transferred to the residuary legatee, upon the representation that there was no child of W. The bank consented to the transfer, but took a bond of indemnity, containing recitals, from which it appeared that they had notice of the will, and of the appropriation of the legacies. The stock in question was transferred to the residuary legatee, and ultimately sold out:—Held, that the bank was not liable for the misapplication of the stock. *Id.*

12. Bank stock specifically bequeathed to A. in trust, to pay a bond debt to himself, and as to the rest for B. for life, remainder over; the trustee being also executor, transferred to persons not entitled under the will. The bank is not chargeable. *Hartig v. England (Bank of)*, 3 Ves. 55.

13. Where one of two trustees sold out stock under a forged power of attorney of his co-trustee:—Held, that in equity the bank was liable to replace the fund. *Sloman v. England (Bank of)*, 14 Sim. 475; 14 L. J., N. S., Ch., 226; 9 Jur. 243.

When Bound by Orders under the Trustee Acts.] See TRUSTEE ACTS, II. XIII.

4. Practice and Evidence.

14. Notwithstanding Act of Parliament 39 & 40 Geo. 3, c. 36, Bank of England may still be made party to bill to restrain transfer of stock filed since that Act. Demurrer by bank overruled. *Temple v. England (Bank of)*, 6 Ves. 769.

1. Application under 39 & 40 Geo. 3, c. 36, to restrain bank from making transfer, without making it party, must be upon notice to defendant, and on affidavit, as in cases of waste. *Hammond v. Maundrell*, 6 Ves. 772. n. 8.

Proof of Death and Identity of Stockholder.]

2. The Bank of England is a body having a discretion to exercise for the benefit of the public as well as itself; and is not bound to accept as sufficient evidence of the death of a stockholder, on a joint account in its books, such proof as would satisfy the Court of Chancery. *Prosser v. England (Bank of)*, 41 L. J., Ch., 327; 13 L. R., Eq., 611; 20 W. R. 362; 26 L. T., N. S., 60.

P. died in 1871. At her death new 3 per cent. annuities, and no other fund, was standing in her name and in the names of the applicants jointly in the books of the bank. The burial of P. was entered in the proper parish register. An extract from the entry, together with a statutory declaration of his identity, was forwarded to the bank, in order that they might affix to her name in their books the usual memorandum of death. The bank, however, would not do so, on the ground that "the declaration did not aver that the extract had been compared with the original register for the parish where P. was buried." A motion for an injunction to restrain the bank from continuing the name of P. in their books without the memorandum was refused with costs. *Id.*

IV. RESTRAINING TRANSFER.

3. Injunction not granted to restrain transfer of stock until defendants have appeared, or are in contempt, and upon notice. *Doolittle v. Walton*, Dick. 442.

4. Widow being, as administratrix, possessed of property of intestate consisting of bank stock, motion to restrain her from disposing of it, to pay into court, refused; but, being clearly entitled to her third, ordered to pay two-thirds into court. *Rogers v. Rogers*, 1 Anstr. 174.

5. Injunction granted to restrain transfer, and receiver appointed to preserve property *pendente lite* in Ecclesiastical Court, upon the will. *King v. King*, 6 Ves. 172.

6. Injunction until answer restraining a transfer of stock, standing in the name of a steward, on strong evidence by affidavit, that it was the produce of his Master's property, rents, etc., received for many years with account; refused as to money at his banker's in his name. *Chedworth v. Edwards (Lord)*, 8 Ves. 46.

7. Where a transfer is about to be made of stock to wrong persons through mistake, the Court will not grant an injunction *ex parte* against the defendant to restrain the transfer, unless the plaintiff swears that he believes the defendant will avail himself of the error, and will refuse to make a retransfer. *Arkwright v. Grylles*, 13 L. J., N. S., Ch., 303.

8. A bankrupt, after the issuing of the commission and appointment of assignees, transferred French stock, his property, to his wife, who afterwards transferred it to her three

sisters. Under a settlement, the wife had a power of appointment over a sum of money in the funds in England, which she exercised by will in favour of one of the sisters, and died in her husband's lifetime: the sister, who resided in France, took out administration with the will annexed: an injunction was granted to restrain the trustees, in whom this fund was vested, from transferring it, on the ground that if the French stock should be proved to be the property of the bankrupt, the assignees would have a claim upon the assets of the wife. *Stead v. Clay*, 4 Russ. 550.

The wife of a bankrupt, having separate property, died in France in possession of other property there, which was claimed by the creditors as belonging to the husband; she by will disposed of all her separate estate, except 1,500*l.* consols, which, in default of appointment, was held in trust for her executors or administrators, and appointed a lady resident in France her executrix. Injunction granted at the suit of the assignees to restrain the transfer of the consols, but refused as to the rest of the separate estate. *S. C.* 1 Sim. 294.

Under the 5 & 6 Vict., c. 5.] 9. *Semble*, that the 4th and 5th sections of the stat. 5 Vict., c. 5 relate to different subjects. *Exp. Field*, 1 Y. & Coll. C. C. 1; 5 Jur. 986.

To authorise an application to the Court, under the former section, it must be founded on an affidavit expressed in positive terms. *Id.*

10. *Semble*, that the remedies given by the 4th and 5th sections of the 5 Vict., c. 5, are cumulative; and consequently, that a party who has sued out a *distringas* under the 5th section is not thereby precluded from afterwards applying for an injunction under the 4th section. *Exp. Hertford (Marquis)*, 1 Ph. 129; 1 Hare 584; 11 L. J., N. S., Ch., 317.

The order which under the Act 5 Vict., c. 5, s. 4 may be issued, upon motion or petition without bill filed, to restrain the bank or any public company from permitting the transfer of stock or shares, or the payment of dividends, cannot be continued after time has been afforded for filing a bill, and no bill has been filed. *Id.*

11. An order made under 5 Vict., c. 5, s. 4, to restrain the transfer of stock, continues in force until discharged, after a bill has been filed for the same purpose; and on a motion being afterwards made to discharge it, the Court will allow affidavits to be read as well in opposition to the answer if then filed, as in support of it. *Re Hertford (Marquis)*, 1 Ph. 203. See 1 Hare 584; 11 L. J., N. S., Ch., 317; 8 Jur. 71.

12. The remedies given by the 4th and 5th sections of 5 Vict., c. 5, are in substitution for the writ of *distringas* under the former practice in the Exchequer; and therefore, where a party had put a *distringas* upon a sum of stock before the passing of that Act, and that *distringas* had been removed upon the usual notice:—Held, that it was not competent to him, after the passing of the Act, to apply for an injunction under the 4th section of it. *Exp. Amyot*, 1 Ph. 130. n.; 6 Jur. 137.

13. The stat. 5 Vict., c. 5, s. 4 has conferred

on the Court no new summary jurisdiction with respect to granting injunctions; but the remedy provided thereby was intended only for limited and interim purposes, viz., to protect stock until the party having a claim to it can have time to assert that claim by bill. *Re Suisse*, 6 Jur. 654.

H. obtained a restraining order under the above statute on the 30th May, but he neglected to file a bill. Upon motion made the 30th June to discharge the order:—Held, first, that the order could not stand without a bill filed; and, secondly, that although the Court had power to continue the order until a bill should be filed, yet that this was not, by reason of H.'s delay in filing a bill, a proper case for the exercise of such power. *Ib.*

A party having issued a distringas under under the 5th section of 5 Vict., c. 5, without filing a bill in due time afterwards, in consequence of which the distringas is taken off by the bank, is not thereby precluded from making an application to the Court under the 4th section of the Act. *Ib.*

The executors of A. indicted S. for embezzling in A.'s lifetime certain moneys belonging to A., with which S. had purchased stock in his own name. H., who was A.'s residuary legatee, obtained an order under the above statute restraining the transfer of the stock, which, upon the application of B., pending his trial, was discharged; but upon appeal:—Held, that H. was entitled to the order. *Ib.*

1. The Court will not accede as of course to an application, by a creditor, under s. 4 of 5 Vict., c. 5, to restrain the transfer of shares belonging to his debtor, but will require special grounds in support thereof. *Re East of England Bank*, 6 N. R. 81.

2. The Court has jurisdiction, under 5 Vict., c. 5, s. 4, to restrain the Commissioners for the Reduction of the National Debt from paying or transferring an annuity payable by them. *Watts v. Watts*, 40 L. J., Ch., 388; 24 L. T., N. S., 120.

3. Upon motion under 5 Vict., c. 5, s. 4, *ex parte*, unsupported by any affidavit of special facts, and made by the mortgagees of reversionary interests in the stock or shares of certain railway companies, the Court restrained such companies until further order from permitting any transfer of such stock or shares. *Re Locke*, 18 W. R. 275.

IV. Distringas.

4. Distringas obtained in Exchequer, by proceedings in the Court of Chancery, discharged with costs. *Williams v. England (Bank of)*, 2 Y. & Coll. 265; 6 L. J., N. S., Exch. Eq., 20.

5. Court will not entertain motion for directing Bank of England to remove a distringas from stock belonging to partnership firm on application of defendant, the surviving partner, even after his answer has been filed by defendant, denying charges in bill; but refused it with costs. *Toulmin v. Copeland*, 7 Price 631.

Court will not interfere to require bank to transfer money which they withhold, on having been served with process (while in

force), on bill filed by representative of deceased partner against survivors of the firm, even for the purpose of paying the partnership debts. S. C. 6 Price 405.

6. A distringas was issued against the Bank of England, and served on the proper officer, with a notice that it was intended to prevent the transfer of the sum of stock mentioned in the notice. On motion to discharge the distringas, on the ground that no bill had been filed, it appearing from an affidavit that the distringas had been issued with a view to subsequently filing a bill in the Court of Chancery, and not in this Court:—Held, that the writ had been issued for a purpose which the Court ought not to sanction, and the distringas was discharged with costs. *Fellones v. England (Bank of)*, Younge 385.

7. A party, who had purchased a reversionary share in certain stock, caused a distringas to be laid upon it, and afterwards filed a bill in Chancery to have his interest in the stock ascertained, alleging conflicting claims. The distringas not having been followed by any suit in this Court, was discharged with costs. *Argent v. Scotland (Bank of)*, 1 Y. & Coll. 557.

8. Where a distringas was issued, and served upon the secretary of the Bank of England, accompanied by a notice that it was for the purpose of preventing the transfer and payment of stock and dividends, standing in the name of W. W., but no bill has been filed against the bank or W. W., the distringas was, under the circumstances of the case, set aside with costs. *Scott v. England (Bank of)*, 2 Y. & J. 327.

9. A, for valuable consideration, takes a security upon a reversionary sum of stock, at a time when, by reason of the death of the person in whose name the stock stood, without legal representatives, no notice of the incumbrance could be given to the trustee of the fund. A., however, does not attempt by distringas or otherwise to perfect the security. Afterwards B., for valuable consideration and without notice of A.'s incumbrance, takes a security upon the same fund, and at the same time serves a writ of distringas on the Bank of England. B.'s security has priority over that of A. *Etty v. Bridges*, 2 Y. & Coll. C. C. 486; 12 L. J., N. S., Ch., 474; 7 Jur. 936.

10. Some time previously to the passing of the 5 Vict., c. 5, whereby the equity jurisdiction of the Court of Exchequer was transferred to the Court of Chancery, a party sued out and lodged at the Bank of England a writ of distringas, in consequence whereof a restraint was put on the transfer of, and payment of the dividends upon, certain sums of stock standing in the bank books in the name of a deceased testator; but no bill was filed by such party for an injunction to stay the transfer. After the Act had come into operation, the same party, upon notice from the bank, presented a petition to the Lord Chancellor, under the 4th section of the Act, and obtained an injunction, *ex parte*, restraining the transfer and payment of the stock and dividends. The executrix thereupon moved to discharge the order granting the injunction. Motion granted, and held, that by the 4th and 5th sections of the Act, two concurrent remedies were substituted in the Court of

Chancery for the single remedy by distringas before existing in the Court of Exchequer; but that it was not intended by the Act to place a party in a better situation than he would have been in if the Act had not passed, in which case, if he had sued out a second writ of distringas, the bank would have paid no attention to it. Order discharged with costs, the petitioner, when obtaining it, not having brought all the circumstances of the case under the consideration of the Court. *Exp. Amyot*, 1 Ph. 130; 6 Jur. 137.

1. Distringas discharged with costs where made applicable by the person who obtained the writ to stock which was not the particular stock mentioned in the affidavit on which the writ had been granted. *Re Cross*, 1 Dr. & Sm. 580; 8 Jur., N. S., 5; 31 L. J., Ch., 255; 7 L. T., N. S., 149.

C. obtained a distringas, accompanied by an affidavit that he was personally interested in a particular stock standing in the name of a person described, and applied the writ to another stock standing in the name of another person, the practice of the Bank of England being not to call for the production of the affidavit. C. became bankrupt, and a motion was made to discharge the writ:—Held, that the writ must be discharged with costs without serving the assignees. S. C. 10 W. R. 53.

2. The effect of a distringas is similar to that of notice to a trustee. *Wilkins v. Sidley*, 9 Jur., N. S., 888; 11 W. R. 897; 8 L. T., N. S., 760; 4 Giff. 442.

A trustee of stock having also a beneficial interest in an undivided moiety of the fund, assigned his moiety, by way of mortgage; and the mortgagee caused a distringas to be placed on a moiety of the fund. Afterwards, the trustee fraudulently sold out the other moiety, and absconded:—Held, that the moiety upon which the distringas had been placed, being at the time of the assignment subject to the equitable rights of the plaintiff, the *cestui que trust* was not relieved from such equity by the application of the distringas; and that the plaintiff was entitled to the same as against the defendant, the mortgagee; but considering that it was by his diligence that the fund was preserved, the mortgagee was not compelled to pay the costs of the suit. *Ib.*

Injunction. Notice in lieu of Distringas under Judicature Act. 3. A notice having been served on the Bank of England under Rules 4 and 7 of Order XLVI, to prevent the transfer of stock or the payment of dividends thereon without notice to the persons serving the notice, the bank gave notice to them that an application had been made to the bank to allow the transfer of the stock and to pay the dividends thereon, and that they should comply with the application, unless an order of the Court should be served on them within eight days. A motion was then made *ex parte* for an order to restrain the bank from permitting the transfer or paying the dividends:—Held, that the proper course was to grant an interim injunction over the next regular motion day, and that notice of the order must be served on the legal owners of the stock. *Re Blakley's Trusts*, 23 L. R., Ch. D., 549; 48 L. T. 776.

V. Charging Order.

- I. *Jurisdiction of Court of Chancery*, 6631.
- II. *When Granted*, 6632.
- III. *What Property Charged*, 6632.
- IV. *Effect of and Priorities*, 6633.
- V. *Practice on Obtaining Order*, 6634.
- VI. *Making Order Absolute*, 6635.
- VII. *Costs*, 6635.
- VIII. *Other Matters*, 6635.
- IX. *When Concurrent with Stop Order*. See PRACTICE (STOP ORDER).
- X. *By Solicitor on Property Recovered*. See SOLICITOR, XIV.

I. JURISDICTION OF COURT OF CHANCERY.

4. A judge of the Court of Chancery is not a judge of one of the Superior Courts of Westminster, within the meaning of the 14th section of the 1 & 2 Vict., c. 110. *Miles v. Presland*, 4 Myl. & C. 431. Affirming 2 Beav. 300.

A court of equity has no jurisdiction, under the 1 & 2 Vict., c. 110, s. 14, to order moneys invested in the name of the accountant-general to stand charged with a judgment debt recovered at law against the party entitled to such funds. S. C. 2 Beav. 300.

5. Stock standing in the accountant-general's name to the separate account of a party against whom a judgment debt has been recovered, may be charged under 1 & 2 Vict., c. 110, with the debt, but the charging order must be made not by a judge in equity, but by a judge at common law, and although such order in terms charges the stock it affects only the interest of the debtor in the stock, and therefore does not interfere with the rights of prior incumbrances. *Hulkes v. Day*, 10 Sim. 41; 10 L. J., N. S., Ch., 21; 4 Jur. 1129.

Although courts of equity have not jurisdiction, under the statutes 1 & 2 Vict., c. 100, and 3 & 4 Vict., c. 82, to make an order to charge the stock standing in the accountant-general's name to the account of a party against whom a judgment debt has been recovered; yet they will, in the exercise of an ancillary jurisdiction, grant a stop order to prevent the stock being transferred before the proper charging order can be made by the common law judge. *Ib.*

6. An application for a charging order under 1 & 2 Vict., c. 110, and 3 & 4 Vict., c. 82, upon a fund in court need not be made to the judge in whose court the suit or matter is, in which the fund is standing. Nor is it material that the order is entitled as in a revived cause, although made before the order of revivor on the defendant. *Hastings (Marquis) v. Beavan*, 4 De G. F. & J. 316; 10 W. R. 206; 5 L. T., N. S., 734; 31 L. J., Ch., 546.

7. A judgment at law being given to be dealt with by a court of equity:—Held, that a charging order ought not to be obtained on such judgment without the leave of the Court of Equity. *Spence v. Briscoe*, 26 Beav. 599.

8. When a judgment has been recovered against a person interested in a fund of the Chancery division, a stop order will be granted to the judgment creditor on such fund, without a preliminary charging order having been

obtained in the division of the High Court in which the judgment was recovered. *Hopewell v. Barnes*, 24 W. R. 629; 33 L. T., N. S., 777.

1. Upon a petition by a solicitor for a charging order on property preserved in an action marked "Chancery Division, Liverpool District Registry, Hall, V.-Ch.," which had been tried by a judge and jury at Liverpool:—Held, that the judge who had dealt with the substantial part of the case was the only judge who could deal with the application. *Onen v. Henshaw*, 7 L. R., Ch. D., 385; 47 L. J., Ch., 267; 26 W. R. 188.

II. WHEN GRANTED.

1. *In General*, 6632.
2. *For Costs*, 6632.
3. *Rule as to Six Months*, 6633.

1. In General.

2. A plaintiff obtained a decree directing that an account should be taken against the defendant of what was due from him, and that he should pay what was found due. The accounts were taken, and a certificate drawn up, finding a certain amount due from him; but before the certificate was confirmed, the plaintiff obtained a charging order against a sum of money directed to be paid out of court to the defendant in another suit:—Held, that this was not such a decree as was equivalent to a judgment at law under 1 & 2 Vict., c. 110, s. 18, and the charging order was ordered to be discharged. *Chadwick v. Holt*, 4 W. R. 791; 2 Jur., N. S., 918; 26 L. J., Ch., 76.

3. A bill to charge lands under the 1 & 2 Vict., c. 110, ss. 13, 18, with sums payable by virtue of a rule of court of common law held demurrable, on the ground that the party filing the bill was not the person to whom the money was payable under the rule, but only the person for whose benefit such money was payable. *Crowther v. Crowther*, 2 Jur., N. S., 274; 25 L. J., Ch., 511.

2. For Costs.

4. Courts of equity will carry into execution their orders and decrees for costs by charging the government stock of the debtor, under the provisions of the stat. 1 & 2 Vict., c. 110; and for that purpose it is not necessary to give further proof of application for payment than is contained in the notice of the intended application to make the order for the charge absolute. *Blake v. White*, 3 Y. & Coll. 434; 3 Jur. 749.

5. Parties interested in a fund standing in the name of the accountant-general in one suit were ordered to pay the defendants in another suit their costs. These being taxed, and a minute having been left with the senior Master of the Common Pleas, the Court on petition made a charging order on the fund for such costs, and granted an interim stop order. *Wells v. Gibbs*, 22 Beav. 204.

6. Under the 1 & 2 Vict., c. 110, s. 18, an order for payment of costs operates only as against purchasers, mortgagees, and creditors

from the registration of the certificate of taxation. *Hargrave v. Hargrave*, 23 Beav. 484.

7. When a plaintiff's bill has been dismissed with costs, an order *nisi* charging railway shares belonging to the plaintiff with the amount of the defendant's costs, when taxed, will be made before taxation upon the application of the defendant. *Burns v. Irving*, 3 L. R., Ch. D., 291; 25 W. R. 66; 34 L. T., N. S., 752; 46 L. J., Ch., 423.

8. A decree declaring a plaintiff entitled to one-fifth of the proceeds of sale of chattels, and directing an account to be taken of what was due, and payment of such amount together with the costs of the action to him, does not entitle him to a charging order under 1 & 2 Vict., c. 110, s. 18, or to a stop order against funds in court in another suit belonging to the same defendant. *Widgery v. Tepper*, *Hall v. Tepper*, 37 L. T., N. S., 297; 25 W. R. 872; 6 L. R., Ch. D., 364.

9. A Master's allocatur, and *a fortiori* a mere rule for taxation of costs, is not an order whereby money is payable, so as to operate as a judgment within 1 & 2 Vict., c. 113, s. 18. *Shaw v. Neale*, 6 W. R. 635; 6 H. L. Ca. 581; 27 L. J., Ch., 444; 4 Jur., N. S., 695.

3. Rule as to Six Months.

10. *Seem*, a judgment creditor, who has obtained an order charging the interest of his debtor in government stock, may, in a proper case, sustain a suit for the intermediate protection of the interest which he has so acquired, notwithstanding the six months prescribed by the stat. 1 & 2 Vict., c. 110, s. 14, have not expired. *Bristed v. Wilkins*, 3 Hare 235.

11. The proviso contained in the 14th section of the Act 1 & 2 Vict., c. 110, that no proceeding shall be taken to have the benefit of the charge created under that section until after the expiration of six calendar months from the date of the charging order, does not prevent the creditor from obtaining a stop order to restrain the debtor from receiving dividends of stock accruing within the six months. *Watts v. Jefferyes*, 3 Macn. & G. 372; 20 L. J., N. S., Ch., 659; 15 Jur. 783.

The correct construction of the proviso is, that although no steps can be taken to enforce immediate payment of the debt by realising the security, yet that the judgment creditor may in the meantime, by force of the order, prevent the security given him by the statute from being defeated or diminished *pro tanto*, by stopping payment to the debtor of part of his security. *Id.*

12. Where a charging order had been obtained by a judgment creditor, upon funds reported to his debtor in the cause, the Court will, after the expiration of the six months from the date of the order, direct the funds to be transferred to the creditor upon motion, without a bill being filed. *Burke v. Burke*, 7 Ir. Eq. R. 174.

III. WHAT PROPERTY CHARGED.

13. A banking co-partnership, which made returns to the Stamp Office pursuant to 7 Geo. 4, c. 46:—Held, to be a public company not

incorporated within the meaning of 1 & 2 Vict., c. 110, s. 14. *Macintyre v. Connell*, 1 Sim., N. S., 225; 20 L. J., N. S., Ch., 284; 15 Jur. 529.

1. As to the possibility of charging, under the 1 & 2 Vict., c. 110, a part only of a sum of stock standing in the name of a debtor. See *Stanley v. Bond*, 8 Beav. 50; 14 L. J., N. S., Ch., 51.

2. Stock of a company standing in the name of a trustee is not affected by a charging order under 1 & 2 Vict., c. 110, s. 14, obtained by a judgment creditor of the trustee in respect of the trustee's own debt. *Re Blakely Ordnance Co.*, 25 W. R. 111; 35 L. T., N. S., 617.

C. transferred 1,000*l.* stock of a company into the name of his son without any consideration, and merely to qualify him as a director of that company; to be transferred to C. on request; which was ultimately done. C. received the dividends on the stock. The son was a contributor to the B. company, to whom he owed 3,000*l.* The official liquidator of that company gave notice to the company of his intention to move for an injunction to restrain the son as owner of the stock, and that company from dealing with it. Thereupon the official liquidator of the B. company was informed of the true facts as to the ownership of the stock. The official liquidator of the B. company immediately afterwards obtained a charging order against the 1,000*l.* stock in the company:—Held, that that order must be discharged, not only on the ground of the notice, but also because the stock was not standing in the name of the son of C. "in his own right." *S. C. nom. Re Blakely Ordnance Co., Coate's case*, 46 L. J., Ch., 306.

[*Of Married Woman.*] 3. When a married woman was entitled, during the joint lives of herself and her husband, to the interest of certain stock, to her sole and separate use, without power of anticipation, and there were certain limitations over as to the principal, in favour of herself and her husband, the Court, upon petition by a judgment creditor, made an order, under 3 & 4 Vict., c. 105, charging the judgment upon the stock, without prejudice to the wife's right of receiving the interest during her coverture. *Cartor v. Mahon*, Fl. & K. 342; 4 Ir. Eq. R. 305.

4. A wife having property settled to her separate use, with restraint upon anticipation, concurred in a fraudulent mortgage of such property, concealing the restraint upon anticipation. The mortgagee obtained a judgment against her for the amount left, and a charging order to charge her next accruing dividend:—Held, that such charging order must be discharged: for in no case and by no device could the restraint upon anticipation be evaded. *Stanley v. Stanley*, 7 L. R., Ch. D., 589; 47 L. J., Ch., 256; 37 L. T., N. S., 777; 26 W. R. 310.

The mortgagee, having discovered the fraud, obtained from the married woman a warrant of attorney, entered up judgment thereon, and afterwards obtained a charging order on a dividend due to her the very day it accrued due:—Held, that this was a mere device to make her future income a security for the mortgage debt, and an attempt to do in-

directly what could not be done directly; and that therefore the charging order must be discharged. *Id.*

IV. EFFECT OF AND PRIORITIES.

5. An order under the 1 & 2 Vict., c. 110, and 3 & 4 Vict., c. 82, charging the stock standing in the name of the accountant-general, affects only the interest of the debtor, and does not interfere with the rights of prior incumbrancers. *Hulkes v. Day*, 10 Sim. 41; 10 L. J., N. S., Ch., 21; 4 Jur. 1125.

6. If a person beneficially entitled to stock standing in the names of trustees has a judgment recovered against him, and the judgment creditor obtains a charging order under the 1 & 2 Vict., c. 110, s. 14, a mortgagee of the fund claiming under a mortgage (whereof no notice was given to the trustee) made subsequently to the judgment, but before the charging order, has priority over the judgment creditor. *Scott v. Hastings (Lord)*, 4 Kay & J. 633; 5 Jur., N. S., 450; 6 W. R. 862.

A fortiori, such mortgagee has priority when the order is only an order *nisi* under the 1 & 2 Vict., c. 110, s. 14. *Id.*

In such a case, the rule in *Dearle v. Hall* (3 Russ. 1), does not apply in favour of the judgment creditor. *Id.*

7. The 14th section of the 1 & 2 Vict., c. 110, gives to a charging order absolute upon stock held in trust for the judgment debtor, the same effect as a charge under his hand; and the object of the 15th section is only to prevent any new charge being effected after the charging order *nisi* has been obtained, and before it is made absolute. When the charging order is made absolute, the 15th section has performed its functions. But if the judgment debtor had assigned the stock before the date of the order *nisi* the assign might obtain a stop order before the order *nisi* was made absolute, notwithstanding the 15th section; for the real charge under a charging order is only acquired when it is made absolute. *Warburton v. Hill, Stant v. Wickens*, 1 Kay 470; 23 L. J., Ch., 633.

If a person, having notice of a previous assignment of a trust fund, take an assignment to himself of the same fund, he cannot obtain priority over the previous assign, whether the trustee had notice or not; and therefore, if a judgment creditor, at the time of making his charging order absolute, have similar notice, he is likewise unable to obtain priority. *Id.*

Where the fund is standing in the name of the accountant-general of the Court of Chancery, the practice of the office is to enter a memorandum of every charging order left at the office; but such notice is not treated as any restraint nor as equivalent to a stop order. No entry is made of the notice of any other assignment. The accountant-general is not a trustee of the funds committed to him, but merely the agent of the Court. The trustees who have paid the fund into court, are the trustees of it until the Court has in some way dealt with it, and then the Court becomes the trustee. Therefore, notice to the accountant-general of an assignment of funds in his hands is of no avail against a stop order afterwards

obtained by a subsequent purchaser without notice. *Ib.*

A. was entitled to a portion of a fund standing in the name of the accountant-general. B., a judgment creditor of A., had obtained an assignment from him of his interest in this fund. Subsequently to this assignment C., also a creditor of A., obtained a judge's charging order, which was made absolute. B. obtained a stop order subsequently to C.'s charging order being made absolute, and subsequently to B.'s stop order C. obtained a stop order also:—Held, upon petition, that B. was entitled to an order for payment to him of the fund, the effect of the charging order being merely to restrain the transfer during the interval between its being obtained *visi* and made absolute, and not giving priority over the assignment when made absolute, the prior stop order having been obtained by such assignee. S. C. 2 W. R. 365; 2 Eq. Rep. 441.

1. Pending a suit for the administration of a testator's estate, in which a decree had been made directing preliminary inquiries, a *cestui que trust* of a share of the proceeds of the residuary realty and personally assigned his share by way of security, and the assignee immediately gave notice to the trustees of the will. Afterwards the real estates were sold, and the proceeds paid into court to the credit of the cause generally. A creditor who had entered up a judgment against the *cestui que trust* subsequently to the assignment, obtained an order charging the fund in court, with respect to which the assignee had not obtained a stop order, or taken any other proceeding:—Held, that the judgment creditor did not thereby acquire a priority over him. *Brearelliff v. Dorington*, 4 De G. & Sm. 122; 14 Jur. 1101; 19 L. J., Ch., 331.

2. A charging order under 1 & 2 Vict., c. 110, ss. 14, 15, has no greater effect than an instrument of charge executed by the judgment debtor would have had. *Re Onslow*, 20 L. R., Eq., 677; 44 L. J., Ch., 628.

Therefore, where D., after the passing of the Infants Relief Act 1874, obtained judgment by default against O. for a debt which was in fact for money lent by him to O. during his infancy, and D. subsequently obtained a charging order upon a fund in court belonging to O.:—Held, that inasmuch as the debt on which the judgment and charging order were founded was void, the charging order was inoperative. *Ib.*

3. The order made by a court of law under ss. 132, 133, 134, and 135 of the Common Law Procedure Amendment Act (Ir.) 1863, to attach stock standing to the credit of a debtor in a cause in the Court of Chancery, does not *per se* operate as a seizure or a charge on the stock. *Semble*, the lodging of such an order with the accountant-general without obtaining an order of the Court of Chancery does not charge the stock. *Semble* also, that a conditional order does not attach the fund under the Common Law Procedure Act. A conditional order to charge funds in Chancery was obtained under the Common Law Procedure Act on the 30th of June, made absolute on the 8th of August, and lodged with the accountant-general on the 14th of November. A conditional order to charge the same fund was

obtained in Chancery by another creditor, under 3 & 4 Vict., c. 105, on the 1st of August, lodged with the accountant-general on the 7th of August, and made absolute on the 13th of November:—Held, that the creditor who had obtained the order in Chancery was entitled to the fund in priority to the other creditor. *French v. Balfre*, 6 Ir. Ch. R. 63.

V. PRACTICE ON OBTAINING ORDER.

4. A judgment creditor had obtained a judge's order under the 1 & 2 Vict., c. 110, s. 14, charging the annuity payable to his debtor out of a fund in a cause in this Court. The judgment creditor is entitled to a decree, upon a claim against the debtor, to charge the annuity with the judgment debt; but in order to make these charges effectual, a petition (which is of course) to be presented in the cause is necessary; and the claim was ordered to stand over, and ultimately one order was made on the claim and petition. *Reece v. Taylor*, 5 De G. & Sm. 480; 21 L. J., Ch., 463.

5. The 23rd and 24th sections of 3 & 4 Vict., c. 105, are to be read in connection, and therefore the charging order under the statute is first a conditional order *ex parte* to be made absolute, which last is the order contemplated by the 23rd section. *Re Dunscombe*, 9 Ir. Eq. R. 4.

6. A charging order made *ex parte* under 3 & 4 Vict., c. 105, s. 24 is conditional only, and the Court has power to direct service of it out of the jurisdiction. *Re Gethin, Ex p. Nixon*, 10 Ir. R., Eq., 512.

7. To obtain a charging order under the 3 & 4 Vict., c. 105, s. 23, it is not necessary that the judgment should be revived. Therefore the Court granted an order, on the petition of husband and wife on a judgment obtained by the wife *dum sola*, without its having been revived. *Irwin v. Nesbit*, 13 Ir. Eq. R. 125.

8. An application for a charging order needs not to be entitled in the particular matter to the credit of which the fund is standing, the order being valid if entitled in the matter of the acts which confer the jurisdiction. *Hastings (Marquis) v. Beavan*, 10 W. R. 206; 5 L. T. N. S., 734; 4 De G. F. & J. 316; 31 L. J., Ch., 546.

Such an order properly entitled will not be rendered void by being also entitled in a matter in which it was not necessary to entitle it at all. *Ib.*

Time.] 9. Upon judgment in an action declaring that the defendant is liable to pay to the plaintiff a certain sum, and decreeing payment to be made on or before that day three months, the plaintiff is at once entitled, under 1 & 2 Vict., c. 110, s. 14, to obtain a charging order upon stock and shares standing in the name of the defendant. *Bagnall v. Carlton*, 6 L. R., Ch. D., 130; 26 W. R. 71; 36 L. T. N. S., 730; 47 L. J., Ch., 51.

Service of Order.] 10. Service of a charging order *visi* upon the solicitor, and upon the

brother, and at the last address of the person sought to be charged, is sufficient without an order for substituted service. *Re Puragon and Spero Mining Co.*, 10 W. R. 76; 8 Jur., N. S., 11.

VI. MAKING ORDER ABSOLUTE.

1. After the order obtained by a judgment creditor, for charging the interest of his debtor in government stock, standing in the name of trustees, has been made absolute under the stat. 1 & 2 Vict., c. 110, s. 15, the Bank of England is still bound to pay the dividends to the trustees, being the legal hands to receive them; and the trustees are to apply the dividends according to the equitable interest of the parties. *Bristed v. Wilkins*, 3 Hare 235.

2. A creditor recovered judgment against his debtor and issued a *fi. fa.* Shortly afterwards the debtor died. The creditor entered a suggestion on the record, entitling him to have execution against the executrix, and obtained a charging order *nisi* upon shares belonging to the debtor. After the order *nisi* had been obtained, but on the same day, a decree was made for administration of the debtor's estate. The order *nisi* not having been made absolute, the plaintiff in the administration suit applied for an injunction to restrain further proceedings by the judgment creditor:—Held, that an injunction ought not to be granted. *Haly v. Barry*, 3 L. R., Ch., 452; 37 L. J., Ch., 723; 16 W. R. 654; 18 L. T., N. S., 491.

A charging order, when made absolute, operates from the making of the order *nisi*. *Id.*

VII. COSTS.

3. After decree taken *pro confesso* in the cause against the defendant, an order was made in March 1844, on petition in the cause, and in the matter of the Act of Parliament, 1 & 2 Vict., c. 110, that a large sum of stock, standing in the defendant's name, should stand charged with payment of a sum of 299*l.* (being the plaintiff's costs of the suit), and interest thereon, unless the defendant (who was out of the jurisdiction of the Court) should show good cause to the contrary, on the 2nd November then next; and the Bank of England was in the meantime restrained from permitting the transfer of the stock:—Held, that the defendant must pay the plaintiff his costs of the order, charging the stock with the sum of 299*l.* and interest, and of the subsequent application to show cause against the order being made absolute, notwithstanding the 299*l.* and interest had been paid previously to the 2nd November. *Stanley v. Bond*, 6 Beav. 423; 14 L. J., N. S., Ch., 51.

4. The costs of obtaining the charging order on stock, under 1 & 2 Vict., c. 110, where the amount with interest was paid before the order made absolute, as well as of a motion to try the defendant's liability for costs of obtaining the order, which failed, ordered to be paid by the defendant. *Stanley v. Bond*, 8 Beav. 50; 14 L. J., N. S., Ch., 51.

VIII. OTHER MATTERS.

5. The Court refused, on petition, to order a fund in court charged, under 1 & 2 Vict., c. 110, s. 14, with a judgment by a party to a suit, and to which the judgment debtor was entitled, to be paid over without his consent. *Whitfield v. Prickett*, 13 Sim. 259; 12 L. J., N. S. Ch., 84.

6. Property was settled on A. until bankruptcy, or until, by any act or default of A., or by any other ways, it should become vested in or the property of any other person. A creditor of A. obtained a judgment against him, and a charge, under 1 & 2 Vict., c. 110, s. 14, on the fund:—Held, that his interest had thereby determined. *Montefiore v. Behrens*, 35 Beav. 95.

VI. Whether Real or Personal Estate.

7. The shares in the Chelsea waterworks company are personal property, and will therefore pass by a will not executed according to the provisions of the Statute of Frauds. *Bligh v. Brent*, 2 Y. & Coll. 268; 6 L. J., N. S., Exch. Eq., 58.

8. Shares in the Grand Junction Waterworks Company are pure personalty, and not within the Statute of Mortmain. *Edwards v. Hall*, 6 De G. M. & G. 74; 1 Jur., N. S., 1189; 25 L. J., Ch., 82.

9. A testator, who was entitled to a portion of a New River share, left all his property to J. H., in trust for purposes and legacies he should make in any codicil. The will was attested so as to pass real estate. The testator made a codicil, but it was not attested so as to pass real estate. The testator left no heir. The New River share was held real estate for all purposes, and the Court declared that J. H., as against the Crown, took it under the will beneficially. *Davall v. New River Co.*, 18 L. J., N. S., Ch., 299; 13 Jur. 761; 3 De G. & Sm. 394.

10. *Semble*, the shares in a commercial company possessing lands in a foreign country for the purpose of trade are not to be considered as real property. *Exp. & Re Richardson*, 3 Dea. 496; 1 Mont. & Ch. 43; 8 L. J., N. S., Bky., 27.

11. A canal was made under the authority of an Act of Parliament, the lands for that purpose were purchased and vested in a corporation, but the shares therein were to be deemed personal estate, and transmissible as such, and were to be conveyed by bargain and sale:—Held, that the shares did not bear the character of realty so as to make a bequest of them specific. *Robinson v. Addison*, 2 Beav. 515; 9 L. J., N. S., Ch., 369; 4 Jur. 647.

12. Where a company is formed by Act of Parliament for the purchase of lands to make a canal, and the Act declares that the shares "shall be deemed personal estate, and shall be transmissible as such":—Held, that though the profits arose out of the land, the shares were personal property, passing as such to the assignees, on the bankruptcy of a proprietor. Where an Act prescribes certain forms in the

transfer of such shares:—Held, unless they are strictly complied with, the shares remain in the order and disposition of the bankrupt proprietor; the ordinary mode of transfer not constituting an equitable mortgage. And though the Act only expressly relates to transfers between third parties, yet it impliedly relates to where the company are the transferees. *Exp. Lancaster Canal Co., Re Dilmorth*, Mont. 116; 1 Dea. & Ch. 411.

1. The shares in the navigation of the river Avon, under the statute 10 Anne, are real estate, and subject to dower. *Buckeridge v. Ingram*, 2 Ves. J. 652. See also *House v. Chapman*, 4 Ves. 542.

2. A parol agreement for the sale of railway shares is binding, for they are neither an interest in nor concerning lands within the 4th section of the Statute of Frauds; nor goods, wares, or merchandises within the 17th section. *Dunouff v. Albrecht*, 12 Sim. 189.

3. A. agrees with B.'s broker for 600l. stock; the broker, according to usage, made an entry of this agreement in his pocket-book; it being no otherwise reduced into writing, is within the Statute of Frauds. *Mussal v. Cooke*, Pre. Ch. 533.

4. An investment of money in the purchase of stock, in the names of trustees, upon trust for the children of the settlor, he not having at the time sufficient property besides the money so invested, to pay his debts, is void under the 13 Eliz., c. 5, because, by the 1 & 2 Vict., c. 110, s. 12, money or stock may be taken in execution; and therefore the effect of such a settlement would be to delay, hinder, or defraud the creditors of the settlor. *Barraek v. McCulloch*, 3 Kay & J. 110; 3 Jur., N. S., 180; 26 L. J., Ch., 105.

VII. Other Matters.

5. Stock not liable to the payment of debts, during the life of the proprietor, in any way except under a commission of bankruptcy. *England (Bank of) v. Lunn*, 15 Ves. 577.

6. A banking company, who were mortgagees of certain Spanish bonds, employed defendant to raise money upon them by deposit in his own name: the party with whom the defendant deposited them called upon the defendant for repayment, and, on default, sold the bonds, with the concurrence of the defendant, without the knowledge of the company, and paid the balance of the proceeds to the defendant. The company was afterwards compelled by their mortgagor to replace them or their value:—Held, that the defendant was answerable to the company for the market price of the bonds at the time of actual sale, and that he was not answerable for the value of the bonds at any other time. *Gordon v. Pym*, 3 Hare 223.

7. The plaintiff was a holder of 20,000 French rentes. The defendant resided in London, and dealt largely in foreign securities, and had contracted for the Prussian loan; he was also a partner with his brothers, who were bankers in Paris. The plaintiff employed the defendant to sell his rentes: the defendant, without the plaintiff's knowledge, purchased them for himself and his partners, but gave the plaintiff

the market price; the plaintiff then purchased Prussian bonds of the defendant, and agreed that they should remain in his hands as a security for the purchase money, which remained unpaid; but no bonds were appropriated for the plaintiff. The defendant, however, had always in his hands bonds to a greater amount. The plaintiff afterwards directed the defendant to sell the bonds, and the defendant subsequently informed the plaintiff that he had sold them accordingly, and he gave the plaintiff credit for the alleged price. The plaintiff then purchased 115,000 rentes of the defendant, which he was to pay for on a future day, and the rentes were then to be transferred to him; but no rentes were set apart for the plaintiff, or identified as belonging to him. Before the day of payment arrived, the defendant, by the plaintiff's desire, sent an order to his partners to sell the rentes, and they subsequently informed the plaintiff that they had sold them accordingly, and gave the plaintiff credit for the alleged proceeds. The accounts between the plaintiff and defendant were afterwards settled, and the plaintiff paid the balance which appeared due from him to the defendant. Four years afterwards the plaintiff, having discovered that the 20,000 rentes had been purchased by the defendant and his partners, and that there was no appropriation on the two other purchases, filed his bill to have all the transactions set aside, and the Court decreed accordingly. *Brookman v. Rothschild*, 3 Sim. 153; 7 L. J., Ch., 163. Affirmed 5 Bli. N. S. 165; 2 Dow & Cl. 188.

STOCK EXCHANGE.

- *Refusal of Bankrupt's Certificate on Ground of Stock Exchange Transactions.* See BANKRUPTCY, XXXI. iii.
- *Privilege from Discovery on Ground of Liability to Pains and Penalties under Stock Jobbing Acts.* See PRACTICE (DISCOVERY).
- *Indemnity by Transferee to Transferor on Transfer of Shares.* See COMPANY, XIII. VII. 10.

I. STOCK JOBBING ACTS, TIME BARGAINS AND DIFFERENCES, 6636.

II. SETTLING DAY, 6638.

III. DEFAULTER, 6638.

IV. RIGHTS AND LIABILITIES OF BROKERS.

1. *In General*, 6639.
2. *Customs of Stock Exchange*, 6639.
3. *Lien of*, 6641.
4. *Pledge by*, 6641.
5. *Notice of Trusts affecting Shares*, 6642.
6. *Action by Principal*, 6642.

V. RIGHTS AND LIABILITIES OF JOBBERS, 6642.

I. STOCK JOBBING ACTS, TIME BARGAINS AND DIFFERENCES.

8. Bill in equity lies to recover back money paid on a bubble. *Coit v. Woollaston*, 2 P. W. 154.

1. A bill in equity lies to recover deposits paid by a shareholder in a joint stock company, where the project is a bubble. *Green v. Barrett*, 1 Sim. 45; 5 L. J., Ch., 6.

2. C. being indebted to G. in 1,000*l.*, agreed to transfer within a given time 100*l.* per ann. long ann., at the then price, and in the meantime pay G. the dividends, and that the debt of 1,000*l.* should constitute part of the purchase money. The stock was not purchased at the time, and there was a rise in the price of the stocks. The agreement held not usurious, or within the stock-jobbing Acts. *Clark v. Giraud*, 1 Madd. 511.

3. Promissory notes, given by stockbroker for the balance of an account of money advanced to him to be employed in stock-jobbing transactions, contrary to the stat. 7 Geo. 2, c. 8, part of the consideration consisting of the profits on those transactions: proof under his bankruptcy was restrained to the residue, viz., the money received, which he had applied to his own use. *Exp. Bulmer, Exp. Ellis*, 13 Ves. 313.

4. The Stock Jobbing Act (7 Geo. 2, c. 8) only applies to "public" stocks and securities, and not to railway and joint stock shares; and therefore, as no penalty is attached to stock-jobbing dealings in such shares, a stockbroker is compellable to make full discoveries respecting them. *Williams v. Trye*, 13 Beav. 366; 18 Jur. 442; 23 L. J., Ch., 860; 2 W. R. 314; 2 Eq. Rep. 766.

5. Under the Act against stock jobbing, the six months in the first section means lunar months, and no discovery lies where the cause of action arose prior to the expiration of six lunar months. *Windale v. Fall*, 3 Bro. C. C. 11.

6. The Court will not interfere to relieve in respect of a speculative transaction upon the Stock Exchange, where the claim to relief amounts in effect to this, that the plaintiff has been duped by his fellow speculators into a transaction which has not turned out profitably for himself. *Rees v. Fernie*, 13 W. R. 6.

7. A., B., and C. were members of the Stock Exchange, according to the rules and customs of which there are two days appointed in a month for settling transactions relating to foreign securities, and, in case of a loan upon or a sale of such securities, the lender or seller has the right, in case of non-payment of the loan or non-completion of the purchase, either to sell or take them at their market value, the deficiency, if any, in the price being paid to the borrower or purchaser, and the surplus, if any, beyond the loan or purchase money, being paid by him to the lender or seller, who, if the borrower or purchaser is declared a defaulter, is bound to take the securities at a price fixed by the official assignees of the association. According to these rules and customs A. lent to C. money on the security of foreign railway shares, which were of the full value of the loan, and on each succeeding settling day the amount of depreciation or increase in the value of the shares was paid by C. or A. respectively to the other, till C. was declared a defaulter, when A. took the shares at the price fixed by the official assignees. C. was afterwards adjudged a bankrupt, and A. tendered a proof for the balance due to him in respect of the transaction, after deducting the price at which

he had taken the shares. According to the same rules and customs B. agreed with C. to sell him 100 foreign railway shares for a certain sum. The transaction was not completed, but on each succeeding settling day the differences were paid by B. or C., as in A.'s case; and, on C. being declared a defaulter, B. likewise took the shares at their market value, and on C.'s bankruptcy tendered a proof for the balance due to him in respect of the said shares:—Held, that these were not gambling transactions, or illegal within 8 & 9 Vict., c. 109, s. 18, and that the proofs must be admitted. *Exp. Phillips, Re Morgan, Exp. Marnham*, 6 Jur., N. S., 1273; 9 W. R. 131; 2 De G. F. & J. 634; 30 L. J., Bk., 1; 3 L. T., N. S., 516.

8. The question of time bargains is, whether at the time of making the contract there was a *bona fide* intention to purchase or deliver shares. If there was such an intention, the contract is good; if there was not such an intention, the contract is an agreement by way of gaming or wagering within 8 & 9 Vict., c. 109, s. 18, and by that section is null and void. *Barry v. Croskey*, 2 John. & H. 1.

9. Time bargains in stock, though they may be "gaming or wagering," within the meaning of the 8 & 9 Vict., c. 109, relating to games and wages, are not so within the meaning of the 12 & 13 Vict., c. 106, s. 201. *Exp. Ryder*, 1 De G. & J. 317; 3 Jur., N. S., 1159; 26 L. J., Bk., 69.

10. The defendant employed the plaintiff, a stockbroker, to speculate for him on the Stock Exchange, knowing that for the purpose of carrying out his transactions the plaintiff would have to enter into contracts to buy or sell stocks and shares, and, in order to protect himself and the defendant, would have to enter into other contracts to sell or buy respectively. The plaintiff knew that the defendant never expected or intended to accept actual delivery of the stocks and shares which the plaintiff might buy for him, nor actually to deliver the stocks and shares that the plaintiff might sell for him. The defendant, nevertheless, knew that he incurred the risk of having to accept or deliver; but was content to run the risk in expectation and hope that the plaintiff would arrange so as to make nothing but differences payable to or by him; and unless that arrangement was made the defendant was, to the knowledge of the plaintiff, wholly unable to pay for or deliver the stocks and shares bought or sold. In an action by the plaintiff against the defendant for commission and indemnity against the liabilities incurred by the plaintiff on the Stock Exchange, with the authority and for the benefit of the defendant, the defendant pleaded that the claim was founded on gaming and wagering transactions, illegal at common law and under 8 & 9 Vict., c. 109, s. 18:—Held, that the plaintiff was entitled to recover both the commission and indemnity claimed. *Thacker v. Hardy*, 27 W. R. 158.

11. Where a person desiring to speculate on the Stock Exchange has instructed a broker to buy and sell stocks for him with the intention that he should only receive or pay "differences," and has authorised the broker to pay any losses for him, the broker is entitled to recover any sums which he has so paid for the principal, even though he has not entered

into separate contracts on his behalf, but has appropriated to him parts of larger amounts of stock which he (the broker) has bought as a principal with the view of dividing them among different clients for whom he has been instructed to buy. *Robinson v. Mollett* (7 L. R., H. L., 802) distinguished. *Exp. & Re Rogers*, 15 L. R., Ch. D., 207; 43 L. T. 163; 29 W. R. 29.

II. SETTLING DAY.

1. By one of the rules of the London Stock Exchange, bargains in the shares of a new company are contingent on the appointment of a special settling day by the committee:—Held, that, if the appointment of a settling day has been obtained by fraud, the validity of contracts in relation to the shares of the company, entered into by persons who were not actors in or parties to the fraud, is unaffected. *Exp. Ward*, or *Exp. Harris, Re Ward*, 20 L. R., Ch. D., 356; 51 L. J., Ch., 752; 47 L. T. 106; 30 W. R. 560.

A member of the committee of the Stock Exchange who takes part in the appointment of a settling day is not in so doing acting in a judicial capacity, and is not, therefore, disqualified from acting by reason of his having a personal interest in the matter. *Ib.*

III. DEFAULTER.

2. The rules of the Stock Exchange as to defaulting members of the body are the rules of a domestic forum which have no influence on the rights of those who are not amenable, as members, to the jurisdiction of that body. They cannot, therefore, govern the rights of the general creditors of a defaulting member. *Tomkins v. Saffery*, 3 L. R., App. Cas., 213; 47 L. J., Bky., 11; 37 L. T., N. S., 758; 26 W. R. 62. Affirming *S. C. nom. Exp. Saffery, Re Cook*, 46 L. J., Bky., 34; 4 L. R., Ch. D., 555; 35 L. T., N. S., 715; 25 W. R. 218.

C. was a member of the Stock Exchange; he became unable to meet his Stock Exchange engagements, and he gave notice thereof to the secretary. In such a circumstance the rules of the Stock Exchange prescribed the course to be followed. The defaulter ceases to be a member of the body. Two members of the body act as official assignees of the defaulter, a meeting of the creditors is called, the defaulter (as he is required to do) makes his statement, and the assembled creditors having decided what is to be done, these official assignees carry the decision into execution. The committee of the Stock Exchange has the power to readmit the defaulter or to refuse him readmission. C. made his statement at the first meeting, declaring, at that time, that he had no debts outside the Stock Exchange. His Stock Exchange creditors then consented to accept a composition; and, to provide for a part of it, he, at the demand of the official assignees, gave them a cheque for 5,000*l.* then standing to his credit in the Bank of England. The official assignees obtained the money and apportioned it among the Stock Exchange creditors. He afterwards confessed to owing debts to a large amount to outside creditors, and was de-

clared a bankrupt. The trustee in bankruptcy, on behalf of the general creditors, claimed from the official assignees of the Stock Exchange the 5,000*l.*:—Held, that he was entitled to claim it; for that what was done by C. amounted to a *cessio bonorum*, and constituted an act of bankruptcy. *Ib.*

Semble, the money was voluntarily paid with the view to give the Stock Exchange creditors an undue preference. *Ib.*

In the 167th rule of the Stock Exchange, that the assignees shall collect and pay "the assets" to their joint account at a banker's, the word "assets" means the whole of the defaulter's available property; and under rule 153 these assets are to be distributed exclusively to those creditors whose claims arise out of Stock Exchange transactions. *Ib.*

3. A creditor of a defaulter on the Stock Exchange who has taken the benefit of the private distribution of Stock Exchange assets, made by the official assignee of the Stock Exchange under its rules, is not precluded from afterwards taking ordinary legal proceedings for the recovery of his debt, though he must give credit for what he has received from the official assignee. *Exp. Ward*, or *Exp. Harris, Re Ward*, 20 L. R., Ch. D., 356; 51 L. J., Ch., 752; 47 L. T. 106; 30 W. R. 560.

4. A member of the Stock Exchange contracted with another member to purchase certain shares. Before completion the purchaser failed to meet his engagements, and was declared a defaulter on the Stock Exchange. By the rules of the Stock Exchange the price of shares, contracted to be bought or sold by such a defaulter, are to be fixed by the official assignee of the Stock Exchange, and the differences paid to or claimed from the assignee:—Held, that the price fixed by the assignee is substituted for the original contract, and is a liquidated sum due under the contract, and, therefore, that a bankruptcy petition may be founded upon a claim for such price. *Exp. & Re Ward*, 31 W. R. 112.

5. By the rules of the London Stock Exchange, when a member is declared a defaulter, the contracts for the sale and purchase of stocks and shares which have been made by him for the next settling or account day are closed by a person, called the official assignee, appointed by that body, at the market prices of the stocks and shares, the subjects of the contracts at the time of the default, and those members who on that footing owe differences upon their contracts with the defaulter, are bound by the rules, on pain of being themselves declared defaulters, to pay those differences to the official assignee. And the official assignee is bound by the rules to employ the moneys thus received by him in the first place in paying to those members to whom upon the same footing differences are due upon their contracts with the defaulter, the differences so due to them:—Held, that the moneys thus received by the official assignee, being an artificial fund created by the rules of the Stock Exchange, do not form part of the assets of the defaulter, and do not pass to his trustee in bankruptcy. *Exp. Grant, Re Plumby*, 13 L. R., Ch. D., 667; 42 L. T. 887; 28 W. R. 755.

Tomkins v. Saffery (3 L. R., App. Cas., 213) distinguished. *Ib.*

Held, also, that, even if the payments made to the official assignee of a defaulter ought to have been made to the trustee in bankruptcy, yet, as the official assignee claimed them adversely, the trustee could not recover them from him. *Id.*

IV. RIGHTS AND LIABILITIES OF BROKERS.

1. *In General*, 6639.
2. *Customs of Stock Exchange*, 6639.
3. *Lien of*, 6641.
4. *Pledge by*, 6641.
5. *Notice of Trusts affecting Shares*, 6642.
6. *Action by Principal*, 6642.

1. In General.

1. A purchase by brokers in pursuance of the order of a customer of shares in a projected railway company provisionally registered:—Held, not illegal, but a sufficient ground for the admission of a proof tendered by the brokers for the loss occasioned by the non-completion of the purchase by the customer. *Exp. Barton, Re Charles*, 1 De G. 292; 10 Jur. 442; 4 Rail. Ca. 371.

2. Sharebrokers, by direction of a customer, purchased shares in a projected railway company, the consideration for which purchase, it was agreed, should be paid on the delivery of the scrip. After the purchase, the brokers, by the direction of the customer, sold the same shares at a higher price, to be paid on the delivery of the scrip. The sharebrokers then became bankrupt. The company was amalgamated with another company, and the scrip in the amalgamated company was delivered. The customer was not allowed to prove against the estate of the bankrupts for the difference of the bought and sold prices. *Exp. Norton*, 11 Jur. 699.

3. A shareholder in an incorporated railway company instructed a stockbroker to sell his shares. The broker agreed with a jobber for the sale of them; but the name of the purchaser was not mentioned. The jobber had been instructed to purchase by B. (another broker), who, as the jobber knew, was not purchasing on his own behalf. B. afterwards requested time for completion, his principal not being ready; and the jobber granted the time on B. giving his own name as that of the principal. A deed of assignment was prepared from the vendor to B., who paid the price to the vendor, and took the deed of assignment executed by the vendor:—Held, upon a bill filed by the vendor, that B. was bound to execute the assignment, to procure himself to be registered, to pay the calls made since the execution of the assignment by the vendor, and to indemnify the vendor against future calls; and a decree was made to that effect. *Wynne v. Price*, 3 De G. & Sm. 310; 13 Jur. 295; 5 Rail. Ca. 466.

4. C. & Co. directed their brokers to purchase for them 200 shares in a company, and on the settling day forwarded to them the name of an infant transferee. Shortly afterwards the company was ordered to be wound up, and upon the application of the infant his name

was removed from the list of contributories, and the names of the transferors substituted in its place. By a resolution of the committee of the Stock Exchange, the broker was ordered to indemnify the transferors:—Held, that C. & Co. must indemnify the brokers. *Peppercorne v. Clench*, 28 L. T. 666.

5. A., B., and C. each bought thirty shares in a company through the same country broker. Fifteen of the shares were sold by D. The brokers placed all the ninety shares in the name of an infant nominee. On the winding up of the company D. was made a contributory. The Court ordered A., B., C., and the brokers to indemnify D. *Brown v. Black*, 8 L. R., Ch., 939; 42 L. J., Ch., 814; 29 L. T. 362; 21 W. R. 892. Varying 15 L. R., Eq., 363; 42 L. J., Ch., 397; 28 L. T. 256; 21 W. R. 457.

2. Customs of Stock Exchange.

6. Where a vendor employs brokers to sell shares on the Stock Exchange, he gives them authority to sell according to the custom then prevailing, and cannot limit that authority by private instructions to them. *Coles v. Bristol*, 19 L. T., N. S., 403; 17 W. R. 105; 4 L. R., Ch., 3; 38 L. J., Ch., 81.

7. A purchase or sale of shares made by one who is not a member of the Stock Exchange, and made through a broker who is a member of that body, will be treated as made subject to the rules of the Stock Exchange. *Nicholls v. Morry*, 7 L. R., H. L., 530; 45 L. J., Ch., 575; 23 W. R. 663; 32 L. T., N. S., 623. Affirming 7 L. R., Ch., 733; 41 L. J., Ch., 767; 20 W. R. 929; 26 L. T., N. S., 12.

8. Persons employing brokers, members of the Stock Exchange, in transactions on the Stock Exchange, are bound by its customs. *Hodgkinson v. Kelly*, 37 L. J., Ch., 837; 6 L. R., Eq., 496; 16 W. R. 1078.

9. The practice of the Stock Exchange for a broker to deliver deeds of transfer in blank cannot prevail against the rule of law. *Taylor v. Great East Indian Peninsular Railway Co.*, 5 Jur., N. S., 1087; 28 L. J., Ch., 701.

10. Four executors holding stock in their name directed their solicitor to sell the stock. The solicitor, in the name of his firm, gave to a stockbroker, whom the solicitor had employed in Stock Exchange speculations, directions to sell the stock. The stock was sold by the broker, and the solicitor returned to the stockbroker transfers of the stock, with receipts indorsed, signed by the four executors. The sale was completed, and the stockbroker sent to the solicitor a cheque for part of the purchase money of the shares, and carried the balance on the transaction to the credit of the solicitor in the account between them, which account was afterwards settled by a payment made to the stockbroker:—Held, that, under the circumstances, the stockbroker must be held to have had notice that the shares were not the property of the solicitor, and that, though the solicitor had from the executors authority to receive the purchase money, payment to him, by giving him credit in an account between them, was not sufficient to discharge the stockbroker, who remained liable to the executors for the balance. *Pear-*

son v. Scott, 9 L. R., Ch. D., 198; 38 L. T. 747; 26 W. R. 796.

The sale was made subject to the rules of the Stock Exchange, and the stockbroker alleged that by those rules the broker could recognise only the person employing him, and obey his directions as to the disposal of the proceeds of a sale:—Held, that the rules of the Stock Exchange applied only to the sale on the Stock Exchange, and not the subsequent transactions. *Ib.*

Held, also, that no such rule or custom was proved, and that no such rule or custom could be upheld. *Ib.*

1. An alleged usage of the Stock Exchange, relied upon as authorising stockbrokers who are entitled to sell stock or shares of a customer for the realisation and payment of money due to them by such customer, to take over to themselves, at the price of the day, stock or shares of the customer, for which there is an inadequate demand, or where a forced sale would lower the selling price:—Held, unreasonable, and incapable of being supported against a customer who was not proved to be acquainted with the existence of such alleged usage. *Hamilton v. Young*, 7 L. R., Ir., 289.

The plaintiff had been for many years engaged in speculative transactions in stocks and shares, and employed as stockbrokers the defendants, who had obtained loans for him on the security of bills of exchange, and by pledging shares. The defendants had obtained for the plaintiff from G. M. & Co., another firm of stockbrokers, a large loan on the security of shares and other property of the plaintiff, including 190 shares in the C. Mining Company. The plaintiff was also largely indebted to the defendants. They called on him to settle his account; and on his failing to make any arrangement with them, the defendants paid off the amount due on the plaintiff's account to G. M. & Co., and obtained from the latter firm a transfer of the securities which they held, including the 190 shares of the C. Mining Company, and on the next day, the defendants sent to the plaintiff a note of their sale, by his order, of the 190 shares of the C. Mining Company, at the price of the day, charging him commission for such sale. The defendants did not, in fact, sell the shares, but took the shares over to themselves at the price of the day. In an action by the plaintiff to set aside the transaction, the defendants relied on an alleged custom or usage of the Stock Exchange, entitling stockbrokers who have made advances to their customers, or who hold stock or shares of their customers as security for general advances, on default by a customer in paying the sums due to the brokers, to take over to themselves, at the market price of the day, such shares or stock, where an immediate sale of such shares or stock would be likely to lower their price. No proof was given that the plaintiff was aware of the existence of the alleged custom or usage, and he deposed that he was ignorant of it:—Held, that the custom or usage relied on was unreasonable, that it could not be supported, and that the transaction should therefore be set aside. *Ib.*

2. If A. sells shares in a company to a member of the Stock Exchange, and B. buys shares in the same company at a different price from

another member of the Stock Exchange, and on the name-day B.'s name is given to A. as the purchaser of A.'s shares, and A. executes a transfer of his shares to B., and B. accepts the transfer and pays to A. the price for which B. originally bought the shares, the transaction constitutes a contract between A. and B. for the sale and purchase of the shares, which a court of equity will compel B. specifically to perform. *Musgrave and Hart's case*, 5 L. R., Eq., 193; 37 L. J., Ch., 161; 16 W. R. 247.

3. By the usage of the London Stock Exchange stockbrokers who have entered into contracts for the purchase of stock are, in the event of the insolvency of their principal, justified in immediately selling the stock. A principal is insolvent within the meaning of this rule when he is unable to pay his debts in the ordinary course of business. *Lacey v. Hill, Cromley's claim*, 18 L. R., Eq., 182; 43 L. J., Ch., 551; 22 W. R. 586; 30 L. T., N. S., 484.

Messrs. C., brokers on the London Stock Exchange, on behalf of H., entered into contracts for the purchase of stocks to be completed on the 15th July 1870. On the 12th July they wrote to H. to the effect that unless he paid them on the 15th a balance (which consisted of the difference between the contract price of the stock and its value at the market price of the day) owing to them from him they would be defaulters; but that if such payment were made, they would sell or continue the stocks as he thought fit. H. promised to pay, and directed them to deal with the stocks as they thought best, and they sold part and continued part. He did not pay on the 15th, but shot himself; on the next day a bank of which he was a partner stopped payment, and on the 19th he died. On the 16th Messrs. C. were (solely by reason of H.'s failure to pay them) declared defaulters on the Stock Exchange, and ceased to be members of that body, and, in accordance with the rules, all their transactions for H. were closed, and all the stocks they had continued for him were sold at the price of the day. In consequence of the value of the stocks having fallen, the balance appearing to be due to them from H. was thus largely increased. The stocks afterwards continued to fall in value. Messrs. C. afterwards paid 6s. 8d. in the pound on their Stock Exchange debts, and were readmitted as members of the Stock Exchange:—Held, that the sale was justifiable, both under the usage of the Stock Exchange (which entitles a broker to sell upon his principal becoming insolvent) and also because the continuation was only effected on the representation of H. that he would pay on the 15th. *Ib.*

Held, also, that although Messrs. C. had not paid their debts in full, they were entitled to prove against H.'s estate for the increased balance appearing due to them after the sales were effected. *Ib.*

In equity the liability of a principal to indemnify his agent is not confined to actual losses, but extends to all the liabilities of the agent incurred on behalf of the principal. *Ib.*

4. Stockbrokers who have with their own money purchased stock for a principal are, in the event of the death, bankruptcy, or insolvency of the principal, justified in immediately

selling the stock. Under such circumstances, the stockbrokers have a claim against the estate of the principal for the balance due to them on the account, which balance is subject to deduction for any loss which may have been incurred by selling before the next settling day. *Lacey v. Hill, Springour's claim*, 8 L. R., Ch., 921; 42 L. J., Ch., 657; 21 W. R. 857; 29 L. T., N. S., 281. Affirming 28 L. T., N. S., 180.

A speculator on the Stock Exchange, having failed to pay the balance of his brokers' account against him when requested, and having died, and a bank, of which he was senior partner, having in consequence stopped payment, the brokers sold out stock which he had directed to be carried over, at a loss, but the stock had fallen still lower before the next account day. On a claim by them for the balance of their next account, which was resisted on the ground that they had broken their contract, and could not speculate as to what would have happened had they kept it:—Held, that their conduct at the most gave rise to a right of set-off for any damage resulting from it, and that, none being shown, their claim was good. *Id.*

Evidence was given of a custom of the Stock Exchange that where a principal who had bought for the account became bankrupt or died, leaving no person ready to take up his account, his broker might cover himself by selling out the shares or stock:—Held, that the custom was reasonable, and that the claim was sustainable on that ground also. *Id.*

3. Lien of.

1. Stockbrokers advancing to bankers, their customers, a specific loan upon specific securities, have thereon not only a specific lien in respect of such loan, but also a general lien in respect of whatever else may be due to them from the bankers on account of their general business transactions; the rule in such cases being that the general lien is not excluded by special contract, unless the special contract be inconsistent with it. *Jones v. Peppercorne*, 1 Johns. 430; 5 Jur., N. S., 140; 28 L. J., Ch., 153.

The circumstance that the securities, though treated by the bankers as their own, belonged, in fact, to third parties, if not known to the brokers when making the advance, does not affect their right to general lien. *Id.*

Bonds payable to bearer, and passing by delivery only, were deposited with bankers for safe custody, and the bankers afterwards fraudulently deposited them with their brokers as a security for money advanced, and became bankrupt:—Held, that the bonds were subject to the general lien of the brokers for all money advanced by them to the bankers, and not merely for the advance made upon the security of those particular bonds. *Id.*

4. Pledge by.

2. Scrip was issued in England by the agent of a foreign government, and such scrip purported to entitle the bearer, upon payment of 100*l.* in instalments, to receive a definitive

bond for 100*l.* G. purchased scrip on the open Stock Exchange, and entrusted it to a broker, who pledged it to his bankers as a security for his private debt. All the instalments of the 100*l.* had been paid. In an action of trover by G. against the bankers for the value of the scrip:—Held, that he had, by purchasing the scrip and entrusting it to the broker, estopped himself from contending that it was not negotiable like a bank-note. *Goodwin v. Roberts*, 1 L. R., App. Cas., 476; 35 L. T., N. S., 176; 45 L. J., Exch., 748.

Held, also, that the scrip was in fact negotiable in the same manner as the bond itself would have been negotiable. *Id.*

3. The pledgee of railway stock is bound to return the identical stock pledged to him, and is not entitled to make a profit in the meantime by selling it and repurchasing other stock of the same kind at a lower price. A. and B., stockbrokers, borrowed, on behalf of the plaintiff, a sum of money, for a term of three months, from the defendants, who were also stockbrokers, upon the security of certain railway stock, which was transferred by the plaintiff into the name of one of the defendants' firm. At the expiration of the term the loan was repaid with interest, and the defendants, who, pending the loan, had sold the plaintiff's stock, purchased other stock, and retransferred a similar amount to the plaintiff. The plaintiff claimed to be entitled to the amount of profit which the defendants had realised:—Held, that he was entitled to sue as principal in the transaction; that the defendants were not justified, either by law or by the custom of the Stock Exchange, in parting with the security during the currency of the loan, but were bound to return the identical stock pledged; and that he was entitled to recover from the defendants the amount of profit realised by their dealings with the stock. *Langton v. Waite*, 6 L. R., Eq., 165; 37 L. J., Ch., 345; 18 L. T., N. S., 81; 16 W. R. 508.

L. transferred railway stock to W., as security for a loan. When the loan was paid off, W. retransferred to L. similar stock to the same amount. L. afterwards discovered that W. had, during the period of the loan, sold the stock which L. had transferred to him, and had afterwards purchased, at a lower price, stock to the same amount, which stock he had, when the loan was paid off, transferred to L. L. then filed a bill alleging that W. was bound to retransfer the identical stock originally transferred to him, and that, as he could not do so, he was bound to account to L. for the profit made by the sale and repurchase. The bill contained an offer on the part of L. to retransfer to W. the stock which he had transferred to L. on W. accounting for the price of the stock which he had sold. Malins, V.-Ch. (see *supra*), made a decree in L.'s favour on the footing of this offer. It afterwards appeared that when he filed his bill he was unable to fulfil this offer, as he had previously sold the stock which W. had transferred to him. L. thereupon presented a petition stating these facts, and praying that he might be allowed to transfer to W. an equal amount of similar stock, or to account for its value. The Vice-Chancellor made an order in accordance with this prayer. On appeal:—Held, that the petition was inconsistent with the decree and

ought to have been dismissed, and that as the plaintiff had by his own act made himself incapable of performing the offer in his bill and not stated the real facts on his pleadings the bill must also be dismissed. 8. C. 17 W. R. 475; 20 L. T., N. S., 337; 4 L. R., Ch., 402.

1. A. commissioned his broker to obtain a loan on security of bonds which he deposited with him for that purpose, and shortly afterwards the broker obtained the loan from B., a member of the Stock Exchange. A. subsequently gave his broker the money to redeem the bonds, but he applied a portion of it to his own use, and was unable to redeem the bonds, of which fact he informed A. It was then agreed that A. should advance the broker a sufficient sum, by way of loan, to enable him to redeem the bonds, and that if the broker redeemed the bonds upon a particular day, A. would call and give him a cheque for the amount to be advanced. The broker gave B. his crossed cheque (upon the faith and in the belief that it would be honoured by means of the cheque to be given by A.), and the bonds were delivered up to him. They were afterwards handed over to A., who obtained them by means of a trick, but he refused to give his cheque, and the broker's cheque was dishonoured.—Held, that A. was bound to make good to B. the representation which he had made to the broker, and upon the faith of which he had given his cheque to B.; and he was directed to pay him the amount due upon the bonds, or, in default, the securities to be delivered up to B. *Mocatta v. Bell*, 24 Beav. 585; 4 Jur., N. S., 77; 27 L. J., Ch., 237.

Held, also, that B. was not guilty of negligence in taking a crossed cheque, in accordance with the practice of the Stock Exchange, and delivering up the bonds, without first inquiring whether the broker had assets to meet the cheque. *Id.*

5. Notice of Trusts affecting Shares.

2. A stockbroker who is instructed to sell trust funds and to reinvest the purchase money, with actual notice of the trust, is a trustee of the proceeds of sale, and the customer employing him is entitled as against his trustee in bankruptcy to so much of the proceeds of sale as can be identified. *Re Strachan, Ex p. Cooke*, 46 E. J., Bky., 52; 35 L. T., N. S., 649; 25 W. R. 171; 4 L. R., Ch. D., 123.

3. Four executors holding stock in their name directed their solicitor to sell the stock. The solicitor, in the name of his firm, gave to a stockbroker, whom the solicitor had employed in Stock Exchange speculations, directions to sell the stock. The stock was sold by the broker, and the solicitor returned to the stockbroker transfers of the stock, with receipts indorsed, signed by the four executors. The sale was completed, and the stockbroker sent to the solicitor a cheque for part of the purchase money for the shares, and carried the balance on the transaction to the credit of the solicitor in the account between them, which account was afterwards settled by a payment made to the stockbroker.—Held, that, under the circumstances, the stockbroker must be held to have had notice that the shares were not the property of the solicitor, and that, though

the solicitor had from the executors authority to receive the purchase money, payment to him, by giving him credit in an account between them, was not sufficient to discharge the stockbroker, who remained liable to the executors for the balance. *Pearson v. Scott*, 9 L. R., Ch. D., 198; 38 L. T., N. S., 747; 26 W. R. 796.

The sale was made subject to the rules of the Stock Exchange, and the stockbroker alleged that by those rules the broker could recognise only the person employing him, and obey his directions as to the disposal of the proceeds of a sale.—Held, that the rules of the Stock Exchange applied only to the sale on the Stock Exchange, and not to subsequent transactions. *Id.*

Held, also, that no such rule or custom was proved, and that no such rule or custom could be upheld. *Id.*

6. Action by Principal.

4. Brokers very often transfer stock without the principal being so much as mentioned, and yet he may maintain an action against the person to whom the stock was transferred. *Lisset v. Reave*, 2 Atk. 394.

5. J. caused a sum of South Sea stock, belonging to another person of the same name, to be transferred into his own name, and then into the name of a broker, for sale, and who accordingly sold it for him. In a bill against the representative of J. and the South Sea Company for satisfaction, the broker is not a necessary party. *Harrison v. Pryce*, Barnard. 324.

6. It is settled law that an undisclosed principal can sue in respect of a contract entered into in his behalf between stockbrokers, though by the rules of the Stock Exchange the brokers, as between themselves, are personally responsible. *Langton v. Waite*, 37 L. J., Ch., 345; 18 L. T., N. S., 880; 16 W. R. 508; 6 L. R., Eq., 165.

V. RIGHTS AND LIABILITIES OF JOBBERS.

7. When a jobber purchases shares on the Stock Exchange, his contract is either himself to purchase the shares, or, in the alternative, to substitute the name of a purchaser who is competent and willing to purchase. His liability is, therefore, conditional in the first instance, but if he fails to give such a name, it becomes absolute. If, therefore, the name given is that of an infant, or of a person who has given no authority to use his name, the jobber is liable. *Rennie v. Morris* (13 L. R., Eq., 203) disapproved of. *Nicholls v. Merry*, 7 L. R., H. L., 530; 45 L. J., Ch., 575; 32 L. T. 623; 23 W. R. 663. Affirming 7 L. R., Ch., 733; 41 L. J., Ch., 767; 26 L. T. 12; 20 W. R. 929.

The period of ten days limited by the rules of the Stock Exchange, within which the seller may object to the name given, has application only to objections grounded on the pecuniary incapacity of the person named to perform the contract, not to his capacity and willingness to enter into it. *Id.*

The ten days' rule is to give time for the

vendor to inquire into the solvency of the person so named, but is no bar to a claim of indemnity against the jobber upon its subsequently appearing that the party named was incompetent or unwilling to contract. *Id.*

If, therefore, the name given is that of one who had no legal capacity to accept the shares, though the time limited is allowed to go by without objection to him, the original contractor, the jobber, will remain liable. *Id.*

The rules of the Stock Exchange imply, that the name of the person given as that of the ultimate purchaser of shares must be that of one able and willing to purchase; and they are not satisfied if the name given is that of a non-existent person, a lunatic, an infant, a married woman, or a person who has not given authority for the use of his name. *Id.*

M. sold fifty shares in a company through his broker, a member of the Stock Exchange, to N., a stock jobber, and also a member. On the settling day N. passed to his broker the name of L. (which he had received from some other broker) as the purchaser. M.'s broker made no objection to L., and prepared a transfer to L. which M. executed, and the price for the shares was paid. Two years afterwards the company was wound up; M. was placed on the list of contributories and ordered to pay calls in respect of the shares. The transfer had never been registered, and L. was an infant:—Held, that the jobber had not performed his contract, inasmuch as he had not given to M. the name of a purchaser competent and willing to contract, and that he was liable to indemnify M. against the calls. *Id.*

1. By the custom of the London Stock Exchange, shares are to be transferred not later than the tenth day after the settling day fixed on by the parties; and the vendee's contract is to pass (i.e., to give to the vendor, within that time) the name of a person who will take a transfer of the shares; and the person whose name is so passed has a similar right, within the time, to pass the name of another person; and so on until the name of an actual purchaser of shares is passed to the vendor. This custom is legal, and when the proposed name has been given, and the transfer executed and paid for, privity of contract between the original seller and the ultimate purchaser is completely established. *Sheppard v. Murphy*, 16 W. R. 948; 2 Ir. R., Eq., 544.

2. Where shares not fully paid up are sold on the Stock Exchange, the vendor is not bound to accept as purchaser a foreigner resident abroad, who has not property in this country which may be made liable for calls. *Goldschmidt v. Jones*, 22 L. T. 220; 18 W. R. 513.

3. C., through his brokers, sold subject to the rules of the London Stock Exchange, to P. & Co., jobbers, certain shares in a limited company, with registration guaranteed. Before the setting day, A. & Co. passed to C.'s brokers the name of H., to whom C. executed a transfer and transmitted the share certificates, and from whose brokers, not from P. & Co., he received the purchase money. H. did not procure the transfer to be registered, notwithstanding P. & Co. used their best endeavours to compel him to do so, and the

company being in the course of winding up, C. was settled on the list of contributories, and calls were made upon him. He died without having paid them, and it was suggested that his estate would be insufficient to pay them:—Held, first, that C., if living, could compel P. & Co. to pay the calls, and generally to indemnify him in respect of the shares. *Cruce v. Paine*, 37 L. J., Ch., 711; 17 W. R. 44; 6 L. R., Eq., 641; 19 L. T., N. S., 127. Affirmed 4 L. R., Ch., 441.

Held, secondly, that P. & Co.'s liability to C.'s executor was similar, and independent of the amount of C.'s assets. *Id.*

Where a purchase of shares on the Stock Exchange by a jobber is expressed to be "with registration guaranteed," the meaning of the contract is, that the jobber will either register them himself or will find a purchaser who will accept and register them. The giving in, therefore, by the jobber to the vendor's brokers of the name of a transferee, who is accepted by the vendor as purchaser, does not discharge the jobber until the transferee has actually registered the shares in his name; and if the transferee does not register, the jobber is bound to register in his own name, and must indemnify the vendor for any damage suffered by him through such omission to register. *S. C.* 38 L. J., Ch., 225; 4 L. R., Ch., 441; 17 W. R. 1033.

4. The exact contract or liability of a jobber on the Stock Exchange who has purchased shares for the next approaching settling day is, that on that day he will either take the shares himself, and be bound himself to accept and register a transfer and to indemnify the vendor, or to give the names of one or more transferees to whom no reasonable objection exists and who will accept and pay for the shares. And if he takes the latter course, and the names are accepted by the vendor, and transfers executed to them, and the transfers are taken and paid for by those transferees or their brokers, the liability to register the shares and indemnify the vendor is shifted to those transferees, and the jobber is relieved from all further liability; but the liability of the jobbers continues entire and unbroken until there is an acceptance of the purchases by the vendor, and an acceptance of the transfers by the purchasers or their brokers; and they are not discharged therefrom by merely paying the agreed price, and giving a name as that of the purchaser, if that name should be objectionable, or the person named refuses to accept the shares. *Coles v. Bristowe*, 19 L. T., N. S., 403; 17 W. R. 105; 4 L. R., Ch., 3; 38 L. J., Ch., 81.

When shares had been sold by jobbers without any express stipulation or condition, and therefore to all appearance in accordance with this usage, and the jobbers duly furnished the names of the purchasers, and paid the purchase money, and the vendor prepared and executed transfers to them which could not be registered by reason of the suspension and winding up of the company between the day of the contract and the settling day:—Held, that the vendor had no right to call for specific performance by, or to claim indemnity from, the jobbers. *Id.*

5. D. held shares in a company, which he agreed, through his broker, to sell to N., a

dealer on the Stock Exchange. N. in due time gave the name of E. as the transferee, and the shares were transferred to him. The company was afterwards wound up; and as E. was an infant, D. was placed on the list as contributory in respect of these shares, and had paid 1,800*l.* for calls on them. D. commenced an action against N. to recover the 1,800*l.*, and N. then filed a bill against D. and the father of E., alleging that the father was the real purchaser of the shares and liable for any loss, and praying that the action might be restrained and that the questions might be decided in the suit:—Held, that D. ought not to be deprived of the opportunity of establishing his claim, and of recovering, if he could, against N., merely because another person might also be liable to pay the money, and might be the person who ultimately would have to pay. *Nicholls v. Eaton*, 23 L. T., N. S., 681; 19 W. R. 172.

1. The owner of shares in a company on which a considerable sum remained to be paid, sold them in the usual way to a stock jobber who, on name day, gave the name of a transferee who was subsequently proved to have been an infant. The vendor filed his bill against the jobber for an indemnification in respect of all calls on the shares. He also made an agreement whereby he undertook to pay to the liquidator of the company a given sum, to transfer the share to the liquidator, and to give him authority to sue and use his name in all proceedings against the jobber for the amount of calls due and all expenses incident to such proceedings, in consideration of which the liquidator was to do all in his power to procure a release for the vendor. In the meantime it had been decided by the House of Lords that in such a case as this the jobber is liable to the vendor. The jobber claimed the benefit of the agreement with the liquidator, and contended that the release operated in his favour, and that no more could be recovered from him than the liquidator was entitled to recover from the vendor:—Held, that as the object of the agreement was to enable the liquidator to enforce his claims against the jobber the latter could not claim the benefit of part of it without giving effect to the whole, and that consequently the agreement did not inure to his benefit. *Heritage v. Paine*, 2 L. R., Ch. D., 594; 45 L. J., Ch., 295; 34 L. T. 947.

2. The plaintiffs, who were jobbers on the Stock Exchange, having contracted to buy certain shares in a company which were standing in A.'s name, agreed to sell the same to the defendant's broker, who then did not disclose his principal's name. On the following settling day the defendant's name was given by the broker to the plaintiffs, and the purchase money was paid. The transfer was executed by A., but the defendant refused to execute it, alleging, that he never intended to take the shares in his own name, and that the broker had given his name for insertion in the transfer without his authority. The plaintiff filed a bill for specific performance of their contract with the broker, but before the cause came to a hearing the company was ordered to be wound up under the supervision of the Court:—Held, that the plaintiffs were entitled to a decree for specific performance, a variation

being, however, made in the decree by inserting a direction to the defendants to indemnify the plaintiffs against any calls. *Paine v. Hutchinson*, 37 L. J., Ch., 485; 3 L. R., Ch., 388; 18 L. T., N. S., 380; 16 W. R. 553.

3. The plaintiff, a holder of shares in a public company, agreed through his broker to sell them to a jobber for 202*l.* 10*s.* By the usage of the Stock Exchange, the transfer of the shares would not be made until a future day, and in the interval the shares might be again sold until a certain day, when the original buyer must name the person to whom the transfer was finally to be made. Accordingly, the shares were ultimately sold to the defendant for 145*l.* (a call having been made in the meantime), and the plaintiff executed and gave to the defendant a deed transferring the shares to him, the consideration named in which was 145*l.*, the difference being paid to the plaintiff by the jobber. The defendant never registered the transfer, and an order was made for winding up the company. The plaintiff was compelled to pay calls upon the shares, and filed a bill for specific performance and repayment, alleging, that there had been a purchase by the defendant for 202*l.* 10*s.*:—Held (reversing 6 L. R., Eq., 506), that the fact of the call having been made in the interval did not invalidate the contract. *Hawkins v. Maltby*, 3 L. R., Ch., 188; 17 L. T., N. S., 897.

But held, that the contract alleged by the bill was not proved. *Id.*

4. The plaintiff, a holder of forty shares in a company, agreed, through his brokers on the Stock Exchange, to sell that number to a jobber for 202*l.* 10*s.* The defendant subsequently directed his broker to buy 100 shares; and, in accordance with the custom of the Stock Exchange, the name of the defendant was passed to the plaintiff's brokers as the purchaser of the forty shares. The plaintiff executed a transfer deed of the shares to the defendant, the consideration afterwards inserted by the plaintiff's brokers being 145*l.*, which was the price the defendant had agreed to pay. The defendant paid to the plaintiff the 145*l.*, and received the deed and the share certificates, the difference between the 145*l.* and 202*l.* 10*s.* being paid by the jobber. The defendant never executed the deed, or registered the transfer, or repudiated the sale, and the company was ordered to be wound up:—Held, that there was a contract between the plaintiff and the defendant entitling the plaintiff to indemnity by the defendant. *Hawkins v. Maltby*, 4 L. R., Ch., 200; 38 L. J., Ch., 313; 20 L. T., N. S., 335; 17 W. R. 557.

STOCKS AND SHARES.

See STOCK.

STOP-ORDER.

See PRACTICE (STOP-ORDER).

STOPPAGE IN TRANSITU.

- I. IN GENERAL, 6645.
- II. INDORSEMENT OF BILL OF LADING. EFFECT, 6645.
- III. TERMINATION OF TRANSIT. WHAT IS, 6646.

I. IN GENERAL.

1. Distinction between the doctrine of stoppage *in transitu* and the ordinary case of the vendor's lien. *McEwan v. Smith*, 2 H. L. Ca. 309; 13 Jur. 265.

2. Injunction to restrain the sailing of a vessel, containing goods sold to a person who had become insolvent, but over which the plaintiff retained a right of stoppage *in transitu*, refused. A court of equity has not jurisdiction in any case to stop goods *in transitu*. *Semble. Goodhart v. Lone*, 2 Jac. & Walk. 340.

3. A bill in equity will lie to enforce a right of stoppage *in transitu*. *Schotsmans v. Lancashire & Yorkshire Railway Co.*, 2 L. R., Ch., 332; 36 L. J., Ch., 361; 15 W. R. 537; 16 L. T., N. S., 189. And see *Spalding v. Ruding*, 6 Beav. 370; 12 L. J., N. S., Ch., 503; 7 Jur. 733.

4. If A. sends goods to B. from beyond sea to the use of B., and before these goods are paid for B. dies insolvent, A. cannot have his goods again; but if A. sends goods to a factor to dispose of to A.'s use, and he becomes a bankrupt, these goods are not liable to the debts of such bankrupt. *Godfrey v. Furzo*, 3 P. W. 185.

A tradesman in London, by order of a tradesman in the country, sends goods to the latter, who does not appoint or name the carrier; afterwards the carrier embezzles the goods; the trader in the country must stand the loss. *Id.*

5. Where consignee becomes insolvent, consignor has a right to stop goods at any time before they come to his hands. *D'Aquila v. Lambert*, 2 Eden 75; Ambl. 399.

6. Application to quash a writ of replevin, issued to try the right to stop goods *in transitu*, refused. *Furrell v. Beresford*, 1 Ball & B. 328.

7. Stoppage no payment at law or in equity, unless under special circumstances, and in case of mutual demands, where the balance only is the debt. *Jeffer v. Wood*, 2 P. W. 128.

8. A., being beyond sea, consigns goods to B., then in good circumstances in London, but before the goods arrive he becomes a bankrupt. If A. can, by any means, prevent the goods coming into the hands of B. or the assignees, it is allowable in equity; and B. or the assignees shall have no relief in equity. *Wiseman v. Vandeputt*, 2 Vern. 203.

9. If goods are delivered to a carrier to be delivered to A., and are lost by the carrier, the consignee only can bring the action; but if before delivery, consignor hears A. is likely to become a bankrupt, or is actually one, and gets the goods back again, no action will lie for the assignees of A. *Snee v. Prescott*, 1 Atk. 248.

10. The right of stoppage *in transitu* extends only over the goods themselves and the net proceeds of the sale thereof, and not over

the policy moneys paid in respect of insurances effected by the vendee. *Bernadson v. Strong*, 37 L. J., Ch., 665; 3 L. R., Ch., 588; 16 W. R. 1025; 19 L. T., N. S., 40.

A merchant in Sweden contracted to sell timber to B. in England; B. chartered a ship to fetch the timber, and insured it. The timber was damaged during the voyage, and before it arrived in England B. had failed. The merchant in Sweden thereupon gave notice to the captain of the ship to stop the timber:—Held, that the merchant in Sweden was entitled as against the other creditors of B. to the proceeds of the sale of the timber, but not to money which had been paid for the damage under the policy of assurance. *Id.*

The vendor had received a dividend under the purchaser's bankruptcy, on condition that it should not prejudice his claim under the stoppage *in transitu*, and that if he recovered anything under the stoppage, the dividend should be returned, the vendor to be able to prove for the balance of his debt:—Held, that under the circumstances the vendor must return only the proportion of dividend assignable to the portion of debt recovered by him as above. *Id.*

Right analogous to.] 11. H. agreed to deliver 330 tons of bleaching powder to E. at the rate of thirty tons per month, E. paying for each delivery of thirty within one fortnight from that delivery. When only thirty tons remained to be delivered, E. made a declaration of his insolvency; H. retained the thirty tons; C., the creditors' trustee of E., demanded delivery of the thirty tons, which H. refused to do; and H. also returned E.'s debit note of 150*l.*, the price of the thirty tons:—Held, that H. had a clear right to refuse delivery, whether on the ground of a rescission of the contract, or in exercise of a right analogous to that of stoppage *in transitu*. *Exp. Chalmers, Re Edwards*, 42 L. J., Bk., 2; 21 W. R. 138. Affirmed 8 L. R., Ch., 289; 42 L. J., Bk., 37; 28 L. T. 325; 21 W. R. 349.

II. INDORSEMENT OF BILL OF LADING. EFFECT.

12. In equity, a transfer of goods for valuable consideration by a consignee for a limited purpose, does not destroy the consignor's right of stoppage *in transitu*, *ultra* the particular lien of the transferee. A. consigned goods of the value of 1,800*l.* to B., who transferred the bill of lading to secure 1,000*l.*; B. having become bankrupt, C., as B.'s factor, claimed, as against A.'s title to stop *in transitu*, a right to retain the whole in satisfaction of a general balance due to him from B.:—Held, first, that he was not entitled beyond the 1,000*l.*; and, secondly, that A.'s remedy against C. for the surplus was in equity. *Spalding v. Ruding*, 6 Beav. 376; 12 L. J., N. S., Ch., 503; 7 Jur. 733. Affirmed 15 L. J., N. S., Ch., 374.

13. Where the consignee transfers bills of lading to a creditor, as a security for his debt, and the consignor stops the goods *in transitu*, the creditor may issue a fiat against the consignee on his original debt. *Exp. Ashton*, 2 Dea. & Ch. 5.

1. The forbearance or release of an antecedent claim is not a good consideration for an indorsement of a bill of lading, so as to defeat an unpaid vendor's right of stoppage *in transitu*. *Rodger v. Comptoir d'Escompte de Paris*, 2 L. R., P. C., 393; 5 Moo. P. C., N. S., 538; 17 W. R. 468; 38 L. J., P. C., 30; 21 L. T., N. S., 33.

L. & S., carrying on business in London and at Hong Kong, as L., S., & Co., bought goods of L. and others, merchants at Manchester, to be shipped to their firm at Hong Kong. The goods were on a ten months' credit, and it was agreed that remittances of proceeds of the sales should be made from Hong Kong to meet the acceptances of L. & S. given for the price of the goods, on receipt of the bills of lading. L. & S. contracted for the carriage, and shipped the goods in a vessel which they engaged, and the bills of lading deliverable to their firm in Hong Kong, or their assigns, were signed by the master and handed over to L. & S., who accepted the draft of the vendors for the amount of the purchase. Before the goods or bills of lading reached Hong Kong, L., S., & Co., being insolvent, and pressed by two banking firms at Hong Kong, to whom they were largely indebted, in consideration of their debt to the bank assigned to them the "whole of their property, premises, and chattels, specified in a schedule thereto, with all the estate, right, title, interest, claim or demand of L., S., & Co. arising thereout or therefrom." The schedule enumerated "all goods and bills of lading, or other documents, for all goods now on the way hither." In pursuance of this agreement the bills of lading were indorsed and handed over to the banking firms, to whom the insolvent circumstances of L., S., & Co. at that time were well known:—Held, first, that a pre-existing debt was not a valuable consideration for the assignment, so as to defeat the right of the unpaid vendors to stop the goods *in transitu*. *Ib.*

Held, secondly, that the *transitus* had not ended before the arrival of the goods at Hong Kong, as the *transitus* continued while the goods were in charge of a third party, contracted with as carrier for the purpose of forwarding them. *Ib.*

2. The plaintiffs shipped goods to the order of Messrs. D., and received a receipt from them from the mate in charge of the vessel. Before the vessel sailed, and before the bill of lading had been given to the plaintiffs, Messrs. D. became insolvent, having previously indorsed the bill of lading to H. for valuable consideration, without the knowledge of the plaintiffs:—Held, that the plaintiffs had not parted with the control over the goods; and an injunction was granted to restrain the ship from sailing with the goods on board. *Newton v. Hubbard*, 2 W. R. 339.

3. The mere fact that the purchaser of goods has resold them, and that the bill of lading has been made out in the name of the sub-purchaser, does not put an end to the *transitus*, or destroy the right of the original vendor to stop the goods *in transitu*. *Exp. Golding, Re Knight*, 13 L. R., Ch. D., 628; 42 L. T. 270; 28 W. R. 481.

The rule being that effect will be given to a vendor's right of stoppage *in transitu*, so far as the exercise of that right will not interfere

with the rights of third parties acquired for value, it follows that an unpaid vendor, who has given a valid notice to stop *in transitu* before his vendee has received the purchase money of the goods from his sub-purchaser, is entitled, on the principle of *Spalding v. Ruding* (6 Beav. 376), to have the original purchase money satisfied out of the unpaid purchase money of the sub-purchaser. *Ib.*

4. The purchaser of goods (shipped by the vendor) consigned them abroad, and indorsed the bill of lading to a bank as security for an advance. Afterwards and before the arrival of the ship the consignees sold the goods "to arrive" to sub-purchasers, to whom they were delivered. The purchaser having become bankrupt, the unpaid vendor gave notice to the master, after the sub-sales, but before delivery and before payment of the freight, to stop the goods *in transitu*. The consignees remitted the proceeds of the sub-sales to the bank, who, after repaying themselves their advance, handed to the trustee of the bankrupt the balance, which was less than the original purchase money:—Held, that the principles established by *Re Westzinthus* (5 B. & Ad. 817) and *Spalding v. Ruding* (6 Beav. 376; 12 L. J., Ch., 503) were applicable; that the right of stoppage *in transitu* was not at an end when the notice was given; and that the vendor was entitled to the balance after satisfaction of the bank's claim. *Kemp v. Falk*, 7 L. R., App. Cas., 573; 52 L. J., Ch., 167; 47 L. T. 454; 31 W. R. 125. Affirming *S. C. sub nom. Exp. Falk, Re Kiell*, 14 L. R., Ch. D., 446; 42 L. T. 780; 28 W. R. 785.

Exp. Golding (13 L. R. Ch. D., 628) approved and followed. *Ib.*

Observations on *Slaney v. Heyward* (2 H. Bl. 504) and *Hammond v. Anderson* (1 B. & P., N. R., 69). *Ib.*

Semble, that notice of stoppage *in transitu* given to a shipowner imposes no duty on him to communicate the notice to the master of the ship, and that it is not effectual until it is communicated to the master. *Ib.*

III. TERMINATION OF TRANSIT. WHAT IS.

5. Upon a question between the consignees of the bill of lading and the vendor, as to the right of the latter to stop *in transitu*, in the absence of any contradictory evidence, the bill of lading, stating that the agent of the purchaser shipped the goods by his order, is conclusive as to the fact of delivery to the purchaser. In such case the Court will not interpose on behalf of the vendor to protect the property pending litigation, but will leave the vendor to the assertion of his right at law. *Meletopulo v. Ranking*, 6 Jur. 1095.

6. The vendor sold several parcels of goods, and sent them by railway to be delivered to the purchaser; the expense of delivery was to be paid by the vendor. Part of the goods was delivered, when the vendor, having suspicions as to the solvency of the purchaser, directed the proper officer of the railway company not to deliver the rest:—Held, that the vendor had a right to stop *in transitu*. *Exp. Cross*, 1 F. N. R. 215.

7. The *transitus* of goods is not ended by delivery on board a ship chartered by the

vendee. *Berndtson v. Strang*, 37 L. J., Ch., 665; 3 L. R., Ch., 588; 16 W. R. 1025; 19 L. T., N. S., 40. Affirming 36 L. J., Ch., 879; 15 W. R. 1168; 16 L. T., N. S., 583; 3 L. R., Eq., 481.

A timber merchant in Sweden agreed to sell certain timber to L. & R. By the original contract the goods were to be delivered "free on board, payable by the buyers' acceptance of seller's draughts, at six months from date of bill of lading; shipment to London," etc.; the seller was to provide ships at rates not exceeding a certain limit. It was subsequently agreed that the buyers should themselves charter a ship to convey the timber to London. The buyers accordingly chartered a ship, and the goods were loaded on board of her. The bill of lading named the seller as the shipper, and the goods were deliverable in London to "order or assigns." The seller indorsed the bill of lading in blank, and delivered it to the buyers in exchange for their acceptance. The buyers deposited the bill of lading to secure an advance. The ship was obliged to put into Copenhagen, and there, the buyers having stopped payment before the acceptance became payable, the vendor caused a notice of stoppage *in transitu* to be served on the captain:—Held, that the *transitus* was not ended by delivery on board the ship, and that the notice was effectual. *Id.*

1. G. shipped linseed from Smyrna to W. in London by a general ship. W. having obtained the bill of lading, mortgaged the cargo, and subsequently, before the ship's arrival, became bankrupt. W.'s mortgagees, after the ship had arrived, obtained a delivery order for the linseed, and handed it to an officer on board the ship, who promised to deliver the linseed to them when he got it clear:—Held, that this did not amount to a constructive delivery of the goods, and that the consignor's right of stoppage *in transitu* remained. *Coventry v. Gladstone*, 37 L. J., Ch., 492; 6 L. R., Eq., 44; 16 W. R. 837.

The test of the consignor's right of stoppage is not whether the voyage is at an end, but whether there has been a delivery of the goods to the consignee. *Id.*

In order to create a constructive delivery, there must be a fresh agreement between the parties as to holding or delivering the goods. *Id.*

2. A., a merchant at Bahia, shipped at Bahia a cargo of sugar by the order and at the risk of B., of Glasgow, in a ship chartered by A. The charter party provided, that the ship should proceed "either direct or *via* Falmouth, Cowes, or Queenstown, for orders to a port in the United Kingdom, or to a port on the Continent (between certain limits), and deliver the cargo in conformity with the bill of lading." The bill of lading stated that the ship was "bound for Falmouth, Cowes, or Queenstown for orders," and that the cargo was to be delivered "unto order or its assigns." A. sent to B., the charter party, the bill of lading, endorsed 'to B. or order'; and the invoice, which stated that the cargo was shipped "for the account and risk of B., for Falmouth, Cowes, or Queenstown, for orders and a market." The ship arrived at Falmouth, and the master, in pursuance of written instructions from A., announced its arrival to A.'s agents in London,

and asked them for orders. The agents applied to B. for instructions as to the destination of the ship; but before instructions were given B. became insolvent, and thereupon A.'s agents stopped the cargo:—Held, that the cargo had not been constructively delivered to B., that the *transitus* was not over, and that the stoppage was valid. *Fraser v. Witt*, 7 L. R., Eq., 64; 17 W. R. 92; 19 L. T., N. S., 440. And see *Jameson v. Wills*, 17 L. T., N. S., 380.

3. G. sold sixteen casks of oil by letter to the bankrupts, upon terms of payment by acceptance at thirty days' date. The oil arrived, and its arrival was notified to the bankrupts by the carrier; subsequently G. telegraphed to stop the delivery. The carrier gave notice to the parties to interplead:—Held, that the *transitus* ended with the notice of arrival of goods, and that the trustee in bankruptcy was entitled. *Exp. Gouda, Re Milla*, 20 W. R. 981.

4. A., a merchant in Liverpool, bought certain winches of yarn of B., in London, through C. who acted as broker for both parties, "To be taken immediately from the wharf in London and paid for by the buyers' acceptance at four months." B. sent an invoice of the goods to A., enclosing a bill of exchange for his acceptance, and on the same day C., acting as agent for A., directed the goods to be forwarded by rail to Liverpool. Upon their arrival there the railway company sent A. the usual advice note that the goods "remained there to his order and were then held by the company, not as carriers, but as warehousemen." A. did not accept the bill of exchange, but filed a petition for liquidation. B. having claimed the right of stoppage in transition as against the trustee under A.'s liquidation:—Held, that the acceptance of the bill of exchange was not a condition precedent to the passing of the property in the goods; and also that the goods on arriving at Liverpool had reached their final destination, and consequently that the *transitus* had ended. *Exp. Cutting, Re Chadwick*, 29 L. T., N. S., 431.

5. L. & S., carrying on business in London and at Hong Kong as L., S., & Co., bought goods of L. and others, merchants at Manchester, to be shipped to their firm at Hong Kong. The goods were on a ten months' credit, and it was agreed that remittances of proceeds of the sales should be made from Hong Kong to meet the acceptances of L. & S. given for the price of the goods, on receipt of the bills of lading. L. & S. contracted for the carriage, and shipped the goods in a vessel which they engaged, and the bills of lading deliverable to their firm in Hong Kong, or their assigns, were signed by the master and handed over to L. & S., who accepted the draft of the vendors for the amount of the purchase. Before the goods or bills of lading reached Hong Kong, L., S., & Co., being insolvent, and pressed by two banking firms at Hong Kong, to whom they were largely indebted, in consideration of their debt to the bank assigned to them the "whole of their property, premises, and chattels, specified in a schedule thereto, with all the estate, right, title, interest, claim or demand of L., S., & Co. arising thereout or therefrom." The schedule enumerated "all goods and bills of lading, or other documents, for all goods now on the way hither." In pursuance of this agreement the bills of lading

were indorsed and handed over to the banking firms, to whom the insolvent circumstances of L., S., & Co. at that time were well known:—Held, that the *transitus* had not ended before the arrival of the goods at Hong Kong, as the *transitus* continued while the goods were in charge of a third party contracted with as carrier for the purpose of forwarding them. *Rodger v. Comptoir d'Escompte de Paris*, 2 L. R., P. C., 393; 5 Moo., P. C., N. S., 538; 17 W. R. 468; 38 L. J., P. C., 30; 21 L. T., N. S., 33.

1. Where goods have been contracted to be sold to a vendee, delivery of such goods by the vendor on board a ship ostensibly belonging to a firm of which the vendee is a member, and of which ship he is sole registered owner, is a delivery of such goods to the vendee, so as to exclude the vendor's right of stoppage *in transitu*, if such ship is a general ship, and takes up the goods in course of one of its regular trips, even though the bills of lading, signed by the captain for such goods, should be made in favour of the vendee and his assigns, and one of such bills should be retained by the captain. *Schotemans v. Lancashire & Yorkshire Railway Co.*, 2 L. R., Ch., 332; 86 L. J., Ch., 361; 15 W. R. 537; 16 L. T., N. S., 189. Reversing 1 L. R., Eq., 349; 12 Jur., N. S., 42; 35 L. J., Ch., 100; 14 W. R. 270; 13 L. T., N. S., Bky., 733.

2. An agreement was entered into between L., a merchant in London, and W., a manufacturer in Yorkshire, that W. should from time to time supply L. with goods, W. drawing upon L., and L. accepting bills of exchange for the invoice price of the goods. L. was to ship the goods to R. at Shanghai, for sale on L.'s account. On receipt of the bills of lading L. was to send them to R., to whose order they were to be made out. W. was to have a lien upon the bills of lading, and each shipment of goods in transit outwards, or in the hands of the consignee or any other persons, which lien, however, was to extend only to the particular shipment, and was to cease when the bills of exchange given for that shipment had been paid. No notice of this agreement was given to R. In pursuance of the agreement L. ordered a parcel of goods of W. The goods were packed by W.'s packer, who forwarded them by railway to London in bales marked for Shanghai, and addressed to a ship called the *Gordon Castle* designated by L., which was loading in the West India Docks for Shanghai. The freight to London was paid by W. The packer, in advising L. of the dispatch of the goods, told him that they were at his disposal. L. accepted a six months' bill of exchange drawn upon him by W. for the invoice price. The railway company, in advising L. of the arrival of the goods at their Poplar Docks Station, told him that they remained at his order and were held by the company as warehousemen at his risk, but added, "will be sent to the *Gordon Castle*." The goods were shipped on board that vessel. The bills of lading were by L.'s directions made out to the order of himself or assigns, but they were never delivered to him by the shipowners, inasmuch as he did not pay the freight. The ship sailed for Shanghai with the goods on board. A few days previously L. had stopped payment, and shortly after she had sailed he

committed an act of bankruptcy, upon which he was adjudicated a bankrupt. The bills of lading were still in the possession of the shipowners in London, of whom they were claimed by W. and by the trustee in the bankruptcy. It was arranged that the goods should be sold by the agent of the shipowners at Shanghai, and the proceeds of sale paid to the person who should be entitled to them:—Held, that the agreement did not deprive W. of the right to stop the goods *in transitu*; that the transit was not ended till the goods arrived at Shanghai, and that the demand by W. of the bills of lading from the shipowners was an effectual stoppage *in transitu*. Consequently, that W. was entitled to have the bill of exchange satisfied out of the proceeds of sale. *Exp. Watson, Re Love*, 5 L. R., Ch. D., 35; 46 L. J., Bky., 97; 36 L. T., N. S., 75; 25 W. R. 489.

Held, also, that W. could have obtained an injunction to restrain L. from sending the goods to any other destination than Shanghai. *Id.*

Held, also, that the agreement, giving to W. a lien upon the bills of lading, etc., was not a bill of sale within the meaning of the 17 & 18 Vict., c. 36. *Id.*

3. Goods were purchased of B. in London by A., residing at Falmouth. On the 27th of October 1876 B. delivered the goods for shipment on a steamer calling at Falmouth, and on the same day posted an invoice to A. On the 29th of October the steamer left London, and on the 31st arrived at Falmouth, where the goods were discharged on the quay and taken to the warehouse of C., who was the agent of the Steam Packet Company, and in the habit of holding goods landed from the steamers at the risk and subject to the order of the consignees, and also with the exclusive right as between himself and the Steam Packet Company of delivering goods to the consignees. On the 30th of October A. committed an act of bankruptcy by absconding from Falmouth, and on the 4th of November 1876 he was adjudicated bankrupt. On the 4th of November B. telegraphed instructions to C. not to deliver the goods:—Held, that the *transitus* had not ended on the arrival of the goods at Falmouth, and transfer to the warehouse of C., who, in the absence of instructions, held them as forwarding agent, and not as an agent for B. to keep the goods; and, accordingly, that the right of B., as unpaid vendor, to stop the delivery of the goods prevailed as against the claim of A.'s trustee in bankruptcy. *Exp. Barron, Re Wordell*, 6 L. R., Ch. D., 783; 46 L. J., Bky., 71; 36 L. T., N. S., 325; 25 W. R. 466.

Semble, that a wharfinger holding goods *in transitu* cannot turn himself into an agent for the consignee so as to put an end to the *transitus* without the express authority of the consignee. *Id.*

4. Manufacturers at Sheffield contracted to deliver goods free on board at Liverpool, and would have sent the goods thither in their own name but for a subsequent arrangement with the purchasers, under which the goods were loaded in trucks sent by the purchasers, and on their arrival at Liverpool were warehoused in the name of the purchasers' agents there:—Held, under the circumstances, that the transit was at an end in law when the goods were loaded in the trucks. *Mercant Banking*

Co. of London v. Phoenix Bessemer Steel Co., 46 L. J., Ch., 418; 5 L. R., Ch. D., 205; 25 W. R. 457; 36 L. T., N. S., 395.

1. G. & Co., merchants in America, shipped a number of bales of cotton to Liverpool "consigned to order, for account and risk of W. & Co., of Luddenden Foot." At the same time G. & Co. sent to B. & Co., their agents at Liverpool, the shipping documents and a bill drawn by G. & Co. for W. & Co.'s acceptance. On W. & Co. accepting the bill, B. & Co. handed to them the shipping documents, and by their direction delivered the cotton to the railway company to be forwarded to Luddenden Foot, but before the whole of the cotton was delivered there, W. & Co. had filed a petition for liquidation. G. & Co. thereupon claimed the right of stoppage *in transitu* over the remainder of the cotton:—Held, that by the terms of the contract between the parties, Liverpool was the place of destination for the cotton, and that the transaction between them was completed when W. & Co. accepted the bill drawn against the consignment, and the shipping documents were handed over to him. *Exp. Blackburn, Exp. Gibbs, Re Whitworth*, 33 L. T., N. S., 479; 1 L. R., Ch. D., 101; 45 L. J., Bky., 10; 24 W. R. 298.

At Luddenden Foot there was a railway siding constructed on the property of the company, but kept in repair at the expense of W. & Co., for whose sole use and convenience it was made. When trucks containing bales of cotton reached Luddenden Foot, they were generally placed on the siding, and thence conveyed across the main line of the railway to the mill of W. & Co. on the other side. Such of the above-mentioned bales of cotton as reached Luddenden Foot prior to the filing of the liquidation petition, were, with the exception of one truck load, which remained on the general siding of the company, placed on the railway siding. Others were immediately taken across to the mill and manufactured, the rest remaining upon the siding. Other portions of the cotton reached Luddenden Foot after the date of the liquidation petition:—Held, assuming that Liverpool was not the destination of the cotton, that the cotton which was placed upon the railway siding at Luddenden Foot had reached its ultimate destination; and also that, under the circumstances, the delivery of part of the cotton was a constructive delivery of the whole. *Id.*

2. A cargo of 114 tons of miscellaneous iron castings was consigned from Scotland to London on board a ship chartered by the vendor, the bill of lading being made out in favour of the purchaser or his assigns, he or they paying freight. After thirty tons of the cargo had been delivered to the purchaser, the vendor gave notice to stop the unloading of the ship. At this time only part of the freight had been paid to the master of the ship. Soon afterwards the purchaser filed a liquidation petition, and a receiver was appointed. The balance of the freight was paid by the receiver, and the remainder of the iron was placed *in medio*:—Held, that, inasmuch as it could not be supposed that the master intended to abandon his lien for the unpaid freight, the delivery of the thirty tons did not operate as a constructive delivery of the whole cargo, and that consequently the *transitus* was not at an

end as to the remainder of the cargo, and the vendor's notice to stop *in transitu* was given in time. *Exp. Cooper, Re McLaren*, 11 L. R., Ch. D., 68; 48 L. J., Bky., 49; 27 W. R. 518; 40 L. T. 105.

3. Delivery of goods by the vendor to a carrier, even though the carrier be nominated and hired by the purchaser, is only constructive, not actual delivery to the purchaser, inasmuch as the contract with a carrier to carry goods does not make the carrier the agent or servant of the person with whom he contracts. Till the goods are in the actual possession of the purchaser, the transit is not at an end, and it makes no difference that their ultimate destination has not been communicated by the purchaser to the vendor. *Exp. Rosevear China Clay Co., Re Cook*, 11 L. R., Ch. D., 560; 48 L. J., Bky., 100; 27 W. R. 591; 40 L. T. 730.

A contract was entered into for the sale of some china clay to be delivered free on board at a specified port, and to be paid for by an acceptance of the purchaser. Afterwards the purchaser chartered a ship and gave notice to the vendors, who then delivered the clay on board the specified ship at the port agreed upon. The destination of the clay had not been communicated to the vendors. Before the ship left the harbour the vendors heard of the insolvency of the purchaser, and gave notice to the master of the ship to stop the clay *in transitu*. No bill of lading had been signed, nor had the purchaser given any acceptance for the price of the clay:—Held, by the chief judge, that so soon as the clay was delivered on board the ship the transit was at an end, and the vendors had no right afterwards to stop the clay *in transitu*. Held, by the Court of Appeal, that, the clay being in the possession of the master of the ship only as carrier, the transit was not at an end, and the notice to stop was given in time. *Id.*

STRANGER TO SUIT. RIGHTS OF.

See PRACTICE (STRANGER TO SUIT).

STREET.

See HIGHWAY—LOCAL GOVERNMENT, VII.—TURNPIKE.

STRIKING SOLICITOR OFF THE ROLLS.

See SOLICITOR, VIII.

SUBMISSION.

— *To Exceptions.* See PRACTICE (ANSWER)
— *To Arbitration.* See ARBITRATION, II.

SUBPOENA.

See PRACTICE (SUBPOENA).

SUBSEQUENT CONDITION.

See CONDITION.

SUBSTITUTED APPEARANCE.

See PRACTICE (APPEARANCE).

SUBSTITUTED SERVICE.

See PRACTICE (SERVICE).

SUBSTITUTION.

- *Of Petitioner's Creditor's Debt.* See BANKRUPTCY.
 - *Legacy. When Cumulative or Substitutional.* See LEGACY, IV.
 - *Substitutionary Bequests and Devises.* See WILL.
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SUCCESSION DUTY.

See REVENUE, V.

SUGGESTIO FALSI.

See FRAUD.

SUICIDE.

- *Conditions Respecting in Policies of Insurance.* See INSURANCE, II. III. 1.
 - *See also FELO DE SE.*
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SUITOR'S FEE FUND.

See PRACTICE (COSTS)—PRACTICE (PAUPER).

SUMMONING JUDGES.

See PRACTICE (APPEAL TO HOUSE OF LORDS)
—PRACTICE (TRIAL OR HEARING).

SUMMONS.

- *Writ of on Special Claims.* See PRACTICE (CLAIM. PROCEEDINGS BY).
 - *Writ of under Judicature Act.* See PRACTICE (WRIT OF SUMMONS UNDER JUDICATURE ACT).
 - *Originating.* See EXECUTOR AND ADMINISTRATOR, XXXI.
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SUNDAY.

1. An apprentice to a barber in Scotland, bound by his indenture "not to absent himself from his master's business on holidays and week-days, late hours or early, without leave," went away on Sundays without leave, and without shaving his master's customers:—Held, that the apprentice could not be lawfully required to attend his master's shop on Sundays for the purpose of shaving the customers, and that work, and all other sorts of handicraft, were illegal in England as well as in Scotland, not being works of necessity, or mercy, or charity. *Phillips v. Innes*, 4 Cl. & F. 234.

2. A charter of incorporation was granted to the company, on condition that no person should be admitted to a company's building or grounds on the Lord's day in consideration of any money payment, whether made directly or indirectly, unless the sanction of the legislature should be obtained. The company having obtained an Act of Parliament, authorising their directors to agree with the proprietors of any shares or stock for the conversion thereof into tickets of admission for life or years for such proprietor or his nominee, but providing that nothing therein contained should relieve the company from any condition contained in the charter, advertisements were issued by the directors, offering to accept the surrender of shares in exchange for tickets of admission for a term limited, to be made out to bearer, and to be available for Sundays as well as ordinary days:—Held, that the admission of any person on a Sunday, by means of such ticket as proposed, would occasion a forfeiture of the company's charter, and upon a bill filed by a shareholder, the company was restrained from accepting a surrender of any shares in exchange for such ticket of admission. *Rendall v. Crystal Palace Co.*, 4 Kay & J. 326; 27 L. J., Ch., 397.

3. Where a prisoner has been arrested on a Sunday, a subsequent detainer by another party, without collusion, is not vitiated by the illegality of the original arrest. *Hooper v. Lane*, 6 H. L. Ca. 443.

Practice.] 4. In the time limited by the 28th Rule of the 16th Order of May 1845, Sunday is reckoned. *Brenster v. Thorpe*, 11 Jur. 6.

5. Under the 19th Order of 1828 (as amended in 1831), if there be no seal between the long vacation and the first day of Michaelmas term, the computation of a fortnight allowed for obtaining the Master's report upon exceptions to an answer for insufficiency, is not to begin until the first day of that term.

although the Vice-Chancellor may have been sitting during the interval, and may have then made the order of reference. When the fortnight would expire on a Sunday, the time is extended to the Monday following. *Angell v. Westcombe*, 1 Myl. & C. 48.

1. In the number of days for notice of the time and place of examining a witness, an intermediate Sunday is to be reckoned. *McIntosh v. Great Western Railway Co.*, 1 Hare 328; 11 L. J., N. S., Ch., 283; 6 Jur. 464.

2. A conditional order may be served on a Sunday. *O'Leary v. Cavanagh*, Hay & J. 373.

3. *Quære*, whether in the computation of the six days allowed by the 5th General Order for referring exceptions, a Sunday, being the first of such days, is to be counted; but see the 13th Order of the 8th May 1845. *Dalton v. Hayter*, 1 Ph. 515; 14 L. J., Ch., 259; 9 Jur. 674.

4. If the 8th day after service of an order *nisi* for confirming a report is a Sunday, that day is not to be reckoned. *Milburn v. Lister*, 5 Sim. 565.

5. Subpœna served on Sunday irregular; attachment and injunction therefore set aside before appearance, on entering appearance with the registrar. *Mackreth v. Nicholson*, 19 Ves. 367.

6. Arrest under chancellor's warrant, for contempt of court, good on Sunday. *Eap. Whitchurch*, 1 Atk. 55.

7. In the language of the Court, bail are the gaolers of the principal; meane arrest by them good, even on a Sunday. *Eap. Gibbons*, 1 Atk. 239.

8. As to arrest under bankruptcy on Sunday. *Eap. Kerney*, 1 Atk. 54.

9. Denial on Sunday is not an act of bankruptcy. *Eap. Preston*, 2 Ves. & B. 312; 2 Rose 21.

10. Appearance on the 26th April; order on the 8th May, staying proceedings until security for costs should be given; security given on the 4th December; cause set down *pro confesso* on the 24th January, the 23rd being Sunday:—Held, irregular, the defendant having the whole of the 24th to answer. *White v. White*, 12 Ir. Eq. R. 425.

SUPERSEDEAS.

See BANKRUPTCY, XV.

SUPPLEMENTAL ANSWER.

See PRACTICE (ANSWER).

SUPPLEMENTAL BILL.

See PRACTICE (ABATEMENT, REVIVOR, AND SUPPLEMENT).

SUPPLICAVIT.

See PRACTICE (WRIT).

SUPPLYING DEFECTIVE OR NON-EXECUTION OF POWER.

See POWER, XIII.

SUPPORT OF LAND.

See also RAILWAY, V. 2.

11. The right of a person to the support of the land immediately around his house is not in the nature of an easement, but is the ordinary right of enjoyment of property, and till that is interfered with he has no legal ground of complaint, although, in fact, something may have been done which (without his knowledge) has occasioned results that will afterwards affect his property. *Backhouse v. Bonomi*, 9 H. L. Ca. 508.

12. A landowner has a right independent of prescription to the lateral support of his neighbour's land, so far as that is necessary to sustain his soil in its natural state, and also to compensation for damage caused either to the land or to buildings upon it by the withdrawal of such support. *Hunt v. Peake*, 1 Johns. 705; 6 Jur., N. S., 107; 29 L. J., Ch., 785.

Where houses of the plaintiffs were injured by mining operations of the defendant in adjoining land, which would have caused the soil to subside without the additional weight of the houses, a decree was made for perpetual injunction, and for compensation. *Id.*

Semble, also, that he may acquire by twenty years' enjoyment the right to lateral support for the additional weight of buildings erected on the land. *Id.*

13. The Court will interfere to restrain excavations which threaten danger to adjoining houses, though the actual resulting damage may be small. *Dent v. Auction Mart Co.*, 35 L. J., Ch., 555.

14. Defendant stayed by injunction from pulling down his rooms to prejudice of plaintiff's rooms. *Bush v. Field*, Cary, 90.

15. A right to lateral support from adjoining land may be acquired by twenty years' uninterrupted enjoyment for a building proved to have been newly built, or altered so as to increase the lateral pressure, at the beginning of that time; and it is so acquired if the enjoyment is peaceable and without deception or concealment, and so open that it must be known that some support is being enjoyed by the building. *Dalton v. Angus*, 6 L. R., App. Cas., 740; 50 L. J., Q. B., 689; 44 L. T. 844; 30 W. R. 191.

Semble, such a right of support is an easement within the meaning of the Prescription Act, 2 & 3 Will. 4, c. 71, s. 2. *Id.*

Two dwelling-houses adjoined, built inde-

pendently, but each on the extremity of its owner's soil and having lateral support from the soil on which the other rested. This having continued for much more than twenty years, one of the houses (the plaintiffs') was, in 1849, converted into a coach factory, the internal walls being removed and girders inserted into a stack of brickwork in such a way as to throw much more lateral pressure than before upon the soil under the adjoining house. The conversion was made openly, and without deception or concealment. More than twenty years after the conversion the owners of the adjoining house employed a contractor to pull down their house and excavate, the contractor being bound to shore up adjoining buildings and make good all damage. The contractor employed a sub-contractor upon similar terms. The house was pulled down, and the soil under it excavated to a depth of several feet, and the plaintiffs' stack being deprived of the lateral support of the adjacent soil sank and fell, bringing down with it most of the factory:—Held, that the plaintiffs had acquired a right of support for their factory by the twenty years' enjoyment, and could sue the owners of the adjoining house and the contractor for the injury. *Bower v. Peate* (1 L. R., Q. B. D., 321) approved. *Id.*

1. Where ancient buildings belonging to different owners adjoin each other there is a right of support from the building as well as from the land; and this right of support can be claimed under the provisions of the Prescription Act (2 & 3 Will. 4, c. 71). The mere fact that the support is derived from property which belongs to an ecclesiastical corporation does not prevent the right of support being acquired under the Act. But the enjoyment of the right must have been open and not surreptitious to come within the provisions of the Act. Damage having been done by the wrongful acts of a contractor or his workmen, employed under a contract and specification, to a neighbour's vault, it was held, under the circumstances, that both the employer and contractor were liable for it, and judgment was given for the plaintiff, with costs against both defendants. *Lemaitre v. Davis*, 19 L. R., Ch. D., 281; 51 L. J., Ch., 173; 46 L. T. 407; 30 W. R. 860.

Implied Grant of.] 2. A conveyance of land to a railway company, for the purposes of the line, gives a right by implication to all reasonable subjacent and adjacent support connected with the subject-matter of the conveyance, and therefore, although in the conveyance to the railway company the minerals are reserved, the grantor is not entitled to work them even under his own land, in any manner calculated to endanger the railway. *Caledonian Railway Co. v. Sprot*, 2 Macq. H. L. Cas. 479; 2 Jur., N. S., 623. *S. P. Caledonian Railway Co. v. Belhaven (Lord)*, 3 Macq. H. L. Ca. 56; 3 Jur., N. S., 573.

On the same principle, if an owner of a house conveys the upper story, reserving all below, the purchaser will be entitled, on general principles, without stipulation, to prevent any damage to the walls underneath. *Id.*

But if B. grants a meadow to A. for grazing purposes, retaining the minerals and the adjacent land, and if A., having no warranty

against subsidence, thinks fit to build a house on the edge of the meadow, and the house falls, he is without remedy against B., and has himself alone to blame for the consequences. *Id.*

If, however, the grant were made expressly for building purposes, there would then be an implied warranty of support, both subjacent and adjacent. *Id.*

In the case of a grant to a railway company for the purposes of the railway, if the line which divides the land granted from the land retained traverses a quarry, it may be that no adjacent support is necessary, and that the grantor may dig or remove the whole contiguous soil. *Id.*

But if the dividing line traverse a bog or bed of sand, it will be incumbent on the grantor to leave untouched such an intervening measure of lateral support as will prevent any part of the land granted from retreating. *Id.*

3. Whether a conveyance of land for the purpose of a railway being constructed thereon be voluntary or compulsory, every grant carries with it all that is necessary to the enjoyment of the subject-matter of it, and a certain amount of lateral support, being essential to the safety of the railway, is a necessary incident of the grant. The amount of support depends on the special circumstances of the locality; thus, if the railway crosses a river, then the abutments of the bridge will require a greater support than the other parts of the railway, and the conveyance will carry such support as an incident. *Elliott v. North-Eastern Railway Co.*, 32 L. J., Ch., 402; 8 L. T., N. S., 337; 7 Jur., N. S., 6; 9 W. R. 172.

Certain reservations of minerals contained in a railway Act:—Held, not to vary the ordinary rule at common law as above stated. *Id.*

The principle that a grantor, knowing the purpose for which his conveyance is accepted, cannot derogate from his own grant, applies to a compulsory conveyance, under an Act of Parliament, to a company. *S. C.* 6 Jur., N. S., 817; 29 L. J., Ch., 808; 8 W. R. 603.

The Act is sufficient notice to the grantor of the purposes for which the conveyance is made. *Id.*

The principle that a grantor cannot derogate from his own grant does not apply to an accidental state of circumstances—the flooded state of a mine, for instance—existing at the time of the conveyance. *Id.*

Therefore, where the owners of a drowned mine sold land to a railway company for the purpose of building a bridge, and the land sold derived additional support from the water in the mine:—Held, that the railway company was not entitled to restrain him from pumping out the water and restoring the mine to a working condition, although the mine had continued in its drowned state, and the works had been abandoned for forty years prior to the purchase. *Id.*

4. The corporation of L. put up a piece of land for sale in lots, the interest acquired by each purchaser being a right to a lease of the lot purchased by him, and he being bound to build upon the lot according to plans to be approved by the corporation. None of the lots were sold, and in July 1868 the plaintiff agreed for the purchase of one of the lots by private contract, subject to the original conditions. He furnished plans showing a founda-

tion 10 feet 9 inches deep; but finding the subsoil unsafe he laid his foundation at a depth of 8 feet 3 inches to the knowledge of the corporation, whose officer inspected the operations and made no objections. In June 1869 the plaintiff's house was carried to the joists of the ground floor. In August 1869 the defendant purchased from the corporation the adjoining lot. In October 1869, when the plaintiff's house was nearly finished, the corporation granted him his lease. After this the defendant got his lease, and in 1881, wishing to carry his foundations lower than those of the plaintiff, excavated to a considerably greater depth and endangered the foundations of the plaintiff's house:—Held, that the plaintiff was entitled to restrain the defendant from excavating so as to let down the plaintiff's house, for that there was not enough in the special circumstances of the case to take away the right of support from the adjoining lands of the grantor which is implied in a grant of land for the purpose of building. How the case would have stood if the grants to the plaintiff and the defendant had been contemporaneous, or if the right of support claimed would have prevented the corporation from building in a reasonable way on the adjoining lot, *quære*. *Rinby v. Bennett*, 21 L. R., Ch. D., 559; 48 L. T. 47; 31 W. R. 222.

SUPPRESSION OF DEEDS AND OTHER INSTRUMENTS.

See TITLE DEEDS.

SUPPRESSION OF DEPOSITIONS.

See PRACTICE (EVIDENCE).

SUPPRESSIO VERI.

See FRAUD and Cross-References there.

SURETYSHIP AND INDEMNITY.

- *Sureties for Receivers*. See PRACTICE (RECEIVER).
- *Sureties on Ne Exeat Regno*. See PRACTICE (NE EXEAT REGNO).
- *Rights on Bankruptcy*. See BANKRUPTCY, XXIV. 1. 2 AND 3.—XXIV. IV. 15.—XXIV. XXXV.—XLII. v. 10.

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I. *Contracts*, 6687.

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VII. *Against Calls*. See COMPANY.

V. PARTIES TO SUITS. See PRACTICE (PARTIES).

I. Rights of Creditor and Surety.

I. *The Contract*, 6653.

II. *Extent of Liability*, 6656.

III. *Right of Surety to Securities*, 6661.

IV. *Appropriation of Payments*, 6667.

V. *Discharge of Surety*, 6668.

I. THE CONTRACT.

1. *General Principles*, 6654.
2. *Consideration*, 6654.
3. *Statute of Frauds. Effect*, 6654.
4. *Sureties. Who are*, 6655.

1. General Principles.

1. *Seemle*, there are three kinds of contracts of suretyship between which it seems important to distinguish : (1) Those in which there is an agreement to constitute, for a particular purpose, the relation of principal and surety, to which agreement the creditor thereby secured is a party; (2) those in which there is a similar agreement between the principal and surety only, to which the creditor is a stranger; and, (3) those in which, without any such contract of suretyship, there is a primary and a secondary liability of two persons for one and the same debt, the debt being, as between the two, that of one of those persons only, and not equally of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid. *Duncan, Fox, & Co. v. North & South Wales Bank*, 6 L. R., App. Cas., 11; 50 L. J., Ch., 355; 43 L. T. 706; 29 W. R. 763.

2. *Seemle*, guarantees may be divided into two classes, the one in which the consideration is entire, and the other in which the consideration is fragmentary, supplied from time to time, and therefore divisible. (1) An instance of the first is where a person enters into a guarantee that in consideration of the lessor granting a lease to a third person he will be answerable for the performance of the covenants. The moment the lease is granted there is nothing more for the lessor to do, and such a guarantee as that of necessity runs on throughout the duration of the lease. (2) The other where the consideration is supplied from time to time, it is reasonable to hold, unless the guarantee stipulates to the contrary, that the guarantor may at any time terminate the guarantee. Instances of the second class are more familiar. They are, where a guarantee is given, to secure the balance of a running account at a banker's, or a balance of a running account for goods supplied. *Lloyd's v. Harper*, 43 L. T. 481; 15 L. R. Ch. D., 290; 50 L. J., Ch., 140; 29 W. R. 452. Affirming 49 L. J., Ch., 217; 42 L. T. 218; 28 W. R. 419.

2. Consideration.

3. Undertaking by one person to pay the debt of another does not require a consideration moving between them. *Exp. Minet*, 14 Ves. 190.

4. Undertaking in writing to guarantee the debt of another is sufficient, within the Statute of Frauds, without stating any consideration as between the creditor and the surety. *Exp. Gardom*, 15 Ves. 286.

5. An agreement by C. & Co. to answer the draft of S. for repairs, will not give any right to another person in whose favour a draft or bill is drawn to proceed against C. & Co., there being no consideration between the drawee and C. & Co. *Rattenbury v. Fenton*, 3 Myl. & K. 505; 3 L. J., N. S., Ch., 203.

Seemle, that if the agreement had gone on to state in whose favour the draft was to be drawn, there would have been an equity raised. *Id.*

There is no consideration between the purchaser and the vendor's creditor to entitle the

latter to recover from the purchaser the amount of repairs done to the subject matter of the sale. *Id.*

6. A bond was vested in a trustee in trust, as to income, for a married woman for life, for her separate use, with remainder in trust for her issue; and in default of issue, in trust for such persons as the married woman alone, notwithstanding coverture, should by deed, or instrument in writing, to be by her sealed and delivered in the presence of, and to be attested by, two credible witnesses, appoint. The husband being indebted to his bankers, on the balance of an account current, the married woman deposited the bond with the bankers, with a letter signed by her to the effect, that in consideration of the bankers paying, or having already paid, the cheques of the husband, or otherwise advancing him sums of money, she thereby guaranteed the repayment thereof; and that she deposited, as a collateral security, the bond, which she undertook to assign to the bankers, on request:—Held, that the consideration was sufficient, and that the separate life interest of the wife was effectually charged; but that, the letter not having been executed and attested as required by the power, the Court would not, under the circumstances, give effect to it as an appointment. *Thackwell v. Gardiner*, 5 De G. & Sm. 58.

7. A surety, upon being informed that proceedings were contemplated against himself and his principal, stated by letter his intention to pay the debt:—Held, after his decease, that the letter was a promise to pay; that his undisputed right to payment was a sufficient identity of the plaintiff, whose address was not set out in the claim; and that the forbearance to sue was a sufficient consideration for the promise. *Jones v. Beach*, 21 L. J., N. S., Ch., 543.

8. A scrivener who is employed to examine into a title fails in his duty, by neglecting to make a thorough inquiry, etc., whereby his client is a sufferer; afterwards the scrivener agrees to make him satisfaction in another way. This agreement decreed *in specie*, though urged that there was no consideration. *King v. Withers*, Pre. Ch. 19.

9. C. having got into difficulties, four friends agreed to help him, and became liable for him on various bills, none of which were signed by all the four. By an agreement subsequently signed by the four friends, they appointed W. their joint solicitor, to act for them in all matters relating to the bills, with full authority to settle the same on the best terms he could, and, upon the amount being ascertained for which the liabilities could be discharged, they undertook to provide the same in the proportion of one-fourth each. W. failed to effect any settlement:—Held, that the agreement was not binding, inasmuch as the settlement in consideration of which it was made could not be effected. *Ardeckne v. Howard (Lord)*, 27 L. T., N. S., 194; 20 W. R. 879.

3. Statute of Frauds. Effect.

10. As to engagement to pay the debt of another, requiring writing under the Statute of Frauds. *Exp. Carr*, 3 Ves. & B. 110.

11. Undertaking in writing to guarantee the debt of another sufficient, within the Statute

of Frauds, without stating any consideration as between the creditor and the surety. *Exp. Gardom*, 15 Ves. 286.

1. One promises, if the widow of an intestate would permit him to be joined with her in the letters of administration, he would make good any deficiency of assets to pay debts:—Held, the promise was binding, and not within the Statute of Frauds. Distinction where a promise is to pay the original debt on the foot of the original contract, and where it is a new consideration; the former is within the Statute of Frauds, the latter is not. *Tomlinson v. Gill*, Amb. 330.

2. An agreement to guarantee a composition to all the creditors of a third person who should, before a day specified, sign a release to the debtors of their respective claims, being an agreement to pay the debt of another, is within the 4th section of the Statute of Frauds, and cannot, in the absence of fraud, be varied by a subsequent parol agreement. *Emmet v. Dewhurst*, 3 Macn. & G. 587; 21 L. J., N. S., Ch., 497; 15 Jur. 1115.

3. A surety, upon being informed that proceedings are contemplated against himself and his principal, states by letter his intention to pay the debt:—Held, after his decease, that the letter was a promise to pay; that his undisputed right to payment was a sufficient identity to the plaintiff, whose address was not set out in the claim; and that the forbearance to sue was a sufficient consideration for the promise. *Jones v. Beach*, 21 L. J., Ch., 543.

4. A testator appointed his son and three other persons his executors and trustees. The son disclaimed and renounced probate, and afterwards purchased a portion of the testator's property. The other legatees raised a claim for losses incurred by the trustees, and the son's solicitor wrote on his behalf to the claimants, agreeing to pay 300*l.* in satisfaction of the losses:—Held, that this letter was not within the Statute of Frauds, as an agreement to answer the debt, default, or miscarriage of another; and that it was not invalid for want of consideration. The claim was therefore allowed against the son's estate. *Orrell v. Coppock*, 2 Jur., N. S., 1244; 26 L. J., Ch., 269; 5 W. R. 185.

5. A board of health had been formed in a town. L. was its chairman. M., a contractor, had, under the orders of the board, formed a main sewer in the town, and, under the orders of the board, had purchased pipes which would be required to be used in making the connecting drains between certain private houses and the main sewer. The board had, under 11 & 12 Vict., c. 63, s. 69, given notice to the inhabitants of certain streets to make these connecting drains, the effect of the notice being that if the inhabitants did not make those connecting drains the board might make them and charge the expenses on the defaulting inhabitants. The notice was disregarded. No subsequent resolution was passed by the board. M. was about to take away his carts and working materials, when L. said to him, "What objection have you to making the connections?" to which M. answered, "None, if you or the board will order the work, or become responsible for the payment": and L. replied, "M., go on and do the work, and I will see you paid."

M. did the work, and, the board refusing to pay, sued L. for the amount:—Held, that the words of L. were properly left to the jury as evidence to sustain a claim against him personally, and that they did not constitute a promise to pay the debt of another, so as to come within the operation of the Statute of Frauds. *Lakeman v. Mountstephen*, 7 L. R., H. L., 17; 22 W. R. 617; 43 L. J., Q. B., 188; 30 L. T., N. S., 437.

When the promise is made to answer for the debt or default of a third person, and there is no actual, but only a supposed liability on the part of that third person, the promise is equally void, whether it is in writing or not. But where the promise is made in respect of a future contemplated liability on the part of a third person, such a promise is within the 4th section of the Statute of Frauds. *Id.*

6. A., at the request of and on a verbal offer by B. to indemnify him against loss, joined with C. in a joint and several promissory note, which he was afterwards compelled to pay:—Held, that the offer to indemnify A. was not an agreement within the Statute of Frauds, s. 4, and, therefore, need not be in writing, and that A., having afterwards become the executor of B., was entitled to retain the amount paid by him on the note as a debt due to him from B.'s estate. *Wildes v. Dudlow*, 19 L. R., Eq., 198; 44 L. J., Ch., 341; 23 W. R. 435.

4. Sureties. Who are.

7. A. and B. give a joint promissory note, upon which money is lent by C. to them, and by them to D. B. becomes a bankrupt, and A. is obliged, after the bankruptcy, to pay the note:—Held, that he is not a surety for B., but that A. and B. are principal debtors or co-sureties, and therefore that A. could not prove for a moiety of the note against B.'s estate. *Exp. Porter*, 4 Dea. & Ch. 774; 2 Mont. & A. 281; 4 L. J., N. S., Bky., 86.

8. In the case of an ordinary money bond, there is no distinction upon the face of it between principal and surety. *Secus*, in the case of an indemnity bond, where the surety expressly stipulates for the act of his principal. *Antrobus v. Davidson*, 3 Meriv. 578.

9. Second tenant in tail joins in a mortgage and bond with the first, who receives the money lent:—Held, to be only a surety, and the real estate not liable in aid of the personal estate of the first, although he had joined in hopes to prevent a recovery. *Robinson v. Gee*, 1 Ves. 251.

10. The drawer of a bill of exchange, though not strictly a surety for the acceptor, who is generally primarily liable, may be in the nature of a surety; but the drawer, if first liable by the real nature of the transaction, with reference to the distinction, whether the acceptor had effects or not, is to have relief as a "person liable" within the stat. 49 Geo. 3, c. 121, s. 8. *Exp. Yonge*, 3 Ves. & B. 40.

11. The solicitor for the petitioning creditor, on the commission being superseded, writes to the bankrupt, "I am ready and hereby offer to allow and pay the costs" incurred by the bankrupt in petitioning for the supersedeas:—Held, that the solicitor was personally liable on this undertaking, and that the bankrupt might petition for an order on the solicitor to

pay these costs, notwithstanding a subsequent commission had issued against him, under which he had not obtained his certificate, his assignees disclaiming all interest in the matter. *Exp. Bentley*, 2 Dea. & Ch. 578; 2 L. J., N. S., Bkly., 39.

1. By a deed executed in consideration of 9,000*l.*, purported to be paid to M. L. and H. E., by D. and H., M. L. granted to them an annuity for three lives, charged upon the estate of M. L., and further secured by the joint and several bond and warrant of attorney of M. L. and H. E., but with a stipulation that execution should not be issued on the judgment to be entered on the bond, until the annuity should be in arrear for forty days. The deed of annuity contained covenants for title, and further assurance by M. L., and a covenant to pay the annuity by M. L. and H. E. :—Held, upon the construction of this deed, that H. E. was merely a surety, and not a principal, it having been proved that the sum of 9,000*l.* was raised for the use of M. L., and, therefore, that a subsequent alteration in the contract, reducing the rate of the annuity from 20*l.* to 9*l.* per cent., upon the loan of a further sum of 1,000*l.* without the knowledge of H. E., discharged him from his liability as a surety. (*Eyre v. Hollier*, 11. & G. temp. Plunk. 250.) But this decision was reversed, the House of Lords holding that H. E. was a principal, and that the question whether a person is principal or surety in the grant of an annuity is to be determined on the terms of the instrument, and that no extrinsic evidence is admissible for that purpose. *Hollier v. Eyre*, 9 Cl. & F. 1; 2 Dr. & War. 590.

2. A. and B. desiring to borrow money of a bank, the bank refused unless C. would join to secure them; C. agreed to join, and A. B. and C. drew a cheque, and the money was paid to them :—Held, that this was a joint, and not a joint and several liability; that C. was in the nature of a surety only, and a bill against his estate, after his death, could not be supported. *Other v. Iverson*, 3 Drew. 177; 1 Jur., N. S., 568; 24 L. J., Ch., 654; 3 W. R. 332; 3 Eq. Rep. 562.

3. If a creditor, with the knowledge that a person is intending to be surety, accepts the instrument or security which pledges his liability, the rights of suretyship attach upon the transaction. *Wythes v. Labouchere*, 5 Jur., N. S., 499.

4. A. and B. were trustees. B. was guilty of a breach of trust. The trust fund was ultimately restored, and A.'s costs were directed to be paid out of B.'s estate. A. afterwards paid money on account of these costs, after the passing of the 19 & 20 Vict., c. 97; and it was held that the money was paid by A. in the character of surety, and therefore that he was entitled, under the 5th section, to claim as a specialty creditor on account of it. *Lockhart v. Reilly*, 27 L. J., Ch., 54.

5. H. and W. were two of the directors of a banking company. It was agreed at a meeting of directors that H. should retire from being a director and shareholder on the terms embodied in a minute, as follows :—"H.'s shares to be taken at par. Release and indemnity may be arranged by the solicitors of the parties. (Signed), F. K., chairman." H. retired, and his shares were cancelled. W. was not

present at the meeting at which this minute was passed, but was aware of the transaction, and expressed no disapprobation, though he did not act to ratify it. It was subsequently determined, under the winding up of the company, that the cancellation of H.'s shares was invalid, and that he was a contributory :—Held, that W. was not under any liability to indemnify H. against liabilities of the company arising after H.'s retirement. *Exp. Walker*, 2 Jur., N. S., 1216.

W.'s silence did not make the minute binding on him, and even if it had done so, as the indemnity was agreed to be given only on the footing of the validity of the surrender of H.'s shares, and that surrender was invalid, the obligation to indemnify would have failed with it. *Semble. Ib.*

The minute did not import a contract by the directors personally to indemnify H., but the indemnity was to be given by the company; and as the surrender of the shares to the company was void, no personal liability remained in the directors. *Semble. Ib.*

Quære, whether, if the directors had agreed personally to indemnify H., the same result would not have followed, the agreement to indemnify being based on the assumed validity of the surrender of H.'s shares. *Ib.*

6. A surety, who as such was indebted together with his principal upon a joint note, received from the holder a letter, stating that the holder was about to make the principal a bankrupt, but could not proceed without joining the surety, and asking whether the surety would join the principal in a fresh note payable jointly and severally. The surety's solicitor answered that the surety would in a post or two pay the amount and interest due on the joint security :—Held, that the contract was not changed, and that the surety had, neither at law nor in equity, rendered himself severally liable. *Jones v. Beach*, 2 De G. M. & G. 886; 22 L. J., Ch., 425.

Quære, whether the dicta in *Thorp v. Jackson* (2 Y. & Coll. 561) can be supported, and whether a joint loan creates in equity a joint and separate liability. *Ib.*

7. Surety by subsequent dealings with the creditor, held to have become a principal. *Reade v. Lowndes*, 23 Beav. 361; 3 Jur., N. S., 877; 26 L. J., Ch., 793.

Judgment having been obtained against A., a surety, he entered into a new arrangement with the creditor (irrespective of the principal debtor), by which execution was not to issue while he kept up certain policies for securing the debt :—Held, that A. became principal, and not surety, by the new arrangement, and that no subsequent dealing between the creditor and the principal debtor would annul it. *Ib.*

Therefore the creditor having afterwards taken the principal debtor in execution and discharged him without payment :—Held, that A. was not thereby released. *Ib.*

II. EXTENT OF LIABILITY.

1. *Continuing Guarantee*, 6657.
2. *Limited Guarantee*, 6658.
3. *Lost Bonds*, 6659.
4. *Judgment recovered against Debtor. Estoppel*, 6659.
5. *Other Cases*, 6659.

1. Continuing Guarantee.

1. Where a bond was given by a merchant to his bankers as a security for a balance and for future advances, to which A. was a party as surety, afterwards, the bond being defective, a fresh one was executed in a larger sum, as was alleged, to secure a floating balance, but in the common form, with interest, from the date of the execution, which was also signed by A., but the purpose was not explained to him:—Held, that he was liable only for the balance then actually due, subject to an account of payments subsequently made to the bankers by his principals. *Walker v. Hardman*, 4 Cl. & F. 258; 11 Bli. N. S. 229. And see 5 L. J., Ch., 39.

2. A guarantee to bankers for the repayment of bills, and any advances that might be made:—Held, to cease on death of one of the partners before the time to which it was expressed to extend, and that bills accepted before and payable afterwards were within it; and that the amount guaranteed could not be increased by any act of the continuing firm and customer, but might be diminished; and that the amount guaranteed in respect of the bills, was not, under the particular form of the guarantee, to be reduced by a balance due to the customer from the bank. *Holland v. Teed*, 7 Hare 50.

3. A father gave his son a promissory note for 2,000*l.*, which was indorsed by the son, and discounted by a banking company, who took from the father an agreement under seal, that in consideration of their discounting the note, certain deeds of the father's deposited at the same time should remain a security for all money due or to become due from the son to the company on any account whatsoever. At the date of the agreement the son owed the company 3,000*l.* upon a running account, and the amount was subsequently increased to 5,000*l.* The father having died:—Held, that the agreement was a continuing guarantee, and that the bank was entitled to prove against the father's estate, not only for the 2,000*l.*, the amount of the note, but for all sums due to them from the son. *Burgess v. Eve*, 41 L. J., Ch., 515; 13 L. R., Eq., 450; 20 W. R. 311; 26 L. T., N. S., 540.

Semble, that a general guarantee under seal may, under certain circumstances, be withdrawn upon the terms of paying all that may be due under it at the time of giving notice of withdrawal. *Id*

4. B. being indebted to the firm of W. and P. gave them a memorandum of charge on leasehold premises, subject to a prior mortgage. The memorandum charged the premises "with the payment of 100*l.* for goods delivered, or to be delivered, to me by you to that amount." The prior mortgage was afterwards transferred to the defendant. Between the date of the memorandum of charge and the transfer of the prior mortgage, W. and P. had delivered goods to B., and received cash from him on account to 120*l.*; but on the balance of account, just before the transfer the sum of 81*l.* 4*s.* 4*d.* was due to W. and P.:—Held, that the security given by the memorandum of charge of 100*l.* and payment thereon did not expire upon the delivery of goods to the amount, but was a continuing security. *Weston v. Empire Assurance Corporation*, 19 L. T., N. S., 505.

5. A guarantee was given by a married

woman entitled to separate estate to a trader, who supplied her husband with goods in the course of business, in the following words:—"In consideration of you, M., having, at my request, agreed to supply and furnish goods to C., I do hereby guarantee to you the sum of 500*l.* This guarantee to continue in force for six years and no longer." C. was at the date of the guarantee indebted to M. for goods supplied, and in consequence of a bill given by C. in respect of such goods having been dishonoured, M. had declined to supply any further goods without security:—Held, that the guarantee only extended to payment for goods supplied subsequently to its date. *Morrell v. Cowan*, 26 W. R. 90; 37 L. T., N. S., 586; 47 L. J., Ch., 73; 7 L. R., Ch. D., 151. Reversing 25 W. R. 808; 6 L. R., Ch. D., 166; 37 L. T., N. S., 122; 25 W. R. 808.

6. Certain of the directors of a company guaranteed personally to the company's bankers the drafts of the agent of the company to the extent of 1,000*l.*, and 1,000*l.* further, undertaking to provide the bankers with funds to meet the acceptances before maturity. The company kept a current account with the bankers, and the drafts of its agent were from time to time honoured and debited to this current account. One of the guarantors died, and his estate was under the administration of the Court. The company's current account had been constantly overdrawn; at the date of the testator's death it was overdrawn to the amount of 1,605*l.* 18*s.* 6*d.*; and the company was now in liquidation:—Held, that the guarantees given were a continuing security not satisfied by the earlier credits in the current account, and that, therefore, the bankers were entitled to prove against the testator's estate for the sum of 1,605*l.* 18*s.* 6*d.* and interest at 4 per cent. from the date of the testator's death. *Re Booth, Browning v. Baldwin*, 27 W. R. 644; 40 L. T. 248.

7. A guarantee the consideration for which is given once for all cannot be determined by the guarantor, and does not cease on his death. But as to whether a guarantee for future advances, which the party guaranteed is not bound to make, is not determinable by the guarantor, and whether it does not cease on notice of his death, *quære*. *Lloyd's v. Harper*, 16 L. R., Ch. D., 290; 50 L. J., Ch., 140; 43 L. T. 481; 29 W. R. 452. Affirming 49 L. J., Ch., 217; 42 L. T. 218; 28 W. R. 219.

In May 1863, a father, on the occasion of the admission of his son as an underwriting member of Lloyd's, addressed to the managing committee of that body a letter, by which he held himself responsible for all his son's engagements in that capacity. Lloyd's was then a voluntary association, governed by certain by-laws, under which a person once admitted a member could not be excluded from membership except in the event of his bankruptcy or insolvency. The association consisted of underwriting members, non-underwriting members, and subscribers. The practice of the underwriting members was to underwrite policies of marine insurance for the benefit of various owners of property, both members of the association and outsiders, but the policies with outsiders could only be effected through the agency of insurance brokers who were either members of or subscribers to the association.

The association as such incurred no liability on the policies underwritten by its members. In 1871 the society was incorporated by Act of Parliament, all the rights of the committee on behalf of the members being vested by the Act in the corporation. In 1876 the father died, and notice of his death was shortly afterwards given to Lloyd's. In 1878 the son became bankrupt, and thereupon ceased to be a member of Lloyd's:—Held: (1) That the guarantee was not determined by the death of the father or by the notice of it, but that his estate was liable in respect of engagements contracted by the son after his death. (2) That the guarantee extended to all engagements contracted by the son as an underwriting member of Lloyd's, whether with members or with outsiders. (3) That the committee of Lloyd's, and the corporation of Lloyd's as their successors, were trustees of the benefit of the guarantee for all the persons, whether members or outsiders, with whom the son had contracted engagements as an underwriting member, and that the corporation could maintain an action to enforce the guarantee against the father's estate for the benefit of all those persons; on the ground, as to the outsiders, that the brokers, through whom the son's engagements with them were contracted, were trustees for their principals of the right which they themselves had to call on their own agents, Lloyd's, to enforce the guarantee for their benefit. *Ib.*

2. Limited Guarantee.

1. Surety for indemnity to a limited amount, having paid to the extent of his engagement, entitled to dividends, upon proof by the creditor under the bankruptcy of the principal debtor, subject (see *Exp. Turner*, 8 Ves. 243) to a deduction of the proportion of dividend upon the residue of the debt proved beyond that for which the surety was engaged, supposing that expunged. The surety not entitled to the benefit of the proof against other estates upon a distinct security. *Paley v. Field*, 12 Ves. 435.

2. Surety by bond for advances generally, but under a limited penalty, is not liable beyond that amount. Therefore, paying that sum, he is entitled to a proportion of the dividends on the proof by creditor to a greater amount under the bankruptcy of the principal debtor. *Exp. Rushforth*, 10 Ves. 409.

Surety in bond may compel creditor to prove under bankruptcy of principal, and creditor will be a trustee of dividends for surety paying the whole; but party liable with others upon bill of exchange, cannot raise that equity by payment subsequent to proof of holder, until he has received 20s. in the pound. *Id.* 414.

It is a rule, that surety charged for the whole debt, and paying only part, has no equity to stand in the place of party paid. *Id.* 420.

3. A surety by bond for advances generally, but under a limited penalty, is not liable beyond the penalty; by paying the penalty, he is entitled to a proportion of the dividends from a proof by the creditors to a greater amount under the bankruptcy of the principal debtor; and a surety may compel the creditor

to prove under the commission against the principal, and to become a trustee of the dividends for such surety having paid the whole. *Exp. Wood*, cor. *Ld. Thurlow*, Bridge Ind.

4. Where a limited guarantee has been given, and the limit has been exceeded by the guarantee, who afterwards receives from the estate of the principal debtor a dividend, the guarantor is entitled to the benefit of a proportional part of that dividend on the amount guaranteed, notwithstanding that the unpaid debt greatly exceeds the amount of such guarantee. *Thornton v. McKean*, 1 Hem. & M. 525; 1 N. R. 16; 11 W. R. 140; 32 L. J., Ch., 69.

Where the guarantee has recovered the whole sum guaranteed in an action against the guarantor, the right of the latter to file a bill for an account and payment to him of such dividends is not barred by the fact that he might have pleaded a set-off to that extent in the action, and omitted to do so. *Ib.*

Such a claim is not a "mere money demand" within the meaning of the principle which excludes suits from damages merely. *Ib.*

A surety gave to a creditor a guarantee to the extent of 5,000*l.*, against losses that might arise from advances to be made to his principal. Advances were made to the principal to an amount considerably exceeding 5,000*l.*, and after his death the creditor proved in an administration suit for the whole debt, and received dividends thereon. He afterwards recovered the 5,000*l.* in an action against the surety. Upon a bill filed by the surety:—Held, that he was entitled to be paid such a proportion of the past and future dividends as was received in respect of the 5,000*l.*, and that he had not lost his equity by not pleading a set-off to the action. *S. C.* 32 L. J., Ch., 69; 11 W. R. 140.

5. A guarantee to B. & Co. the payment of all goods supplied by them to H. until they received notice from C. of the discontinuance of the guarantee, "but so as A.'s liability under the guarantee should not at any time exceed 250*l.*" H. afterwards became bankrupt, and owed B. & Co. for goods 657*l.*, upon which sum they received a dividend in the bankruptcy. A. paid the 250*l.* under his guarantee:—Held, that A. was entitled to receive from B. & Co. a proportionate part of the dividend. *Hobson v. Bass*, 19 W. R. 992; 6 L. R., Ch., 792.

6. Four directors of a company, by way of security for any balance which might be due from the company to a bank, gave the manager of a branch of the bank their promissory note for 2,000*l.*, and the manager indorsed the note to the bank. The company was wound up. The bank proved in the winding-up for 3,659*l.* as due by the company to the bank, and was declared entitled to a dividend of 1,051*l.* on that sum. The bank afterwards brought an action against one of the makers of the note, who paid the bank 2,067*l.* for debt and interest due on the note:—Held, that the giving the note was in pursuance of an ordinary contract of suretyship, and that the surety who had paid the 2,067*l.* was entitled to receive from the bank a share of the dividend, bearing the same proportion to the whole dividend as the sum paid by him bore to the sum proved for by the bank. *Gray v. Seckham*, 7 L. R., Ch., 680; 20 W. R. 920; 27 L. T., N. S., 290; 42

L. J., Ch., 127. Affirming 41 L. J., Ch., 281; 26 L. T., N. S., 233.

3. Lost Bonds.

1. If bond is lost, equity will set it up against surety, as well as principal debtor. *Sheffield v. Castleton (Lord)*, 1 Eq. Abr. 93.

2. Relief upon a lost bond against sureties, the principal being out of the jurisdiction, upon giving an indemnity against the demand of the plaintiffs, or persons claiming under them by virtue of the bond, and such costs, damages, and expenses as defendants may be put to by loss of the bond. *East India Co. v. Boddam*, 9 Ves. 462.

4. Judgment recovered against Debtor. Estoppel.

3. In the absence of special agreement a judgment or an award against a principal debtor is not binding on the surety, and is not evidence against him in an action against him by the creditor, but the surety is entitled to have the liability proved as against him in the same way as against the principal debtor. *Exp. Young, Re Kitchen*, 17 L. R., Ch. D., 666; 50 L. J., Ch., 824; 45 L. T. 90.

4. Where A. contracts to indemnify B. against a claim, and a judgment is obtained against B. in an action *bonâ fide* defended by him, and he pays the demand, A. cannot be heard to contend that the judgment was erroneous; the case is otherwise where there is no contract to indemnify, but only a claim to indemnity founded on a breach of trust. *Gray v. Lewis, Parker v. Lewis*, 8 L. R., Ch., 1035; 21 W. R. 923, 928; 29 L. T., N. S., 199.

5. Other Cases.

5. A surety not chargeable in equity further than he can be by law. *Ratcliffe v. Graves*, 1 Vern. 196.

6. Sureties relieved from the penalties of the bond in Chancery. *Anon.*, Cary 12.

7. A petition by a solvent surety of an insolvent tenant to surrender or reduce the rents of certain premises, which had greatly diminished in value since the lease was made, was dismissed with costs. *Semble*, the general rule of equity by which a surety is supposed to be favoured more than the principal debtor, is erroneous. *Re O'Neill's*, San. & Sc. 686.

8. The 54th and 56th sections of statute 6 Geo. 4, c. 16, are not confined to mere personal obligations by the surety, but are applicable to cases where the property of the surety is assigned as collateral security for the debt of the principal. *Maber v. Hobbs*, 2 Y. & Coll. 317; 6 L. J., N. S., Exch. Eq., 12.

9. A surety is no more justified in placing the whole of his property out of the reach of liability to pay the debt than if he were the principal debtor. *Goodricke v. Taylor*, 2 De G. J. & S. 122.

10. The vendor of a trading concern guaran

teed the net profit of the business sold, and of another business, in which the purchasers were also engaged, at a certain specified sum:—Held, that the guarantee applied to the profits made by the two concerns, after deducting the interest allowed on the amount of further capital advanced by the purchasers for the purpose of carrying on the concern. *Kirby v. Wright*, 2 Myl. & K. 131; Coop. temp. Brougham 215.

11. Extent of acceptance of bills by a surety. *M'Fee v. Morris*, 7 Jur. 387.

12. Injunction against securities obtained by one French emigrant against another, by arresting him when about to sail on the expedition against France, and under an obligation entered into in France as surety, which, according to the law of France, could not affect the person. *Talleyrand v. Boulanger*, 3 Ves. 447.

13. By an agreement between the Agra and Masterman's Bank, a Calcutta tea company, and their London agents, the bank granted a letter of credit, permitting the tea company to draw bills on the bank. The tea company undertook that the credit should provide for the outlay for the season's tea; that it would ship the whole produce of the season; that it would draw upon the London agents for the value of the produce, and forward to the bank the bills, with bills of lading, policy of insurance, and invoice of tea shipped; and that it would pay any balance which might appear due on the credit on or before a certain date. The London agents guaranteed to the bank that the tea company would perform its undertaking, "the terms of which we hereby confirm, holding ourselves responsible for the same." The tea company drew, in accordance with the letter of credit, several bills on the bank, which it accepted. Before any of them became due, the bank stopped payment, and was wound up, and its property transferred to the Agra Bank. The bills were not paid at maturity, but were afterwards paid either by the Agra and Masterman's Bank or by the Agra Bank. The tea company never performed any part of its undertaking except the drawing the bills, before mentioned, and became insolvent. The Agra Bank, relying on the guarantee, claimed to be a creditor, for the amount of the bills, against the estate of the London agents, who had executed a deed of inspectorship:—Held, that the fact of the Agra and Masterman's Bank stopping payment and being wound up did not excuse the tea company from fulfilling its contract; or release the guarantors from their liability; and that the claims of the Agra Bank must be admitted for the amount of such damage as it had sustained by the default of the tea company to fulfil its contract. *Exp. Agra Bank, Re Barber*, 39 L. J., Bky., 39; 9 L. R., Eq., 725.

14. A receiver, who had omitted to account regularly, became bankrupt, being indebted to the trust estate in a large sum, and for some time no steps were taken to have the accounts duly passed:—Held, that under the particular circumstances of the case, his sureties were not liable to pay interest on the balance found due from him, though he himself, if solvent, would have had to pay such interest. *Semble*, that in general the sureties of a receiver are answerable for such interest, as well as for such

principal as the receiver himself is liable to pay. *Dawson v. Raynes*, 2 Russ. 466.

1. The sureties for a receiver are liable under the recognisance for the costs of an attachment against the receiver for not passing his account, and for all costs incurred in discharging him and appointing a new receiver. *Mauvssell v. Egan*, 9 Ir. Eq. R. 283; 3 J. & L. 251.

2. The sureties in the recognisance of the committee of a lunatic for his obeying the orders of the Lord Chancellor, with respect to the lunatic's estate:—Held, liable, on his making default, not only for the balance reported due from him, but also for the costs of the proceedings taken for enforcing the payment of such balance, although they may have had no notice of the default of their principal until after such proceedings taken. *Re Lockey*, 1 Ph. 509; 14 L. J., N. S., Ch., 164.

3. Where, in a suit against the principal and sureties to a bond, the sureties were held liable to make good a deficit of principal and interest, and costs were given against the principal, but not against the sureties:—Held, that the sureties were not to be liable for the costs by circuitry, under the bond. *Berwick (Mayor) v. Murray*, 3 Jur., N. S., 847; 26 L. J., Ch., 201.

4. The respondent advanced money to the appellant on a guarantee to be repaid "on the completion of six houses in accordance with a contract between myself and T." One of the terms of the contract was that the houses were to be built to the satisfaction of a surveyor, and payment was to be made upon his certificate. No such certificate had been given. In an action on the guarantee, brought by the respondent against the appellant, the jury found that, as a matter of fact, the houses were completed:—Held, that the respondent was entitled to recover, notwithstanding the absence of the certificate. *Lewis v. Hoare*, 44 L. T. 66; 29 W. R. 357.

5. A surety has no equity to restrain an action against him by the creditor on the ground that the creditor has instituted proceedings in equity under which he may obtain relief against the principal, in the absence of circumstances to prevent the surety from recovering over against his principal. *Jackson v. Digby*, 2 W. R. 540.

6. There may be cases in which a security will be rectified as against a surety, so as to make it conformable to his intentions. *Spaight v. Corone*, *Edwards v. Spaight*, 1 N. R. 550; 1 Hem. & M. 359.

7. On claim filed to have a fund provided by the executors of a surety who had died insolvent, and who had with his principal covenanted to pay 1,000*l.* in May 1858, the Court held that the executors ought to provide the fund. *Atkinson v. Grey*, 18 Jur. 282.

8. A mortgagee upon two estates, one of which was not to be had recourse to unless the other proved insufficient, instituted a redemption suit against the prior mortgagees of the other property, setting up various doubtful claims against them. The prior mortgagees offered a small sum of money for the purchase of her interests. She applied to the owners of the surety estate, offering

either to sell to them on the same terms, or to allow them to continue the suit. They refused or neglected to do anything, and she then sold to the prior mortgagee:—Held, that under the circumstances the sale was binding on the owners of the surety estate. *Aoland v. Gravener*, 1 N. R. 350. And see 34 L. J., Ch., 474; 31 Beav. 482.

III. RIGHT OF SURETY TO SECURITIES.

9. A surety paying off the debt is entitled to the benefit of a security given without his knowledge by the debtor to the creditor, at a different time, to secure another demand in addition to that for which he became surety. *Scott v. Knox*, 2 Jones 778.

10. A surety is entitled to the benefit of all securities obtained by the creditor from the principal for the debt; and where a surety pays a debt secured by separate judgments obtained against himself and the principal, upon their joint and several bond, he may compel the creditor to assign to him the judgment obtained against the principal. *Mara v. Ryan*, 2 Jones 715.

11. Where a creditor recovered judgment on a bill of exchange (in which the plaintiff was joined as surety) against the principal debtor, and also against the bail in the action, and the surety "paid and satisfied" both judgments, and took assignments thereof:—Held, that he could not recover on the judgment against the bail. *Armitage v. Baldwin*, 5 Beav. 278.

12. A. brought separate actions against B. and C. for the payment of the amount of a joint and several promissory note given by B. and C., his surety, to A., and recovered judgment in both actions; A. issued out execution only against C., the surety, who thereupon paid the debt and costs. C. dying, his administratrix filed a bill against A. and B. for an assignment of the judgment obtained by A. against B., the principal debtor:—Held, that as the debt was discharged, the judgment was satisfied, and could not be enforced at law against B., and that a court of equity would not compel an assignment, and that judgment was only available at law for the costs of the action against the principal. *Doubiggen v. Bourne*, 2 Y. & Coll. 462; 6 L. J., N. S., Exch. Eq., 82; 1 Jur. 102; Youngs 111.

13. Upon the appointment of A. to the office of county treasurer, in 1831, he, together with four other persons, B., C., D., and E., entered into security by recognisance, whereby A. acknowledged himself indebted to the King in 7,000*l.* sterling; by the same instrument B. and C. acknowledged themselves to be jointly and severally indebted in 5,000*l.* sterling; and D. and E. in like manner in 2,000*l.* sterling. In the condition (which was that A. should duly account, pursuant to the 4 Geo. 4, c. 33) the instrument was described as "the foregoing recognisance." In 1837 A. resigned the office of treasurer, being a defaulter to the amount of 18,000*l.* and upwards, of which sum about 4,000*l.* was due to the Crown, and the residue to the county:—Held, that this was a recognisance securing a single sum of 7,000*l.* and no more:—Held, also, that 7,000*l.* British was the

amount thereby secured, although the amount which the 4 Geo. 4, c. 33 required such treasurer to secure was 7,000*l.* Irish; and that upon payment of that sum by A. the principal, he was entitled to have the recognisance of himself and sureties vacated; but on payment of that sum by the sureties they were not entitled as against the Crown to the benefit of the recognisance acknowledged by A. the principal. *Reg. v. O'Callaghan*, 1 Ir. Eq. B. 439; Jon. & C. 154.

Sureties of a county treasurer, paying the amount of his recognisance, are not by reason of such payment entitled to priority over the Crown, there being a debt due by such treasurer to the Crown *ultra* the amount of the recognisance. *Id.*

1. B. became surety for S. by bond and several judgment of 1807; and S. afterwards became surety for B. to nearly the same amount by bond of 1814. A suit for the administration of B.'s assets having been instituted by a judgment creditor of 1816, decrees to account and for a sale were pronounced in 1822. S., having in 1821 been obliged to pay the debt for which he was B.'s surety, procured the creditors of 1807 to prove the debts under the decree:—Held, that they were entitled to be paid the sum reported due to them, but that they should assign their judgment against S. to a trustee for B.'s creditors. *Peoples v. Stewart*, Hayes 90.

2. As to the assignment of a judgment to a trustee for the benefit of a co-surety, see *Scott v. Lowry*, Hayes 95. n.

3. The plaintiff joined the testator as surety in a bond, which he paid after the death of the testator, taking assignment of the bond; he is only a simple contract creditor of the testator. *Jones v. Davids*, 4 Russ. 277.

4. The right of a surety who pays the debt, to the benefit of subsidiary securities belonging to the principal, is the common equity of the Court; therefore, where A. granted land to B., who covenanted to pay rent, and keep premises in repair, and C. executed a mortgage to A. to secure the performance of the covenants, a bill to foreclose (rent being in arrear) filed by A., who afterwards accepted a surrender of the land from B., dismissed; for the subsidiary fund to which C., as surety, was entitled to resort for indemnity being extinguished by A. accepting the surrender, C. was thereby deprived of his remedy over the land. *Harberton (Lord) v. Bennett*, Beat. 386.

5. A surety for part of a debt is not entitled to the benefit of a security given by the debtor to the creditor, at a different time, for another part of the debt. *Wade v. Coups*, 2 Sim. 155.

6. Where two persons execute a bond, the one as principal, the other as surety, and no other assurance is executed at the time, the surety paying the bond debt is a simple contract creditor only of the principal. *Copis v. Middleton*, T. & B. 224; 2 L. J., Ch., 82. S. P. *Simpkins v. Poulet*, 2 L. J., Ch., 81.

It is a general rule, that in equity a surety is entitled to the benefit of all the securities which the creditor has against the principal; the rule, however, must be qualified, by considering it to apply to such securities as continue to exist, and do not get back upon

payment to the person of the principal debtor. *Id.*

Where a bond is given by principal and surety, and at the same time a mortgage is made for securing the debt, the surety, if he pays the bond, has a right to stand in place of the mortgagee. *Id.*

7. Sureties are entitled to the benefit of every security which the creditor has against the principal. *Mayhew v. Crickett*, 2 Swan 191; 1 Wils. 418.

8. Surety paying off specialty debts is to be considered as a specialty creditor. *Robinson v. Wilson*, 2 Madd. 434.

9. Surety for a receiver indemnified out of the balance due to him. *Glossop v. Harrison*, 5 Ves. & B. 134; Coop. 61.

10. The Court will not, sitting in bankruptcy, on behalf of the sureties of a bankrupt, direct a sale of mortgaged premises for payment of the debt secured by recognisance, or for payment of any other security except a mortgage. *Exp. Usher*, 1 Ball & B. 197.

11. A. and B. join in executing a bond and warrant to C., who entered judgment thereon, and issued execution against A.; he, being merely a surety, filed a bill to have judgment assigned upon payment of the debt, which was decreed. *Hill v. Kelly*, 1 Ridgw. L. & S. 265.

12. A., being indebted to B., lodges several securities for money with him as collateral securities for the debt; A. afterwards borrows a further sum of money of B., for which C. becomes his surety; A. becomes bankrupt, and B. calls upon C. to pay the second debt. The securities in the hands of B. being more than sufficient to pay the first debt, C. shall have the benefit of the surplus in reduction of the second debt. *Præd v. Gardiner*, 2 Cox 86.

13. Executor, surety with testator for another, allowed to retain out of estate whole amount due on bond. *Bathurst v. De la Zouch*, Dick. 460.

14. Where the surety pays off debt in bankruptcy, he is entitled to have an assignment of the security to enable him to obtain satisfaction for what he has paid above his own share. *Exp. Crisp*, 1 Atk. 133.

15. Held, in bankruptcy, that after a voluntary discharge by agreement, the creditor cannot make use of a security against third persons where the effect would be to make the party discharged again liable, though in another form and in the shape of the demand of another person. *Manson v. Stock*, 6 Ves. 305.

16. Bill of surety in a bond, to have it assigned after having paid its amount, dismissed with costs, as useless. *Gammon v. Stone*, 1 Ves. 339.

17. Annuity bond forfeited when the grantor was discharged under an insolvent Act, which provided that future estate should not be discharged; the penalty, being less than the subsequent arrears, was allowed as the debt, and not only in favour of the purchaser of an annuity, but also of a co-obligor as surety, having compounded with the purchaser, and obtained possession of the securities, by repaying the money advanced with the arrears then due, being at that time less than the penalty. *Butcher v. Churchill*, 14 Ves. 569.

1. Assignment of bond to co-obligor who pays it, is of no use, since even the principal may plead payment to action in name of obligee; but action on the case lies, or perhaps *indebitatus assumpsit*. *Woffington v. Sparks*, 2 Ves. 569.

2. A. mortgaged his own estate, and his wife joined him in charging hers; this is a pledge, and the wife shall stand in the mortgagee's place. *Partridge v. Powell*, 2 Atk. 384. In *Clinan v. Cooke* (1 Sch. & Lef. 35) Lord Redesdale said this case was imperfectly reported by Atkyns.

3. Merchants in London agreeing to become sureties for a West Indian planter, on being secured by a conveyance of his plantation, in trust, with a covenant that they should be continued as consignees till the expiration of five years after the reimbursement of what they might advance:—Held, entitled to the benefit of this covenant. Whether a covenant to continue a mortgagee as consignee after payment of the debt is valid, *quære*. *Bunbury v. Winter*, 1 Jac. & Walk. 255.

4. A., together with B. and C., as his sureties, executed a bond to D., for securing 300*l.* and interest; the debt is paid by C., with the proper money of A., but C. neglects delivering up the bond to A. to be cancelled; C. afterwards procures this bond to be assigned as a collateral security for a debt of his own:—Held, that this assignment was a gross fraud in C., and a perpetual injunction was granted to restrain all further proceedings upon the bond. *May v. Harman*, 4 Bro. P. C. 156.

5. The principal in a bond being arrested gave bail, and judgment is had against the bail; on a bill by the sureties, who had been sued on the original bond, and paid the money, decreed the judgment against the bail to be assigned to them in order to reimburse them what they had paid with interest and costs. *Parsons v. Bridgock*, 2 Vern. 608.

6. A. is indebted by bond (in which J. is bound as surety), and also by simple contract, to B.; A. states an account of both debts with B., and makes a bill of sale for securing the balance, which proves deficient. On a bill by the surety, decreed the money arising by the bill of sale should be applied towards discharge of both debts in proportion. *Perris v. Roberts*, 1 Vern. 34.

7. As to the assignment of a bond or judgment to a surety who has paid the debt, see note to *Kent v. Cantor*, Wall. Lyn. 864.

8. The right of a surety to the benefit of the security held by the creditor is derived from the obligation of the principal debtor to indemnify his surety. *Semble*. *Yonge v. Reynell*, 9 Hare 809.

In a suit by A. against B. and C., a conveyance of an estate by A. to B. was declared void, and set aside for fraud, except as to an intermediate mortgage of the estate made by B. to D., to secure a sum of money lent by D. to B., and for which C. had joined B. as his surety in a bond and covenant to D.; and the decree also directed B. to redeem the estate, and procure its reconveyance to A., and, if he did not do so, gave A. the right to redeem, and to use the name of B. for that purpose, and to recover from B. the money which A. should pay to D. for such reconveyance; and the bill

was dismissed against C. A. afterwards procured an assignment of D.'s mortgage to a trustee, and, in the name of the mortgagees, brought an action against C. on his covenant and bond:—Held, that if A. had redeemed D., the debt would have gone as against C.; that C., as the surety of B., would, on payment of the mortgage debt, be entitled to the benefit of the security held by D., such security not having been disturbed by the decree; that the charge of participation by C. in the fraud, whereby B. had been enabled to create the mortgage on the estate, was not a ground for depriving C. of such right; and that C. was, therefore, in a suit for an injunction to restrain A. from suing him on the bond and covenant, entitled to such relief. *Id.*

The circumstance of the dismissal, as against C., of the bill brought by A. against B. and C., which prayed that the mortgage debt might be paid by B. and C., was material to the case, though it was not alone conclusive, as it might well be that there might be no equity to compel C. to pay the debt, though C. might have no equity to be relieved from his legal liability to pay it. *Id.*

9. The contract of suretyship entitles the surety to require that his position shall not be altered by any arrangement between the creditor and the principal debtor from that in which he stood at the time of the contract, and it therefore entitles him, absolutely, to the benefit of all the securities, and for the debt which the creditor held at the time of the contract; it also entitles the surety at any time to require that the creditor shall enforce against the principal debtor not only all the remedies and all the securities for the debt which he has at the time of the contract, but also any securities for the debt which the creditor may have acquired subsequently to the contract, and which he holds at the time that the surety requires him to proceed. And as a person paying off a debt for which he is liable is entitled in equity to stand in the place of the creditor, and to have the benefit of the securities held by the creditor for such debt, so the surety, on paying off the debt of the principal debtor, is entitled to require from the creditor the benefit not only of the securities for the debt which the creditor had at the time of the contract of suretyship, but also of all the securities which he holds at the time he is paid off. But there is no implied duty in the contract of suretyship which requires the creditor to retain, for the benefit of the surety, securities, for the debt which he might subsequently receive from the principal debtor, and which, whilst the creditor holds them, the surety does not call upon him to enforce. And a creditor who, after the contract of suretyship, having taken a further security from the principal debtor, subsequently parts with that security, does not thereby either wholly or *pro tanto* release the surety. *Newton v. Chorlton*, 10 Hare 646; 2 Drew. 333.

10. Where two properties are mortgaged by A. to B. for distinct sums, and C. is surety for the one only, the right of B. to retain all the securities until repaid both debts over-rides the right of C. to have the benefit of the securities for that debt for which he is surety. *Farebrother v. Wodehouse*, 23 Bear. 18; 2 Jur.,

N. S., 1178; 26 L. J., Ch., 81; 5 W. R. 12. And see S. C. on appeal 29 L. J., Ch., 240.

The defendant lent A., at the same time, two sums of 2,000*l.* and 3,000*l.*, on distinct securities, and the plaintiff was surety for the first sum:—Held, that he, on paying the 2,000*l.*, was not entitled to have a transfer of the securities held for that sum until the defendant had also been paid the 3,000*l.* *Ib.*

1. S., in May 1850, assigned his interest in a fund in court to J. to secure payment of a loan, and a bond was at the same time entered into by S., and the petitioner and her brother as sureties, as a further security. All the parties resided at Calcutta. In consequence of the terms of the bond not having been complied with by S., a stop order, at the request of the petitioner, was in March 1853 obtained by J. The petitioner had, however, in February 1853, at Calcutta, on the demand of the attorney of J., paid the debt and interest. In May 1853 the stop order was, on the application of S., with the consent of J., discharged, but the mortgage deed remained in the possession of the agents of J. The residue of the fund belonging to S. was, by an order of December 1855, ordered to be paid over to his appointees, and thereupon the surety presented a petition, praying that so much of the fund as might be necessary might be sold and paid to her in satisfaction of her demand against S.:—Held, that the petitioner was entitled to the relief which she prayed, and that she had adopted the proper means to obtain redress. *Allen v. De Lisle*, 3 Jur., N. S., 928; 5 W. R. 158.

2. A. joined B. in a promissory note as surety for a moiety of a debt due from B. to C., with knowledge that the whole debt was also secured by a bill of sale of B.'s furniture. C., who was also B.'s landlord, took the furniture under a distress for rent which became due subsequently to the date of the bill of sale:—Held, that C. had precluded himself from appropriating the furniture to any other purpose than the debt for which it was given as a security, and that A. was entitled to be discharged to the extent of one-half of the value of the furniture. *Pearl v. Deacon*, 3 Jur., N. S., 1187; 26 L. J., Ch., 761; 1 De G. & J. 461; 5 W. R. 793. Affirming 3 Jur., N. S., 879; 24 Beav. 186; 5 W. R. 702.

A surety is entitled to the benefit of all securities taken by the creditor, whether he has notice of them or not. S. C. 24 Beav. 186; 3 Jur., N. S., 879; 5 W. R. 702.

3. D., a partner in a banking firm in New York, in which firm H. and two other persons were also partners, made two promissory notes in the name of H., D., & Co. payable to W. at a bank in New York. The notes came, by several indorsements, into the possession of I., a merchant at New York, and he, on presenting them at maturity for payment, found that they were dishonoured. D. had notice of the dishonour, and subsequently, in consideration of the amount of the notes, conveyed to I. land, which was declared to be intended as a security for payment of the notes and interest. H. being in England, the notes were indorsed to W., and he, in accordance with instructions, sued H. for the amount, and having received information that H. intended to leave

the country, he caused him to be arrested. H. was discharged from custody on G. and F. becoming sureties in a bond to the sheriff, and they (H. having absconded) afterwards had to pay the amount of the judgment entered in the action against him. G. and F. then applied to W. for the mortgage executed by D., and were informed that he had nothing to do with it. On bill filed by G. and F. against W., I., S. H., and G. D.:—Held, that he was entitled to have the mortgage delivered up to him; to be paid the costs of the suit out of the amount of the judgment; and to recover against S. H. and G. D. the whole amount of principal, interest, and costs in respect of the notes. *Goddard v. White*, 6 Jur., N. S., 1364; 3 L. T., N. S., 313.

4. A creditor holding a mortgage for a guaranteed debt is bound to hold it for the benefit of the surety, so as to enable him, on paying the debt, to take the security in its original condition, unimpaired. *Pledge v. Buss*, Johns. 663; 6 Jur., N. S., 695.

Therefore, where a creditor held a mortgage for a debt for which the plaintiff was surety, and after the bankruptcy of the principal debtor, without notice to the surety released the assignees, and the bankrupt's estate, in consideration of the conveyance to him of the equity of redemption:—Held, that the surety was discharged, and that it was not enough for the creditor to allow in account the dividends released, and to give a new charge on the mortgaged premises. *Ib.*

The rights of a surety, with respect to securities, extend to securities taken after the contract of suretyship. *Ib.*

5. D. and P., under a covenant in a mortgage deed, paid the premiums on a life-policy forming part of the security, as sureties. By a contemporaneous instrument, to which they were not parties, the equity of redemption was assigned in trust for the benefit of the creditors of the mortgagor, and D. signed the trust-deed as a creditor. The mortgage was paid off, and the policy was sold by the trustee of the creditor's deed, under a power contained therein. A creditor's suit being instituted:—Held, that the creditors were not entitled to take the money produced by the sale of the policy, without making payment in satisfaction of the premiums paid by D. and P. *Aylwin v. Witty*, 30 L. J., Ch., 860; 9 W. R. 720.

6. A surety being entitled to all collateral securities, the creditor is bound to preserve them, and if through his negligence they are lost the surety is discharged. *Strange v. Books*, 11 W. R. 983.

7. A. was tenant for life of lots 1 and 2, to which B. was entitled in remainder; B., and A. as his surety, mortgaged lot 2, B. alone covenanting to pay. By a contemporaneous deed, B. conveyed his interest in the other lot on trusts to indemnify A. as his surety: A. paid large sums for interest on the mortgage:—Held, that he was entitled to the benefit of the deed of indemnity only, but not to stand in the place of the mortgagee on lot 1. *Cooper v. Jenkins*, 32 Beav. 337; 1 N. R. 383.

8. A surety guaranteed the sufficiency of a security covering part of the principal's debt:—Held, that the release of his guarantee did not necessarily vacate the security. *Wagh v.*

Wren, 1 N. R. 142; 11 W. R. 244; 7 L. T., N. S., 612.

1. A surety who pays off a debt for which he became answerable, is entitled to all the equities which the creditor could have enforced, and that, not merely against the principal debtor, but also against all persons claiming under him. *Drew v. Lockett*, 32 Beav. 499; 9 Jur., N. S., 786.

In 1858 L. mortgaged real estate to E., and D. joined in that mortgage as surety for L. Subsequently thereto, L. further mortgaged the same estate to C., and in 1854 and 1855 executed several other mortgages to S., who then had notice of the first mortgage. In 1858 the first mortgage was transferred to S. The legal estate in the property comprised in that mortgage and the subsequent mortgages afterwards became vested in S. A portion of the real estates had been sold by E., and S. claimed a priority over D. in respect of the unsold part of the property. On a bill by D., to ascertain the priorities of the several incumbrancers:—Held, that D. was entitled to the unsold realty in priority to S. S. C. 11 W. R. 843; 8 L. T., N. S., 782.

A. mortgaged his estate to C., and B. became A.'s surety for the debt. Afterwards A. mortgaged the estate to D., who had notice of the first mortgage. The first mortgage was subsequently paid off, partly by B., the surety, but D. got a transfer of the legal estate:—Held, that the surety had still priority over D. for the amount paid by him under the first mortgage, as surety for A. *Id.*

2. A surety is not entitled to have an assignment of the principal security, unless he pays the debt in full. *Ewart v. Latta*, 4 Macq. H. L. Ca. 983.

3. A creditor who holds several securities for his debt, partly given by the principal debtor and partly by a surety, must retain all securities given by the principal debtor for the benefit of the surety, and if he neglects to do so, he discharges the surety. *Merchants' Bank of London v. Maud*, 18 W. R. 312. And see 19 W. R. 312.

4. The Mercantile Law Amendment Act, 19 & 20 Vict., c. 97, s. 5, applies to a contract entered into before the passing of the Act, provided a breach of it has taken place, and payment has been made by the surety after the passing of the Act. *Re Cochran*, 16 W. R. 324; 17 L. T., N. S., 487; 5 L. R., Eq., 209; 37 L. J., Ch., 293.

In 1854 W., as surety, joined in a bond with C. The Act was passed in July 1856. In December 1856 the condition of the bond was broken, and W. paid the amount due on the bond in January and April 1857:—Held, that W. was entitled to rank as a specialty creditor of C. *Id.*

5. One of the makers of a joint and several promissory note, who was a surety for the other, effected an insurance on the life of the latter, with his privity and concurrence, for an amount equal to that secured by the note. The principal died, having appointed the surety his executor, and the surety received the insurance money:—Held, that to the extent to which it was not required for indemnifying the surety, it ought to be applied in payment of the debt. *Lea v. Hinton*. 5 De G. M. & G. 823.

6. In 1863 A. effected a policy on his own life for 2,000*l.*, which he mortgaged to the assurance company to secure 1,000*l.*, and shortly afterwards he effected a second policy for 1,000*l.*, which he mortgaged to the company to secure 500*l.* In 1865 he again mortgaged the first-mentioned policy (together with a further policy which was afterwards forfeited) to the company to secure 1,500*l.*, and B. became his surety for the repayment of the last-mentioned advance. In 1865 A. became bankrupt, and the company recovered judgment for 1,500*l.* and costs against the surety. B. had paid 1,000*l.* under this judgment, and A.'s wife had paid to B. 450*l.* out of her separate estate to reimburse him for his loss. In 1867 A. died; and in a suit instituted by B. against the company and A.'s assignee to recover out of the balance due to A.'s assignee in respect of the two subsisting policies the amount which B. had paid as surety:—Held, that B. was entitled to have the securities marshalled, and to be paid the whole amount of his loss by the company, before anything was paid to A.'s assignee in respect of either policy; and further, that the payment made by A.'s wife out of separate estate did not affect B.'s rights as against A.'s assignees. *Heyman v. Dubois*, 25 L. T., N. S., 558; 13 L. R., Eq., 158; 41 L. J., Ch., 224.

7. C., as surety for D., gave to B., in 1847, a mortgage security for various specified sums, and also for such moneys as B. should pay in respect of moneys borrowed by D. from E. The deed stated that B. was liable as a surety for the repayment of these moneys to E.; but, in fact, he was under no legal liability for them, though he considered himself under a moral liability to see that they were repaid:—Held, that the deed could not stand as a security to B. for moneys paid in respect of the debt to E. *Lake v. Brutton*, 2 Jur., N. S., 839; 25 L. J., Ch., 842. Affirming 18 Beav. 34; 18 Jur. 412; 23 L. J., Ch., 294.

Previously to the execution of the deed of 1847, D. had deposited with B. a policy of insurance as security for part of the moneys which were afterwards secured by that deed. Shortly after the execution of that deed, D. assigned to C. property (not including the policy) by way of indemnity against his liabilities as surety. It appeared that C. at that time did not know of the existence of the policy. In 1848 D. formally assigned the policy to B. as a collateral security for the money secured by the deed of 1847. In 1850 B., with the approbation of D., deposited the policy with E. as security for the debt due to him from D. C. having paid off the money for which he was liable as surety under the deed of 1847 claimed the policy:—Held, that whether the doctrine in *Newton v. Chorlton* (10 Hare 646) (as to the right of a surety to securities taken by the creditor of the principal debtor after the suretyship has been entered into being defeated by an assignment of those securities before the surety pays the debt), were correct or not, the surety was entitled to the policy, for that the creditor had a security upon it when the suretyship was entered into, which security was merely perfected by the subsequent assignment; and that E., who took the policy with notice of the suretyship, took subject to the rights of the surety. *Id.*

Quere, whether, if E. had taken without such notice, he would have been protected. *Ib.*

Held, also, that the right of the surety to the benefit of the creditor's security on the policy was not lost by his taking an express indemnity on certain specified property of the principal debtor, not including the policy, he not being at the time aware of the existence of that security. *Ib.*

Quere, whether, if he had known of the existence of the security on the policy, his taking a specific indemnity not including the policy, would have barred his right to it. *Ib.*

1. The rules as to a surety's right to securities do not apply where the only suretyship is created by indorsing and discounting a bill of exchange. *Duncan, Fox, & Co. v. North & South Wales Bank*, 11 L. R., Ch. D., 88; 48 L. J., Ch., 376; 27 W. R. 521; 40 L. T. 371.

A., a member of a firm, pledged his separate estate to a bank to secure to the bank the balance for the time being owing to the bank from the firm. Afterwards the firm accepted bills of exchange which were indorsed to and discounted for B. by the bank. The firm became bankrupt, and the bills were dishonoured at maturity. The bank having demanded of B. payment of the amount due on the bills, B. claimed to be a surety for the firm in respect of the bills, and to be entitled as such surety to the benefit of the securities held by the bank:—Held, that B., as indorsee of the bill of exchange, was a principal debtor to the bank and not entitled to any such right of suretyship as he claimed. *Ib.*

Held, also, that if the law of suretyship applied A. and B. were co-sureties for the firm, and that A. had the prior right to require B., as a principal to the bill, to contribute to relieve him. *Ib.*

2. A surety, who has obtained from the principal debtor a counter-security for the liability which he has undertaken, is bound to bring into hotchpot, for the benefit of his co-sureties, whatever he receives from that source, even though he consented to be a surety only upon the terms of having the security, and the co-sureties were, when they entered into the contract of suretyship, ignorant of his agreement for security. *Steel v. Dixon*, 17 L. R., Ch. D., 825; 50 L. J., Ch., 591; 45 L. T. 142; 29 W. R. 736.

3. In December 1854 S. assigned certain premises and a policy of assurance to secure the repayment of a sum of 200*l.* advanced to him by W., and interest. The proviso for redemption was that, on payment of the money, W. would reassign the premises and policy unto S., his executors, administrators, or assigns, or as he or they should direct. F., by the same indenture, as surety, covenanted, for himself only, with W., that while the 200*l.* or any part should remain owing he would pay the interest and premiums, and he also assigned a policy on his own life, and covenanted to pay the premiums. W., at four different periods between May 1856 and May 1866, advanced moneys amounting to 530*l.* to S. on the security of the same premises. S. made default in the payment of interest. W. died

in 1878, and his executors made a demand upon F. for all arrears, which he paid, and he also paid the premiums on the policy of S.:—Held, that F. was entitled to have a transfer of all the securities on paying what was due upon the mortgage of December 1854. *Williams v. Owen* (13 Sim. 597) not followed. *Newton v. Chorlton* (10 Hare 646) followed. *Forbes v. Jackson*, 19 L. R., Ch. D., 615; 51 L. J., Ch., 690; 48 L. T. 722; 30 W. R. 652.

4. A., B., and C. executed to D. a mortgage of B.'s lands (comprised in the petition for sale) and of C.'s lands, to secure 2,914*l.* 9*s.* 9*d.*, of which 900*l.* was B.'s debt, and the remainder C.'s debt. The mortgage contained a proviso that, as between A., B., and C., A. was a surety only, and that B. and C. respectively were sureties only for portion of the said sum; yet, with regard to D., they were to be considered as principal debtors, so as not to be released by time being given to any other or others of them, or by any act or omission of D., whereby, as sureties only, they would be released. B. subsequently executed to D. two other mortgages of the lands comprised in the petition. A. having paid D. the full amount of the debt secured by the first mortgage, claimed to stand in D.'s place for 900*l.*, being B.'s debt, and the moiety of 2,014*l.* 9*s.* 9*d.*, being C.'s debt, for which both he and B. were joint sureties, and to be placed on the final schedule on foot of, and in the priority of, the first mortgage:—Held, first, that A.'s claim was valid, and that he was not estopped by the special proviso of the mortgage from relying on his equitable rights of surety. *Re Kirkwood*, 1 L. R., Ir., 108.

Held, secondly, that a surety joining in a mortgage is entitled on paying off the original mortgage debt to get the benefit of all the securities held by the original mortgagee, without paying off subsequent mortgages. *Ib.*

Held, thirdly, that the doctrine of tacking is applicable only in the case of an existing debt. *Ib.*

5. A person who became surety for a limited amount of a debt has, on paying the amount for which he is liable, all the rights of a creditor in respect of that amount, and is entitled to share in the security held by the principal debtor for the whole debt. *Goodwin v. Gray*, 22 W. R. 312.

6. On the 3rd of March, goods belonging to C., lying at the St. Katherine Dock in the custody of the Docks Company, were bought by D., as broker for buyers and sellers, for B. & Co., without disclosing the names of his principals, and D. indorsed to them the delivery order he had obtained from the sellers on the representation of B. & Co. that the goods were wanted for immediate shipment. They, however, pledged their interest in the goods to the plaintiffs, and indorsed the order to them. On the prompt day, the 18th of March, the plaintiffs' clerk lodged the order at the London office of the docks company, with this memorandum, "Hold within to our order, and have warrants made out as soon as possible." He was told that the warrants would be ready with the goods on the 20th of March. Three hours later a messenger from the office reached the warrant office at the dock house with a notice that the order

had been lodged. Meanwhile B. & Co. had stopped payment, and D. being so informed, and having no notice of the plaintiffs' title, on the same day paid C. for the goods, and through a clerk, who reached the dock house before the messenger had arrived, obtained at the warrant office a warrant for the goods in the name of C., who indorsed the same to D., and gave him a second delivery order. The first delivery order was returned to the plaintiffs by the docks company, who refused to act upon it. In an action by the plaintiffs, claiming as against the docks company, C., and D., to be entitled to the goods:—Held, that D. was the surety, and B. & Co. the principal debtors; that, in the circumstances of the case, the unpaid vendor's lien had passed to D.; that the title to the goods was in D. *Imperial Bank v. London & St. Katherine Docks Co.*, 5 L. R., Ch. D., 195; 46 L. J., Ch., 385; 36 L. T. 283.

See also v. 5 infra.

IV. APPROPRIATION OF PAYMENTS.

1. Where a man paid into his banker's a joint promissory note, payable on demand, signed by himself and another party as his surety, of which the amount was carried to his account as money, and afterwards paid in at different times money more than sufficient to cover the amount, but drew out more than he paid in:—Held, that the surety was not entitled to have the subsequent payments of the principal debtor applied first in payment of the note, not being a party to the accounts between him as his banker. *Exp. Whitworth, Re Mayor*, 2 M. D. & De G. 164.

2. The respondent M., was the surety in a bond for the payment by G., the collector of taxes, etc., of all the taxes, etc., to be collected for the year 1842, to E., the receiver-general. At the date of the bond G. was in arrears for taxes collected in 1841. M. appointed one S. to collect the taxes for the year 1842, which he did as to a great part. Upon E. pressing G. for payment of the arrears of 1841, G. went to S. and asked him for 3,000*l.* to remit to the receiver-general. S. did so, taking that amount out of a chest in which he placed the moneys received in the collection of taxes. G. converted that sum and another sum of 2,000*l.*, other part of the taxes of 1842, into paper money, and transmitted it to E., but did not appropriate it to the taxes of 1842, and E. appropriated it to the arrears of 1841:—Held, that it was not necessary that G. should assent to that appropriation; and that the surety, M., was bound by the appropriation of the remittance by E. to the arrears of 1841; and that M. was liable on the bond to make up the deficiency of the year 1842. *Jamaica (Att.-Gen.) v. Manderson*, 12 Jur. 383.

3. A. and B. entered into a joint and several bond for securing a sum of money advanced to A. by his bankers. After the execution of the bond, and before it became due, A. paid money to the bankers, and he continued to draw upon them until his banking account was overdrawn. Some years afterwards, an account was settled between A. and the bankers, in which the

whole money secured by the bond was treated as remaining due from A. The bankers then took a warrant of attorney from A. for securing payment of the balance found due upon the settlement, by instalments at distant periods. Several of the instalments were paid, but A. became bankrupt before the whole debt was liquidated. It being proved that B. was privy to the settlement of accounts between A. and the bankers, and to the arrangement respecting the warrant of attorney:—Held, first, that B. was not discharged by the time given to A.; and, secondly, that the bond was not discharged by the course of payment, the money paid by A. to the bankers being applicable to the banking account, and the bankers being entitled to hold the bond and warrant of attorney as distinct securities. *Tyson v. Coar*, T. & R. 395.

4. A customer borrowed from his bankers 2,000*l.*, which was placed to the credit of his current account, and to secure the debt gave them ten promissory notes payable at intervals of a week, a surety undertaking that in the event of the notes not being paid to secure the amount due. On the first five due dates, the sums represented by the first five notes respectively were debited by the bankers to the customer in the current account; and on each of the first two due dates enough cash was paid in to the account in the course of the day to liquidate the amount of the note. On the remaining three days the balance throughout the day was against the customer. The amounts of the last five notes were not entered by the bankers in the account at all. The payments in to the credit of C. to his current account and to another special account after the last note became due, were sufficient to cover up all debits up to and including the last note; but the accounts were during all this time overdrawn:—Held, that the bankers were bound to apply all moneys paid in first to the notes secured by the surety which had fallen due; and that the debt was, moreover, discharged, on the principle of *Clayton's case* (1 Meriv. 605). *Kinnaird v. Webster*, 10 L. R., Ch. D., 139; 48 L. J., Ch., 348; 27 W. R. 212; 39 L. T. 494; 27 W. R. 212.

5. Repayment of a sum given by bankers to a customer for the purpose of constituting a parliamentary qualification, on an understanding that it was to be returned:—Held, not a payment on his general account so as to discharge a surety. *Wythes v. Labouchere*, 5 Jur., N. S., 499; 3 De G. & J. 593.

6. A payment by a surety must be appropriated in accordance with his intention, and cannot be controlled for the benefit of the principal. *Wagh v. Wren*, 1 N. R. 142.

W. and his wife deposited with a banking company the title deeds of real estate, to which the wife was entitled under her father's will, to secure a running account not exceeding 2,000*l.* The father of W. gave the following guarantee to the bank: "I beg to say that the deeds lodged by my son are good for the amount of the arrangement with him, otherwise I will guarantee the same." The father subsequently paid a portion of the amount due on the security, and received back his guarantee:—Held, that the security was not

thereby vacated so as to affect the surety. S. C. 11 W. R. 244; 7 L. T., N. S., 612.

V. DISCHARGE OF SURETY.

1. *By giving Time*, 6668.
2. *Concealment and Misrepresentation*, 6670.
3. *Breach of Duty by Creditor*, 6672.
4. *Variation of Contract*, 6673.
5. *Laches of Creditor*, 6677.
6. *Release of Debtor*, 6678.
7. *Death of Surety*, 6680.
8. *Other Cases*, 6681.

1. By giving Time.

1. A. and B. entered into a joint and several bond for securing a sum of money advanced to A. by his bankers. After the execution of the bond, and before it became due, A. paid money to the bankers, and he continued to draw upon them until his banking account was overdrawn. Some years afterwards an account was settled between A. and the bankers, in which the whole money secured by the bond was treated as remaining due from A. The bankers then took a warrant of attorney from A. for securing payment of the balance found due upon the settlement by instalments at distant periods. Several of the instalments were paid, but A. became bankrupt before the whole debt was liquidated. It being proved that B. was privy to the settlement of accounts between A. and the bankers, and to the arrangements respecting the warrant of attorney:—Held, first, that B. was not discharged by the time given to A.; and secondly, that the bond was not discharged by the course of payment, the money paid by A. to the bankers being applicable to the banking account, and the bankers being entitled to hold the bond and warrant of attorney as distinct securities. *Tyson v. Cox*, T. & R. 395.

2. Where sureties are bound after a certain time's demand, creditor may make arrangements with debtor for time, etc., prior to that interval, so that it does not interfere with sureties' recourse back on debtor. *Prendergast v. Devey*, 6 Madd. 124.

3. By giving time to the principal, the grantee of annuity exonerates the surety for past and future arrears. *Eyre v. Bartrop*, 3 Madd. 221.

4. Creditor giving time to debtor without notice to surety releases him, and injunction granted to restrain proceedings against him at law. *Ireland (Bank of) v. Beresford*, 6 Dow 233.

5. A. guarantees the payment of any goods to be supplied by B. to C. between the 2nd April 1814, and the 2nd April 1815; C. having accepted bills for the amount of the goods delivered, which B. permits him to renew when payable without any communication to A. on the subject of such renewal:—Held, that A. was discharged from his guarantee by virtue of the rule that a creditor giving further time to the principal debtor, without the consent of the surety, releases the surety; and that although it was proved that the renewal was given only in consequence of C.'s inability

to pay, and that no injury could accrue to A., the surety being himself the fit judge of what is or is not for his own benefit. *Samuel v. Howarth*, 3 Meriv. 272.

6. Creditor may sue surety first: if he sues principal first and gives time, surety is discharged. *Wright v. Simpson*, 6 Ves. 734.

7. Holder of a bill giving time to the acceptor discharges the drawer. *Exp. Wilson*, 11 Ves. 410.

8. Creditor sues the principal by direction of the surety, but without his privity agrees to stay execution, the surety is discharged. *Rees v. Berrington*, 2 Ves. J. 543.

9. Oblige in a bond with a surety, without communication with the surety, takes notes from the principal, and gives further time, the surety is discharged. *Fordyce v. Ford*, 2 Ves. J. 539.

10. A creditor giving the principal debtor further time for payment discharges the surety. *Nisbet v. Smith*, 2 Bro. C. C. 579.

11. Where the surviving obligee in joint and several bonds extended the time of payment of the bonds for three years, and on a further advance took a collateral security, reserving his right against the executors of the deceased obligee, but the arrangement was concealed from them:—Held, that by such indulgence they were discharged. *Oakeley v. Pasheller*, 4 Cl. & F. 207; 10 Bli., N. S., 548.

12. It is a general rule that a creditor may give time to a principal debtor without prejudicing his right against the surety, provided he expressly reserves such right. Circumstances may, however, prevent that rule from having effect. *Owen v. Homan*, 4 H. L. Ca. 997; 17 Jur. 861.

13. A. and B. were indebted as principal and surety to C. B. dies, and C. in a creditors' suit obtains a decree against his estate. Afterwards C. sues A., and takes a judgment by arrangement, giving time, without the knowledge of the surety:—Held, this did not discharge the surety. *Jenkins v. Robertson*, 2 Drew. 351; 23 L. J., Ch., 816.

14. The obligee of a bond having placed himself in such a position with regard to the principal debtor, that he could not demand payment of the bond until a certain agreement entered into with third parties had been carried into effect:—Held, that this was such a giving of time to the principal debtor as discharged a surety to the bond. *Cross v. Sprigg*, 2 Macn. & G. 113; 2 H. & Tw. 233; 14 Jur. 634; 19 L. J., N. S., Ch., 528.

15. Where there are two co-sureties, and the creditor grants a further loan to his principal debtor, and takes a new security for that and the former loan, and gives further time to him and one of the sureties only, without specially reserving his remedy against the other surety, he by so doing discharges the latter. *Vyner v. Hopkins*, 6 Jur. 889.

16. A creditor, having the security by bond of a third person for the due accounting of an agent, settles accounts with that agent and takes from him a bond for the balance found to be due, and bills at different dates for the amount of the bond and the interest thereon, until the last of the bills should fall due; and at the same time stipulates that he is at liberty at any moment to proceed on the original

security :—Held, that this was not a discharge of the surety. *Lindsay v. Downes (Lord)*, 2 Ir. Eq. R. 307.

1. A father gave a bond to secure the repayment in four years of a simple contract debt due by his son. Upon the death of the father the creditor commenced proceedings against his estate for the recovery of the debt, but afterwards stayed those proceedings upon obtaining from the son, who was heir to the father, and the widow, who was his personal representative, a joint bond for the payment of the same debt by instalments :—Held, that the estate of the father as surety was discharged, both on the ground of time given to the son, and because the second bond was to be considered as given in substitution for the first. *Clarke v. Henty*, 3 Y. & Coll. 187; 2 Jur. 918.

2. By the old French law in Canada, a surety is not discharged by the mere giving of time by the creditor to the debtor; but any transaction which may suspend, though only for a time, the right of the creditor to sue the debtor, shall be a discharge to the surety, unless it can be shown that the surety might, during the suspension of that right, sue the debtor in his own right, which by the old French law he may, under some circumstances, do, before payment of the debt by himself: and where a debtor, in consideration of his default or inability to make good his engagements, accepted bills drawn on him by his creditors, it was :—Held, that this was such a temporary extinction of the demand, while the bills had to run, as to discharge the surety, it being considered that the surety could not himself sue the debtor, though apparently insolvent, during that time. *Bellingham v. Frere*, 1 Moo. P. C. 333.

3. Where action in replevin is by agreement referred to arbitration, and without consent or privity of surety in bond time for award is enlarged, surety becomes discharged. *Bowmaker v. Moore*, 7 Price 223.

Court will grant injunction to restrain landlord from proceeding at law on assignment of replevin bond against the sureties, if there has been an agreement to refer, and a reference between landlord and tenant (the debtor) without concurrence of surety, whereby performance of condition of bond (to proceed with effect) has been suspended. S. C. 3 Price 214.

4. A surety is not discharged by the creditor's taking from the debtor a cognovit in an action he had brought against the debtor, with a stay of execution until a day earlier than that on which judgment could have been obtained in the regular course. *Hulme v. Coles*, 2 Sim. 12.

5. A court of equity will not relieve a surety by bond upon the ground of the creditor having given time to the principal debtor, unless there has been an express and positive contract between them for that purpose. *Heath v. Key*, 1 Y. & J. 434.

6. The liability of a surety in a bond is not discharged by the delay of the creditor in suing for the debt, or by the circumstance of the principal debtor afterwards executing to the creditor another bond for a larger sum. *Eyre v. Everett*, 2 Russ. 381.

7. It is not every alteration of his position

by the act of the creditor that discharges the surety. To have this effect, the alteration must be such as interferes for a time with his remedies against the principal debtor. *Tucker v. Laing*, 2 Kay & J. 745.

Where the creditor knew that the surety was negotiating a loan for the principal debtor, for the purpose of paying off therewith the debt for which the surety was liable, and thus getting rid of such liability, and the creditor promised the debtor to give him further time, and this induced the surety to desist from his attempt to raise the money :—Held, that the surety's liability to the creditor was not discharged. *Id.*

A letter written by the agent of a bond creditor to the principal obligor, giving him eighteen months further time to pay the bond, upon condition of his paying off at once the arrear of interest, and keeping down the interest to accrue in future :—Held, a mere promise without consideration, and not binding; and therefore that a co-obligor, who had joined in the bond as surety only, was not thereby discharged. *Id.*

8. Indorsees of bills of exchange as a security for a floating balance due on the accounts between them and the drawer, had notice that the acceptance was for the drawer; they afterwards entered into an agreement with the latter that the existing debt should be liquidated by the drawer building for them ships, and should, in the meantime, be secured by a policy of assurance :—Held, first, that time was thus given to the principal debtor, and the surety was released in equity, if not at law also. *Davies v. Stainbank*, 6 De G. M. & G. 679.

Held, secondly, that a creditor who holds a floating guarantee for a surety, cannot, without the surety's consent, give time to the principal debtor as to a portion of the debt, without reserving the creditor's rights against the surety, and yet hold the surety liable for that portion. *Id.*

Held, thirdly, that whether the acceptor could or could not sue, by way of defence to an action by the holders of the bills, the giving of time by them to the drawer, he was not bound to do so, but might (at the risk of costs) defend the action on other grounds, and also institute a suit for equitable relief and for an injunction to restrain the proceedings at law; though if the matter had been pleaded at law, and the court of law had adjudicated on the plea, the case might have been different. *Id.*

9. If an intention to give what is in effect time be declared by a written agreement, in order that the right as against the surety may be reserved, it is necessary that such a reservation be declared also in writing. *Wyke v. Rogers*, 1 De G. M. & G. 408; 21 L. J., N. S., Ch., 611.

A. and B. (principal and surety) became bound to C. in the payment of 400*l.*, of which sum, by an arrangement between A. and B., 120*l.* were paid to the latter. B. repaid to C. that sum before the time limited by the bond for the payment of the 400*l.*, and C., after that time, accepted from A. a promissory note, payable at two months, for the remainder, on a parol agreement (which was proved) that the note was not to be considered as given in discharge of or as substituted for the bond. A

died insolvent. On a bill filed by B. against C. for a declaration, that under the circumstances he might become released and discharged from the bond, and for an injunction to restrain C. from proceeding in an action which he had commenced for the recovery of 280*l.*, the remainder of the 400*l.* :—Held, that the surety was not discharged, and that there was no case for the interference of a court of equity. *Id.*

1. A creditor, upon giving time to his principal debtor, may reserve his rights against the surety, and this without communicating the arrangement to the surety. *Webb v. Hewitt*, 3 Kay & J. 438.

2. A creditor may suspend his rights for ever against the principal debtor, yet preserve his rights against the surety. *Green v. Wynn*, 38 L. J., Ch., 76; 19 L. T., N. S., 553; 17 W. R. 72; 7 L. R., Eq., 28. Affirmed 38 L. J., Ch., 220; 20 L. T., N. S., 131; 17 W. R. 385; 4 L. R., Ch., 204.

A debtor executed a deed under the Bankruptcy Act 1861, s. 192, which amounted to a *cessio bonorum*, and contained a general release from his creditors, followed by a proviso reserving any rights they might have against any other persons in respect of any debt due by the debtor either alone or jointly with any other person :—Held, that a surety for interest only on a debt thereby released was not discharged from payment of interest which had accrued due since the date of the release. *Id.*

3. The holder of a security who agrees with the principal to give time to the surety by so doing discharges the surety. *Overend, Gurney, & Co. v. Oriental Financial Corporation*, 31 L. T., N. S., 322; 7 L. R., H. L., 348. Affirming 7 L. R., Ch., 142; 41 L. J., Ch., 332; 20 W. R. 253; 25 L. T., N. S., 813; 24 L. T., N. S., 774; 19 W. R. 869.

The holder of a security is, in dealing with the security, affected by knowledge acquired after taking it as to which of the parties liable upon it is principal, and which is surety. *Id.*

A financial company, by agreement with an agent, accepted bills of exchange which were discounted by a discount company for the agent, he guaranteeing payment. The discount company was not at the time aware of the relations between the acceptors and the agent, but was informed before the bills matured that the agent was principal, and that the acceptors were sureties. After this, the company agreed with the agent not to press the acceptors for payment until certain other bills became due :—Held, that the acceptors were thereby discharged. *Id.*

If after a right of action accrues to a creditor against two or more persons, he is informed that one of them is a surety only, and, after that, he gives time to the principal debtor without the consent and knowledge of the surety, the rule as to the discharge of the surety applies. *Id.*

Merely giving an additional security by a principal will not discharge a surety, but if the giving of such security is really a consideration for giving time to the principal, it will do so. *Id.*

Seem, that to reserve a creditor's right against a surety there must be a distinct expression of intention to reserve it. *Id.*

2. Concealment and Misrepresentation.

4. A party relying on his ignorance of facts must show, not only that he had not the information, but that he could not, with due diligence, obtain it. *Wason v. Waring*, 15 Beav. 151.

The plaintiff, a surety, sought to set aside a deed executed in 1848, on the ground that he had been released by a transaction between the principals in 1842, of which he was ignorant in 1848. It appeared that he had made inquiries in 1845, and was referred to persons who could give him the information, but neglected to do so until the end of 1849, when he obtained it :—Held, that having in 1845 the means of acquiring the knowledge, he must be deemed to have had it in 1848, and his bill was dismissed. *Id.*

5. A surety is not of necessity entitled to receive without inquiry, from the party to whom he is about to bind himself, a full disclosure of all the circumstances of the dealings between the principal and that party. If he requires to know any particular matter of which the party about to receive the security is informed, he must make it the subject of a distinct inquiry. An obligation to a banker by a third party to be responsible for a cash credit to be given to one of the banker's customers is not avoided by the fact, that, immediately after the execution of the obligation, the cash credit is employed to pay off an old debt due to the banker. If the surety intends to rely upon such a fact for his defence as showing that there was a previous agreement between the banker and the customer to deal with the credit in a particular manner, to which he, if he had known it, should not have consented, he must bring such a defence before the Court by putting it on the record. *Hamilton v. Watson*, 12 Cl. & F. 109.

6. *Quære*, how far is it the duty of the creditor to communicate to a surety any arrangements between the creditor and principal debtor, which do not appear on the instrument creating the contract of suretyship. *Espey v. Lake*, 16 Jur. 1106.

7. Where the surviving obligee in joint and several bonds extended the time of payment of the bonds for three years, and, on a further advance, took a collateral security, reserving his right against the executors of the deceased obligee, but the arrangement was concealed from them :—Held, that by such indulgence they were discharged. *Oakeley v. Pasheller*, 4 Cl. & F. 207; 10 Bl. N. S. 548.

8. If a banking company agree that, upon receiving the guarantee of a particular person, they will advance a certain sum of money for the purpose of securing to the creditors of a trader a composition, and setting up the trader in business again; and at the same time the company, being themselves creditors of the trader, enter into a secret arrangement with him, by which they secure to themselves repayment of the difference between their composition and the full amount of their debt; this is a fraud upon the guarantor and upon the creditors who execute the composition deed on the faith of the ostensible agreement, and the guarantor may sustain a bill in equity to set aside the guarantee. *Pendlebury v. Walker*, 4 Y. & Coll. 424.

1. A. covenanted to convey certain estates to B., free from all incumbrances, except those specified, B. and C. covenanting, as principal and surety, to secure the payment of an annuity to A. It afterwards appeared that part of the estates were subject to a mortgage, not included in the specified incumbrances, the existence of which had not been discovered to C., and which A. alleged he had forgotten at the time:—Held, that C. was discharged from his liability as surety. *Willis v. Willis*, 14 Jur. 404; 17 Sim. 218.

2. An injunction having been obtained to restrain proceedings in an action on a bond in which the plaintiff had joined as a surety, on the ground of misrepresentation on the part of the obligee, and a deviation by him, with the concurrence of the principal obligor, from the terms of the contract on which the bond was founded; and it appearing on the evidence that there was reason to suppose that there had been such misrepresentation and deviation, although the evidence was not conclusive on the point; the Court refused, on motion, to dissolve the injunction, or to put the plaintiff on the terms of bringing the money into court. *Allan v. Inman*, 7 Jur. 433.

3. Without saying that in every case a creditor is bound to inquire under what circumstances his debtor has obtained the concurrence of a surety, it may safely be stated, that if the dealings are such as fairly to lead a reasonable man to believe that fraud must have been used in order to obtain such concurrence, he is bound to make inquiry. In some cases wilful ignorance is not to be distinguished in its equitable consequences from knowledge. *Owen v. Homan*, 17 Jur. 861; 4 H. L. Ca. 997; 1 Eq. Rep. 370.

The creditor must make a full, fair, and honest communication to the surety of all circumstances connected with the transaction to which the suretyship is to be applied, which are calculated to influence the discretion of the surety in entering into the required obligation. *S. C. 3 Macn. & G. 378*; 20 L. J., N. S., Ch., 314; 15 Jur. 339.

How far is the creditor responsible for the misrepresentation or non-communication of material circumstances by the debtor, where there is no communication between the creditor and the surety, and particularly in a case where the creditor desires his debtor to procure the suretyship contract, and abstains from all communication with the surety, *quære. Ib.*

The general law being that the creditor discharges a surety by any dealing or arrangement with the principal debtor without the surety's assent which at all varies the situation, rights, or remedies of the surety, will the surety be discharged in a case where the creditor precludes himself by covenant from suing the debtor except in certain events, those events not comprising all that might reasonably stimulate the creditor to sue if his power or discretion were unfettered, and what would be the effect in such a covenant of a reservation to the creditor of a power to sue the debtor, if required to do so by the surety, *quære. Ib.*

Assuming that if the remedies are reserved against the surety the liability of the surety is not discharged by an arrangement between the

creditor and debtor which does not alter the rights and position of the surety in regard to the creditor or debtor, it must still in each case be considered whether the arrangement between the creditor and debtor did in law or equity affect the surety and his rights, and whether the reservation of the remedy against the surety is such as that the liability of the surety may be enforced to its full extent, consistently with the compact between the creditor and debtor. *Ib.*

In the case of a bond given by one of several joint debtors, the legal effect of which is to merge the simple contract debt, can this effect be controlled by the parties agreeing by a separate instrument, that such bond shall be deemed a collateral security only, and that all remedies shall remain for the simple contract debt as if the bond had not been taken, *quære. Ib.*

4. Notice to a creditor when his debt is contracted that the relation of principal and surety exists between his co-debtors is sufficient to affect him with the consequences of that relation without any further acceptance of it on his part. *Wythes v. Labouchere*, 3 De G. & J. 593; 5 Jur., N. S., 499.

But it is not a consequence of that relation that the creditor, without any inquiry on the part of the surety, should acquaint him with every circumstance affecting the credit of the debtor, or of any matter unconnected with the transaction in which he is about to engage which may render it hazardous, the principles applicable to insurances not applying to such a case. *Ib.*

A customer being desirous of obtaining an advance from his bankers on the credit of a surety employs solicitors for that purpose, who are also the ordinary solicitors of the bankers, but are not employed by them in the transaction in question. The solicitors, however, give information to the bankers as to the sufficiency of the surety, and debit them with the costs of preparing the instrument of suretyship:—Held, that they could not be regarded as having acted for the bankers from the beginning, so as to affect the bankers with notice of any concealment or misrepresentation on the part of the customer towards the surety. *Ib.*

A concealment on the part of a creditor must be of some material part of the transaction itself between the creditor and his debtor to which the suretyship relates. *Ib.*

5. It is settled that there must be something amounting to fraud to enable a surety to say, that he is to be released from his contract on account of misrepresentation or concealment. *Pledge v. Buss*, Johns. 663; 6 Jur., N. S., 695.

6. A surety who executes a bond on a misrepresentation by the obligee of a material fact is entitled to relief. *Blest v. Brown*, 3 Giff. 450; 8 Jur., N. S., 187; 5 L. T., N. S., 663. Affirmed 8 Jur., N. S., 602; 10 W. R. 569; 6 L. T., N. S., 620.

Therefore, where a surety was induced to execute a bond on a representation by the obligee that the principal was not indebted to him, which statement was untrue, the Court directed the bond to be cancelled. *Ib.*

Where a bond by a surety purported to guarantee the payment of flour, to be supplied by the obligee (of a specified quality), in order

to enable the principal debtor to execute a contract, and the obligee designedly supplied inferior flour, so that the contract was annulled, the obligor is entitled to have the bond cancelled. *Id.*

1. Where an obligee at the time of the execution of a bond concealed a material circumstance from a surety under it:—Held, that such concealment was sufficient to absolve the surety from all liability. *Stiff v. Eastbourne Local Board*, 19 L. T., N. S., 408; 17 W. R. 68.

An injunction having been granted by the Vice-Chancellor, to restrain an action on a bond against a surety, on the ground that when the bond was entered into a material fact was concealed from the surety, the Court of Appeal discharged the injunction, on the ground that the defence was equally open at law by way of plea. S. C. 17 W. R. 428; 20 L. T., N. S., 339.

2. A debtor induced a lady, to whom he was engaged, to become security for a debt. After the marriage, she insisted that she had been imposed upon:—Held, that the only duty of the creditor (who was aware of the relation between the parties) towards the lady was, to see that she had proper professional assistance, and that any fraud or misrepresentation of the debtor in the transaction, of which the creditor had no notice, did not affect his security. *Cobbett v. Brock*, 20 Beav. 524.

3. Where parties are contracting, either of them, unless he is under a duty to the other, may keep silence even as to facts which he believes would be operative on the mind of the other; if, however, one of them has made a statement which he believes to be true, but which in the course of the negotiation he discovers to be false, he is bound to correct his erroneous statement. *Davies v. London & Provincial Marine Insurance Co.*, 8 L. R., Ch. D., 469; 47 L. J., Ch., 511; 38 L. T., N. S., 478; 26 W. R. 794.

In some cases, such as contracts between solicitor and client, there is a duty to make entire disclosure. In others, such as contracts of partnership, everything material must be disclosed. There is no such duty in the case of a contract of suretyship, but nevertheless very little said which ought not to have been said and very little omitted which ought to have been said will suffice to avoid the contract. *Id.*

The officers of a company, believing that the retention of money by one of their agents amounted to felony, directed his arrest. Certain friends of his came to the officers of the company and proposed to deposit a sum of money by way of security for any deficiency. On the same day the company was advised that the acts of the agent did not amount to felony, and the directions for the arrest were withdrawn. Later in that day the friends of the agent had a second interview with the officers of the company, and agreed to deposit a sum of money as security for his defaults, no mention being made of the withdrawal of the directions for the arrest. The sum of money was afterwards deposited with trustees on an agreement for the security of the company:—Held, that the change of circumstances ought to have been stated to the intending sureties, and that the agreement must be rescinded and the money returned to the sureties. *Id.*

Held, that even if the agreement was illegal as compounding a felony, the Court would interfere in a case where the money was actually in the hands of trustees, and pressure had been exercised. *Id.*

3. Breach of Duty by Creditor.

4. A. became surety for B. to C. for a sum "for value received by a draft at three months date." C. (without the concurrence of A.) at once paid the amount to B., instead of giving the draft at three months:—Held, that the agreement had been varied, and that the surety was therefore discharged. *Bonsor v. Cox*, 6 Beav. 110. Affirmed 13 L. J., N. S., Ch., 260; 8 Jur. 387.

And see S. C. 4 Beav. 937; 10 L. J., N. S., Ch., 895; 5 Jur. 164.

In the same case A. agreed to join B. as his surety on a joint and several bond, upon receiving from him a counter-bond of indemnity; the original bond was executed by A. only, and it did not appear that the obligee had taken any pains to procure its execution by B. the principal debtor:—Held, that A., the surety, was discharged on that ground also. *Id.*

5. The defendant agreed to sell two ships to a company, to be paid partly in bills of exchange accepted by the company; with liberty of the defendant to freight one of the vessels. The plaintiff agreed to indorse the bills by way of surety. Shortly afterwards the defendant, assuming to act as agent of the company, dispatched one of the vessels to Constantinople, laden on his own account, with munitions of war, for the Circassians, who were at war with Russia. This was not known either to the company or to the plaintiff:—Held, that the defendant having exposed the ships to extraordinary risk, it amounted to a release of the plaintiff from his liability. *Burke v. Rogerson*, 12 Jur., N. S., 635; 14 L. T., N. S., 780.

6. B., as principal, gave to his partner, C., a bond, which was executed by L. as surety, indemnifying him from all loss from the partnership business, it being stipulated by the articles of partnership that the business should continue for five years; that in case either partner should retire, and the other be desirous of continuing the business, the continuing partner might take the retiring partner's share of the partnership assets at a valuation; and that if at the expiration of the partnership term either of the partners should be desirous of carrying on the business, and should neglect or refuse to purchase his partner's share in the assets at a valuation as above mentioned, then the assets should be realized, the partnership debts paid out of the proceeds, and the surplus proceeds divided between the partners according to their interests. At the expiration of the partnership term neither of the partners retired from the business, but, without consulting L., continued to carry it on for about twenty months longer, at the end of which time C. retired, leaving the whole partnership assets in the hands of B., by whom the business was continued till B.'s bankruptcy, about three months afterwards. B. then absconded, leaving the concern insolvent, and C. was compelled to liquidate the liabilities of the partnership:—Held, that in-

asmuch as by the articles of partnership the partnership ought to have been wound up at the expiration of the term limited by the articles, it was not competent to C. to agree to its continuance without the consent of L., and yet to hold L. liable as surety upon the bond, and that C. therefore was not entitled to put the bond in force against L. *Small v. Currie*, 18 Jur. 781; 23 L. J., Ch., 764; 5 De G. M. & G. 141; 2 Eq. Rep. 639.

1. Where a bond creditor, by agreement with his debtor, takes interest on his debt by anticipation, a court of equity will restrain an action on the bond, whether brought against the principal or the surety. *Blake v. White*, 1 Y. & Coll. 420; 14 L. J., N. S., Exch. Eq., 48.

2. A contractor undertook to perform certain works, and it was agreed that three-fourths of the work, as finished, should be paid for every two months, and the remaining one-fourth upon the completion of the whole work:—Held, that the sureties for the due performance of the contract were released from their liability, by reason of payments exceeding three-fourths of the work done, having, without the consent of the sureties, been made to the contractor before the completion of the whole work. *Calvert v. London Dock Co.*, 2 Keen 638; 7 L. J., N. S., Ch., 90; 2 Jur. 62.

3. Upon the eve of a sale by a sheriff, a surety gave a written guarantee for payment of the judgment debts by instalments, in consideration of the judgment creditors consenting to postpone the sale under the execution. It turned out that the consent of another person was necessary in order to prevent the sale, and in consequence the sale took place. The surety gave notice that the consideration having failed, the guarantee was at an end. Representations were made on behalf of the judgment creditors when they took the guarantee, that they had power to stop the sale, and it would be stopped:—Held, that the surety was entitled to have the guarantee delivered up to be cancelled. *Cooper v. Joel*, 1 De G. F. & J. 240; 27 Beav. 313.

4. Corn factors supplied flour on credit to a baker, on his executing to them, with a surety, a bond, the condition of which, after reciting that the baker had entered into a contract for the supply of bread to the army, was that the bond was to be void if the baker should deliver to the corn factors his bills on the Government as he drew them, and if he and the surety should make good the amount to become due to the corn factors. The corn factors supplied flour, but not of the quality specified in the Government contract, which was vacated on that account:—Held, that the corn factors could not as against the surety allege ignorance of the terms of the contract, and that the surety was discharged. *Blest v. Brown*, 4 De G. F. & J. 367.

5. Landlords advance money to their tenant on a joint note of himself and a surety; they afterwards take a security for this and another sum advanced at the same time, by an assignment of furniture of the tenant by way of mortgage:—Held, that, by taking the furniture under a distress for rent in arrear, they discharged the surety. *Pearl v. Deacon*, 1 De G. & J. 461; 3 Jur., N. S., 1187; 26 L. J., Ch., 761; 5 W. R. 793. Affirming 24 Beav. 186; 3 Jur., N. S., 879; 5 W. R. 702. Followed in

Coates v. Coates, 3 N. R. 355; 33 L. J., Ch., 448; 9 L. T., N. S. 795; 10 Jur., N. S. 532; 12 W. R. 634.

6. A surety, by a note for a floating balance due to bankers from a customer:—Held, released by the bankers crediting the customer with the full amount of the note without advancing the money at the time. *Archer v. Hudson*, 7 Beav. 551; 13 L. J., N. S., Ch., 880; 8 Jur. 761. Affirmed 15 L. J., N. S., Ch., 211.

7. A surety, who has contracted to become so on the understanding that he is to be co-surety with another, is wholly released in equity if the intended co-surety does not execute. *Evans v. Bremridge*, 8 De G. M. & G. 100; 2 Jur., N. S., 311; 25 L. J., Ch., 334; 4 W. R. 350. Affirming 2 Kay & J. 174; 2 Jur., N. S., 134; 25 L. J., Ch., 102; 4 W. R. 161.

One of two intended co-sureties executed a deed for the repayment of moneys to be advanced to the principal debtor, on the understanding that the money would not be advanced until the deed was executed by the other surety. The deed was never executed by the other surety, and no notice of his failure to execute was given by the creditor to the executing surety, until after the principal debtor had made default and become insolvent:—Held, that the executing surety was entitled to be discharged in equity from every part of the debt, and (varying so much of the decree as ordered the deed to be delivered up to be cancelled), to have an injunction to restrain all proceedings under it. *Id.*

Held, secondly, that he had not lost his right by setting up this defence at law by equitable plea, to which the covenantees demurred in such a way as might leave the equitable ground untouched. *Id.*

8. Equity will not relieve a surety against execution of a common law judgment upon a bond, on the ground that the principal has not executed the bond. *Cooper v. Evans*, 15 W. R. 609; 36 L. J., Ch., 431; 4 L. R., Eq., 45.

A coal agent entered into an agreement, under seal, with the coal owners, for the proper discharge of his duties. A joint and several bond of even date by the coal agent and two sureties, for the performance of this agreement, was prepared and executed by the sureties, but not by the principal. The agreement being broken, an action was brought against the sureties for the penalty of the bond, and judgment recovered. On a bill filed in equity by a surety to stay execution of the judgment:—Held, first, that as the sureties might have had the benefit of the agreement under seal, they were not discharged by the non-execution of the bond by the principal debtor, and secondly, that the doctrine of principal and surety is the same at law and in equity, and the question was therefore decided by the judgment at law. *Id.*

4. Variation of Contract.

9. A, B, and C. carried on business in co-partnership for a term, which would expire on the 19th of February 1807, under articles which empowered A., in case of his death during the term, to bequeath his share of the trade in

favour of his wife or children. S., a customer of the bank and a surety, covenanted that they, or one of them, would pay to A., B., and C., the survivors or survivor of them, etc., all sums which, on or before or until the 19th of February 1807, should become due from the customer to A., B., and C., the survivors or survivor of them, etc. A. died, having bequeathed his share of the concern to his executors, in trust for his children; the business continued to be carried on under the same firm as before, and his executors interfered in the management, and shared in the profit. At the time of A.'s death, the balance due from S. to the bank was upwards of 14,000*l.*; after that time, S. continued his dealings with the bank in the same manner as previously, paying in more than 14,000*l.* within a few weeks after A.'s death, but drawing out during the same period a larger sum, and these subsequent dealings were contained in the same account with the preceding dealings, and some years afterwards S. became insolvent, being indebted to the bank in a balance of 19,000*l.* and upwards:—Held, that the partnership, which carried on the business after the death of A., was a new partnership; that the surety's covenant did not extend to cover sums advanced to the customer by the bank after A.'s death; that the balance due at A.'s death from the customer was to be considered as discharged by the payments subsequently made by him to the bank. *Pemberton v. Oakes*, 4 Russ. 154; 6 L. J., Ch., 35.

1. A creditor took, as security for his debt, bills of exchange drawn and indorsed by a surety, and accepted by the principal debtor. After those bills were dishonoured, the creditor drew accommodation bills on and which were accepted by the principal debtor, but were paid by the drawer when at maturity. On a bill filed by the surety to restrain an action subsequently brought against him on the bills which had been dishonoured, the Court allowed the action to proceed, but stayed execution. *Quare*, whether the surety was discharged by the subsequent transactions which, without his knowledge, took place between the creditor and the principal debtor. *Mackintosh v. Wyatt*, 8 Hare 562.

2. The rule as to the liabilities of sureties in a bond is the same in Scotland as in England, viz., that they are not to be discharged from their obligation unless the contract between them and the obligees is varied by a positive contract between the obligees and the principal, without notice to the sureties. *Creighton v. Rankin*, 7 Cl. & F. 325.

3. Creditor having, among other securities, a bond with a surety, taking a mortgage from the principal debtor, and agreeing to receive the residue by instalments, secured by a warrant, etc., without prejudice to any security he now holds; injunction granted against suing the surety. *Boulbee v. Stubbs*, 18 Ves. 20.

Composition with reserve of the remedy against sureties valid, but must plainly appear. *Ib.*

4. The firm of H., B., & Co., consisting of M. H., and J. B., being indebted to their bankers, F. & Co., J. B., a partner in the firm of H., B., & Co., procured S. H., a married woman having separate property, to join with him as surety

in certain promissory notes to F. & Co. Afterwards H., B., & Co., being considerably indebted to F. & Co., dissolved partnership, and by articles of agreement between M. H., J. B., and the bankers, it was arranged that the business should be carried on by J. B. alone, that M. H. should be released from the debt of the bankers, and that J. B. should pay the debt by monthly instalments, and the remedies of the bankers against the sureties of H., B., & Co., were expressly reserved:—Held, that the sureties were not released by this arrangement between the bankers and H., B., & Co., and that the bankers were entitled to have a receiver appointed of the rents of certain estates to which S. H. was entitled for her separate use for life. *Owen v. Homan*, 13 Beav. 196; 19 L. J., N. S., Ch., 549; 14 Jur. 821; but the order for a receiver was discharged, S. C. 3 Macn. & G. 378; 10 L. J., N. S., Ch., 814; 15 Jur. 339. But see 4 H. L. Ca. 997; 17 Jur. 861; 1 Eq. Rep. 370.

The general law being that the creditor discharges a surety by any dealing or arrangement with the principal debtor, without the surety's assent, which at all varies the situation, rights, or remedies of the surety, *quare* will the surety be discharged in a case where the creditor precludes himself by covenant from suing the debtor except in certain events, those events not comprising all that might reasonably stimulate the creditor to sue if his power or discretion were unfettered, and what would be the effect in such a covenant of a reservation to the creditor of a power to sue the debtor, if required to do so by the surety. S. C. 3 Macn. & G. 378; 20 L. J., N. S., Ch., 814; 15 Jur. 339.

Assuming that if the remedies are reserved against the surety the liability of the surety is not discharged by an arrangement between the creditor and debtor which does not alter the rights and position of the surety in regard to the creditor or debtor, it must still in each case be considered whether the arrangement between the creditor and debtor did in law or equity affect the surety and his rights, and whether the reservation of the remedy against the surety is such as that the liability of the surety may be enforced to its full extent consistently with the compact between the creditor and debtor. *Ib.*

In the case of a bond given by one of several joint debtors, the legal effect of which is to merge the simple contract debt, can this effect be controlled by the parties agreeing by a separate instrument that such bond shall be deemed a collateral security only, and that all remedies shall remain for the simple contract debt as if the bond had not been taken, *quare. Ib.*

5. If A. take a joint bond from B., C., and D., and then accept the notes of B. and C. in discharge of the bond, D., as a surety, is no longer liable. *Skip v. Edwards*, 9 Mod. 438. S. C. *nom. Skip v. Huey*, or *Wilcox v. Edwards*, 3 Atk. 91.

6. The liability of a surety in a bond is not discharged by the delay of the creditor in suing for the debt, or by the circumstance of the principal debtor afterwards executing to the creditor another bond for a larger sum. *Byre v. Everett*, 2 Russ. 381.

7. A father gave a bond to secure the repay-

ment within four years of a simple contract debt due by his son. The father died, leaving the son his heir, and the creditor commenced proceedings against his estate for the recovery of the bond debt, but subsequently took a fresh bond from the son and the personal representative of the father, conditioned for paying the same debt by instalments, the creditor at the same time retaining the original bond:—Held, that the original bond was discharged; first, on the ground that the father was only surety for the son, and that the creditor, by giving time to the principal debtor, had discharged the surety; and, secondly, because the second bond must be considered, under the circumstances, as having been given in satisfaction of the first. *Clarke v. Henty*, 3 Y. & Coll. 187; 2 Jur. 918.

1. A variance in the agreement to which a surety has subscribed, which variance has been made without the surety's knowledge or consent, and which may prejudice him, or amount to the substitution of a new agreement for a former one, will discharge the surety, though the original agreement, notwithstanding such variance, may be that on which the liability is substantially incurred. *Bonar v. Macdonald*, 3 H. L. Ca. 227; 7 Bell. App. Cas. 379; 14 Jur. 1077.

A. became surety for B.'s conduct as a clerk in a bank. B. was subsequently appointed to a better situation in a branch of the same bank, and A. extended his suretyship to this new situation. B. afterwards, while remaining in the same situation, undertook on having his salary raised to become liable to one-fourth of the losses on discounts. A communication of this new arrangement was made to A. B. allowed a customer considerably to overdraw his accounts, and thereby the bank lost a sum of money:—Held, that the surety could not be called on to make good this loss, though it fell within the terms of the original agreement, as the fresh arrangement was the substitution of a new agreement for the former one, and it was thereby discharged. *Id.*

2. By a decree in a creditor's suit U. was declared to be a specialty creditor on the estate of R. It appeared that the claim of U. against R. was in respect of a debt due by S., and for which R. had become surety. After the decree U. sued S., and took a judgment by arrangement for payment of the debt by instalments without the knowledge or consent of R.:—Held, that his so doing did not discharge the estate of R. *Jenkins v. Robertson*, 2 Drew. 351.

3. A surety is bound only to the letter of his engagement; if that engagement is altered in a single line, no matter whether it be altered for the benefit of the surety, or whether the alteration be innocently made, the surety has a right to say the contract is no longer that for which he engaged to be the surety, and he is entitled to be relieved from the engagement. *Blest v. Brown*, 8 Jur., N. S., 602; 10 W. R. 569; 6 L. T., N. S., 620.

4. A. and B. were indebted to C. on a joint and several promissory note, A. as principal, B. as surety. A. deposited with C. a policy of assurance as a collateral security for the debt. C. died, appointing D. his executrix. A. became bankrupt; D. proved for the balance of the debt against A.'s estate, and, without communi-

cating with B., surrendered the policy to the insurance office for value:—Held, that B. was not thereby discharged from his original liability. *Coates v. Coates*, 33 L. J., Ch., 448; 9 L. T., N. S., 795; 3 N. R. 355; 10 Jur., N. S., 532; 12 W. R. 634.

Where a testator bequeathed the residue of his property to his widow and executrix for her life, and she released the surety for a debt due to her husband's estate from payment of all interest on the debt:—Held, to extend only to her life interest in the principal moneys due in respect of the debt. *Id.*

5. Sureties in 1842 covenanted with a corporation that M., who had been appointed treasurer to the corporation under the 5 & 6 Will. 4, c. 76, s. 58, "should well and truly pay to the corporation, or to their successors, all such sums of money as M. should or might recover or receive, in virtue of his appointment as treasurer as aforesaid, during the whole time of his continuing in the office in consequence of the said election, or under any annual or future election of the said council to the said office." At the time of his appointment the office was an annual one, under the 5 & 6 Will. 4, c. 76, s. 58; but in 1843 was passed the 6 & 7 Vict., c. 89, which by s. 6 repealed that enactment as inconvenient and unnecessary, and directed that the treasurer should "thenceforth hold his office during the pleasure of the council for the time being":—Held, by the House of Lords, that there was not such a variation of tenure of the office as to discharge the sureties, and that the change from an annual to a perpetual appointment during pleasure was provided for by the words of the bond, "annual or other future election." *Dobie v. Berwick-on-Tweed (Mayor)*, *Renton v. Same*, *Onnald v. Same*, 2 Jur., N. S., 743; 25 L. J., Q. B., 383; 4 W. R. 738.

6. A., B., and C. contracted with a company to execute certain works on given terms. D. and E. gave a bond, as their sureties, for the performance of the contract. A. and B. retired from the partnership, and F. was substituted. Afterwards, disputes arose between the company and C. and F. as to the conduct of the works, and various transactions took place by which the terms of the contract were varied, and during which the company paid to C. and F. certain moneys which it had been agreed originally should be paid to A., B., and C. D. and E., the sureties, were no parties to these transactions, and gave no express consent, but they had been the solicitors of A., B., and C. in the original contract, knew of all the subsequent transactions, and acted as the solicitors of C. and F., and as such solicitors, prepared many of the documents required for such transactions. The company having brought an action on the bond against the sureties, for breach of the contract, they filed this bill to restrain the action:—Held, that the sureties were not discharged, and that the action could not be stopped. *Woodcock v. Oxford & Worcester Railway Co.*, 1 Drew. 521.

7. B., as principal, gave to his partner, C., a bond, which was executed by L. as surety, indemnifying him from all loss from the partnership business, it being stipulated by the articles of partnership that the business should continue for five years; that in case either partner should retire, and the other be desirous

of continuing the business, the continuing partner might take the retiring partner's share of the partnership assets at a valuation; and that if at the expiration of the partnership term either of the partners should be desirous of carrying on the business, and should neglect or refuse to purchase his partner's share in the assets at a valuation, then the assets should be realized, the debts paid out of the proceeds, and the surplus divided between the partners according to their interests. At the expiration of the partnership term neither of the partners retired, but, without consulting L., continued to carry it on for about twenty months longer, at the end of which time C. retired, leaving the whole partnership assets in the hands of B., by whom the business was continued till B.'s bankruptcy, about three months afterwards. B. afterwards absconded, leaving the concern insolvent, and C. was compelled to liquidate the liabilities of the partnership:—Held, that inasmuch as by the articles the partnership ought to have been wound up at the expiration of the term limited by the articles, it was not competent to C. to agree to its continuance without the consent of L., and yet to hold L. liable as surety upon the bond; and that C., therefore, was not entitled to put the bond in force against L. *Small v. Currie*, 5 De G. M. & G. 141; 18 Jur. 731; 23 L. J., Ch., 746; 2 Eq. R. 639; 2 W. R. 213.

Held, secondly, that whether that circumstance would afford a defence to an action on the bond or not, a court of equity would restrain the obligee from proceeding in such an action. *Id.*

1. The contract of suretyship entitles the surety to require that his position shall not be altered, by any arrangement between the creditor and the principal debtor, from that in which he stood at the time of the contract, and it therefore entitles him absolutely to the benefit of all the securities, for the debt which the creditor held at the time of the contract; it also entitles the surety at any time to require that the creditor shall enforce against the principal debtor not only all the remedies and all the securities for the debt which he has at the time of the contract, but also any securities for the debt which the creditor may have acquired subsequently to the contract, and which he holds at the time that the surety requires him to proceed. And as a person paying off a debt for which he is liable is entitled in equity to stand in the place of the creditor, and to have the benefit of the securities held by the creditor for such debt, so the surety, on paying off the debt of the principal debtor, is entitled to require from the creditor the benefit not only of the securities for the debt which the creditor had at the time of the contract of suretyship, but also of all the securities which he holds at the time he is paid off. But there is no implied duty in the contract of suretyship which requires the creditor to retain, for the benefit of the surety, securities for the debt which he might subsequently receive from the principal debtor, and which, whilst the creditor holds them, the surety does not call upon him to enforce. And a creditor who, after the contract of suretyship, having taken a further security from the principal debtor, subsequently parts with that security, does not thereby either wholly or *pro*

tanto release the surety. *Newton v. Chorlton*, 10 Hare 646; 2 Drew. 333.

2. A principal debtor and his surety, being entitled to two shares in a fund in court, assigned them to a creditor to secure a debt. The creditor assigned the debt of the trustees of his marriage settlement, but no notice of the assignment was given to the surety, nor was any stop-order obtained by the trustees. Afterwards the solicitor of the creditor in an unauthorised manner obtained the payment out of court of the fund of the principal debtors without the knowledge of the creditor or of the surety:—Held, first, that as between the parties, neither the creditor nor his trustees were bound by the act of the solicitor. Secondly, that the assignment of the debt without notice was no discharge of the surety. *Wheatley v. Baston* (*Collins's case*), 1 Jur., N. S., 1124; 24 L. J., Ch., 727; 7 De G. M. & G. 261; 3 W. R. 296, 540; 1 Jur., N. S., 222; 3 Eq. Rep. 859, 865.

3. In and prior to 1866, W. and L. partners in trade executed two joint and several bonds to the trustees of S.'s will to secure the repayment with interest of two sums of money advanced to them. In 1869 W. retired from the firm, and in pursuance of an agreement, assigned by deed all his share and interest in the firm to L., who covenanted to indemnify him against all the trade debts and liabilities. The trustees had notice of this deed. L. carried on the business with C. till 1871, when they filed a petition for liquidation by arrangement. The trustees proved under the liquidation for the balance of the principal and interest then due on the bonds, attended and voted at all the meetings of the creditors, who agreed to accept a composition. The trustees were also parties to the composition deed, by which they gave time to L. and C. for the payment of the balance due on the bonds. W. filed a bill praying for a declaration that, under the circumstances, he was absolutely released from all liability under the bonds:—Held, that the retirement of W. with a covenant of indemnity with the knowledge of the trustees had altered his character of principal into that of surety; that the subsequent acts and conduct of the trustees had effected a complete novation of the bond debts; and, consequently, that W. was entitled to the relief which he sought. *Wilson v. Lloyd*, 21 W. R. 507; 42 L. J., Ch., 559; 16 L. R., Eq., 60; 28 L. T. 331.

4. A. was security for B. on a joint and several bond to Z. Title deeds of B. were deposited with Z. as a collateral security for payment of the debt and interest secured by the bond. A., on a given day, offered to pay Z. the amount due on having B.'s title deeds delivered up to him. This was refused by Z. Subsequently Z. lent B. the title deeds to enable him to come to an arrangement with A., his surety, as to paying off the amount of the bond, on an undertaking to return them to Z., which he had done:—Held, that this was not such a dealing with the principal as discharged the surety from the debt and interest due on the bond. *Bushell v. Collett*, 6 L. T. N. S., 20.

5. On the 15th February 1831 A. and B. dissolved partnership, A. leaving in the business, to be continued by B., the amount of his share. On the same day B., as principal, and F., as

surety, executed a bond for payment to A. of 5,000*l.* on the 15th August following, with interest at 5*l.* per cent. On the 21st February 1831, without the privity or consent of F., A. and B. agreed that the whole of the debt due by the latter to the former should, as to 1,000*l.*, be paid within a year, and as to the residue within the five years, by equal half-yearly payments, with interest. In May 1855 B. was adjudicated bankrupt, and under the bankruptcy A. or his assignee received dividends. In February 1856 A. commenced an action against the representatives of F. to recover a large sum and interest, and thereupon a bill was filed to restrain the proceedings, and an injunction was granted. On the hearing the Court directed that the injunction should be made perpetual, that A. should enter up satisfaction on the judgment obtained (by consent) against F.'s estate, and that A. should pay all the costs at law and in equity. *Wright v. Sanders*, 3 Jur., N. S., 504; 5 W. R. 644.

1. In 1872 a company was formed to purchase and work a going concern, consisting of railway tire and steam-roller works, and the vendor accepted part of the purchase money in fully paid-up shares, called vendor's shares. The vendor guaranteed to the shareholders a dividend for the first five years upon the called-up capital for the time being at the rate of 10 per cent., and that if in any one of the five years the profits should not equal a dividend of 10 per cent., he would pay the amount required to make the profit equal such dividend; and that, if he did not on demand pay such amount, the company might sell his "vendor's shares," and apply the proceeds in satisfaction of such amount. The business was carried on at a loss from the first, and in 1874 the directors, who had the widest powers of management, shut up the railway tire department, which comprised four-fifths of the whole concern. In 1875 there were no profits at all, and the directors called upon the vendor under his guarantee to pay an amount sufficient to make up the dividend of 10 per cent., and, on his refusal, commenced an action to enforce payment:—Held, that the guarantee was given upon the implied condition that the company should carry on the whole concern as it existed at the first, and that, the company having broken the contract on its part, the vendor was discharged from his guarantee. *Brown & Co. v. Brown*, 35 L. T., N. S., 54.

Held, also, that the vendor was, under the circumstances, entitled to an injunction to restrain the company from selling his "vendor's shares." *Ib.*

5. Laches of Creditor.

2. A creditor whose debt is secured by a warrant of attorney, having received promissory notes from the debtor and two sureties, and afterwards entered up judgment and taken the goods of the debtor, and without the knowledge of the sureties withdrawn the execution, has discharged the sureties; but a subsequent promise to pay the debt by one surety, knowing that the execution has been withdrawn, renews his liability. *Mayhew v. Crickett*, 2 Swan. 185; 1 Wils. 418.

3. A tenant's recognisance was executed at

the same time as his lease, but was not inrolled for four years after. The tenant in the meantime became insolvent and incumbered his property:—Held, that the neglect to inrol the recognisance, when the lease was executed, did not discharge the surety. *Quere*, whose duty is it to inrol the recognisance. *Jephson v. Maunsell*, 10 Ir. Eq. R. 38, 132.

4. A surety to the East India Company discharged by payment of a balance to the principal under an erroneous settlement by the officer of the company without their authority or knowledge. *Law v. East India Co.*, 4 Ves. 824.

5. By the civil law, sureties are not discharged from their liability to satisfy the creditor, though the benefit of a hypothec of the debtor is lost by the laches of the creditor to enforce his demands. *Macdonald v. Bell*, 3 Moo. P. C. 315.

6. A. was bound jointly and severally with B. the trustee of a bankrupt's estate in Scotland to the extent of 1000*l.*, that B. should faithfully discharge the duties of his office. Commissioners, according to the practice in Scotland, were afterwards appointed by the creditors, to superintend the conduct of the trustee in the management of the estate. B. having been found a defaulter to the amount of 1,000*l.*, the bond is put in suit against A., who alleges in his defence the general negligence of the commissioners, and their connivance at fraudulent acts of B.:—Held, that A. was not discharged from his obligation by the alleged neglect of the commissioners. *McTaggart v. Watson*, 10 Bli., N. S., 618; 3 Cl. & F. 525.

7. If, by neglect of the creditor, the benefit of some of the securities for the debt is lost, the surety is *pro tanto* discharged. *Capel v. Butler*, 2 Sim. & S. 457; 4 L. J., Ch., 69.

8. A. borrowed from B. 1,000*l.*, to secure which A., and W. as his surety, in 1841 mortgaged to B. their reversionary third shares of a fund in court. B. obtained a stop order. In February 1846, B., on his marriage, assigned the debt to trustees, who did not obtain a new stop order, nor was notice of the assignment given to W. In December 1846, C., who was the general solicitor of B., presented a petition on A.'s behalf, setting out the mortgage in such a way as not to show that W. was merely a surety, and containing a statement that 500*l.* had been paid to B. by A. in part discharge of the debt, and praying for payment out of court of A.'s share. C. instructed counsel to appear and consent for W. and B., and the order was made without the knowledge of either W. or B., or B.'s trustees:—Held, by the Vice-Chancellor, that W.'s share was discharged, on the grounds that a surety is entitled to notice of the assignment of the debt, and that the fund primarily liable had been lost by the neglect of the trustees in not obtaining a new stop-order. But held, on appeal, First, that there is no such rule as that a surety is discharged by the omission of the assignee of the debt to give him notice of the assignment. Secondly, that the trustees of the settlement owed no duty to W. to obtain a new stop-order on A.'s share, and that although their omission to do so might make them liable to their *cestuis que trustent*, it gave no right to W. Thirdly, that the fact of C. being B.'s general solicitor did not enable him to bind B. as against third parties in such

a matter as the petition, and that B. was not bound by the statements contained in the petition, nor subjected to any equity by the order made upon it. Fourthly, that the share of the surety was liable for any deficiency of the primary security not attributable to the default of the creditor, and that the fact of the deficiency being occasioned by the act of the Court of Chancery made no difference. *Wheatley v. Bastow*, 1 Jur., N. S., 222, 1124; 24 L. J., Ch., 727; 7 De G. M. & G. 261; 3 W. R. 296, 540; 3 Eq. Rep. 859, 865.

1. Where, through negligence on the part of a creditor, a security, to the benefit of which a surety is entitled, is not properly perfected, the surety is discharged to the extent of the security lost. *Strange v. Pooks*, 9 Jur., N. S., 243; 8 L. T., N. S., 789; 4 Giff. 408; 2 N. R. 507.

Repayment of a sum of money was secured to the lender by a bond of the borrower and his surety, and by a mortgage of the equitable life interests of the borrower and his wife in certain settled real estate, accompanied by policies of assurance. The lender assigned the debt. No notice of the mortgage or of the assignment was given either by the lender or the assignee to the trustees of the settlement, and the latter sold the estate under a power. The surety's indemnity against his principal in respect of the life-estates having thus become lost by the negligence of the creditor:—Held, that the surety was entitled to be relieved to the extent of the security lost. *Ib.*

2. By an agreement between bankers, a customer, and a surety, the surety guaranteed the balance due or to become due from the customer, subject to a limit and to a proviso empowering the surety at any time to determine by notice his liability as to subsequent dealings. The customer afterwards obtained a loan from the bank beyond the limit of the guarantee on a warrant of attorney, and simultaneously with it a second agreement was entered into between the bankers, the customer, and surety, that the warrant of attorney should not prejudice or affect the former agreement, and that the bank would, at any time when requested by the surety, enter up judgment and issue execution. The bank omitted to file the warrant of attorney, and the customer became bankrupt:—Held, that by the omission to file the warrant of attorney the surety was discharged. *Watson v. Alcock*, 4 De G. M. & G. 242; 17 Jur. 568; 22 L. J., Ch., 858; 1 Eq. R. 231; 1 W. R. 359; 1 Eq. Rep. 231.

Held, also, that the surety who had pleaded to an action on the guarantee, and then filed a bill for an injunction, had put the bank to unnecessary costs, and could only be relieved in equity on paying the costs at law subsequent to the declaration. *Ib.*

3. It is very questionable whether the sureties of the bond usually given by an official assignee in bankruptcy to the chief registrar and another registrar of the Court for the proper performance of his duties would be discharged from their suretyship by the neglect of the creditors' assignees in the bankruptcies in which he acted, to exercise that supervision over his conduct which by the statutes and rules in bankruptcy it is their duty to do. The bond seems to be given to the registrars, and not to the creditors' assignees as obligees, for the express purpose of preventing the negli-

gence of the assignees having that effect. *Dawson v. James*, 1 Kay 280; 23 L. J., Ch., 434; 2 W. R. 213; 2 Eq. Rep. 230.

In such a case the negligence, in order to discharge the sureties, must amount to connivance at the official assignee's getting the fund into his hands improperly, or must be so gross as to be equivalent to a wilful shutting of the eyes to the fraud which he is about to commit. *Ib.*

4. A surety guaranteeing the honesty of a person employed is not entitled to be relieved from his obligation because the employer fails to use all the means in his power to guard against the consequences of dishonesty. *Black v. Ottoman Bank*, 8 Jur., N. S., 801; 10 W. R. 871; 6 L. T., N. S., 763.

The mere passive inactivity of the person to whom a guarantee is given, his neglect to call the principal debtor to account in a reasonable time, and to enforce payment against him, do not discharge the surety; and the rule at law and in equity is the same, that there must be some positive act done by him to the prejudice of the surety, or such degree of negligence as to imply connivance and amount to fraud. *Ib.*

B. executed a bond, by which he bound himself in 5,000*l.* as surety for P., and guaranteed that P. should honestly discharge his obligations to O.; the bond to remain in force till P. should have rendered a just account of his charge, and full payment and satisfaction to O. P. misappropriated funds of O. In an action by O. on the bond, B. pleaded that O. was guilty of negligence and want of due care in checking and properly examining the accounts of P., and that he was thereby released and discharged from the bond. O. replied that the conditions of the bond did not limit B.'s liability to such acts of dishonesty by P. as might have been prevented by the exercise of care and diligence:—Held, first, that O. did not by this replication admit the duty to check the accounts of P. *Ib.*

Held, secondly, that the plea was no defence to the action. *Ib.*

Held, thirdly, that the securities placed in the hands of P. by O. before the date of the bond, and left in his hands after the date of the bond, were just as much intrusted to him after that date as if they had been delivered after that date. *Ib.*

5. As between principal and surety, if the primary security proves worthless, whether it was so originally or whether it becomes so afterwards, the surety is not discharged, unless the loss or deficiency of the original and primary security was occasioned by the act of the creditor. *Hardwick v. Wright*, 35 Beav. 133.

6. A creditor who holds several securities for his debt, partly given by the principal debtor and partly by a surety, must retain all securities given by the principal debtor for the benefit of the surety, and if he neglects to do so, he discharges the surety. *Merchants' Bank of London v. Maud*, 18 W. R. 312. And see S. C. on appeal 19 W. R. 657.

6. Release of Debtor.

7. In general a release to the principal is in

equity a release to the surety, but if the surety has, previously to the release given by the creditor, paid part of the debt, and given a security for the remainder, the general rule will not apply, but the creditor, notwithstanding the release, will, in the absence of evidence to the contrary, retain his right against the surety. *Hall v. Hutchons*, 3 Myl. & K. 426; 3 L. J., N. S., Ch., 45.

1. Holder of a bill of exchange discharging the acceptor by receiving a composition cannot come upon the drawer. *Exp. Wilson*, 11 Ves. 410.

2. B. and C. were jointly bound as sureties for A.; D., the wife of A., charged her separate estate to indemnify B. from all losses, etc. The whole loss was borne by B. alone, who afterwards, without the concurrence of D., released C., his co-surety:—Held, that D.'s separate estate was thereby released from the moiety of the losses. *Hodgson v. Hodgson*, 2 Keen 704; 7 L. J., N. S., Ch., 5.

3. If a creditor execute a deed of compromise with the principal debtor, he thereby discharges the surety. Not so if it be stipulated in the deed of composition that the remedies against the sureties shall be reserved. Parol evidence of the understanding of the parties to the deed that the remedies against the sureties should be reserved, cannot be admitted. *Exp. Glendinning*, Buck 517. *Exp. Carstairs*, id. 560. And see S. C. 1 Rose 130.

4. A. B. entered into a bond as a surety; the creditor subsequently took from the principal debtor a promissory note for the amount, payable in two months, but afterwards, in consequence of the insolvency of the debtor, sued A. B. on the bond. A. B. then filed his bill to restrain the action, on the ground that he was discharged from liability by the giving of the promissory note; the creditor, by his answer, denied that such was the effect of the transaction, and on the hearing an inquiry was directed in respect of the circumstances under which the promissory note had been given. The Master reported that, though there was not any written or any distinct parol agreement between the parties, yet that there was a general understanding that the giving of the note was not to affect the bond:—Held, on further directions, that under these circumstances there was no case for the interference of a court of equity. *Wyke v. Rogers*, 1 De G. M. & G. 408; 21 L. J., Ch., 611.

A transaction, which would otherwise operate as a release of a surety, will not have that effect if the remedy against the surety is reserved; and the question in the above case was, there being no special ground for equitable relief, whether an agreement to reserve the rights against the surety really existed:—Held, on the evidence, and the Master's report founded on it, that such an agreement did exist, and also that parol evidence was admissible to prove it. *Id.*

5. The doctrine of equity that a discharge of the principal debtor operates to release the surety from all liability, may be displaced by the conduct of the surety, who by further contract with the creditor, rendered himself liable as a principal debtor, and thus lost the benefit of any subsequent dealings between the creditor and the person originally the principal debtor. *Reade v. Lowndes*, 23 Beav.

361; 26 L. J., Ch., 793; 3 Jur. N. S., 877; 30 L. T. 28. See also S. C. 80 L. T. 110.

6. When the creditor gives a release to the debtor, he cannot reserve any right against the surety, because the debt is gone at law. *Webb v. Hewitt*, 3 Kay & J. 438.

An agreement between a bond debtor and his creditor that the latter shall take all the debtor's property, and pay his other creditors 5s. in the pound, though not a discharge of the bond by way of accord and satisfaction, because not under seal, still operates in equity as a satisfaction of the debt; and it is not possible in equity, upon such a transaction, to reserve any rights against the surety, and any attempt to do so would be void, as being inconsistent with the agreement. *Id.*

7. It is not universally necessary, in order to reserve on a trust deed remedies against sureties, that the reservation should be expressed in the deed. *Exp. Harvey*, 4 De G. M. & G. 881; 23 L. J., Bky., 26.

A firm was holder of a joint and several note made by a father and son. The son assigned all his property to trustees for the benefit of his creditors, who were expressed to be parties, and to be named in a schedule, and the deed purported to contain an absolute release of the debts without any reservation of their rights against sureties. One of the trustees was a partner in the firm, and the deed was executed by him and the other trustees, but not by any other creditor. It was also executed by the son, with the privity and concurrence of the father. Upon its execution as an act of bankruptcy, an adjudication was pronounced against the son:—Held, that even assuming the father to have joined in the note as a surety merely, and the partner to have executed the deed as a creditor, and not merely as a trustee, the father's liability was not discharged. *Id.*

8. A banking company whose chief office was in London, but who had offices and carried on business in Australia, made advances at the request of M. and R. to C., the agent of M. and R. in Australia, upon bills of exchange drawn by him upon M. and R. These bills were dishonoured by M. and R., who had entered into a deed of composition with their creditors, which was executed on behalf of the banking company. Dividends had been received under this deed by the banking company, who had brought an action in Australia against C. for the amount of their advances upon the bills, and damages for their non-acceptance. Injunction granted restraining the banking company from proceeding in this action, they having been distinctly informed that the bills were drawn by C. as agent for M. and R., whom they had relieved by executing the deed and taking a dividend thereunder. Objection as to jurisdiction overruled, the chief office and domicile of the banking company being in London, where also the deed had been executed, and all the arrangements made. *Walker v. Brooks*, 4 W. R. 347.

9. *Semble*, that if a creditor release by deed one of two sureties, who are jointly and severally liable, the other is also discharged. *Evans v. Bremridge*, 2 Kay & J. 174; 2 Jur. N. S., 134; 25 L. J., Ch., 102; 4 W. R. 161. And see 4 W. R. 350; 25 L. J., Ch., 334; 2 Jur. N. S., 311.

The dicta to the contrary in *Exp. Gifford*, (6 Ves. 805) have not been followed. *Id.*

1. When a creditor releases the principal debtor at the request of the surety, and upon a representation made by him, which turns out to have been founded in mistake, the surety cannot claim, as against the creditor, the benefit of the doctrine that release of the principal releases the surety. *Scholefield v. Templer*, 1 Johns. 155; 5 Jur. N. S., 619; 28 L. J., Ch., 452. Affirmed 4 De G. & J. 429.

A surety concurs with the principal debtor in suggesting to the creditor, who is pressing for his money, to accept a transfer of a mortgage, which the debtor knows to be fictitious, but the surety believes to be genuine. Subsequently, at the solicitation of the surety, and in reliance on the pretended transfer (which the surety suggests as the reason for releasing him), and in the belief that such transfer is a valid mortgage security, the creditor releases the surety, and erases his name from the securities; upon the faith of which release the surety's friends advance him money, for the purpose of relieving him from all other liabilities. Upon discovery of the fraud:—Held, first, that the creditor was entitled to be restored to all his rights as against the surety, in the same manner as if the latter had never been released, nor his name erased from the securities. *Id.*

Held, also, by the Vice-Chancellor, that the creditor was entitled to such relief only upon the terms of repaying to the surety's friends the sums lent by them, with the right of standing in their place against the surety; but on appeal, the provisions in their favour were struck out, and the decree made simply without prejudice to their rights. *Id.*

Held, also, that the same result would have followed had the case been considered upon the mere grounds of mistake. *Id.*

The circumstance that the surety's remedies against his principal were suspended by the erasure of his name from the securities:—Held, not to release him from his suretyship, that erasure having been upon a misrepresentation made, though innocently, by himself. *Id.*

2. B. accepted a bill of exchange as surety for A., and subsequently, in consideration of further time given him (B.) for payment, covenanted by deed to pay what was due on the bill with interest, and at the same time assigned a policy as further security:—Held, that an entire acquittal of debts given to A. by all his creditors did not release B. *Defries v. Smith*, 10 W. R. 189.

3. It is a rule of law that a creditor may suspend his right for ever against the principal debtor, and yet preserve his rights against the surety. When a debtor executed a deed which contained a release from his creditors, followed by a proviso reserving any rights his creditors might have against any other persons in respect of any debt due by the debtor, either alone or jointly with any other persons:—Held, that a surety was not released. *Green v. Wynn*, 17 W. R. 72; 7 L. R., Eq., 28; 38 L. J., Ch., 76; 19 L. T., N. S., 553. Affirmed 38 L. J., Ch., 220; 20 L. T., N. S., 131; 17 W. R. 385; 4 L. R., Ch., 204.

4. A deed of assignment contained a clause providing that it should not affect any surety nor any security which any of the creditors might have, but if such security should be enforceable against the debtor or his estate,

then the creditor (unless he should consent to abandon his security) should be entitled to receive dividends upon so much only of his secured debts as might remain after such security should have been realised, or after credit should have been given for the full value thereof; and a creditor, holding a policy of assurance at that time valueless, proved for the full amount of his debt and received a dividend thereon:—Held, that there was no evidence of the creditor's intention to abandon his security. *Parker v. Anglosea (Marquis)*, 25 L. T., N. S., 482; 20 W. R. 162.

7. Death of Surety.

5. B., being hired as clerk to A. & Co., but not for any definite period, C. and D. joined with him in a bond to secure his duly accounting for his assets. C. died, and his executrix gave written notice to A. & Co. that she would no longer remain security. A. & Co. communicated this notice to B., and required and obtained from him the bond of another surety. D. died, and also the new surety, and four years and a half after death of C., B. died, when deficiencies were found in his accounts subsequent to the notice:—Held, executrix of C. had no equity to restrain A. & Co. from proceeding at law on bond. *Gordon v. Calvert*, 4 Russ. 581; 2 Sim. 253.

6. A guarantee was determinable by six months' notice. The guarantor died, leaving as his executor the debtor on whose behalf the guarantee was given. The creditors to whom the guarantee was given continued to make advances to the debtor, knowing that there was no personal estate to answer the guarantee:—Held, that, under the circumstances, the creditors were not entitled to the benefit of the guarantee for their advances subsequent to the death. The death alone did not determine the guarantee. *Harries v. Fawcett*, 8 L. R., Ch., 866; 29 L. T., N. S., 84; 42 L. J., Ch., 502; 21 W. R. 762. Affirming 28 L. T., N. S., 182; 21 W. R. 504; 15 L. R., Eq., 311.

7. Held, that a joint security given by three partners to a bank, to cover advances to be made to them, was, as to future advances, determined by the death of one partner, as to the estates of such partner comprised in the security; and that a heritable bond given by the heir of such partner within a year after his death, and over the estates of the father, to secure payment of future advances by the bank, was void under the Scotch Act of 1661, as a bond given by an heir, for payment of his own debts, within a year after the death of the ancestor. *Scotland (Bank of) v. Christie*, 8 Cl. & F. 214.

8. A. desiring to become an underwriting member of Lloyd's, B. gave a guarantee to the committee of that body on behalf of A., in which he held himself responsible "for all his engagements in that capacity":—Held, that the guarantee was not determined by the death of the guarantor or by notice of his death. *Calvert v. Gordon* (3 M. & R. 124) followed. *Lloyd's v. Harper*, 43 L. T. 481; 16 L. R., Ch. D., 290; 50 L. J., Ch., 140; 29 W. R. 452. Affirming 49 L. J., Ch., 217; 42 L. T. 218; 28 W. R. 419.

Held, also, that the guarantee extended to

all engagements entered into by A., as an underwriter, both with the members of Lloyd's and other persons. *Id.*

When the guarantee was given Lloyd's was a voluntary association, managed by a committee, to whom the guarantee was given. A few years after the members of this association were incorporated by a special Act of Parliament under the name of Lloyd's, and the rights of the committee were vested in the corporation:—Held, that the committee, and the corporation as their successors, were in the position of trustees for all persons with whom A. had entered into engagements as an underwriter, and were therefore entitled to maintain this action. *Id.*

8. Other Cases.

1. The recognisance of a surety for a tenant will not be put in suit, unless an attempt has been made to enforce the rent from the tenant by attachment, or it is shown that such a proceeding would be useless. *Newman v. Mills*, 1 Hog. 291.

2. Where, on default of the receiver, and discharge under the Insolvent Act, the plaintiff not appearing, although served with notice, his surety paid the amount to the solicitor, which was proved by affidavit:—Held, that such payment was insufficient, and a motion to discharge the recognisance of the surety refused; but, on a subsequent notice on the plaintiff to show cause, on his not appearing the order made. *Mann v. Stennet*, 8 Beav. 189; 9 Jur. 98.

3. The 12th section of the 1 Vict., c. 54, enabling the treasurer of a county to apply to the Court of Chancery by motion, to vacate the recognisances of himself and his sureties, upon his investing in Government securities a sum equal to that secured by the recognisances, applies only to those cases where the party continues to be treasurer at the period of making the application. Therefore, a petition presented under the twelfth section by a person who had resigned the office of county treasurer before the passing of the above Act was dismissed. *Re Callaghan*, 1 Ir. Eq. R. 448, n.

In cases of principal and surety, circumstances may arise where payment of the entire sum by the principal would not discharge the sureties. *Id.* 450, n.

4. A creditor pending an action on a guarantee against a surety, who contests the question of his liability, proves the debt under a commission of bankrupt against the principal debtor, and, by his signature, enables the bankrupt to obtain his certificate, though the surety had given him notice not to sign it: the surety is not thereby discharged from his liability on the guarantee. *Broune v. Carr*, 2 Russ. 600.

5. An annuity granted by A. to B. was secured by a covenant by C., a surety, to pay the annuity in case A. made default, and by a judgment for 2,100*l.* entered up against A. and C. The annuity remained unpaid from January 1823, A. having left the country; and in February 1824 C. became bankrupt, and afterwards obtained his certificate. C. having died, B. filed a bill to have the arrears of the an-

nuity paid out of his real and personal estates:—Held, that neither the value of the annuity nor the sum due on the judgment was provable under C.'s commission, and therefore that his certificate was not a bar to the plaintiff's demand. *Johnson v. Compton*, 4 Sim. 37.

6. The liability of sureties in a replevin bond is limited to the amount of the rent in arrear at the time of the distress and costs, and they are not liable for subsequent rent; and, therefore, where on the trial of an action of replevin, a verdict was taken by agreement between the plaintiff in the action and the avowant for the penalty of the bond, subject to reference, not only as to the amount of the rent due at the time of the distress, but of the rent then due, and also of certain penal rents, the sureties being no parties to such agreement, and the arbitrator awarded damages to the full amount of the penalty of the bond, the Court:—Held, that the sureties were entitled to be relieved from the bond, it appearing that the rent originally distrained for had been fully paid before the trial of replevin. *Ward v. Henly*, 1 Y. & J. 285.

7. G. grants a lease of a farm to C. O. D. for fourteen years, C. D., father of C. O. D., joining in such lease and covenanting for the payment of the rent and performance of the covenant by C. O. D.; and the lease contains provisions for re-entry on non-payment of rent, and determination of the lease at the end of the first seven years on giving six months' previous notice. G. gives notice in writing that he shall require C. O. D. to deliver up possession of the premises held by him under a lease determinable as therein mentioned, and such notice is given full six months before the expiration of the seven years. G. permits C. O. D. to remain in possession and dies, and after his death the rent becomes in arrear and breaches of covenant are committed. G.'s representative then files a bill, claiming to be a specialty creditor in respect of the rent due against the estate of C. O. D., and against C. D. as his surety:—Held, that the notice was sufficiently in accordance with the terms of the lease to put an end to it so far as C. D., the surety, was concerned, and the bill dismissed with costs. *Giddins v. Dodd*, 4 W. R. 377; 3 Drew 485; 25 L. J., Ch., 451.

8. The discharge of a debtor by the acceptance of a composition under the Bankruptcy Act 1869, s. 126, is a discharge in bankruptcy by operation of law, and only releases the debtor himself, but does not release any person jointly bound with him. *Exp. v. Re Jacobs*, 31 L. T., N. S., 745; 44 L. J., Bk., 34; 10 L. R., Ch., 211; 23 W. R. 251.

Therefore, when the acceptor of a bill of exchange filed a petition for liquidation of his affairs by arrangement, and the creditors duly passed resolutions accepting a composition from him, and the holder of the bill voted in favour of the composition:—Held, that this did not operate to release the drawer. *Id.*

9. If a surety of a bill assents to its being renewed, he is not discharged. *Torrance v. British North America (Bank of)*, 5 L. R., P. C., 246; 29 L. T. 109; 21 W. R. 529.

II. Rights of Debtor and Surety.

1. *Indemnification of Surety*, 6681.
- II. *Interest on Payment by Surety*, 6684.

I. INDEMNIFICATION OF SURETY.

1. Surety, having paid defendant for fear of arrest, shall recover same in Chancery. *Anon.*, Cary 19.

2. The testator as principal, and his son as surety (being successive tenants for life) joined in granting an annuity, and as a collateral security gave a joint and several bond and warrant, conditioned that if the annuity was in arrear the annuitant might issue execution against the father during his life, and after his death against the son. Both having died, the son's executor paid several gales of the annuity:—Held, that he could recover only the principal sums so paid, and no interest upon them against the father's assets. But a fund of the father's having been originally assigned to secure the annuity, which became part of his assets and produced interest, the son's executor was recouped to the full amount of the bond and interest. *Caulfield v. McGuire*, 8 Ir. Eq. R. 164; 2 J. & L. 141.

3. A. is principal in a recognisance of 5,000*l.*, and B. and C. sureties. A. afterwards jointures his wife, before marriage, in some lands, without notice either to the wife or her friends of this recognisance, and devises his real and personal estate to B., one of his sureties, and dies. First, the personal estate of A., the principal, shall be applied towards the recognisance; then his lands devised, the devisees being a volunteer; next the paraphernalia of the wife of A., the principal; and lastly, the two sureties shall contribute to make up the deficiency. *Tynt v. Tynt*, 2 P. W. 542; Mos. 192.

4. Bond creditor shall have the benefit of all counter bonds as collateral security given by debtor to surety. *Mauve v. Harrison*, 1 Eq. Abr. 93.

5. Principal and surety, on a note payable by instalments; after one payment became due, principal discharged under the Insolvent Debtors Act. Bill by creditor, and decree against surety and him, to have remedy over against effects of the principal for the first money due on the first payment, and the common decree for the rest. *O'Carrolls' case*, Ambl. 61.

6. The obligor of several bonds, in which A., his solicitor, joined as surety, conveyed certain real property to A., upon trust to sell, and out of the proceeds of the sale to pay the bond creditors. The creditors did not execute, nor had any notice of the deed:—Held, that the deed was a mere deed of agency, and not binding in favour of the creditors; but that A. was entitled to retain the estates conveyed to him until he should be discharged from his liability as surety under the bonds. *Wilding v. Richards*, 1 Colly. 655; 14 L. J., N. S., Ch., 211.

7. A. is bound for B., and has a counter bond. Equity will compel B. to pay the defendant, though A. is not sued. *Ranelagh v. Hayes*, 1 Vern. 190.

8. A surety under an annuity deed, redeeming the annuity subsequent to the bankruptcy

of the grantor of the annuity, is entitled to the benefit of the grantee's proof under the grantor's commission, and to proceed by action against the grantor, who had obtained his certificate for the arrears of the annuity subsequent to the commission. *Watkins v. Flannagan*, 3 Russ. 421; 1 G. & J. 199; 6 Madd. 280. And see S. C. at law, 3 Barn. & Ald. 186.

9. Surety in a bond for the bankrupts, after the bankrupts obtain their certificate, joins with them in a new bond to the representatives of the creditor, and the old bond is delivered up to the surety:—Held, that this was not equivalent to payment by the surety so as to enable him to prove under the commission. *Exp. Sergeant*, 1 G. & J. 183. Affirmed 2 G. & J. 23.

10. Where a judgment on a joint and several bond has been obtained against one of the obligors only, and the co-obligor pays the debt, the judgment is not thereby extinguished; and the co-obligor having obtained an assignment of the judgment is a specialty creditor against the estate of the other. *Kent v. Canter*, Wall. Lyn. 364. See S. C. *id.* 366. n.

11. Second tenant in tail joins in a mortgage and bond with the first who receives the money lent:—Held, to be only a surety, and the real estate not liable in aid of the personal estate of the first, although he had joined in hopes to prevent a recovery. *Robinson v. Gee*, 1 Ves. 251.

12. The Court will not, sitting in bankruptcy, on behalf of the sureties of a bankrupt, direct a sale of mortgaged premises for payment of the debt secured by recognisance, or for payment of any other security except a mortgage. *Exp. Usher*, 1 Ball & B. 197.

13. Surety for a receiver indemnified out of the balance due to him. *Glossop v. Harrison*, 3 Ves. & B. 134; Coop. 61.

14. Surety depositing money, and indemnifying against expense, etc., may compel creditor to go against principal, and even to prove under commission of bankruptcy for benefit of surety. *Wright v. Simpson*, 6 Ves. 734.

Holder of bill of exchange may be compelled to prove under bankruptcy of acceptor for benefit of drawer. *Id.*

15. A. was indebted on bond to B. B. died, leaving C. his sole next of kin, who obtained letters of administration of his estate. The estate of B., after all debts, etc., were paid, left a clear residue exceeding the amount of the bond debt. A. became surety for C. by joining in promissory notes, C. became an insolvent debtor, and A. was compelled to pay the notes. C. died, and then the assignee under his insolvency took out letters of administration *de bonis non* of B., and sued A. on the bond:—Held, that A. might set off the sums which he had been compelled to pay as surety for C. against the bond debt. *Jones v. Mossop*, 3 Hare 568; 13 L. J., N. S., Ch., 470; 8 Jur. 1064.

16. A surety who compounds a debt for which his principal and himself have become jointly liable, and takes an assignment of that debt to a trustee for himself, can only claim, against his principal, the amount which he has actually paid. *Reed v. Norris*, 2 Myl. & C. 361; 6 L. J., N. S., Ch., 197; 1 Jur. 233.

17. Settlement by a husband, of money, in trust to pay the interest to the wife during her life, with a proviso against anticipation. The

husband joins with a surety in a covenant to pay an annuity, secured by an assignment by the wife of the interest to become due, and of the principal sum in the event of there being no children of the marriage :—Held, the surety not entitled to any remedy in equity under the assignment, in respect of his payment of the arrears of the annuity recovered against him by an action upon the covenant, although he had no notice of the proviso against anticipation in the settlement ; a charge of fraudulent concealment not being sufficiently established ; and even if fraud had been fully made out against the wife, it seems it would not be sufficient to support the assignment, which would be to give her a power of alienation against the intention of the settlor. *Jackson v. Hobhouse*, 2 Meriv. 488.

1. B. was a surety for A., in a joint bond to C. and D., for 180,000*l.* conditioned to pay 90,000*l.* with interest at 5 per cent. By a counter bond of equal date, A. was bound to B., in a like penalty, with condition to indemnify B., his heirs, executors, etc., from payment of the said 90,000*l.* and interest, and from all damages he might sustain on account of the non-payment of the said sum, and interest. After the deaths of A. and B., the executors of B. were called upon, and did pay to C. and D. 22,000*l.* on account of the principal, and several large sums for interest on A.'s debt. In a suit for the administration of A.'s estate, the Court allowed the executors of B. to come in as creditors for the several sums so paid by them, and for interest on the 22,000*l.*, but not for interest on the several sums of money paid for interest on the original debt. *Rigby v. Macnamara*, 2 Cox 415.

2. The case in which a surety has a right to sue his principal in equity, to be discharged from his liability, is where the creditor has a right to sue his debtor, and refuses to exercise that right, *semble*. *Padwick v. Stanley*, 9 Hare 627 ; 16 Jur. 586.

3. A surety may in equity compel his principal to relieve him of his liability by payment of the debt. *Antrobus v. Davidson*, 3 Meriv. 578.

4. The East India Company having compelled payment from a surety in India by their power over him as one of their servants, without an account or proceeding against the principal, though solvent, and otherwise under harsh circumstances, he was restored to the same situation by a decree for repayment, with interest at 5 per cent., upon giving security for repayment in case in a future suit by the company he should be held liable ; the Court would not, upon the circumstances, give Indian interest. *Law v. East India Co.*, 4 Ves. 825.

5. If A. borrows money for B. on a mortgage of his estate, the covenant in the mortgage deed to pay the money will bind him for whom it is borrowed. The mortgagor may file a bill against his debtor to have his estate disencumbered, and so may every surety against his principal, for he shall not be put to his *indebitatus assumptit*. *Lee v. Rook*, Mos. 318.

6. A. bound with his father for the debts of the father, who enters into a statute to the son to pay the debts, and indemnify the son ; one of the creditors delivers up his bond, and takes a mortgage from the father. The son shall not

set up the statute to defeat the mortgage. *Legriell v. Barker*, 2 Vern. 39.

7. A necessary consequence of a reservation in a composition deed of a creditor's remedies against a surety is the continuance of the surety's right to be indemnified by the principal debtor, and this right will not be held to be abandoned unless a contract to abandon it is proved. Therefore, where one of the creditors who acceded to a composition deed was also a residuary legatee of a surety for the compounding debtors to another creditor, and one of the compounding debtors happened to be the surety's executor :—Held, that the residuary legatee's accession must be taken to have been in respect of his direct debt only, and did not preclude him from insisting on the surety's residuary estate being indemnified by the debtors. *Close v. Close*, 4 De G. M. & G. 176.

8. A person appointed in a cause to be receiver of the rents of a testator's estate was entitled to some shares of that estate by descent, and had acquired others by purchase. By deed he gave to his sureties, by way of indemnity, a security on the descended shares, expressly excluding the purchased shares, but without any expression of an intention to exonerate them from such liability as they might by law be subject to. The receiver became bankrupt, being considerably indebted to the estate, and the assignees sold his purchased shares. On further directions it was declared that the descended and the purchased shares were liable to make good to the other part owners under the will so much of the balance due from the receiver as the sureties were not liable for ; and from this declaration there was no appeal :—Held, that the sureties had, for the sums paid by them, the same lien on the receiver's shares as the other part owners would have had, and that they had not, by taking the security on the descended shares, lost this right as against the purchased shares. *Brandon v. Brandon*, 3 De G. & J. 524 ; 5 Jur., N. S., 256 ; 28 L. J., Ch., 147.

9. D. and P., under a covenant in a mortgage deed, paid the premiums on a life-policy forming part of the security, as sureties. By a contemporaneous instrument, to which they were not parties, the equity of redemption was assigned in trust for the benefit of the creditors of the mortgagor, and D. signed the trust-deed as a creditor. The mortgage was paid off, and the policy was sold by the trustee of the creditor's deed, under a power contained therein. A creditor's suit being instituted :—Held, that the creditors were not entitled to take the money produced by the sale of the policy, without making payment in satisfaction of the premiums paid by D. and P. *Aylwin v. Witty*, 30 L. J., Ch., 860 ; 9 W. R. 720.

10. A., one of three sureties who had become bound to the extent of 2,000*l.* to a corporation for the due accounting of the office of its treasurer, B., received formal notice from the corporation that B. was a defaulter, and on the next day took from B. a deposit note of a bank for 2,300*l.*, which had been placed in the bank by B., one month previously, in the name of his daughter. On a bill filed by the corporation against B., who had absconded, and the three sureties, to make good the amount found due by B., ultra the 2,300*l.* :—Held,

establishing the liability of the sureties, that the circumstances under which A. received the 2,300*l.* were such as ought to have induced him of make inquiry, and that, having neglected to do so, he was bound to restore that amount, with interest, after the rate of 5*l.* per cent. *Berwick-upon-Tweed (Mayor) v. Murray*, 7 De G. M. & G. 497; 3 Jur., N. S., 847; 26 L. J., Ch., 201; 5 W. R. 208.

1. The plaintiff accepted a bill for the accommodation of B. R. afterwards compounded with his creditors, who executed a release in which the holder of the bill concurred, under a secret understanding between him, the plaintiff, and B. that his rights against the plaintiff should not be prejudiced. R. died, appointing the plaintiff his executor. The plaintiff, at the request of R.'s widow, renounced probate, and allowed her to take out administration, in consideration of which, she and her brother gave him a memorandum, undertaking to indemnify him against all his liabilities as surety for R., on several instruments, and under the accommodation bill, but not beyond the amount of the assets. The holder of the bill pressed the plaintiff for payment, the plaintiff paid him, and filed a bill against Mrs. R. and her brother for indemnity out of the assets:—Held, that however the case might have stood apart from the memorandum, Mrs. R. had thereby estopped herself from treating the plaintiff's payment to the bill holder as voluntary, and not made in satisfaction of a legal liability, and that she had therefore no defence to the suit; and that although the demand against her brother might be of a legal and not of an equitable nature, yet as he was surety in respect of a demand which, as against his principal, was the proper subject of a suit in equity, he was properly made a party to the suit. *Atkins v. Revell*, 1 De G. F. & J. 360.

2. A surety, who in an action by the creditor has omitted to plead by way of set-off the receipt by the creditor of dividends from the debtor's estate, is not precluded from establishing his title to such dividends in equity. *Thornton v. McKean*, 1 N. R. 16; 11 W. R. 140; 32 L. J., Ch., 69; 1 Hem. & M. 525.

3. A. became surety for payment of two promissory notes upon which his son was liable. He died before the notes were due, and the son being unable to pay them, the trustees of A.'s will borrowed money sufficient for the purpose, and paid the amount due for principal and interest on such notes. By his will A. made his son one of his residuary legatees:—Held, that the son, or his share in the testator's estate, was bound to make good to such estate, in addition to the principal paid by the trustees on account of such notes, interest upon the sums for which the notes were originally made. *Willes v. Greenhill*, 30 L. J., Ch., 808; 9 W. R. 217.

4. A surety for a mortgagor, who pays part of the mortgage, is entitled, as against the mortgagor, to a charge on the estate. *Gedye v. Matson*, 25 Beav. 310.

5. A surety having paid the debt of his principal is entitled to rank as a simple contract creditor for the amount, and, if made executor, to retain it out of the assets of the principal against all other creditors of equal degree. *Boyd v. Brooks*, 34 L. J., Ch., 605; 13 W. R.

419; 12 L. T., N. S., 38; 5 N. R. 258. Affirming 34 Beav. 7.

6. A surety on a bond to secure a money debt, was secured by another bond of indemnity entered into by the principal debtor's father, who had died, having devised property specifically upon trust to pay the debt. The creditor having applied to the surety, the surety had recourse to the executors, who said they had no funds in hand, and that they were unable under the will to raise the money by sale of any portion of the testator's estate, except under a decree of the Court:—Held, that the surety, though he had not actually paid anything, was entitled to maintain a bill against the executors for administration, payment of the debt, and indemnity. *Woodbridge v. Norris*, 6 L. R., Eq., 410; 16 W. R. 965.

Held, also, that it was not necessary that the bill should be filed on behalf of all the creditors. *Ib.*

7. A banking company, at the request of D., a speculator in cotton, issued a letter of credit, authorizing C., a merchant at Bombay, to draw upon them to the amount of 23,150*l.*, the drafts to be accompanied by bills of lading of cotton to be delivered on their acceptance of the drafts. A similar letter of credit for 50,000*l.* was issued to C., at the request of W., another speculator in cotton. C. accordingly drew drafts under the first letter of credit to the full amount, and under the second letter of credit to the amount of 33,635*l.* The first set was accepted by the banking company, which received the corresponding bills of lading. The second set was not presented till after the banking company had stopped payment, and was therefore not accepted. The first set was dishonoured:—Held, that C. could only prove against the company for the amount of the several bills, after deducting the value of the cotton which was sold, and the proceeds received by C. & Co. *Re Barnard's Banking Co., Coupland's claim*, 39 L. J., Ch., 287; 5 L. R., Ch., 167; 21 L. T., N. S., 807.

8. An indenture was made between A., B., C., and D., which recited the bankruptcy of A., and that he had entered into a composition, with the sanction of the Court of Bankruptcy, to be paid by instalments secured by promissory notes, and that B., C., and D. had agreed to secure the payment of the last two of the notes upon being indemnified against any loss in respect of their liability on foot of the notes. The deed witnessed that, in pursuance of the agreement, and in consideration of the liability of B., C., and D. on foot of the notes, and in order to indemnify them from any loss in respect thereof, A. charged his stock in trade, and all his real and personal estate, with payment of the amount of the two last instalments of the notes, and gave them powers of attorney, of entry and sale; and out of the proceeds, and after payment of costs, to retain any moneys which they should pay, or should be liable to pay, in respect of the notes; and A. covenanted to indemnify B., C., and D. against payment of the notes. B. was a creditor of A., and took notes signed by A., B. C., and D., for the composition. E., another creditor, took similar notes, and handed them over before they were due to B., in payment of a debt due by himself to B.:—Held, first,

that the deed was confined to the liability of the sureties, and did not convert the simple contract debts of A. into specialty debts. *Caldwell v. Parker*, 3 Ir. R., Eq., 519; 17 W. R. 955.

Held, secondly, that B. was only a simple contract creditor in respect of notes given to him. *Id.*

Held, thirdly, that he was a specialty creditor in respect of the notes given to E. *Id.*

II. INTEREST ON PAYMENT BY SURETY.

1. A surety having paid the whole amount of a recognizance, and having been allowed to use the recognizance for the recovery of contribution from his co-surety, he is not thereby entitled to recover interest thereon. *Salkeld v. Abbott*, Hay. & J. 110.

2. Surety cannot prove for interest due and paid subsequent to commission under the 6 Geo. 4, c. 16, s. 52. *Exp. Wilson*, 1 Rose 187.

3. By deed A. agreed to charge certain property with all sums that B. should pay as surety for a third party, and also agreed that B. should insure her life, and that the costs of such insurance, and the payments for keeping the same on foot, should be paid out of the property charged; and she directed the trustees to make the necessary payments for effecting and keeping on foot the policies. The trustees did not make the payments, but the policy was kept on foot by B.:—Held, that he was entitled to interest thereon at 4 per cent. *Hodgson v. Hodgson*, 2 Keen 704; 7 L. J., N. S., Ch., 5.

4. Where sureties joined as co-obligors in a bond, one who had been compelled to pay the amount with interest, was not entitled to carry on interest upon such payment against the personal representative of his co-surety. Contribution decreed, but without interest either on the consolidated sum or the principal money paid. *Quære*, whether as against the principal debtor or his representative, such payment carries interest in the absence of express agreement. *Ongé v. Truelock*, 2 Moll. 42.

5. A. as principal and B. as surety joined in granting an annuity for the life of C., and A. assigned to trustees a policy of insurance upon his own life, upon trust to permit C., after the death of A., out of the money insured or the interest thereof, to receive the annuity, and A. and B. executed their joint and several bond conditioned to secure the punctual payment of the annuity. The executors of A. received the amount of the policy, and invested it upon Government securities. The executor of B. was compelled to pay C. an arrear of the annuity:—Held, that as against the general assets of A. the executor of B. was not entitled to interest on the money so paid by him; but that he was entitled, as against the sum insured and the interest thereon, to be put in the same situation as if it had been duly applied in payment of the annuity, and therefore to be repaid thereout the money advanced by him with interest. *Caulfield v. Maguire*, 2 J. & L. 141; 8 Ir. Eq. R. 164.

6. A. covenants to indemnify lands settled on B. from certain debts, the interest of which B. is afterwards obliged to pay: B. is entitled under the covenant to come against the estate of A. for the sums so paid for interest, together with interest thereon. *Fergus v. Gore*, 1 Sch. & Lef. 107.

7. Two persons having jointly and severally granted an annuity, and mutually covenanted that each should pay one moiety, and indemnify the other against all "actions, suits, costs, charges, damages, demands, sums of money, and expenses," which might be incurred by reason of the non-payment thereof; one, who, on the insolvency of the other, had made payments on account of his moiety, is not entitled to interest on such payments. *Bell v. Free*, 1 Swan. 90; 1 Wils. 51.

8. In cases of bond debt, interest is computed only to the commission. In the case of principal and surety, if principal become bankrupt, the surety cannot prove for interest paid by him after date of the commission. *Francois v. Rucker*, Ambl. 674.

See also Preceding Subdivision.

III. Co-Sureties.

- I. *Contribution and Extent of Liability*, 6684.
- II. *Release of Co-Surety*, 6686.

I. CONTRIBUTION AND EXTENT OF LIABILITY.

9. A. mortgaged house to B., and C. and D. were his sureties; money being due for interest, C. paid it to prevent suit. D. lent A. money on equity of redemption, on which C. requested him to include debt, in consideration money, which he did:—Held, that C. shall have his demand first satisfied. *Beckett v. Booth*, 2 Eq. Abr. 595.

10. Where sureties joined as co-obligors in a bond, one who had been compelled to pay the amount with interest, was not entitled to carry on interest upon such payment against the personal representative of his co-surety; contribution, decreed, but without interest either on the consolidated sum or principal money paid. *Quære*, whether as against the principal debtor or his representative, such payment carries interest in the absence of express agreement. *Ongé v. Truelock*, 2 Moll. 42.

11. Where one obligee is sued by the custom of London, his co-sureties shall contribute: so, by the custom of London, where a surety pays a debt, he shall maintain an action against the principal, though he has not counter bond. *Laver v. Nelson*, 1 Vern. 456.

12. Suit by one surety against another for contribution, the representatives of another surety who died insolvent ought to be parties. *Hole v. Harrison*, Rep. temp. Finch. 15.

13. The doctrine of contribution among sureties is not founded in contract, but is the result of general equity on the ground of equality of burden and benefit. *Dering v. Winchelsea* (Lord), 1 Cox 318.

1. On a bill filed by a surety against his co-surety and the principal, for a contribution from the co-surety, in respect of money actually paid by the plaintiff for the principal, it is not necessary to prove the insolvency of the principal; otherwise, where the principal is not a party to the suit. *Lanson v. Wright*, 1 Cox 275.

2. A surety who pays the debt of his principal has the same rights against his co-surety that he has against the principal. *Woods v. Creaghe*, 2 Hog. 50.

3. Discharge of surety by creditor has not the effect of a discharge of the principal without reserve, and, therefore, a co-surety is not discharged. When it is ascertained what each of the co-sureties has paid beyond his proportion, the equity as between them is arranged upon the principle of contribution for excess. *Exp. Gifford*, 6 Ves. 805.

4. Where several persons are sureties for the payment of one sum of money, though by distinct instruments, and one pays more than an equal share of that sum, he may have contribution from his co-sureties; but if it be arranged by contract, which it may be, that each surety shall be answerable only for a given portion of one sum of money, in such case there is no right of contribution among the co-sureties. The case of *Dering v. Winchelsea* (Lord) (1 Cox 318) considered. *Pendlebury v. Walker*, 4 Y. & Coll. 424.

5. Where sureties are bound by different instruments, for equal portions of a debt due from the same principal, and the suretyship of each is a separate and distinct transaction, there is no right of contribution between them. *Corpe v. Tynnam*, T. & R. 426.

6. A surety by recognisance who pays the whole amount into court, when pressed with Crown process, is entitled to use the Crown securities, in order to levy a moiety from his co-surety, provided he share with his co-surety the benefit of any counter security he may have taken from the principal. *Latouche v. Pallas*, Hayes 450.

7. Right of contribution between co-sureties exists, whether by separate instrument, or by the same instrument. *Mayhew v. Crickett*, 2 Swan. 185; 1 Wils. 418.

8. No contribution in favour of one surety against another; his engagement according to the bond and parol evidence (which was held admissible) being, not as co-surety, but without the privity of the other; as a distinct collateral security, limited to the default of payment by the principal and the other surety. *Craythorne v. Spinburne*, 14 Ves. 160.

Right to contribution as between co-sureties: whether by the same or several instruments, whether prior or not, and whatever their number, depending rather upon a principle of equity than contract, except as upon the implied knowledge of that principle. *Ib.*

Right of contribution among co-sureties limited by the extent of their respective contracts; as where they are for different sums. *Ib.*

9. When one of several sureties has paid the principal debt, and some of the co-sureties are insolvent, he is entitled as against the solvent sureties to be repaid their numerical shares of what he has paid with interest from the time of payment, although the instrument does not

contain any express indemnity so as to carry interest as on a specialty. And the insolvent sureties must pay their own costs of being brought before the Court to the final hearing of the cause. *Hitchman v. Stewart*, 3 Drew. 271; 1 Jur., N. S., 839; 24 L. J., Ch., 690; 3 Eq. Rep. 838.

Five persons become sureties in four bonds, the principal debtor becomes insolvent, and one surety is called on to pay, and does pay in respect of the whole default, and files a bill for contribution against the representatives of one of the sureties, the others being insolvent. It is objected by the defendants that the remaining sureties should be parties, and they are made parties by amendment. A reference is ordered as to sums paid and money due; and on the question of costs, and whether the plaintiff is entitled to interest on the money he has paid:—Held, that each party must pay his own costs, and that the plaintiff is entitled to interest from the time of payment. S. C. 3 W. R. 464.

10. A bond was executed by a principal and two sureties. One of the sureties compounded with his creditors, and by the terms of the bond the moneys secured became immediately payable. After this the plaintiff entered into a separate bond to become liable for the whole amount; and upon the principal becoming insolvent, the creditor sued the plaintiff and obtained payment of the amount due. The plaintiff filed a bill against the other surety in the first bond for contribution:—Held, upon the parol evidence, that a co-suretyship was intended by the parties; but, that even if the defendant had not known of the plaintiff's suretyship, the plaintiff would still have been entitled to contribution as against him. *Whitting v. Burke*, 10 L. R., Eq., 539. Affirmed 6 L. R., Ch., 342.

11. In a decree against sureties who were jointly and severally liable, the Lord Chancellor refused to make any declaration for contribution between them equally. *Berwick (Mayor) v. Murray*, 3 Jur., N. S., 847; 26 L. J., Ch., 201; 7 De G. M. & G. 497; 5 W. R. 208.

12. Five directors of a company gave their joint and several bond to a bank to secure repayment with interest of a loan made by the bank to the company. By an agreement between five persons interested in the company of the first part, and the five directors of the second part, after reciting the bond, it was agreed that, in pursuance of an agreement made upon the treaty for the loan by the bank, the liability of the several persons, parties thereto of the second part, under the bond, should be borne and discharged by the ten several persons parties thereto in equal shares and proportions, and that each of the several persons parties thereto would indemnify the other nine against all actions, etc., in respect of the loan by the bank or in respect of the bond. The company was ordered to be wound up, and the bank recovered judgment against the obligees of the bond for the whole amount of principal and interest due thereunder. One of the guarantors had become insolvent. On a bill by two of the guarantors, who had under the judgment paid more than their proportion of the sum secured by the bond against the other eight guarantors to enforce a ratable contribution from them in respect of the principal, interest, and costs re-

covered under the bond:—Held, that all the solvent guarantors were liable to contribute ratably in respect of the whole amount recovered under the bond, and that the extra liability arising from the insolvency of one of the guarantors was not to fall upon the defendants to the action at law. *Dallas v. Walls*, 29 L. T., N. S., 599.

The bank made a further advance to the company upon the personal security of three of the directors. Five of the guarantors for the amount secured by the bond signed an agreement that they would join the three directors in guaranteeing repayment to the bank of the further advance in equal proportions with the three directors. One of the five who signed this agreement stated by his affidavit that his signature (if he did sign) was obtained "on the express engagement and understanding" that the agreement should be signed by all the guarantors for the sum secured by the bond:—Held, that the words "express understanding" were utterly unmeaning, and that the Court would never pay any attention to a statement that something was done on an express engagement, unless the engagement was spoken to in a manner which was admissible in evidence. *Ib.*

1. Where some only of a body of directors have given a guarantee, they are primarily liable, unless the other directors adopt it. *Re Dover, Deal, & Cinque Ports Railway Co., Exp. Londesborough (Lord)*, 1 Eq. Rep. 271.

2. A., B., C., and D., at request of E., who was in pecuniary difficulties, had joined with E. as sureties in various promissory notes and bills of exchange, but in no one instance had they all four joined. A. was liable to a larger amount than B., C., and D. The creditors of E. pressed for payment, and A., B., C., and D. employed W., a solicitor, to enter into arrangements with the creditors on their behalf, and the following agreement was drawn up by W. and signed by A., B., C., and D.:—"We, the undersigned, being jointly liable as guarantors upon certain bills of exchange given in favour of E., authorize W. to act for us as our joint and several solicitor in all matters concerning those bills, and we further authorize W. to take such proceedings as he may think fit to recover the amount of such bills from E. In carrying out the terms W. will negotiate to settle the above upon the best terms he can. As, however, between the parties themselves, the following is the basis of the arrangement *inter se*: Upon the amount being ascertained for which the liabilities can be discharged, the parties to this arrangement undertake to provide the same in the proportion of one-fourth each, and all sums recovered from E. are to be brought into account and repaid to such parties in proportion to their existing liabilities, or to the amounts respectively found by them." In a suit by A. for contribution:—Held, that upon the true construction of this agreement, the parties did not intend to alter their existing liabilities and to take the entire liability upon themselves in equal shares, but only to advance the requisite money in the first instance in equal shares; and that, consequently, their ultimate rights and liabilities were not thereby varied. *Arce-deckne v. Howard*, 45 L. J., Ch., 622.

3. Sureties in a recognizance contribute in proportion to the amounts for which they were

respectively originally bound. *Re MacDouglas*, 10 Ir. R., Eq., 269.

4. When one of two sureties has paid the full amount of a receiver's recognizance, he is entitled to use the recognizance for the purpose of recovering, out of the estate of his co-surety, not only one-half of the sum so paid by him, but also interest thereon from the date of payment. *Re Swan*, 4 Ir. R., Eq., 209.

5. C. being indebted to D., four of his friends joined him in signing and giving four promissory notes to secure the payment to D. of the sum of 13,000*l.* and interest. D. effected three policies on the life of C. for, in the aggregate, 10,000*l.* In 1867, Lord H. of E., one of the co-sureties, having been sued by D. on the notes, paid, with the assistance of his father, the Earl of E., the 13,000*l.* and interest by a mortgage of estates which were settled upon the Earl for life with remainder to Lord H. of E.; and the Earl, having paid the premiums and kept the policies on foot, in September 1871, shortly after the death of C., obtained an assignment from D. of the policies and received the 10,000*l.* from the insurance office. A., another of the four sureties, died. His estate, which was stated to be insolvent, was being administered by the Court, and Lord H. of E. brought in a claim against it for contribution in respect of the sum paid to D. on the notes:—Held, that under all the circumstances of the case, Lord H. of E. and his father, the Earl, must be treated as one person, and that the claim for contribution would be allowed, but only after Lord H. of E. had brought into account, as a set-off, the moneys which were received on the three policies assigned to the Earl, credit being first given for the premiums and other moneys which had been paid in reference to the transaction. *Re Arcedeckne, Atkins v. Arcedeckne*, 24 L. R., Ch. D., 709; 48 L. T. 725; 53 L. J., Ch., 102.

6. A surety, who has obtained from the principal debtor a counter security for the liability which he has undertaken, is bound to bring into hotchpot, for the benefit of his co-sureties, whatever he receives from that source, even though he consented to be a surety only upon the terms of having the security, and the co-sureties were, when they entered into the contract of suretyship, ignorant of his agreement for security. *Steel v. Dixon*, 17 L. R., Ch. D., 825; 50 L. J., Ch., 591; 45 L. T. 142; 29 W. R. 735.

II. RELEASE OF CO-SURETY.

7. Where two or more sureties contract severally the creditor does not break the contract with one of them by releasing the other. The contract remaining entire, the surety in order to escape liability must show an existing right to contribution from his co-surety which has been taken away or injuriously affected by his release:—Held, in an action upon a guarantee, that a plea to the effect that M. was the defendant's co-surety, and had been released in consideration of a new guarantee given to the plaintiff, constituted no defence: the plea nowhere averring or implying that the liability was joint, or that the defendant became surety on the faith of M.'s co-suretyship, or that any

right of contribution had arisen against M. which had been taken away or injuriously affected, or that the defendant had suffered any damage or injury by the substitution described. *Ward v. National Bank of New Zealand*, 8 L. R., App. Cas., 755; 52 L. J., P. C., 65; 49 L. T. 315.

1. *Semble*, if a creditor release by deed one of two sureties who are jointly and severally liable the other is also discharged. *Exp. Gifford* (6 Ves. 805) not followed. *Evans v. Bromridge*, 2 Kay & J. 174; 2 Jur., N. S., 134; 25 L. J., Ch., 102; 4 W. R. 161. And see 4 W. R. 350; 25 L. J., Ch., 334; 2 Jur., N. S., 311.

IV. Indemnity.

See also I. 1, 3 and 4 *ante*—CONTRIBUTION.

- I. *Contracts*, 6687.
- II. *Wrongdoers*, 6688.
- III. *To Executors and Administrators*. See EXECUTOR AND ADMINISTRATOR, XV. III.—XVIII. III.—XIX.—XX.
- IV. *On Sales of Land*. See VENDOR AND PURCHASER, XIX.
- V. *To Trustees*. See TRUSTS XXVII.
- VI. *To Agents by Principal*. See PRINCIPAL AND AGENT, V.
- VII. *Against Calls*. See COMPANY, XIII. VII.

I. CONTRACTS.

2. The defendant sued at law on an indemnity bond; the plaintiff filed this bill for an injunction, without offering to make any recompense for the damage actually sustained; the bill was dismissed. *Godbolt v. Watts*, 2 Anstr. 543.

3. A recommendation by letter of the education of infants, with an assurance that the writer was willing to go himself towards its object as far as a certain sum, construed to be a promise to pay that sum for the purpose. *Dowell v. Wilson*, Coop. temp. Brougham 504.

4. Upon the occasion of a bond being executed by A. and B. to secure money lent to A., the title deeds of an estate purchased by A. were deposited with B. as an indemnity against his liability upon the bond; the legal interest in the estate was likewise conveyed to B., and it was agreed that he should also hold it as an indemnity. After the death of B. his executor delivered up the title deeds to A. upon a false representation by him that the bond had been paid off:—Held, that a conveyance of the legal estate could not be compelled until the indemnity was worked out, and that the lien upon the title deeds remained. *Tyson v. Cox*, T. & R. 395.

5. Covenant to save harmless decreed in specie; to wit, the principal was decreed to indemnify the surety. *Ranelagh v. Hayes*, 1 Vern. 189.

6. A. covenants to indemnify lands settled on B. from certain debts, the interest of which B. is afterwards obliged to pay: B. is entitled under the covenant to come against the estate of A. for the sums so paid for interest, together

with interest thereon. *Fergus v. Gore*, 1 Sch. & Lef. 107.

7. Covenant by a third person to indemnify the husband against wife's debt, a good consideration. *Compton v. Collinson*, 2 Bro. C. C. 377.

8. Two persons having jointly and severally granted an annuity, and mutually covenanted that each should pay one moiety, and indemnify the other against all "actions, suits, costs, charges, damages, demands, sums of money, and expenses," which might be incurred by reason of the non-payment thereof, one who on the insolvency of the other had made payments on account of his moiety, is not entitled to interest on such payments. *Bell v. Free*, 1 Swan. 90; 1 Wils. 51.

9. A life estate and a reversionary term having been mortgaged together, the reversioner, who was the principal debtor, settled other lands upon trusts, giving to the owner of the life estate (the surety) a more complete indemnity than he would have been entitled to under the ordinary rules of equity:—Held, that the owner of the life estate could not (to reconp himself the interest which he had paid on the mortgage debt) claim the benefit both of the indemnity deed and of the mortgage of the reversionary term held by the creditor. *Cooper v. Jenkins*, 1 N. R. 333.

A. was tenant for life of lots 1 and 2, to which B. was entitled in remainder; B., and A. as his surety, mortgaged lot 2, B. alone covenanting to pay. By a contemporaneous deed, B. conveyed his interest in the other lot on trusts to indemnify A. as his surety: A. paid large sums for interest on the mortgage:—Held, that he was entitled to the benefit of the deed of indemnity only, but not to stand in the place of the mortgagee on lot 1. S. C. 32 Beav. 337.

10. Where, for providing for payment of bills, a third person charged certain property for the benefit of acceptor by way of security, alleging it to be sufficient in value above incumbrances, but which turned out to be otherwise:—Held, that the acceptor was entitled to have so much as he had paid, and interest, as the property was insufficient to pay, raised and paid out of the general estate of the deceased third person. *Ingram v. Thorp*, 7 Hare 67.

11. The payee of two promissory notes being about to sue the maker, the brother of the maker agreed to pay 200*l.* to the payee in trust for E., or 6*l.* 10*s.* per quarter, so long as the 200*l.* should be unpaid, so that the notes should be suspended and rendered inoperative so long as the brother continued to pay 6*l.* 10*s.* a quarter to the payee; and on payment of the 200*l.*, all claim on the notes to cease, and the same to be given up. The brother not having paid the 6*l.* 10*s.* to the payee for two quarters, but having paid these sums to E., the *cestui que trust* (as the latter admitted), the payee brought his action upon the notes against the maker:—Held, in error, reversing the judgment of the Queen's Bench, that the agreement could not be pleaded in bar to the action upon the note, but might be the subject of a cross-action. Held, in equity, that the agreement must be construed as a contract by the brother to provide for E. the annuity of 25*l.* or the gross sum of 200*l.*, as a substitute for the two notes, and by the payee that the two notes

should thenceforth be only as security for the performance of such contract; and not as an agreement, under which the original right of the payee against the maker would revive on any failure of the quarterly payments by the brother; that the brother was entitled to the specific performance of the agreement in equity, not on the ground of the circuitry of cross-actions which the rule of law occasioned, but on the ground that this Court, by modifying its decree, could give to all parties the benefit of the agreement, whilst a court of law, being unable so to modify its judgment, could not give to one party the benefit of the agreement, without depriving another party altogether of such benefit. *Beech v. Ford*, 7 Hare 208.

1. On the retirement of S., a director of a banking company, the board of directors passed a resolution to take back his shares at par, and that he should retire and be indemnified in a form thereafter to be prepared. The company was subsequently ordered to be wound up, and the Court decided that the transactions on the retirement of S. were invalid, and that he was a contributory. Before the winding-up, W., another director, had paid money to satisfy the claims of creditors, and the Master made a call upon all the contributories for the payment of this money to the creditor of W., but the Vice-Chancellor discharged that order so far as respected S.:—Held, upon appeal, that the retirement and cancellation of his shares having been declared invalid, S. was not entitled to any indemnity, and must contribute towards the call. *Exp. Walker*, 2 Jur., N. S., 1216; 26 L. J., Ch., 261.

2. W. and S. by deed assigned to J. P. all moneys to which they might become entitled from a certain railway company upon trust to secure the due payment of the sum of 5,000*l.* advanced by J. P., "and also of all other sums which might thereafter become due from W. and S. by the said J. P., whether in respect of principal, interest, discount, commissions, or otherwise howsoever." The 5,000*l.* mentioned in the deed was paid off, but J. P. was afterwards compelled to pay 5,000*l.* under a guarantee for W. and S. The appellants, as execution creditors, afterwards attached a sum of money due from the railway company to W. and S. J. P. had given notice of the assignment to the railway company:—Held, that the deed of assignment included not only advances made by J. P. to W. and S., but also money paid by him under his guarantee for them, and was not affected by subsequent letters offering additional security for the guarantee. *Dumbell v. Isle of Man Railway Co.*, 42 L. T. 745.

3. Father on binding his son apprentice, gives a bond for 1,000*l.* for his son's fidelity; the son embezzles 200*l.*, which the father pays, but desires his master not to trust his son any more with the cash; the master does trust the apprentice again with the cash, and is negligent in calling him to account; the son embezzles 1,000*l.* more; the father is liable, but not to answer more in the whole than 1,000*l.*, including the first 200*l.* *Shepherd v. Beecher*, 2 P. W. 288.

4. By an agreement and a policy of insurance the defendants agree to reimburse the plaintiff any pecuniary loss, to the amount of 1,000*l.*, which he might sustain by reason of any such fraud or dishonesty of A. in connec-

tion with his employment by the plaintiff, as should amount to embezzlement, and should be committed and discovered during the continuance of the policy. The policy provided (among other things) "that the employer shall, if and when required by the company, but at the expense of the company, if a conviction be obtained, use all diligence in prosecuting the employed to conviction for any fraud or dishonesty, as aforesaid, which he shall have committed, and in consequence of which a claim shall have been made under this policy, and shall, at the company's expense, give all information and assistance to enable the company to sue for and obtain reimbursement by the employed or his estate of any money which the company shall have become liable to pay:—Held, that the prosecution of A. for embezzlement was a condition precedent to the plaintiff's right of action upon the policy. *London Guarantee & Accident Co. v. Fearnley*, 5 L. R., App. Cas., 911; 43 L. T. 390; 28 W. R. 893.

See also SPECIFIC PERFORMANCE, X. VII.

II. WRONGDOERS.

5. The principle that no rights of indemnity and of contribution exist as between wrongdoers is confined to cases where the transaction is actually illegal or void, or where the fraud is so great that on moral grounds the Court will not entertain a suit for the relief of the malfeasors. The principle is further limited to cases where the fraudulent or illegal transaction is itself the basis of the claim, and does not apply where the transaction, though leading to that which is the basis of the claim, is separable from it. *Power v. Hoey*, 19 W. R. 916.

SURGEON.

See MEDICINE AND MEDICAL PRACTITIONER.

SURPLUS.

- *Of Bankrupt's Estate.* See BANKRUPTCY.
- *Of Gifts to Charities (Increased Income).* See CHARITY, VI. VI.
- *Right of Executor to.* See EXECUTOR AND ADMINISTRATOR, VIII.
- *Of Accumulations.* See ACCUMULATION, IV.
- *Of Funds applicable to Maintenance or Advancement of Infants and other Persons.* See TRUSTS, VIII. II. 4.

SURRENDER.

- *Of Bankrupts.* See BANKRUPTCY, XXX. i.
- *Of Copyhold.* See COPYHOLD, VI.—WILL.
- *Of Leases.* See LANDLORD AND TENANT, IX. VII.
- *Of Attendant Terms.* See TERMS, IV.

SURVEYOR.

- *Assessment of Compensation on taking Land under Compulsory Powers.* See LANDS CLAUSES ACT, VI. VIII. 5.
- *Duty of Trustees to employ.* See TRUSTS, XXXIII. VIII. 4.

See also ARCHITECT AND ENGINEER.

1. A surveyor is a competent adviser in the matter of a building lease, and a lessee who has had the assistance and advice of a competent surveyor, cannot complain of surprise. *Haberdashers' Co. v. Isaac*, 3 Jur., N. S., 611.

2. Little reliance is to be placed on the evidence of surveyors in a contest as to value. *Waters v. Thorn*, 22 Beav. 547.

3. The Court looks with suspicion at the evidence of value derived from the mere opinion given by surveyors, unsupported by any other circumstances. *Cookell v. Taylor*, 15 Beav. 103; 21 L. J., Ch., 545.

4. Ryde's scale, by which a commission of 1 per cent. on the purchase money is allowed, approved of in *Att.-Gen. v. Drapers' Co.*, 21 L. T., N. S., 651; 9 L. R., Eq., 69.

5. A surveyor appointed by the parties, at the instance of the judge, to make a report, acts in a quasi-judicial capacity, and ought not to be examined in the action. *Broder v. Saillard*, 24 W. R. 456.

SURVIVORSHIP.

- *In Case of Wife's Choses in Action.* See HUSBAND AND WIFE.
- *Between Joint Tenants.* See JOINT TENANT—TENANT IN COMMON.
- *Gifts by Will.* See WILL.
- *Among Partners.* See PARTNERSHIP.
- *Of Portions.* See PORTION, VIII.
- *Of Powers.* See POWER, VII.
- *Between Executors or Trustees.* See EXECUTOR AND ADMINISTRATOR, II. V.—TRUSTS, XII.

SWEARING.

See OATH—PRACTICE (AFFIDAVITS)—PRACTICE (ANSWER)—PRACTICE (EVIDENCE).

TACKING SECURITIES.

See MORTGAGE, VIII.

TAIL. TENANT IN.

- *Creation of by Will.* See WILL.
- See also FEE TAIL—SHELLEY'S CASE. RULE IN.

TAXATION.

See SOLICITOR, XVI.

TAXES.

- See ANNUITY, XII. 3—LANDLORD AND TENANT, XI.—LEGACY, XII. VIII.—REVENUE, VENDOR AND PURCHASER, XIV. VIII. 5.

TELEGRAPH.

- *Notice of Injunction by Telegram.* See INJUNCTION, X. III.

6. A telegraph company, without any parliamentary powers, laid down their wires in tubes under a public highway. An information and bill were filed complaining of those acts as a nuisance to the public and an invasion of the rights of the owner of the adjacent land in the soil of the road. The Court refused to grant an injunction until the legal right had been established. *Att.-Gen. v. United Kingdom Electric Telegraph Co.*, 30 Beav. 287; 8 Jur., N. S., 583; 31 L. J., Ch., 329; 10 W. R. 167.

7. *Seemle*, that a telegram, if properly identified, is equivalent to a letter. *Coupland v. Arrowsmith*, 18 L. T., N. S., 755.

8. A telegram company in London made an arrangement with the defendants, being two individuals in Australia, for the transmission of messages, in which certain words were used as short expressions of the names and addresses of the principal customers; and the defendants were described as agents of the telegram company. In a little time the parties quarrelled, and one of the defendants came to England to carry on an independent telegram business with his partner in Australia, and sent circulars to the customers of the telegram company, mentioning that he had their cyphers. On motion to restrain him from using the cyphers:—Held, that there was nothing confidential in the cyphers, and that he was entitled to use them. *Reuter's Telegram Co. v. Byron*, 43 L. J., Ch., 661.

9. On a subpoena from the Court of Bankruptcy to produce all telegrams sent by the bankrupt from a certain date, the secretary of the post-office was ordered to produce the documents sought for, the Court intimating that such subpoenas should be prepared so as to meet the convenience of the officials. *Re Thomas Smith*, 7 L. R., Ir., 286.

TENANT.

- *At Will or Sufferance.* See LANDLORD AND TENANT, IV.
- *For Life and per autre vie.* See LIFE, ESTATE FOR.
- *In Common or Joint.* See JOINT TENANT—TENANT IN COMMON—WILL.
- *In Fee.* See FEE SIMPLE—FEE TAIL—SHELLEY'S CASE, RULE IN—WILL.
- *By Curtesy.* See CURTESY.
- *In Dower.* See DOWER.
- *For Years.* See LANDLORD AND TENANT—TERMS.

TENANT IN COMMON.

- *Limitations to by Will.* See WILL.
 - *In Case of Partners.* See PARTNERSHIP, VI.
 - *As Parties to Suits.* See PRACTICE (PARTIES).
 - *Receiver Over.* See PRACTICE (RECEIVER).
 - *Joint Purchaser.* See TRUSTS, VII. II.
 - *Rights over Mines and Minerals.* SEE MINES, II. 3.
 - *Waste by.* See WASTE, II.
 - *Objects of Special Powers.* See POWER, XVII.
- See also JOINT TENANT—PARTITION—TRESPASS.

- I. CREATION OF, 6690.
- II. OUSTER, 6691.
- III. ACCOUNT, 6691.
- IV. INJUNCTION, 6392.
- V. OTHER MATTERS, 6692.

I. CREATION OF.

1. Surrender of a copyhold to the use of A., B., and C., and their heirs, equally to be divided betwixt them and their heirs respectively: this held by two judges a tenancy in common, by reason of the apparent intent of the surrenderor, against the opinion of Holt, C. J., who thought it a joint tenancy. *Fisher v. Wigg*, 1 P. W. 14.

2. Tenants in common may be of unequal but not of uncertain shares. *Marlborough (Duke) v. Godolphin (Lord)*, 2 Ves. 74.

In deeds which receive their operation from the statute of uses, the words "equally to be divided" make a tenancy in common. *Sed sevis* in common law conveyances. In *Rigden v. Vallier*, 3 Atk. 731; 2 Ves. 252, Ld. H. said, that though deeds to uses must be construed like common law conveyances as to words of limitation, yet he saw no harm in construing them otherwise, as to words of regulation and modification of an estate, as the words "equally to be divided" are. G., being seised of a gavelkind estate, by deed poll, in consideration of natural love to his wife and children, granted to his daughters, M. and H., the rents of his lands, equally to be divided between them, paying 5*l.* to their mother for life, and after her decease to hold to his said two daughters and their heirs, equally to be divided between them. This creates a tenancy in common, whether the instrument be considered as a deed or a will. *Ib.*

3. Notwithstanding the leaning of late to a tenancy in common, an interest given to two or more, either by way of legacy or otherwise, is joint, unless there are words of severance, as "equally among," etc., or an inference of that sort arises in equity from the nature of the transaction, as in partnership, a joint mortgage, etc. *Morley v. Bird*, 3 Ves. 628.

4. On articles previous to the marriage of W. with R., the father of W. bound the whole of the farm of, etc., as a marriage portion to his son W., along with R., the one half of said farm to be the right, title, and interest of the issue, whether son or daughter, if begotten on the body of R. by W. The issue take as tenants in common. *Taggart v. Taggart*, 1 Sch. & Lef. 84.

5. A. having been indebted to the estate of

B., in a sum of money, but from which he had been discharged under a commission of bankruptcy, voluntarily executed to C., the widow of B., a bond for the payment of part of such debt, for the use of herself and children, but at her disposal. Two years afterwards A. executed to C. another bond for the payment of the remainder of such debt, for the use and benefit of herself and children only, in what proportion among the latter she may think proper to direct, but for no other use, purpose, or intent whatsoever:—Held, that the principal, after the widow's decease, became payable among the children, in such manner, and in such proportions, as she should direct, and the widow having made an exclusive appointment in favour of two of her children, it was held that such appointment was void, and that all the children took as tenants in common. Though generally speaking an instrument must be construed by the provisions contained in it, and not by anything *dehors*, yet under the circumstances of this case:—Held, that the Court might call the language of the second bond into aid in construing the effect of the first. Where there is a general power of appointment among children, and the appointment from any circumstance becomes void, the children take as tenants in common. *Fowler v. Hunter*, 3 Y. & J. 506.

6. Settlement to permit "all and every the children to take rents, etc., to them and their heirs for ever," they are joint tenants, not tenants in common. *Stratton v. Best*, 2 Bro. C. C. 233.

7. Though the words "equally to be divided," in strict settlement at common law, have never been determined, barely of themselves, to make tenancy in common, yet it has been settled that they do so in a will, both with regard to real and personal estate. *Owen v. Owen*, 1 Atk. 494.

8. A testator, by will, gave to two persons the privilege of purchasing his warehouse, etc., and they, by a joint letter written to the trustees of the will, signified their acceptance of the privilege; but no conveyance was ever executed:—Held, that the Court was at liberty to receive evidence of the acts of the purchasers, showing that they considered themselves entitled as tenants in common. *Harrison v. Barton*, 7 Jur., N. S., 19; 30 L. J., Ch., 213; 9 W. R. 177.

9. Leaseholds were conveyed to trustees, and it was declared, that when the settlor's eldest son attained twenty-one, they should be in trust for him, and that the same should be assigned accordingly; but so that the settlor's wish that his other children "might be allowed by the eldest son to participate with him in the same," should be observed by him:—Held, that the younger children were entitled to equal shares with the eldest as tenants in common. *Liddard v. Liddard*, 28 Beav. 266.

10. A. having a mortgage for years, devises, after his debts paid, all his personal estate to his two daughters, equally to be divided between them. After the debts paid, the daughters purchase the equity of redemption and inheritance of the mortgaged premises to them and their heirs; this is a tenancy in common, and not a joint tenancy. *Edwards v. Fashion*, Pre. Ch. 332.

1. To establish a tenancy in common by use and enjoyment, acts of ownership by all the alleged tenants in common, in various parts of the lands indifferently, must be proved. *Tiedall v. Parnell*, 14 Ir. C. L. R. 1.

2. Parol evidence, to be admissibly to show that a contract to purchase apparently as joint tenants was in reality a contract to purchase as tenants in common, must be confined, as evidence to vary an instrument is, to facts *in pais*, as distinguished from statements of intention. *Harrison v. Barton*, 7 Jur., N. S., 19; 30 L. J., Ch., 213; 9 W. R. 177.

A. directed that his two sons should have the option of purchasing his property at a specified price upon signifying in writing within a certain time their acceptance of the privilege. The sons wrote a joint letter signifying their acceptance of the option to purchase. No conveyance was executed, but instructions were given, and a draft prepared for a conveyance to the sons as tenants in common. Voluntary settlements were simultaneously executed by the sons, each giving an option to the trustees of such settlement to invest the moneys in purchase of a moiety of the property; and after the death of one of the sons, his widow received the rents of a moiety of the property:—Held, that notwithstanding the joint nature of the contract contained in the letter, the legal presumption of a joint tenancy was refuted by the circumstances, and that the property was taken by the sons as tenants in common. *Ib.*

3. Two sisters carried on business as farmers. They had a joint account at their bankers' and an establishment and purse in common. They invested part of their money in the purchase of consols, in their joint names, and they had a balance due to them on their banking account, besides a sum due to them from their bankers on deposit notes:—Held, on the death of one, that the two sisters were joint tenants of the consols, and tenants in common of the balance and of the deposit notes. *Bone v. Pollard*, 24 Beav. 283.

4. Where stock has been purchased in the joint names of two, out of money standing to their joint account in a bank, it is not necessarily to be considered in equity as held in joint tenancy; but the origin of the money, and the acts and intentions of the parties, may be looked to, and a conclusion in favour of a tenancy in common drawn from the circumstances. *Robinson v. Preston*, 4 Kay & J. 605; 4 Jur., N. S., 186; 27 L. J., Ch., 395.

Two sisters being tenants in common of real estates, had money arising from the rents standing to their joint account in a bank. Part of the money was, from time to time, invested in the purchase of stock, in the joint names, and part on mortgage, the mortgaged premises being conveyed to them as tenants in common. Each sister, by will, affected to dispose of her share of the stock:—Held, that they were entitled to the stock as tenants in common, and not as joint tenants. *Ib.*

By Will.] See WILL.

II. OUSTER.

5. Ejectment is not maintainable by one
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tenant in common against another, without actual ouster. *Prince v. Heylin*, 1 Atk. 494.

6. There can be no ouster between tenants in common in possession, and, therefore, if one takes more than his share of the rents the only remedy is account either by action under the statute of Anne, or by bill in equity. *Denys v. Shuckburgh*, 4 Y. & Coll. 42; 5 Jur. 21.

7. When two persons are tenants in common of a field, the merely putting, by one of them, a lock upon the gate, not shown to be kept locked, will not constitute an ouster so as to enable the co-tenant in common to maintain trespass against the other. There must, for such a purpose, be other circumstances attending the act. *Jacobs v. Seward*, 5 L. R., H. L., 464; 41 L. J., C. P., 221; 27 L. T., N. S., 185.

In order to enable one tenant in common to maintain trover against another, there must not merely be a carrying away of the property, but such a carrying away of it as will disable the party complaining from having the lawful use or benefit of the property, or there must be the destruction of it. *Ib.*

8. If, after an ouster of the rest, one tenant in common or joint-tenant continues in possession of the whole for twenty years, it is a bar. *Story v. Windsor (Lord)*, 2 Atk. 632; 1 Ch. Ca. 34.

9. The plaintiff's mother and the defendant were tenants in common in fee. She died in 1851, and her interest descended on the plaintiff her heir (an infant.) The defendant, who had previously occupied the estate, continued in possession, and thenceforward excluded the plaintiff. The plaintiff attained twenty-one in 1857:—Held, that the defendant was accountable to the plaintiff for the whole period, and ought to be charged with an occupation rent. *Pascoe v. Swan*, 27 Beav. 508; 5 Jur., N. S., 1235; 1 L. T., N. S., 17; 29 L. J., Ch., 159.

III. ACCOUNT.

10. Tenant in common of manor shall have account of manor from one in possession. *Capell v. Myrns*, Cary 16.

11. J. having a devise in common with P., whom he survived, took possession of two houses, and enjoyed them; he was decreed to account as far back as the death of P. *Prince v. Heylin*, 1 Atk. 493.

12. If a lease for years, worth 200l. a year, belong to two co-parceners, and one of them, upon a false suggestion that the fine of 250l. was to be paid for the renewal of it, obtain an assignment of the other's moiety for consideration of 20l., equity will set aside this conveyance, and order the assignee to account for a moiety of the profits. *Evans v. Hoskins*, 9 Mod. 83.

13. Mortgagee of the share of one tenant in common of a mine may maintain a bill for an account against the mortgagor and the co-tenants in common. On a bill for an account of the dealings and transactions of a mining partnership, it is not necessary to pray for a dissolution of the concern. *Bentley v. Bates*, 4 Y. & Coll. 182; 9 L. J., N. S., Exch. Eq., 30; 4 Jur. 552.

14. A., being at the time abroad, became a

tenant in common with B., and died fifteen years afterwards, without having been during that period in England, and being all the time ignorant of her right as tenant in common; B. continued all along in possession and receipt of the rents and profits of the premises:—Held, that B.'s possession did not amount to an ouster; and that A.'s representative could sustain a bill for an account against B., without previously recovering the possession. *Johnson v. Burslem*, 2 L. J., Ch., 168.

1. There can be no ouster between tenants in common in possession; and, therefore, if one takes more than his share of the rents, the only remedy is account either by action under the statute of Anne, or by bill in equity. *Denys v. Shuckburgh*, 4 Y. & Coll. 42; 5 Jur. 21.

2. A., on behalf of herself and her infant children, filed a bill against B., who was tenant in common with her husband C., alleging that on his death B. entered into receipt of the entire rents, claiming the whole, and kept possession of the title deeds, for want of which the plaintiffs could not proceed at law; and praying that they might be put in possession of C.'s moiety, and an account of the rents of it since his death, and for the title deeds. A. did not make affidavit that the deeds were not in her possession:—Held, that such affidavit is not necessary in a case where the plaintiffs have a right to sue in equity *aliunde*, and that a demurrer for want of it was bad in substance, that the demurrer not stating specifically the parts of the statement or relief to which it applied, was bad in form; that though the bill could not be sustained for an account between tenants in common, yet that the infant plaintiffs were entitled to such account against the defendant; and that the mother being co-plaintiff was no misjoinder. *McCarthy v. Hatch*, 9 Ir. Eq. R. 206.

3. Mere occupation by one of several tenants in common of an estate, if unaccompanied by exclusion, does not make him liable for rent to his co-tenants. *McMahon v. Burchell*, 2 Ph. 127; C. P. C. 457. Varying 3 Hare 97.

A tenant in common occupying the premises held in common, not excluding his co-tenants in common, is not chargeable by such co-tenants with an occupation rent. S. C. 5 Hare 322.

4. A tenant in common of a farm may sustain a suit in equity for an account against his co-tenant, who has alone occupied it and cultivated it, for a moiety of the profits. *Leake v. Cordeaux*, 4 W. R. 806.

5. Where one co-tenant receives more than his share of the rents of a property, his co-tenant can compel an account, and payment, by suit in equity. *Montgomery v. Swan*, 9 Ir. Ch. Rep. 131.

6. Two, being tenants in common, one entered into possession in 1827, with the consent of the other, upon an understanding that he should pay an occupation rent when called upon to do so. The tenant in possession died in 1839. The survivor claimed six years' rent:—Held, that the claim must be allowed, and that 4 Anne, c. 16, was not repealed by 3 & 4 Will. 4, c. 27. *Henderson v. Eason*, 10 Jur. 821; 15 L. J., Ch., 457; 15 Sim. 303. S. C. on appeal 2 Ph. 308.

7. Where there were two tenants in common,

one of whom (the plaintiff) was an infant when his title accrued, and the other (the defendant) had been in actual occupation of the property at the death of the infant's mother, the former tenant in common, and had continued in such occupation during the infancy of the plaintiff:—Held, that the occupation of the defendant was an entry on the estate of the infant, and therefore that he was liable to account for rents and profits under 4 Anne, c. 16, although he had not received any rent, and that he must pay an occupation rent. *Pascoe v. Swan*, 5 Jur., N. S., 1235; 1 L. T., N. S., 17; 29 L. J., Ch., 159; 27 Beav. 508.

Held, also, that the defendant was entitled to an allowance for permanent improvements, proportionate to the improvements made. *Id.*

IV. INJUNCTION.

8. The Court will restrain one tenant in common from the wilful destruction of the common property, but where a railroad company had obtained a lease from five out of six tenants in common, and had, contrary to the wishes of the remaining tenant in common, constructed a railroad on the property which at law had been held to be an ouster, the Court refused to interfere by injunction to prevent the dissenting tenant in common removing the rails, etc., though the rent agreed to be paid by the company was three times the former rent. *Durham & Sunderland Railway Co. v. Wain*, 3 Beav. 119; 4 Jur. 764.

9. A husband, seised in right of his wife, concurred with the other tenants in common in a partition of estate and mines, but no fine was levied. He died in 1828; after which his widow acquiesced in the arrangement, and took the benefit of it. She and her lessee afterwards proceeded to get coal under the land awarded to other parties, and defended that proceeding on the ground that the husband's acts were invalid, and that the parties were still tenants in common of the whole. The Court restrained her by injunction. *Maden v. Veivers*, 5 Beav. 503; 13 L. J., N. S., Ch., 38.

V. OTHER MATTERS.

10. Possession of some owners is possession of all. *Exp. Machell*, 2 Ves. & B. 216; 1 Rose 447.

11. Where two persons are joint owners of a lake, with a common right of sailing, fishing, floating timber, etc., such right is not indivisible; but either may, without the consent of the other, alien the whole or any portion of his right, even where it is merely appurtenant to the land. But if the effect of such alienation was to deprive the co-owner of the full enjoyment of his moiety, such co-owner could maintain an action for the regulation of his enjoyment, as he could if there had been no alienation. What amounts to an excessive use of his right by a joint owner of a lake, *quære*. *Menzies v. Macdonald*, 4 W. R. 625; 2 Jur., N. S., 575; 2 Macq. H. L. Ca. 463.

TENDER.

- *By Contractor for Works.* See WORK AND LABOUR.
- *Of Petitioning Creditor's Debt.* See BANKRUPTCY, X. xxiv.
- *Tender of Demand and Offers to Settle. Effect of on Costs.* See PRACTICE (COSTS)—MORTGAGE, XIX. IV. 4.

What amounts to.] 1. In the case of a tender, if the party to whom it is to be made says, "You need not make a tender to me, as I will not accept it," it is considered as made. *Wallis v. Glynn*, 19 Ves. 380; *Coop.* 284.

2. The plaintiff tendered rent to the defendants, his landlords, with the words, "Here is your quarter's rent"—Held, that this did not require the landlord to make any admission as to the amount due, as a condition of its receipt, and was therefore a good tender. *Jones v. Bridgman*, 39 L. T. 500.

3. A lessee, after certain supposed breaches of covenant, tendered money as rent. The lessor refused to receive it as rent, but finally did accept it, though protesting that he took it not as rent under the lease, but as compensation for the occupation of the premises merely, and that he did not mean to waive, but expressly reserved, the right of re-entry:—*Quære*, whether if there had been any forfeiture by breaches of covenant, this acceptance of the money was a waiver of them. *Croft v. Lumley*, 6 H. L. Ca. 672; 6 W. R. 523; 4 Jur., N. S., 903; 27 L. J., Q. B., 321.

4. A tender accompanied by a protest is valid. *Sweeney v. Smith*, 38 L. J., Ch., 446; 7 L. R., Eq., 324.

A shareholder in a company formed for working patents owed 40l. to the company in respect of calls on his shares. He sent a cheque for that amount to the secretary, accompanied with a letter, which began thus:—"Herewith I forward a cheque for 40l., being the amount of the call made upon me for twenty shares which I hold in the company." Then followed a protest against the payment, on the ground that certain patents which had been sold to the company were invalid; and the letter concluded in these terms:—"I request that you will enter this my protest in the records of the company, and further, that this money be held in trust by the directors (each of whom I shall hold responsible for repayment of the same) until the question of the vendor's patent right has been settled":—Held, that this was a good tender of payment, and that the concluding words of the letter imposed no obligation or liability on the directors. *Id.*

5. A trader who, under a trader debtor summons, had signed an admission of a debt, went to his creditor with the amount of it in his pocket in money, and told the creditor that he had come for the purpose of paying that amount. The creditor said it was no use, as it was too late, and that the debtor must see the creditor's attorney:—Held, that the production of the money was dispensed with, and that there was a good tender. *Exp. Danks*, 2 De G. M. & G. 936; 22 L. J., Bk., 73.

Upon an adjudication of bankruptcy founded on failure to comply with the 82nd section

of the Bankrupt Law Consolidation Act, the onus is upon the petitioning creditor of proving that there has been no payment or tender. *Id.*

Quære, in such a case, whether the tender need be made with the same strictness as would be required to support a plea of tender in an action. *Id.*

6. Circumstances may make that amount to a tender in equity, which was not pleadable as such at law, *e.g.*, a tender in bank notes, during the restriction as to the issue of cash, *semble*. *Biddulph v. St. John*, 2 Sch. & Lef. 534.

Estoppel by.] 7. When a declaration shows substantially a contract, and a tender in compliance with it, the plaintiff is not estopped from contending for the true interpretation of the contract by the fact that he has also set out in his declaration an alternative case of a tender which would not have been a compliance. *M'Connel v. Murphy*, 5 L. R., P. C., 208.

Between Mortgagor and Mortgagee.] 8. If the mortgagor tenders the money to the mortgagee, and he refuses it, his interest shall cease from that time, and he ought not to keep the pledge. *Manning v. Burgess*, 1 Ch. Ca. 29.

9. As to a tender of mortgage-money, there ought to be reasonable notice of paying it in, and, if the tender be insisted on, to stop interest, the money must be kept dead from that time, because the party is to be always ready, six months' notice being given to pay in the mortgage-money at H.: though this be not the place mentioned in the proviso of the deed, yet where money was lent in town, and no objection made to the notice, no reason for a personal tender, or to make a man carry a great sum to a person in the country. *Gyles v. Hall*, 2 P. W. 378.

10. Interest on mortgage not stopped, but on a proper tender and notice. *Garforth v. Bradley*, 2 Ves. 678.

11. Tender of payment by mortgagor to agent of mortgagee, and refusal to accept, and twenty-four years thereafter suffered to elapse without demand from mortgagee of principal or interest; payment of principal or interest for whole decreed, under the circumstances. *Meade v. Bandon (Earl)*, 2 Dow 268.

12. Where covenants are inserted in a deed of assignment on the part of a mortgagee, he may refuse to take the principal and interest, though tendered, till he has advised with his attorney on the safety of executing the assignment, being entitled to reasonable time. *Wiltshire v. Smith*, 3 Atk. 89; 9 Mod. 441.

Other Matters.] 13. If an agent does not render his accounts within a reasonable time, he must bear the costs of a suit instituted to have the accounts taken, and it will not be any excuse for him that he offered to pay on account a gross sum, which it turns out would have covered all that was due from him. *Collyer v. Dudley*, T. & R. 421.

14. Where, upon order of dividend, assignees forward to creditor a bill for the amount of his dividend, but creditor rejects it, because he claims more than is offered (namely, full payment, without allowing the assignees a

set-off, which they claimed against him, and the amount of which, together with the sum tendered, made up the amount of dividend declared on creditor's proof), and the proceeds of the bill are received by one assignee, and by him invested at interest: the creditor was held, after twenty years and upwards, entitled to the fund, and all interest made by it. *Exp. Holford*, 4 Dea. & Ch. 798; 2 Mont. & A. 289.

1. An active step taken in a cause by defendants in contempt is not rendered valid by the subsequent tender of the costs of the contempt. Where, therefore, defendants in contempt, having put in answers which were excepted to, obtained the previous order, and afterwards tendered the costs of the contempt, the order was discharged for irregularity. *Taylor v. Sheppard*, 1 Y. & Coll. 99; 4 L. J., N. S., Exch. Eq., 7.

2. An averment in an answer of defendant being ready to pay, where his obligation was to offer payment, is no defence against the demand for an account. *Stratford v. Aldborough (Lord)*, Beat. 239.

3. In creditors' suit, the plaintiff's solicitor refused to attend accountant-general with Master's report, unless a contribution was made to him of one shilling in the pound; on motion, he being ordered to attend, on payment to him of 6s. 8d. each creditor, and his claims disallowed, the costs thereof were allowed to such as had tendered him the 6s. 8d., but not otherwise. *Shortley v. Selby*, 5 Madd. 448.

TERMS.

— *Creation of*. See LANDLORD AND TENANT, XXII.

— *Sale of*. See VENDOR AND PURCHASER, XXII.

— *Protection against Dower*. See DOWER, IV. 10.

— *Merger of*. See MERGER, III.

— *Leaseholds Settled on Trusts of Freeholds*. See SETTLEMENT, XVI. II.

See also LANDLORD AND TENANT—PORTION.

I. ATTENDANT AND SATISFIED, 6694.

II. LIMITATIONS OF.

1. *Entail of and Absolute Interests*, 6696.

2. *Remainders*, 6697.

III. ENLARGEMENT INTO FEE SIMPLE, 6697.

IV. SURRENDER, 6697.

I. ATTENDANT AND SATISFIED.

1. *Nature and Incidents*, 6694.

2. *When Attendant by Implication, and Resulting Trust for Heir*, 6694.

3. *Protection by*, 6695.

4. *Injunctions against Setting up Outstanding Terms*. See EJECTMENT, III. 2.

1. *Nature and Incidents*.

4. Term, though more properly applied to a

term for years, may yet mean an estate for life. *Smith v. Packhurst*, 3 Atk. 137.

5. Owner of an estate may sever a term assigned to attend the inheritance. *Willoughby v. Willoughby*, Ambl. 282.

6. Assignment of an *interesse termini*, on the circumstances of the case, considered as an assignment to attend the inheritance. *Saltern v. Melhuish*, Ambl. 249.

7. A term attendant upon inheritance is part of it, and shall not be severed from it, nor can it pass without it. *Villiers v. Villiers*, 2 Atk. 72.

8. Term attendant is liable for King's debts. *Hon v. Nicholl*, Pre. Ch. 125; 2 Vern. 389.

9. Tenant by curtesy shall have the aid of Equity against a trust term, assigned in trust to attend the inheritance. *Snell v. Clay*, 2 Vern. 324.

10. A term vested in trustees is not assets to pay debts; otherwise, if the term be in the party himself, and the inheritance in trustees. *Thurston v. Att.-Gen.*, 1 Vern. 341.

11. An infant in *ventre sa mere*, under a devise to heirs of the body of the devisor begotten, and to be begotten, cannot take by purchase the legal fee, the terms of description not amounting to a legal designation of him; but is entitled in equity, by virtue of the apparent intention, to the trust of a term attendant on the inheritance, though merged at law. *Nurse v. Yermworth*, 3 Swan. 608.

12. Every heir has a right to inquire by what means and under what deed he is disinherited; and, before he had established his title at law, he may go into equity to remove terms out of the way, which would prevent his recovering there; and may also have a production and inspection of deeds and writings in equity. *Harrison v. Southcote*, 1 Atk. 539.

13. Real estates were devised to a trustee upon trust, on a given event, to convey them to certain parties, upon one of them electing which he would take. A party, in whom, as satisfied mortgagee at the date of the will and death of the testator, a satisfied mortgage term in one of the estates was, was held bound to execute a deed of surrender of the term to the trustee, and the *cestui que trustent* were held not to be necessary parties thereto. *Pool v. Pass*, 1 Beav. 600; 8 L. J., N. S., Ch., 325.

2. When Attendant by Implication, and Resulting Trust for Heir.

14. Purchase of the fee-simple in the name of the purchaser, and of terms in the name of a trustee, with an intervening reversion of eleven days, and a reservation of rent, etc., to the vendors: the terms are terms in gross, not attendant upon the inheritance. *Scott v. Penhoullet*, 1 Bro. C. C. 69.

15. A., possessed of a term of 500 years in B. acre, afterwards purchases the fee-simple in C.'s name, and devised B. acre to J. in fee; but the will is not attested by three witnesses; the term shall not pass, because attendant on and part of the inheritance. *Whitchurch v. Whitchurch*, 2 P. W. 236; Gibb. Eq. Rep. 168; 1 Stra. 619; 9 Mod. 124.

16. A woman who is *cestui que trust* of a term, having the inheritance in her, marries and dies; the term shall attend on the inherit-

ance, and not go to the husband as administrator of the wife. *Best v. Stamford*, 2 Vern. 520; Pre. Ch. 252; 1 Salk. 164; 2 Freem. 288.

1. A man purchases land, and takes the fee in his own name, and an assignment of a term in a trustee's name: the term shall attend the inheritance, though not said in the assignment it should do so. *Tiffin v. Tiffin*, 1 Vern 1; 2 Ch. Ca. 49, 55. *S. P. Douse v. Percival*, 1 Vern. 104.

The custom of London shall not prevent the attendance of a term on the inheritance. *S. C.* 1 Vern. 2.

2. The attendancy of terms on the inheritance is regulated by the discretion of the courts. *Nurse v. Yerrorth*, 3 Swan. 612.

3. Covenant to convey legal estate will be considered in equity as actually conveyed, and the term attendant only upon the inheritance. *Cooke v. Cooke*, 2 Atk. 67.

4. A., being possessed of a term of 1,000 years in the lands of Y., bequeathed it to K., charged with an annuity of 182l. for M. K. conveyed the lands in mortgage, subject to the annuity, and afterwards purchased the fee in those lands. There was no declaration of trust that the term should attend the inheritance:—Held, that the term, though mortgaged, became attendant upon the inheritance, though there was no express declaration to that effect. *Scott v. Knox*, L. & T. 381; 4 Ir. Eq. R. 397.

5. Where the term and freehold would, if legal estates, merge, being vested in the same person, the term in equity in such case is construed to attend the inheritance, unless there be a declaration or other act to evince an intention to sever them. *Kelly v. Power*, 2 Ball & B. 253.

6. Where term would merge by its union with the inheritance in the same person, if he has in the one the legal, and in the other the equitable estate, the term will attend the inheritance. *Capel v. Girdler*, 9 Ves. 509.

7. When purposes of trust of a term are satisfied, the term belongs in equity to the owner of the inheritance, whether declared by the original conveyance to attend the inheritance or not. *Maundrell v. Maundrell*, 10 Ves. 270.

8. Devise to trustees for ninety-nine years upon the trusts thereafter expressed, and after the expiration, or other sooner determination of the said term, in strict settlement; the term, no trust being declared, decreed to attend the inheritance, according to the limitations of the will, and no resulting trust for the heir upon the apparent intention to devise immediate estates subject to the term, not future estates expectant on its determination. *Sidney v. Shelley*, 19 Ves. 352; Coop. 206.

9. Term raised for a particular purpose: when that purpose is answered, the term shall be in trust for the heir. *Levet v. Needham*, 2 Vern. 139.

One devises lands to trustees and their heirs, in trust to receive the rents until his son shall come to twenty-one, and to pay one-third thereof to the testator's wife in lieu of dower, and out of the other two-thirds to raise portions for his daughters, and devises all to his son William when twenty-one, in

tail, remainder to B. and C. The wife dies. The son dies before twenty-one, and without issue. Resolved, the wife's interest determined by her death, and her third shall not go to the executors until her son would have attained twenty-one: resolved, the remainders over to A., B., and C. are good, though the son died before twenty-one: resolved, the daughters' portion being raised, the residue of the term shall go to the heir as an interest undisposed of by the will; but it will vest in the heir as a chattel, and, on his death, go to his executor until testator's son should have come to twenty-one. *S. C.* 2 Vern. 138.

10. A., by will, gives lands to trustees for terms, remainder to T. Lord Foley and E. Foley for life. The trusts of the terms were for payment of scheduled debts, and to make an allowance to Lord Foley and E. Foley. The debts being stated to be paid, a trust results to the tenants for life. A demurrer by the trustees to a bill by creditors for an account as having no interest, therefore overruled. *Davidson v. Foley*, 2 Bro. C. C. 203.

11. Wherever land, etc., which would descend to heir-at-law is devised for purposes which law will not suffer to take effect, the heir-at-law shall have the benefit of the interest so devised as undisposed of, whether testator intended he should have it or not. *Tregonwell v. Sydenham*, 3 Dow 194.

12. If, in voluntary deeds and wills, there is no declaration of trusts of term, they result to donor; but, *secus*, if for valuable consideration, and in nature of contract for benefit of wife and issue. *Brown v. Jones*, 1 Atk. 190.

3. Protection by.

13. Purchaser for valuable consideration without notice, by taking an assignment of a term attendant, may protect himself from mesne incumbrances. *Willoughby v. Willoughby*, Amb. 282.

14. An attendant term is a creature of equity to protect real estates, and keep them in their course. *Id.* 283.

At law there is no difference between an attendant term and a term in gross. *Id.*

Before stat. 21 Hen. 8 tennor was in power of the owner of the freehold; since then the tennor in trust is affected as the owner of the inheritance shall think fit. *Id.*

A *bonâ fide* purchaser without notice, if the term is in a trustee, may use it to protect or recover the possession; so if the term is in himself. *Id.*

The term will protect against all intermediate incumbrances. *Id.*

15. Testator devised an estate to several persons for their lives successively, with power to grant leases, under certain restrictions. The first tenant for life grants a lease to a person who had no notice of the power, or that the lessor was tenant for life only. A subsequent tenant for life brings an ejectment against the lessee, on the ground that the lease was not made according to the power. The Court will not prevent the lessee from setting up an old outstanding term created by the testator. *Goleborn v. Alcock*, 2 Sim. 552.

1. An attendant term having been vested in the wife of the owner of the inheritance, as the administratrix of the trustee, and her husband becoming bankrupt, his assignees agree to sell the estate, and file a bill for specific performance of the agreement, pending which suit the husband dies:—Held, that the widow was not entitled to dower; that she was to assign the terms of the purchaser; and that he was bound to accept the title. *Mole v. Smith*, Jac. 498.

2. Right of mortgagees to the benefit of a term attendant on the inheritance, though the term was not assigned, nor the inheritance conveyed to them. *Buckinghamshire (Earl) v. Hobart*, 3 Swan. 201.

3. A. purchases of a man who had committed an act of bankruptcy, but without notice thereof; afterwards a commission is taken out, and, there being a term standing out in trustees, the assignee brings a bill against them and the purchaser, to have the bill assigned to him: bill dismissed. *Wilkes v. Bodington*, 2 Vern. 599.

A purchaser without notice shall not be hurt in equity, not only where he has got a prior legal title, but where he has a better right to call for the legal estate than another who has obtained an incumbrance prior to his title. *Id.*

4. Where lands escheat to the King, he shall have the benefit of a term to attend the inheritance. *Bodmin v. Vandebendy*, 1 Vern. 357; Pre. Ch. 65; 2 Ch. Ca. 172.

Court will not entertain bill by dowress to set aside an outstanding term as against a purchaser, though he had notice. *Id.*

5. In *Att.-Gen. v. Sands* (Hardr. 481; 2 Freem. 129; 3 Ch. Rep. 33) it was held, that the trust of a term attending on the inheritance was not forfeited by the felony of the *cestui que trust*, because it was no more than an accessory to the inheritance, which was not forfeited. It is not denied, however, that where a term is attendant upon the inheritance, and the King extends the inheritance, he shall have a right to the term. *Nicholls v. How*, 2 Vern. 389.

6. Tenant by curtesy shall have the aid of equity against a trust term assigned in trust to attend the inheritance. *Snell v. Clay*, 2 Vern. 324.

7. A mere trustee of an outstanding term cannot avail himself of it for the purpose of establishing a priority. *Shaw v. Neale*, 6 H. L. Ca. 581; 4 Jur., N. S., 695; 27 L. J., Ch., 444.

See also DOWER, IV. 13—MERGER, III.—MORTGAGE, VII. III.

II. LIMITATIONS OF.

1. *Entail of and Absolute Interests*, 6696.
2. *Remainders*, 6697.

1. Entail of and Absolute Interests.

8. Term *pur autre vie* may be limited to one and his heirs, and may be entailed and descend, though a term for years cannot. *Finch v. Tucker*, 2 Vern. 184.

9. The trust of a term cannot be entailed. *Ireland v. Payne*, Poll. 25.

10. The trust of a term is limited to W. for life, remainder to B. for life, remainder to the

heirs of the body of B., and for want of such issue to the executors of W.:—Held, that it vests in B. *Tatton v. Molineaux*, Poll. 24.

11. Term assigned in trust for baron and feme for their lives, remainder in trust for the heirs of the body of the feme by the baron. Baron and feme die. The term shall go to the heir of the body of the feme by baron, and not to her executor or administrator, the words "heir of the body" being a good *descriptio personæ*. *Peacock v. Spooner*, 2 Vern. 195; 2 Freem. 114. *Sed quære*, see note there. *Id.*

12. Where term is assigned in trust for husband for life, and then to trustees for raising an annuity for wife, and then to heirs male of husband begotten on wife. On death of husband and wife, the heir male takes by purchase, and it is not assets. *Anon.*, 2 Eq. Abr. 509.

13. One possessed of a term for years, on his marriage, assigns it to trustees in trust for himself for life, remainder to his wife for life, remainders to the heirs of the body of the wife by the husband. They have a son. This is a good limitation to the heirs of the body of the wife, and they are words of purchase and not of limitation. *Dafforne v. Goodman*, 2 Vern. 362; Pre. Ch. 96; 2 Freem. 23.

One possessed of a term for years, in consideration of a marriage, assigns it to trustees in trust for himself for life, remainder in trust for the children of the body of the wife. This shall be intended for the children of the wife by this marriage, and not to let in her children by another husband. *Id.* 363.

14. A long term of years is assigned upon trust for A. for ninety-nine years, if he lived so long, and then to his wife for her life, remainder to the heirs of A. begotten on his wife. The whole term does not vest in A., but, after the death of him and his wife, shall go to all their children equally. *Ward v. Bradley*, 2 Vern. 23.

15. A., on his marriage, assigns a term for 1,000 years, in trust for himself for life, remainder to his wife for life, remainder to the heirs of his body of the husband and wife, remainder to the husband's right heirs. The wife dies, leaving issue; the whole term vests in the husband, and he may assign it. *Webb v. Webb*, 1 P. W. 132; 2 Vern. 668.

16. A., seised in fee, demises to B., his executors, etc., for ninety-nine years, in trust for himself and his wife for their lives, and the life of the survivor, and after the death of the survivor, in trust for the heirs of their two bodies; and in default of such issue, then in trust for the heirs of the body of the husband; and in default of such issue, then in trust for the heirs of the survivor of the husband and wife. Husband and wife have issue a son, and the husband dies, and then the son dies in the lifetime of the mother, without issue; the mother administers to her husband and assigns the term to the defendant. Decreed, her assignee well entitled, and that the term should not go to the heir of the husband as attendant on the reversion. *Hayter v. Rod*, 1 P. W. 360.

17. In this case an absolute term of ninety-nine years, limited to C., amongst other limitations of a real estate under a will was with reference to the true construction of the several parts of the will, considered not as an

absolute term, but as determinable on the death of C. *Coryton v. Helyar*, 2 Cox 340, cited Burr. 923, 1631.

1. Term settled in trust for wife, if she should so long live, and after her decease in trust for her husband, if he should so long live, and after his decease in trust for the heirs of the body of the wife by her husband, their executors, administrators, and assigns, and for default of such issue remainder over. The husband died, never having had any issue, and the wife survived him:—Held, that the term was not vested in the wife, and that the words "heirs of the body" were not words of limitation but purchase; and the lease was directed to be deposited in court for the benefit of all parties. *Hodgeson v. Bussey*, 2 Atk. 89; 9 Mod. 236.

The words, "if A. B. shall so long live," are an affirmation implying a negative, that if he did not live so long the remainder should go over. *Ib.*

Words of limitation are improperly used in terms for years. *Ib.*

"Heirs of the body" here means the heir of the body living at the death of the husband, or born in a reasonable time after. *Ib.* 92.

Term settled in trust for wife for life, and after her decease in trust for husband for life, and after his decease in trust for the heirs of the body of the wife by the husband, their executors, administrators, and assigns; and for default of such issue, remainders over:—Held, that the words "for want of such issue" are the same as for want of such son or such daughter; for the word "such" confines it to such issue as is meant by the words "heirs of the body." 8 C. 2 Atk. 92.

2. Trust of a chattel real for S. for life, and immediately after her death, for the "heirs of her body," with limitations over; the whole interest vested in S. *Theobridge v. Kilburne*, 2 Ves. 233.

3. A marriage settlement, after reciting that it had been agreed that a cottage, etc. (which the husband held for the remainder of a term of 2,000 years), should be settled on the husband for life, and after his decease on the wife for life, by way of jointure, and after their several deceases on the issue of the marriage, and in default of issue on W. C. and his heirs, executors, etc., assigned the cottage to a trustee for the remainder of the term in trust, to permit the husband to receive the rents for so many years of the term as should expire in his lifetime, and after his decease in trust to permit the wife to receive the rents during her natural life, and after their several deceases to permit the heirs of the body of the husband begotten on the body of the wife to receive the rents so many years of the term as should expire in the life or lives of him, her, or them respectively, and after the several deceases of the husband and wife, and in default of issue of the body of the husband and wife, as before limited, to permit W. C., his heirs, executors, etc., to receive the rents for all the residue of the term:—Held, that the term vested in the husband absolutely under the first limitation. *Bartlett v. Green*, 13 Sim. 218; 12 L. J., N. S., Ch., 149; 6 Jur. 1099.

Leaseholds settled on Trusts of Freeholds.]
See SETTLEMENT, XVI. II.

2. Remainders.

4. Limitation of term to several persons not in being one after another is good. *Goring v. Bickerstaffe*, Poll. 31.

5. Possibility of trust of term may be disposed of to one in being. *Ib.* S. P. *Veisy v. Pinnell*, Poll. 44.

6. The trust of term is limited to one for life, and after to his eldest issue male; it is a good remainder, and the feoffment of tenant for life will not destroy it. *Cotton v. Heath*, Poll. 26.

7. Remainder of freehold is limited to H. in tail male, remainder to C. in tail male, and there being then a term for years of the same estate in being, that term is limited to H. and his issue male, so as if H. comes to be El. of A., then the term is limited to C. and his issue male:—Held, a good limitation to C. *Norfolk's (Duke) case*, Poll. 223.

8. Where a trust of a term is limited to be assigned to the issue of J., upon request, and no request or assignment made, and J. dies, the administrator of J. is entitled to the trust. *Warman v. Seaman*, Poll. 112.

9. The trust of a term limited to J. for life, then to E. for life, then to L. for life, then to the first and other sons of L., to be begotten on the body of M., the remainders, etc., with remainders over. All limitations after that to L. for life, sons of L. not being born, are void. *Sed quere.* *Apprice v. Flower*, Poll. 27.

10. A., seised in fee by deed and fine, conveys the lands to the use of trustees for seventy years, if A. so long live, remainder to trustees for 3000 years, and, after the death of A., then to his son B. Whether the remainder to B. is good? *Penhay v. Hurrell*, 2 Vern. 373; 2 Freem. 258.

III. ENLARGEMENT INTO FEE SIMPLE.

11. An annual rent of merely nominal amount, e.g., three shillings, is not "a rent having no money value" within s. 65, sub-s. 1 of the Conveyancing Act 1881, even though it may have in practice not been regularly paid, those words meaning, rather, a rent which, when received, has no money value. *Re Smith and Stott's Contract*, 48 L. T. 512; 31 W. R. 411.

IV. SURRENDER.

12. The case made by the bill was this. It alleged title, under several instruments, to certain real estates settled thereby, one of such deeds creating a term to raise a sum of money not yet raised. It alleged possession on receipt of the rents in some of the defendants; and that they had possession of some of the deeds; and that they had given notice to tenants not to pay rent to the plaintiff, and threatened to distrain; it alleged that the trustee of the term refused to assign it to the plaintiff. It prayed, among other things, a declaration that under certain of the instruments the plaintiff was entitled to the estates; and that on payment of the money to be raised by the term, by him, he was entitled to a surrender or assignment of the term:—Held, that there was an equity for that relief, if for no more, and the bill was not therefore demurrable. *Saunders v. Richardson*, 2 Drew. 128; 18 Jur. 714.

TESTAMENTARY GUARDIAN.

See GUARDIAN AND WARD, I. III.

THAMES.

Piers.] 1. Where there is some convenience afforded to the public, the conservators of the Thames have, subject to the sanction of the Board of Admiralty, such a right to erect piers or landing-places at such points and in such manner as they think fit, that their discretion is conclusive on the question of nuisance to the navigation; and the Court cannot restrain them upon any ground arising out of the balance of convenience and inconvenience. *Att.-Gen. v. Thames (Conservators), Brewery Co. v. Same, Clothworkers' Co. v. Same, Thornton v. Same*, 8 Jur., N. S., 1203; 11 W. R. 163.

The requirements of s. 62 of the 22 & 23 Vict., c. 133, under which the conservators, when they obstruct any free public stairs, are bound to erect others in their stead, is a condition subsequent, and the Court will not restrain the obstruction of the public stairs until other stairs are constructed. *Ib.*

The conservators having a right to obstruct the stairs in the first place, the remedy, if afterwards they do not erect others equally convenient, is by *mandamus*. *Ib.*

The Court, distinguishing the right of access to a public right of way itself, will restrain the conservators from depriving any person, having a right of access to the river from his own land, of such access. *Ib.*

But if such access is merely hindered by the impediment which the conservators' works cause to all persons navigating the river, the Court will not interfere, although the land-owners may suffer substantial damage thereby. *Ib.*

2. Under the Thames Conservancy Act 1857, the conservators of the Thames were empowered to erect piers at any convenient place, of such form and construction as they should deem advantageous to the public, and causing the least obstruction to the navigation. The plans were to be first approved by the Admiralty:—Held, that the Court had no jurisdiction to interfere by injunction at the suit of the attorney-general, on the ground of the alleged inconvenience of proposed piers, or, at most, that it could only interfere where it was shown that the piers would be entirely useless. *Att.-Gen. v. Thames (Conservators)*, 1 Hem. & M. 1; 1 N. R. 121.

The statute directed, that, whenever the conservators should remove or obstruct the free use and enjoyment of any public stairs or landing-places marked by the Waterman's Company, they should erect equally convenient stairs or landing-places in substitution for them:—Held, that the substitution of new stairs or landing-places was not a condition precedent to the removal or disturbance, and that where the conservators had prepared plans for piers which would interfere with such old stairs without showing any adequate provision in substitution for them, the Court would not assume that the duty would be neglected, and would not

interfere at the suit of the attorney-general to restrain the works until proper substitutes should be provided for the old stairs. *Ib.*

3. The Temple Pier, erected under a licence from the conservators of the Thames, determinable by seven days' notice, was purchased and managed by a company. The Metropolitan Board of Works, under the provisions of the Thames Embankment Act of 1862 (which incorporates the Lands Clauses Act of 1845, with the additional provision that the word "lands" shall include easements and interests in land, and which gives express power to alter and divert piers), altered and diverted the pier temporarily, to enable them to prosecute the embankment works, yet not so as to interrupt the use thereof; and proposed eventually to build, as nearly as might be at the same spot, a new pier in the place of the old one. The conservators refused to grant any licence to the company with respect to the proposed new pier:—Held, that the Metropolitan Board were not taking or permanently using any land or easement belonging to the company, and consequently were not bound to comply with the terms of the 84th section of the Lands Clauses Act before dealing with the pier in the manner mentioned. *Temple Pier Co. v. Metropolitan Board of Works*, 11 Jur., N. S., 337; 34 L. J., Ch., 262; 13 W. R. 535; 12 L. T., N. S., 369.

4. The city of London by licence granted a company permission to form a floating pier on the Thames, such pier to remain during pleasure, and to take tolls on all passengers landed at the pier. Under the powers conferred upon them by the Thames Embankment Act 1862, the Board of Works took the floating pier from the company, and agreed to pay them a certain sum and to construct a new landing-stage in lieu of the old pier, and to appropriate it in perpetuity to the benefit of the company. The Thames Embankment Act 1868 purported to give validity to this agreement. On a bill by the conservators of the Thames (in whom all the estate of the city of London in the bed, soil, and shores of the river had become vested by the Thames Conservancy Act 1857) to restrain the company from continuing in possession of the landing-stage constructed in lieu of the old pier:—Held, that the company was entitled to the use of the pier only on sufferance, and at the pleasure of the conservators of the Thames; that the Board of Works had no power to convert the licence at pleasure into an irrevocable licence; and that the Act which purported to give a validity to the agreement between the company and the Board of Works did not affect the rights of the conservators of the Thames. *Thames (Conservators) v. South Eastern Railway Co.*, 24 L. T. 246.

Held, also, that their proper remedy was by bill in equity, and not by ejectment. *Ib.*

Wharf-owners.] 5. A wharf-owner, who has not any special easement or privilege over the bed or soil of the river, but only the common right of passage to his property, has neither an easement over nor a right in land, within the enlarged definition given to that word by the 4th section of the Thames Embankment Act of 1862 (25 & 26 Vict., c. 93). *Macey v. Metropolitan Board of Works*, 10 Jur., N. S., 333; 33 L. J., Ch., 377; 12 W. R. 619; 10 L. T., N. S., 66; 3 N. R. 669.

A person so situated, therefore, whose land is not taken, but whose right of passage is injuriously affected by the works authorized by the 25 & 26 Vict., c. 93, has no right to compensation before those works are proceeded with; but, having regard to the provisions of that Act, and of the various Acts incorporated therewith, his right to compensation arises when his damage is completed, and his remedy is under the 68th section of the Lands Clauses Act, or by arbitration alone. *Ib.*

Where damage is occasioned to a party whose premises are not entered upon, but are injuriously affected by the exercise of the powers given by the 25 & 26 Vict., c. 93, and for which damage compensation is required to be made, the payment, ascertaining, or depositing of the amount of compensation is not a condition precedent to the commencement of the works which occasion the damage. *Ib.*

1. The owner of a wharf and warehouse on the north bank of the Thames, projecting into the river for forty feet, and thereby having a west as well as a south frontage on the river, was accustomed to moor barges on the west side of his wharf, and to load them from openings in the side of his warehouse. The conservators of the Thames gave to the owners of the adjoining wharf, on the north-west side of the plaintiff's wharf, a licence to construct an embankment which would cut off his immediate access to the river on his west frontage:—Held, that by the Thames Conservancy Act, 20 & 21 Vict. c. 147, s. 53, the conservators appointed under that Act have a power to grant a licence to a riparian proprietor to make an embankment in front of his own land abutting on the river; but though such licence might be the owner's justification so far as the public right of navigation was concerned, it would not authorize a licensee, being a riparian owner, to embank in front of his own land so as injuriously to affect the land of another riparian owner. *Lyon v. Fishmongers' Co.*, 35 L. T., N. S., 569; 1 L. R., App. Cas., 662. Reversing 10 L. R., Ch., 679; 33 L. T., N. S., 146; 44 L. J., Ch., 747, and affirming 44 L. J., Ch., 408; 23 W. R. 689; 32 L. T., N. S., 479.

The power granted to the conservators under 20 & 21 Vict., c. 147, s. 53, is qualified and restricted by the provisions of s. 179. *Ib.*

Purpresture.] 2. On an information of the attorney-general, at the relation of an individual, and a bill by the relator, the Lord Chancellor granted an injunction *ex parte*, on affidavits, to restrain a purpresture in the river Thames, and it appearing that there had been no previous writ of *ad quod damnum*, and that an indictment in the King's Bench was depending against the defendants for the same act, Lord Chancellor refused to dissolve the injunction before the trial of the indictment, notwithstanding there were some affidavits on the part of defendants, stating that the act complained of was beneficial to the navigation; it was also held, that it was immaterial to whom the soil belonged, it not being competent either to the Crown or to a subject, to use it for any purpose amounting to a nuisance. *Att.-Gen. v. Johnson*, 2 Wils. 87.

THEATRE.

- *Agreements to perform at.* See ACTOR
- *SPECIFIC PERFORMANCE, V. II.*
- *Dramatic Authors.* See COPYRIGHT, III.

Licences.] 3. No play can lawfully be acted for hire, gain, or reward, within twenty miles of London, without the authority of letters patent from the king, or of a licence from the lord chamberlain; and no such letters patent, or licence, can be granted so as to authorize the performance of plays at any place except within the city or liberties of Westminster, or where the king may happen to reside. An agreement, therefore, for a partnership in acting plays at a theatre situate within twenty miles of London, but not within the city or liberties of Westminster, or in the place of the king's residence, is one to which the Court will not give effect. *Erving v. Osbaldeston*, 2 Myl. & C. 53; 6 L. J., N. S., Ch., 161; 1 Jur. 60.

4. The Court refused to seal a patent for representing Italian operas, because the provisions for carrying it on were by agreement with the lord chamberlain, his executors and administrators, and the right to the patent was not sufficiently connected with the property in the house. Not sufficient for the party applying merely to answer objections, but he must lay a proper case. Upon such application the Court will take care that the king is not deceived, or his object disappointed, and will represent the whole to the king, but will not decide upon the merits of the various claimants. Essential to the complaint of an old market against a new one set up near it, that the old is competent in the accommodation of the public; so here the old proprietors must be able to keep it up properly, the accommodation of the public being the principal thing. *Earp. O'Reilly*, 1 Ves. J. 112.

5. By the 26 Geo. 3, c. 57, s. 1, the Crown was authorised to grant letters patent for establishing and keeping a theatre in Dublin; and, by s. 2, it was enacted that no person should, for hire, act any play in any theatre in Dublin, except in such theatre as should be so established by letters patent, under the penalty of forfeiting 300*l.* for every such offence, to be sued for by the common informer. Under this statute, the Crown granted letters patent to H., authorising him, during a certain time, to keep a theatre in Dublin, and his Majesty prohibited and forbid all persons whatsoever during the term that they presume to keep open, in any manner, any theatre in Dublin, and therein to act any play, unless they should be thereunto authorised by His Majesty:—Held, that the patentee could not maintain a bill for an injunction to restrain unauthorised persons acting plays in a theatre in Dublin, for the keeping of which no patent had been granted. Such a bill can only be maintained upon the ground of interest in the plaintiff; and unless he can sustain an action in the case, the injunction cannot be supported. *Calcraft v. West*, 2 J. & L. 123; 8 Ir. Eq. R. 74.

Bowes and Stalls.] 6. W., in 1816, became, under an order of the Court, purchaser of the Opera House, and was in possession as equitable owner until possession was delivered to

C. in 1821. No assignment of the terms of years for which the premises were held was made to W., but the same were vested in T., who, in 1821, on behalf of and by the direction of W., assigned the terms to C. (who was mortgagee of the premises), but "subject to the right of possession of W., his executors, etc., to the box numbered 124, usually occupied by him, or his or their nominees, not exceeding in number six persons nightly, during the remainder of the several terms granted by the indenture, and of the terms covenanted by the indenture to be granted." In 1823 W. assigned his leasehold or other interest in the Opera House and other property to H. W., in trust for the benefit of his creditors, and he, as such trustee, or his solicitor, received the rents and profits of the opera box numbered 124, to 1838, and his solicitor continued to receive the rents to 1850. In 1823 C. filed a bill for specific performance of the contract of 1821, and in 1829 a decree was made to that effect, and it declared that he was entitled to the leasehold premises of the Opera House, to the rents, and to a renewal at the cost of W. C., from 1821 to 1845, paid the rents of the box to, or permitted the same to be received by, H. W. or his solicitor, by virtue of the reservation in the assignment of 1821. In 1845 the assignees of C. sold the Opera House to L. for the residue of the terms subsisting by virtue of the covenants for renewal in the indenture of 1821. In the contract for sale the indenture of 1821 was noticed, and it was provided that it should be subject to such rights to boxes as the premises were then subject to. A renewed lease was granted in 1845. L., from 1845 to 1850, paid the rents of the box to the solicitor of H. W., or persons claiming under him; but since 1850 he had refused to pay any rent for such box. In 1855 the plaintiff was appointed a new trustee under the deed of assignment by E. W. of 1823. By the renewed lease of 1845 L. was restrained from disposing of boxes for more than one year, except forty-one boxes, to be selected within five years, which he was at liberty to dispose of at pleasure, but after that period provision was made for his acquiring, with the assent of the lessors, the right of disposing of other boxes. In May 1856 L. assigned the lease of 1845 to the defendant, who, as alleged, had notice of the plaintiff's claim to the box. On a bill filed by the plaintiff for a declaration that he was entitled to the box, or to an equivalent in money for the residue of the renewed term of 1845:—Held, by the Vice-Chancellor, that he was entitled to such declaration, and that it was no defence to the bill to say that, inasmuch as the assignee of the lease had disposed of the forty-one boxes, a decree in the terms of the prayer of the bill would, in effect, compel him to dispose of more than forty-one boxes, and therefore render him liable to a forfeiture of the lease:—Held, on appeal (affirming that decision), that the defendant refusing to make compensation in money or otherwise, the plaintiff was entitled to the relief sought. *Helling v. Lumley*, 5 Jur., N. S., 301; 28 L. J., Ch., 249. Affirming 4 Jur., N. S., 868; 6 W. R. 758.

1. An owner of a theatre by deed in 1839, for valuable consideration, covenanted to confirm to certain debenture-holders the privilege of free admission to a theatre. A. was en-

titled as a debenture-holder to the benefits of the deed, but subsequently lost his debenture. Afterwards B. became lessee of the theatre, with notice of the deed:—Held, that A. was not entitled specifically to enforce against B. the privilege of free admission created by the deed. *Malone v. Harris*, 11 Ir. Ch. R. 33.

2. The lessee of a theatre held it under a lease in which he covenanted not to convert it to any other use than for acting or performing operas or theatrical entertainments. He demised certain boxes and stalls to a sub-lessee, reserving power of access for the purpose of repairing; the sub-lessee covenanted only to use the same for the purpose of viewing and hearing the operas and other entertainments. The underleases contained covenants for quiet enjoyment. The lessee demised the theatre for a term of three months for the purpose of holding religious meetings. To enable three meetings to be held, the stalls were covered with a flooring, the division between the boxes removed, and other temporary structural alterations made:—Held, that a trespass had been committed by the lessee and persons claiming under him in thus entering upon the sub-lessee's boxes and stalls without his licence, and the conversion of the theatre for other than theatrical purposes was a derogation from the grant and a breach of the covenant for quiet enjoyment. *Leader v. Moody*, 44 L. J., Ch., 711; 20 L. R., Eq., 145; 23 W. R. 606; 32 L. T. N. S., 422.

3. Trustees acting for the shareholders or rentallers of a theatre, called the Queen's Theatre and Opera House, who had obtained a feu right to the site, granted in 1858 a disposition of the ground and buildings to one J. B., subject, *inter alia*, to the burden of a perpetual annuity of 2l. per share to each rentaller of the said Queen's Theatre and Opera House, and to the successors or assignees of them; and it was further declared that each of the said rentallers, or the assignee or successors of such, should at all times be entitled, *inter alia*, to free admission to the auditorium of the said Queen's Theatre and Opera House; also declaring that J. B. should not convert the said theatre to any other use; and that he should keep it open for performance six months in each year. There was no stipulation as to insurance of the theatre or as to the rebuilding of it in case of destruction by fire or otherwise. In 1865 the theatre was entirely destroyed by fire, and was rebuilt by J. B.'s trustee and called by another name. In 1875 it was again entirely burnt down and again rebuilt. From 1865 to 1879 the theatre, under the new name, was twice sold, but in each case the conveyance was granted subject to the "real burdens, conditions, provisions, declarations, and others," specified in the original disposition of 1858, and especially under the burden of payment of the annuities to the rentallers, and of allowing "these parties the privileges to which they are entitled." The privilege of free admission was enjoyed by the rentallers for fourteen years after the destruction of the first theatre. In 1879 disputes arose as to the validity of the rentallers' right to, *inter alia*, the privilege of free admission. The trustees maintained that the rentallers were entitled under the disposition of 1858 and the succeeding conveyances to the same privileges in the new theatre which

they had in the first :—Held, that the privileges conferred on the rentallors by the original dispositions—other than the payment of the annuities, which was constituted a real burden—rested only on the personal obligation of the original disponent, and were confined to the theatre then in existence, and that the subsequent deeds, to which the rentallors were not parties, were not intended to, and did not, confer on them any new right. *Scott v. Howard*, 6 L. R., App. Cas (Sc.), 285.

Covenants in Lease of.] 1. A lease of the opera house contained covenants on the part of the lessee, first, not to use the house for any but purposes of a theatrical kind, and "to use his best endeavours to improve" the house for that purpose. The house was closed at the end of the season of 1852, and was not opened at all during the following year :—Held, that this was not a breach of the covenant. *Croft v. Lumley*, 6 H. L. Ca. 672; 4 Jur., N. S., 903; 27 L. J., Q. B., 321; 6 W. R. 523.

A second covenant was, not to grant away, assign, dispose of, etc., the stalls or boxes "for any longer period than one year or season." On the 21st of December 1851, the lessee leased certain boxes for one year, to commence from March 1852. On the 1st of August 1852 he made another lease of the same boxes to a different person, with this habendum, "from the 1st of February now next ensuing, or from such subsequent day during the year upon which the theatre shall be opened, and thenceforth for the full term of one year, to be computed from that day" :—Held, that this was not a breach of the covenant. *Id.*

And a third covenant was, "not to charge nor incumber the theatre, or the income thereof, or the terms hereby granted, by mortgaging the same, or granting any rent-charges, or any other incumbrance whatever." The lessee was greatly in debt. In respect of his debts, he granted warrants of attorney, one of which was to secure payment of bills not due, and another provided that it was a concurrent security, with an indenture therein recited, that judgment was to be entered up when the grantee thought fit, and to be registered. Judgments were signed against him on those warrants of attorney, and upon judges' orders, and registered :—Held, that no breach of this covenant had been committed. *Id.*

Contract with Dramatic Author.] 2. Contract with the proprietors of a theatre not to write dramatic pieces for any other, legal; as similar restraint of a performer would be; not resembling a covenant restraining trade generally. *Morris v. Coleman*, 18 Ves. 437.

Covenant restraining trade within particular limits, or partners from carrying on the same trade for their private benefit, legal. *Id.*

Other Cases.] 3. The Court will entertain a bill to compel partners to act according to the provisions of instruments into which they have entered; and where it will interfere for that purpose, will take care that the decree shall not be defeated by anything done in the meantime. Thus, where, in 1812, the then proprietors of Covent Garden Theatre executed a deed, by which they covenanted and agreed that the profits of the theatre should be exclusively

appropriated to particular purposes, and that the treasurer for the time being should be irrevocably directed so to apply the profits; and in 1822, parties then entitled, under the former proprietors, to seven-eighths of the theatre, entered into an agreement, which provided, in some respects, for a different application of the profits, and otherwise affected the rights of a party interested in the remaining eighth, who was not consulted on the subject; the Court, upon a bill filed by that party, for the specific performance of the covenants and agreements contained in the deed of 1812, appointed a receiver. *Const v. Harris*, T. & R. 496.

4. Partnership in the opera house dissolved by the conduct of the parties making it impossible to carry it on upon the terms stipulated. Decree accordingly for sale of the whole concern; restraining the managing partner from acting with liberty to either party, and to lay proposals before the Master for management until sale. *Waters v. Taylor*, 2 Ves. & B. 299.

THIRD PARTY PROCEDURE UNDER JUDICATURE ACT.

See PRACTICE (PARTIES).

TIMBER.

See WASTE AND TIMBER.

TIME.

- *In Practice.* See PRACTICE (TIME)—PRACTICE (SPECIFIC TITLES)—SUNDAY.
- *When Essence of Contract.* See LANDLORD AND TENANT, I. II. 11—VENDOR AND PURCHASER, X.

- I. COMPUTATION OF. IN GENERAL, 6701.
- II. REASONABLE, 6702.
- III. FRACTIONS OF A DAY, 6702.
- IV. MONTH, 6702.
- V. OTHER CASES, 6703.

I. COMPUTATION OF. IN GENERAL.

5. Bequest of residue in trust in case A. shall, within six calendar months after the testator's decease, give security not to marry B., then and not otherwise to pay to the children of A.; with a proviso to go over if she shall refuse or neglect to give such security; a condition precedent: the six months are exclusive of the day of the testator's death; therefore, as he died on the 12th January, between eight and nine in the evening, a security given on the 12th July about nine in the evening was held sufficient. *Lister v. Garland*, 15 Ves. 248.

No general rule, in computing time from an act or event, that the day is to be inclusive or exclusive; depending on the reason of the thing, according to the circumstances. *Id.*

In the time from the presentment of a bill of exchange, the day of presentment exclusive. Other instances, where the day of an act done, or an event happening, is sometimes inclusive, sometimes exclusive. *Id.*

1. Devise to A. as soon as he shall accomplish his full age of twenty-one years. A. was born on the 16th August 1725, and died on the 15th August 1746:—Held, that he lived to attain his full age of twenty-one. *Toder v. Sansam*, 1 Bro. P. C. 469.

2. The six months given to tenants to redeem under the statutes of ejectment for nonpayment of rent, are calendar months, and the day on which the *habere* is executed is not to be included in the calculation. Where a right would be devested or a forfeiture incurred by including the day of the act done, the computation will be made exclusive of it. *Dowling v. Fowall*, 1 Ball. & B. 193, 196.

3. Where there was a right of forfeiture of shares, on giving ten clear days' notice:—Held, that a notice to forfeit "on Monday the 9th" was insufficient, the 9th being on a Friday. *Watson v. Eales*, 23 Beav. 294.

4. In computing time, under the 15 & 16 Vict., c. 5, s. 2, avoiding letters-patent, in failure in payment of stamp duties:—Held, that the day of the date is excluded, and that the three years do not expire until twelve o'clock at night of the anniversary of the day on which the letters-patent were granted. *Williams v. Nash*, 5 Jur., N. S., 696; 28 L. J., Ch., 886; 28 Beav. 93.

5. Limitation in a will that the tenant for life, who should be of full age, should reside at the house for six months in every year, to be computed from January to January, or in default forfeit 1,000*l.*:—Held, to mean a personal presence at the house for the period of six lunar months. *Walcot v. Botfield*, 2 Eq. Rep. 758; 1 Kay & J. 534; 18 Jur. 570.

II. REASONABLE.

6. What is reasonable time, in compliance with request of landlord, to pay a fine on renewal of leases in Ireland. In considering what reasonable time is after demand, the previous transactions are to be taken into the account. *Jackson v. Saunders*, 2 Dow 444.

7. Reasonable time in mercantile transactions not applicable to cases of contracts respecting real property. *Jessop v. King*, 2 Ball. & B. 95.

III. FRACTIONS OF A DAY.

8. Fraction of a day to support a commission of bankruptcy, by evidence that it was committed before the commission sealed on the same day. *Exp. Dufrene*, 1 Ves. & B. 54.

9. Fraction of a day allowed, in support of a commission of bankruptcy, by admitting evidence, that the act of bankruptcy, though on the same day, was previously to the issuing, *i.e.*, the awarding and sealing the commission. *Wydown's case*, 14 Ves. 80.

10. Under 6 Geo. 4, c. 16, s. 81, where the computation of time is to be from an act done, the day when such act is done is to be included. For some purposes the Court notices the fraction of a day. *Exp. Farquhar*, Mont. & M. 7.

11. Fraction of a day in notices to prevent reputed ownership. *Exp. Bagnold, Re Newton*, 3 Mont & A. 13.

IV. MONTH.

12. Under an order permitting a plaintiff to amend within a month, the amendment must be made within a lunar month. *Creswell v. Harris*, 4 L. J., Ch., 94; 2 Sim. & S. 476.

The Court will not relieve a plaintiff from the consequences of a mistake in acting under such an order, when his conduct shows that he had not in view the due prosecution of the suit. *Id.*

13. In most orders of the courts of law and equity "month" means a lunar month; and it so means in an order for payment of money. *Att.-Gen. v. Nembury Corporation*, C. P. C. 383.

14. Where parties contract that the purchase of lands shall be completed within so many months, calendar, and not lunar, months are intended. *Hipwell v. Knight*, 1 Y. & Coll. 401; 4 L. J., N. S., Exch. Eq., 52.

15. If a clerk and foreman is engaged at a weekly salary, and to have two suits of clothes, per annum, it is a yearly hiring within s. 48 of 6 Geo. 4, c. 16. The words "six months" in s. 48 mean "six lunar months." *Exp. Humphreys*, Mont. & Bli. 413; 3 Dea. & Ch. 114; 2 L. J., N. S., Bky., 71.

16. The nine months allowed by the stat. 8 Geo. 1, c. 2, s. 4, to a mortgagee of an evicted lease to redeem, are calendar months. *Bidulph v. St. John*, 2 Sch. & Lef. 521.

17. The six months given to tenants to redeem under the statutes of ejectment for nonpayment of rent, are calendar months, and the day on which the *habere* is executed is not to be included in the calculation. Where a right would be devested or a forfeiture incurred by including the day of the act done, the computation will be made exclusive of it. *Dowling v. Fowall*, 1 Ball. & B. 193, 196.

18. Under the Act against stock-jobbing, the six months in the first section means lunar months, and no discovery lies where the cause of action arose prior to the expiration of six lunar months. *Windale v. Fall*, 3 Bro. C. C. 11.

19. Months ought to be considered in equity as calendar months; but in Acts of Parliament it means lunar months, except in the case of *tempus semestre*, with regard to the lapse of livings, and other instances of six months, allowed to prohibition. *Franco v. Alvaes*, 3 Atk. 346.

20. By 2 & 3 Edw. 6, c. 13, s. 5, all barren heath or waste land shall pay tithe after seven years' improvement and conversion into arable or meadow; and the suggestion for a prohibition against the Spiritual Court must be proved within six months after the prohibition granted, for it is an affirmative suggestion; which six months shall be computed by the calendar, and begin to run from the teste of the prohibition. *Thomas v. Gifford*, 2 Show. 92; *Straker v. Baynes*, *id.* 308.

1. The six months for redemption given to the tenant, after the execution of the *habere*, by 4 Geo. 1, c. 5, are calendar and not lunar months. *Devereux v. Bradstreet*, Wall. Lyn. 338.

2. A custom of letting on a particular estate cannot be imported into an agreement so as to give to the word "month" the meaning of "calendar month," unless, perhaps, in the case of an estate so large that all persons living in the district may be presumed to know of the custom. *Rogers v. Hull Dock Co.*, 4 N. R. 494; 10 Jur., N. S., 1245; 12 W. R. 1101; 13 W. R. 217; 11 L. T., N. S., 42, 463.

3. The plaintiff hired chattels of the defendant by a hiring agreement, by which he agreed to pay him a certain sum once a week, the hiring to be for twenty-six months from the date of the first payment. The plaintiff afterwards gave the defendant a bill of sale of the same and other chattels to secure money owed by him to the defendant. An account was ordered of the dealings between the plaintiff and defendant, the bill of sale to be a security for what should be found due on such account. The defendant claimed that in taking the account the twenty-six months should be taken to be calendar, and not lunar months:—Held, that the months must be taken to be lunar. *Hulton v. Brown*, 45 L. T. 343; 29 W. R. 928.

V. OTHER CASES.

4. A week's order to examine means exclusive of that day se'night. Otherwise in Irish courts. *Donovan v. Keatinge*, 2 Moll. 337.

5. Notice for payment of a mortgage at three o'clock, is not forfeited, where there is an attendance before four o'clock. *Know v. Simmons*, 4 Bro. C. C. 443.

6. Two bound jointly and severally; a day given to one for payment shall be extended to other. *Anon.*, Cary 1.

7. An assignment with notice of an act of bankruptcy, is not protected under the old statutes after the lapse of five years. *Mountford v. Ponten*, Mont. 79; 7 L. J., Ch., 156.

8. Deed of composition by creditors not signed within the time stated in it, though void at law, yet if the creditors act under it who have not signed it, it is good in equity. Plea of two creditors not having so signed it, therefore, held bad. *Spottiswoode v. Stockdale*, Coop. 102.

9. The word "forthwith" in a notice to a party charged criminally, and out on bail to appear, on pain of forfeiting his recognizance means, within a reasonable time from the service, and not from the date of the notice. *Reg. v. Price*, 8 Moo. P. C. 203.

TITHES.

- *As an Objection to Title on Sale of Land.* See VENDOR AND PURCHASER, XI. VI. 7.
- *Abatement or Compensation in respect of on Sales of Land.* See VENDOR AND PURCHASER, IX. IX.

I. JURISDICTION, 6703.

II. TITLE TO.

1. *Of Crown*, 6704.
2. *Of Rector*, 6704.
3. *Of Vicar. Endowment of Vicar, ages*, 6706.
4. *Of Perpetual Curate*, 6709.
5. *Of Portioner*, 6709.
6. *Inclosure Acts. Effect*, 6711.

III. GRANTS, CONSTRUCTION OF, 6712.

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VI. WHETHER GREAT OR SMALL, 6714.

VII. OBLATIONS AND EASTER OFFERINGS, 6714.

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IX. EXEMPTION AND PRESCRIPTION IN NON DECIMANDO, 6717.

X. SETTING OUT AND PAYMENT, 6719.

XI. MODUS.

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1. *Validity*, 6721.
2. *Proof of*, 6726.
3. *Issue at Law*, 6727.
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XXI. OTHER CASES, 6750.

I. JURISDICTION.

10. *Quere*, have courts of equity jurisdiction with respect to tithes, except as incident to their jurisdiction in amount, and in enforcing discovery. *Disney v. Taaffe*, San. & Sc. 113. n.

In a suit for tithes, where the sum in dispute was only 6l. 1s. 5d., the defendant having moved at the Rolls that, on payment of this sum, the plaintiff should be stayed from all further proceedings, the Master of the Rolls, under the special circumstances, granted the motion:—Held, on appeal, that the order of the Rolls should be affirmed; and that as, in this case, there was no allegation of any special circumstances arising, either

from combination, or any right to be ascertained, or any difficulty in the way of proceeding at law, the bill might have been demurred to or dismissed at the hearing, with costs. *Semble*, that the tithe composition might have been recovered in any county in which the defendant was resident, even though the lands out of which the tithe issued were situate in a different county. *S. C. nom. Tisney v. Taaffe*, 1 Dr. & Wal. 94. Affirming *Sau. & Sc.* 105.

1. *Quere*, whether a court of equity can make a decree to establish the right to tithes. *Day v. Drake*, 3 Sim. 72.

2. Sequestrators appointed by the Court of Chancery have no right to seize on the tithes of an ecclesiastical benefice. *Ward v. Hayes*, 1 Hog. 107.

3. Chancery has jurisdiction in case of sequestration of tithes during a vacancy, by reason of general jurisdiction of court in matters of trust. *Biroh v. Bygrave*, 6 Madd. 158.

4. Bill for partition will lie as to tithes. Demurrer overruled. *Gibson v. Montford*, 1 Ves. 404.

5. The award of the commissioners, although final as between the tithe owners and the tithe payers, yet, as between the former, does not preclude further investigation as to their title, which by accident or mistake was not brought forward until after the award made; as where by the award the whole was made payable to the rector, he being entitled only to a moiety, the patron the other joint owner being ignorant of his right, and the former having under mistake received the whole:—Held, that the patron might have relief in the Court of Chancery against the former. *Clarke v. Yonge*, 5 Beav. 523.

A. and B. were entitled to tithes in equal moieties; B. under mistake received the whole. A bill filed by A. against B. for his moiety dismissed with costs. *Id.*

6. It is no ground for application to Court of Equity, to restrain plaintiff in suit for tithes in equity from proceeding in actions brought by him against parishioners, not parties to that suit, for not setting out their titles, that equity has decreed issue to try the validity of (parochial) moduses, laid in answers as covering the articles in respect of tithes of which actions are commenced; nor will fact of such parishioners having entered into bond to pay costs of all suits, etc., relating to such tithes, entitle them to relief. *Taylor v. Cooke*, 9 Price 207.

7. The Court will, on motion, grant an injunction to restrain actions for tithes, which had accrued since the decree for an account, and pending the taking of the report; on the ground of the plaintiff having elected to proceed in equity, and having got the relief he prayed for: and as the subject matter of the actions was the same as in the suit, he must continue in equity till the report of the Master is made. *Thorpe v. Mattingley*, 2 Y. & Coll. 421; 8 L. J., N. S., Exch. Eq., 9.

8. Canonical constitutions of ecclesiastical synods have no binding force or authority in this kingdom in questions of tithes between the clergy and laity in courts of law, without acquiescence. *Evans v. George*, 12 Price 76.

9. If a modus be pleaded in the Spiritual

Court, and they refuse the plea, a prohibition shall go. *Hucks v. Phelps*, Bunb. 8.

10. Where a bill is brought in the Exchequer Chamber to establish a modus, the Spiritual Court shall be enjoined. *Blackett v. Finney*, Bunb. 176. *Salmon v. Rake*, *id.* n.

11. After a suit in the Ecclesiastical Court for a subtraction of tithes, defendant there brought a bill in equity to establish a modus, and, on the bare suggestion of a modus, moved for an injunction. Injunction denied, as it would be a precedent for tripping up both the ecclesiastical and common law courts. So the King's Bench will not grant a prohibition, unless it be shown that a modus has been pleaded in the Ecclesiastical Court, and refused there; and equity grants an injunction on the same ground that a court of law grants a prohibition. *Rotherham v. Fanshaw*, 3 Atk. 628.

II. TITLE TO.

1. *Of Crown*, 6704.

2. *Of Rector*, 6704.

3. *Of Vicar*. *Endowment of Vicarages*, 6706.

4. *Of Perpetual Curate*, 6709.

5. *Of Portioner*, 6709.

6. *Inclosure Acts*. *Effect*, 6711.

1. Of Crown.

12. The King, in right of his crown, has a general right to the tithes of all lands situate in extra-parochial places. *Att.-Gen. v. Eardley (Lord)*, 1 Dan. 271; 8 Price 39.

13. Tithes of rectory which belonged to a dissolved abbey, are due to the grantee of the Crown, and not to the incumbent as rector. *Turner v. Smith*, 7 Bro. P. C. 7.

2. Of Rector.

14. The defendant, in a suit for tithes, by his answer said that he heard and believed that the plaintiff was instituted and inducted into the rectory of A., and ever since continued and then was rector of A., and as such was entitled to the tithes of A.; "but for greater certainty as to the truth and legality of said several matters, defendant begs leave to refer to such proof of same as complainant may adduce." It was proved that the plaintiff had been in the receipt of tithes for several years, and had been paid tithes by the defendant:—Held, that the plaintiff was not bound to prove his title by the production of the certificate of his collation, presentation, or donation. *Jones v. Waller*, 1 Jones 300.

15. In a suit for tithes, the plaintiff, claiming as rector, need go no farther in showing his title than to prove institution and induction, and occupation by the defendant, and it makes no difference that the benefice consists of a union of parishes, although such union of parishes must be confirmed by the lord-lieutenant and Privy Council; such confirmation being merely in approval of the act of the bishop, his certificate is sufficient *prima facie* evidence of title, and the confirmation need not be proved. *Armstrong v. Blake*, 1 Moll. 178.

1. Representatives of a rector not permitted to enforce payment of tithes which the rector never demanded. *Cart v. Hodgkin*, 3 Swan. 161.

2. Payment of tithes by the defendant, a parishioner, is *prima facie* evidence against him of the rector's title. *Chapman v. Beard*, 3 Anstr. 942.

3. Immemorial non-payment of any tithes from a district cannot raise a presumption of an exemption by grant from the lay rector, but is strong evidence to explain the extent of the grant to the rectory, if at all doubtful. *Petre (Lord) v. Blencoe*, 3 Anstr. 945.

4. In a suit by rector for account of great tithes, evidence of vicar to prove payment of small tithes to himself is admissible. *Barker v. Baker*, Wightw. 397.

5. Mere non-payment of a particular species of tithes is no evidence against a lay rector of a conveyance of that tithe. *Nagle v. Edwards*, 3 Anstr. 702.

6. A party entitled to an impropriate rectory for life, and in possession, is entitled to receive the tithes, notwithstanding the legal estate is subject to a trust term to secure annuities, and to a mortgage. *Glegg v. Legh*, 1 Dow, N. S., 98; 1 Bli. N. S. 302.

7. If tithes claimed by vicar are supposed to be payable to rector, and he makes no claim, but stands by and allows the vicar to take them, he is bound as between him and vicar by the effect of such laches. *Manby v. Lodge*, 9 Price 231.

8. Bill to establish the rector's right to tithes, and for an account; the defence, though formerly stated as a prescription *de non decimando* in a *quo* estate, was, as to two-thirds possession by the lord of the manor, under an apparent title by various conveyances, etc., stated by the answer, from 37 Hen. 8, of the lands with tithes generally, or two-thirds specifically, with evidence of reputation and notice to the plaintiff, who had purchased the advowson and was lessee of the tithes, but the commencement of the title did not appear. The bill was dismissed with costs. *Strutt v. Baker*, 2 Ves. J. 625.

9. Plea of title to bill by impropriate rector, for account of tithes, overruled. *Heathcote v. Aldridge*, 1 Madd. 236.

10. Plea of non-residence in bar to a bill for tithes is good. *Quilter v. Mussendine*, Gilb. Exch. Rep. 228. *S. P. Mills v. Etheridge*, Bunb. 210.

11. In proving the title of a lay impropriator to tithes it is not necessary to produce the deed of severance; it is sufficient to give evidence that there was one. *Fansham v. Rotherham*, 1 Eden 297.

12. Bill by a lay impropriator for tithe hay; he derived his title under a grant from Jac. 1, but it appearing that no tithe had been paid since the grant, the bill was dismissed. *Stone v. Rideout*, Bunb. 262.

13. Tithe of peas and beans shall be paid to the impropriator, if the vicar doth not show an endowment or usage to the contrary. *Gumley v. Burt*, Bunb. 169.

14. Bill by a lay impropriator for tithe; he only proved his claim under laymen, and went no further back than thirty-four years. This is sufficient:—Held, also, that where a general exemption is insisted upon, a partial one

cannot be admitted in evidence. *Leigh v. Maudsley*, Bunb. 296.

15. Person suing as lay impropriator for tithes of a parish in which there has been within living memory a parish church and burial-ground, in order to establish his title, must show that there has been an appropriation, and when it was made. *Norbury v. Meade*, 3 Bligh 211.

16. A grant of tithes of land will not be presumed from long non-payment, although lands may be shown to have been once in possession of a former lay impropriator, unless some evidence of the existence of a grant be offered, or the enjoyment of tithes be shown by at least something like pernancy, or a dealing with the tithes as owner. Nor will evidence of retainer only be sufficiently strengthened to support such presumption by its being shown that a former impropriator had declared the lands in question to be exempt from tithes, or by instances of exemption of tithes in leases by impropriate rector. *Meade v. Norbury*, 2 Price 338.

17. The mere non-payment of tithes, for however long a period, would not be evidence of a grant; yet a layman's adverse enjoyment or pernancy for a long series of years of the tithes of certain lands, or of a money payment in lieu of tithes occupied by a succession of deeds, by which the tithes of money payments in lieu of tithes have been conveyed from one person to another, corresponding with the enjoyment, affords evidence sufficient to justify a jury in presuming a legal grant of the tithes. *Bacon v. Williams*, 3 Russ. 525.

18. The mere non-payment of tithes is not a sufficient answer to a claim of tithes made by a lay impropriator. *Garland v. Cartledge*, 4 Cl. & F. 693; 11 Bli. N. S. 421.

Perception of tithe of corn is evidence of a title to tithe of hay. *Id.*

19. Though a layman may prescribe *in quo* estate to have tithes as appurtenant to a manor, upon the ground that before the time of memory the lord may have bargained with the parson to pay him a pension and receive the tithes of the manor, yet this prescription has never been extended to the lord and his assigns, *i.e.*, the assigns of the tithes simply. *Knight v. Waterford (Marquis)*, 4 Y. & Coll. 283; 10 L. J., N. S., Exch. Eq., 57; 5 Jur. 818.

20. A lay impropriator, who is in possession of a rectory, and in perception of the tithes, subject to charges by way of mortgage, and for raising portions (inasmuch as such mortgagees, etc., having permitted the possession, cannot claim the bygone rents), has a title sufficient to sustain a suit against occupiers for an account of tithes. *Cherry v. Legh*, 1 Bli. N. S. 306.

Upon a bill filed by such a lay impropriator against an occupier, who had taken a lease from the rector of the tithes of corn and grain, but expressly without prejudice to any question as to the tithes of hay, and who by his answer set up, but did not prove, a *modus* as to the small tithes:—Held, that proof of the perception of some tithes by a lay impropriator, without evidence of a grant from the Crown, gives a title to other tithes of the perception of which there is no actual proof. *Id.*

If the occupier shows a colour of title to the tithes not rendered, a court of equity will not

interfere, but leave the plaintiff to his remedy at law. *Ib.*

1. At the trial of an issue to ascertain whether one of defendants, a layman, was entitled to tithes as a modus of certain lands, it was proved that a payment described as a tithe, or a rate tithe, issuing out of the lands in question, had been conveyed by defendant's title-deeds for the last 150 years, and that this payment had been received by defendant and his ancestors, and that no tithe had ever been paid to plaintiff, the rector, within living memory; and a verdict was found for defendant. Motion for new trial refused. *Williams v. Bacon*, 1 Sim. & S. 415; 1 L. J., Ch., 210.

2. Upon the trial of an action brought by a lay impropriator, under the stat. 5 & 6 Edw. 6, c. 13, for not setting out tithe, evidence having been given that the tithe in question had never been paid for the lands of the defendant, the judge was required to direct the jury that a grant or release of the tithe ought to be presumed. But the judge told the jury that they could not presume a grant from mere non-payment, and that it was no answer to a claim of tithe by a lay impropriator; whereupon a bill of exceptions was tendered and signed. A verdict upon this direction having been given for the plaintiff, and judgment thereon, upon a writ of error the judgment was affirmed in the Exchequer Chamber and in the House of Lords. *Andrews v. Drever*, 9 Bli. N. S. 471; 3 Cl. & F. 314.

From evidence of a grant from the Crown in 1579, and of modern enjoyment of tithes, the jury may presume intermediate conveyances of the rectory between the date of the original grant and a lease of tithes dated in 1686. *Ib.*

Perception of tithe of corn is evidence of a title to tithe of hay. *Ib.*

From evidence of right to tithes of all kinds, in a lay impropriator, up to a given time, and of perception of the corn tithe since that time by another party, a jury may, if it think fit, infer a grant of all the tithes by the first-mentioned impropriator to such latter party, who is therefore at liberty, in support of his right to the hay tithe, to give in evidence leases of that and all other tithes from the presumed grantor. *Ib.*

3. Presumption of grant founded on non-perception, may be raised against a lay-rector, if the pleadings are so framed as to admit it. *Ringrose v. Todd*, 12 Price 650.

4. Impropriator of the small tithes bound to maintain a priest where there is no vicarage endowed. And in such case, the king may assign to a curate such a proportion of the small tithes as he thinks fit. Otherwise, where there is an endowment, though never so small. *Bonsey v. Lee*, 1 Vern. 247.

3. Of Vicar. Endowment of Vicarages.

5. In a suit by the vicar for agistment-tithe, the endowment was lost; but he produced an old extent of the rights of the impropriators and tenners, in support of his claim to all small tithes, except wool and lambs; tithe of agistment had never been paid in the parish; the defendant was in the occupation of land in the parish, and also of the

other tithes, which he claimed as rector. The Court decreed for the vicar without an issue. *Garmons v. Barnard*, 1 Anstr. 296. Decree reversed in House of Lords, and issue directed. See 3 Anstr. 926.

6. The right to compel an account for tithes being incidental to the legal title, and a rector having *prima facie* a title to all the tithes in turn, it seems that in questions between the rector and vicar, a court of equity ought not to make a decree in consequence of their favourable opinion of the vicar's title, and in derogation of that of the rector, until the title of the vicar has been established at law, unless such title is made out in the most clear and satisfactory manner. *Barnard v. Garmons*, 7 Bro. P. C. 105.

7. Where defendant admits that a vicar is entitled to all sorts of tithes, but insists on a special exemption, the vicar shall not be obliged to show any special title, either by endowment or prescription. *Pye v. Rea*, Bunb. 72.

8. If endowment of tithes be not followed by usage, the claimant as to such tithes as fail of usage shall not support his claim. *Anon.*, Loft. 66.

9. A modus bad in law received by the vicar is proof of endowment of the tithe for which the modus was paid. *Travis v. Oaton*, 1 Anstr. 309.

10. A modus for agistment tithe paid to the rector is a bar to the demand of that tithe by the vicar, although by the endowment he has all the small tithes. *Ellis v. Saul*, 1 Anstr. 342.

11. A vicar has the same right to all tithes in his endowment as a rector has of common right. *Fox v. Rutty*, Bunb. 87. *Sed quare*, if a vicar has received for many years tithes, not mentioned in his endowment, whether subsequent augmentation or endowment shall not be presumed. *Twiss v. Brazenose Coll.*, *Oxon.*, Hardr. 328.

12. In a suit by a vicar for tithes the occupiers insist on certain exemptions, but the impropriator by his answer admits the vicar to be entitled to all tithes, except corn and grain. On this admission the Court decreed for the vicar, without hearing the evidence touching the exceptions; but this decree was reversed on an appeal, and the Court was ordered to hear the cause upon the pleadings and proofs. *Berkeley v. Fox*, 3 Bro. P. C. 618.

An answer of impropriator admitting title of vicar to all tithes except corn and grain, is not sufficient to establish that right against occupiers. *Id.* 613.

13. Bill by a vicar for tithe hay and small tithe. Defendant admitted, by his answer, that the vicar was entitled to all tithe, except corn and grain:—Held, sufficient to support the vicar's right to hay. *Fox v. Bardwell*, Bunb. 327.

14. Where there is an old endowment of a vicarage, but the modern usage varies from it, there is ground to presume that the variance has arisen from the act of persons competent to make it. The endowment is not, therefore, conclusive evidence in favour of vicar, but his right is properly triable at law. *Carr v. Henton*, 7 Bro. P. C. 100.

15. Usage of rendering one article of small tithe to the rector will not support his title against the vicar, if it appears to have origi-

nated from a mistaken notion that the article in question was a great tithe. *Davis v. Benn*, Jac. 95.

1. Bill by a vicar for tithe herbage and furze. Plaintiff proved that the vicar was entitled to all small tithes within the parish, and that the great tithes were constantly paid to the impropriator; and he gave one instance within thirty years of a compensation with the vicar for the agistment tithe of the close:—Held, this was sufficient proof of the vicar's title to the small tithes. *Goole v. Jordan*, Bunb. 144.

2. Where an endowment gave to the vicar the tithes of flax and hemp, mills, dairies, calves and colts, pigs and kids, geese, hens, eggs, bees, and gardens, and other small matters, belonging to the altarage of the church and chapel:—Held, there being no usage to the contrary, that these words would carry all small tithes. *Gibson v. Peacock*, Younge 184.

3. A vicar, unable to produce an endowment, has to support his claim by secondary evidence, and, if that secondary evidence furnishes a ground for inferring that the missing endowment contained a gift to the vicar of all small tithes, there are authorities for decreeing to him not only the tithes which have actually been received by him, but all other tithes of that class, either neglected or of modern introduction. The cases in which the inference has been made have been, generally, cases in which the vicar has received the whole small tithes actually rendered, and in which it did not appear that any other person had received any tithes of that class. Such a usage has been supposed to warrant the presumption that the endowment bestowed upon the vicar all small tithes, in general words. The intention of the Ecclesiastical Survey was to ascertain the value and amount of the living, the particular sources from whence that amount came being but a secondary object; and the expressions, therefore, upon the latter point are equivocal, and capable of receiving any construction, from contemporaneous and collateral documents and usage. And, therefore, where the Ecclesiastical Survey, after enumerating certain tithes, stated the vicarage to be worth a specified sum *in decimis minutis et oblationibus*, but collateral documents and usages showed that the vicar had not received all small tithes, but only some small species of small tithes, and the other small tithes had been received by the rector and his lessees; the Court held:—That the vicar was not entitled to all the small tithes, contrary to *Cowliffe v. Taylor*, 2 Price 329; *Masters v. Fletcher*, Younge 25.

4. A rector (claiming tithe of seed against a vicar, endowed of all small tithes except hay, on ground of presumption, that, as the former has had perception of the tithe of seeds, notwithstanding the terms of the endowment of the latter, who had also had immemorial perception of the tithe of corn of certain lands ultra his endowment, an ancient exchange must be presumed of vicarial for rectorial tithes) will be held to strict proof of his title to tithes sought, and of exchange or grant of the tithes. Nor is his perception of tithe in question available against percep-

tion by vicar, if it was even doubtful whether they were rectorial or vicarial tithes, nor can rector insist on issue. *Dorman v. Curry*, 4 Price 109.

5. Construction of endowment of vicarage, as to articles of modern introduction. Usage is the broad ground of presumption in favour of vicar's endowment; and if there be an endowment in proof, expressing of what tithes vicarage shall be endowed, and other tithes not so expressed are received by him, a subsequent endowment shall be presumed. *Williams v. Price*, 4 Price 156.

6. Endowment produced, showing the vicarage expressly endowed of hay, not sufficient to support a bill for that tithe without usage, against evidence of money payment to rector in lieu of hay; but grant from Crown subsequently to endowment, including all the tithes in general words, not sufficient to overturn vicar's right without proof of perception. A particular and minute enumeration of the several articles of endowment in that instrument does not preclude vicar's right to other small tithes not therein mentioned. *Manby v. Curtis*, 2 Price 284.

7. Vicar (claiming tithes), relying on a special endowment to support his case, is not precluded by the enumeration therein of specific titheable matters, the tithes of which were assigned to him, from demanding from occupiers tithes of other articles *ejusdem generis*, usually called small tithes, where the vicar can show that he has received some tithes not included in the enumeration in his endowment, and they are not shown to be payable to some other person. *Manby v. Lodge*, 9 Price 231.

8. A vicar, by showing a general right to the perception of tithes in kind, places himself in the situation of a rector, and throws it upon the occupier to prove the existence of moduses set up, and the lands to which they apply; and, *semble*, that evidence of a general payment throughout the parish of so much in the pound in lieu of tithes regulated according to the poor's rate or rack-rent, is sufficient evidence of a vicar's general right to tithes in kind. *Wright v. Southwood*, Dan. 137.

9. It is not sufficient for vicar, who rests his case on presumption of an endowment from evidence of perception, to prove that he had received the tithes claimed from the rest of the parish generally, and even from part of the district in which defendant's lands are situate, unless he carries it to the parts for which the exemption is claimed by the defence; and the vicar not doing so, proof on part of defendants that no tithe has ever been paid for their lands, will entitle them to an issue: nor will the Ecclesiastical Survey, stating vicar to be entitled to tithe of parish generally, supply the absence of proof of perception from the particular lands. *Armstrong v. Hewitt*, 4 Price 216.

10. Vicar claiming tithe of hay may establish his right by sufficient proof of perception during living memory, where none can be shown to have been enjoyed by rector, although his endowment actually negative his right to that tithe expressly, and state it to belong to rector, on presumption of a subsequent endowment, which the Court is bound to adopt. *Parsons v. Bellamy*, 4 Price 190.

Perception of tithes by means of a composition, which has always been understood by the parties to have been paid for tithe hay, is as strong evidence as if it had been paid in kind. And perception by vicar for a considerable period, where its inception cannot be shown, and is not met by perception by rector, or any other person, is a sufficient proof of usage to ground a presumption of perception long anterior, and of its having been founded on subsequent endowment; nor will Court grant an issue for the rector. A receipt for payment (by person sued by vicar for tithes) of plaintiff's bill of costs, is evidence of suit having resulted in favour of vicar. So also is an entry to that effect in a former vicar's books. *Ib.*

1. Evidence relating to tithes so old as to be unintelligible, issue was directed. Evidence of reputation of certain lands having been inclosed in pursuance of agreement, not admissible. Copy of lost terrier rejected as evidence. *Leathes v. Newitt*, 4 Price 355.

Non-perception of vicarial tithes by either vicar or rector (the latter admitting the vicar's right except as to certain titheable articles, there being no third claimant) in certain parts of parish, throughout which vicar receives some small tithes, is negative evidence in favour of vicar's right to all other than excepted articles. *Id.* 374.

2. In favour of a long-continued enjoyment of tithes, in conformity with successive recitals in old leases, the Court will presume performance of conditions to endow, etc., and adopt every other presumption necessary to give effect to such a title so supported. *Woolley v. Birkensham*, 12 Price 702.

3. A general title to tithes throughout a parish in a vicar gives him a *prima facie* case; and throws it on the defendants to prove their alleged exemptions from liability, on the trial of an issue. *Pulley v. Hilton*, 12 Price 625.

4. Vicar having made out a *prima facie* title to all tithes, except corn, grain, and hay, in a suit for agistment-tithe, a defence that it belonged to the lay impropiator is not proved by showing that agistment-tithe has never been paid to vicar, and that lay impropiator is entitled, under a grant from the Crown, of tithes of corn, grain, hay, and grass; and that tithe of agistment is covered by a modus payable to impropiator in lieu of tithe of hay and grass. *Williamson v. Hutton*, 9 Price 187.

5. Where a vicar succeeds in establishing a general right to all tithes, except those of corn and grain, throughout a parish, it requires very strong evidence to show that an impropiator of a particular district, who claims under a grant, limiting his title to the excepted articles, is entitled to the tithes of any other thing. *Williamson v. Lonsdale (Lord)*, Dan. 171.

6. Where a rectory was granted by the Crown in 22 Edw. 6, with licence to appropriate, and a direction to appoint a vicar, and endow him with a dwelling-house, and on the appropriation to endow him also with a specified annual pension or portion for his food and sustentation; and it appeared that there had been a vicar through all subsequent time, and that such vicar had, for a great number of years back, received from the lessees of the rectory for the time being a

larger sum than the pension specified by the grant; but no instrument of endowment, nor evidence of the existence of such, was produced, from the absence of which it was contended that the terms of the grant had not been complied with, and that the payment by the lessees was a voluntary payment by the impropiators, and determinable at their pleasure; the Court held:—That after so long a possession it might be presumed that an endowment had been made according to the terms of the grant, and that the vicarage had been subsequently augmented. *Inman v. Whormby*, 1 Y. & J. 546.

7. In a suit by the vicar, where the endowment is lost, and it appears from the evidence that the rector has not received any small tithes, but that the vicar has received all the small tithes which have been rendered, the Court infers, in favour of the vicar, that the endowment conferred upon him, by a general expression, all small tithes whatsoever, carrying not only such small tithes as were then actually received, but such as were at that time neglected, or came afterwards into existence by the improvements in husbandry; but where the vicar never has received, or been entitled to receive, the whole of the small tithes, then it cannot be so readily presumed that the endowment contained a gift to him in those general terms. *Willis v. Farrer*, 2 Y. & J. 217.

8. Upon a bill for tithes by a vicar against the occupiers of an estate, which had belonged to the knights hospitallers of St. John of Jerusalem, and, after the dissolution of the monasteries, being vested in King Henry VIII., had been granted to him by the Archbishop of York and his successors, under whom the defendants occupied. The defendants pleaded that the lands were held by the hospital exempt from tithes; that they were so held and granted by the king; and they proved that no tithes had, within memory, been paid for the lands. On the part of the vicar was produced an inquisitum of an inquisition, made under the authority of the Archbishop of York in 1314, by which it was found, after specifying certain tithes, "that the vicar ought to receive all other tithes to the said church belonging (except corn and hay) which the master and brethren of the hospital of St. John of Jerusalem received, as rectors, but that all the vicars had, ever since the time of the ordination of the vicarage, received all other tithes, and peaceably, and did so at that time, but they were bound to give their tithe of corn and hay:—Held, that this instrument afforded evidence that the small tithes had been *de facto* paid to the vicar at the time when it was made, and that the usage proved had grown up from some unexplained cause after the time of memory; and that it therefore overturned the defendant's *prima facie* case; and an account of tithes demanded by bill was decreed. *Donnison v. Elsley*, M'Clel. & Y. 1. Affirmed *sub. nom. Elsley v. Donnison*, 2 Bl. N. S. 94.

Evidence of reputation of exemption of district from tithes read *de bene esse*. S. C. M'Clel. & Y. 24.

9. The words "privy tithes" are generally synonymous with "small tithes;" therefore, although the ecclesiastical survey appeared to

distinguish between privy tithes and small tithes, yet this was held to be explained by a subsequent terrier, which mentioned privy tithes, in contradistinction to tithes in general, as being payable to the vicar; and under these circumstances, supported by evidence of former vicars having regularly received payments called "privy tithes," although those payments had been in some instances made for houses only, and in other instances omitted altogether, and although some portion of the small tithes was proved by the defendants to have been conveyed away:—Held, that vicar was entitled to a decree for small tithes. *Hall v. Godson*, 2 Y. & Coll. 153. Affirmed *sub. nom. Clee v. Hall*, 7 Cl. & F. 744; West 148.

1. Vicar's bill for small and great tithes of an ancient park, which had been disparked and thrown into cultivation, dismissed; there being no evidence of perception, or of receipt of compositions for tithes by the vicars in respect of the lands within that district, although it was proved that compositions for tithes had been regularly paid to the vicars in respect of the other lands in the township in which the park was situate. *Hall v. Farmer*, 2 Y. & Coll. 145.

2. Held, upon circumstances stated in report contained in this case, tithes of hay and corn were due except as to certain farms covered by modus. *Holdsworth v. Fairfax*, 8 Bli. N. S. 882; 3 Cl. & F. 115.

3. By the common law, the rector has a right to all such tithes as the vicar is not proved to be entitled to, and the title of the vicar must rest either on direct proof of an endowment, or on an endowment to be inferred by prescription or usage. *Att.-Gen. v. Ward*, 11 Beav. 203; 17 L. J., N. S., Ch., 486; 12 Jur. 807.

4. Of Perpetual Curate.

4. A perpetual curate removable at pleasure cannot maintain a bill for tithes. *Price v. Pratt*, Bunb. 273.

5. There is nothing illegal in the supposition that, in ancient times, a chapel and chapelry existed, to the curate or chaplain of which the rector of the parish, with the consent of all proper parties, may have assigned a portion of the tithes by way of endowment, reserving to the rector the right of patronage of the curacy: and, therefore, where it appeared from ancient documents that a chapel had immemorially existed as a parochial chapel, with rights of baptism, marriage, and sepulture; and that, in early times, there were chaplains having an assignment of the tithes, as of old time, and there were appointments to the curacy from a very early period; and there was evidence of usage, on the part of the curate, to receive all small tithes of modern introduction:—Held, that the curate was entitled to all small tithes, except wool and lamb, which appeared from the documents to be clearly payable to the rector. Where parishioners, dwelling within a chapelry, contribute to the repairs of the parish church, it is strong but not conclusive evidence that the chapel is a chapel of ease to the inhabitants of the parish, and not a separate and distinct chapelry. It does not of necessity follow that

there cannot be a parochial chapel because there has not been a union of parishes in ancient times, nor any vicarage or mother church with which the chapel can be supposed to have been anciently united. And the circumstance that there is no vicarage may be accounted for by the fact of the rectory having been conveyed to a monastery prior to the stats. 15 R. 2 and 4 Hen. 4. *Dent v. Rob*, 1 Y. & Coll. 1.

6. Proof of perception of certain tithes by the successive officiating curates of a church for a period of nearly two hundred years, without opposition on the part of the impropriate rectors who had, during the whole of that time, resided in the parish:—Held, sufficient evidence of title, as against the tithe payers, to support a bill for such tithes by the present minister as perpetual curate, although the defendants insisted that such perception had been permissive only, and the documentary evidence was irreconcilable with the supposition of an endowment. *Oliver v. Latham*, 1 Ph. 408; 13 L. J., N. S., Ch., 149; 8 Jur. 411. Affirming 1 Y. & Coll. C. 243; 6 Jur. 206.

To a bill by a perpetual curate for tithes, a modus was held to be well pleaded, as payable to the impropriate rector, or other owner for the time being of the tithes. *Id.*

7. James I., by letters patent, granted the rectorial churches and chapels of T. and K., and two parts of the tithes and altarages of the rectory or chapel of C., parcel of the possession of the abbey or monastery of T., in Ireland, the grantee repairing and maintaining the chancel of the churches, rectory, and chapels, at his cost, from time to time, for ever, and supporting annually and from time to time paying the stipend of the curates, and all other the rents and services issuing or payable out of or from the premises. In 1641, the church of K. was destroyed, and was not afterwards rebuilt. By an order of the Lord Deputy and Council, in 1678, the parish of K. was united with the parish of A. In 1855, the bishop of the diocese, by a deed, executed under 14 & 15 Vict., c. 72, erected the ancient parish of K., and a part of the parish of A., into a new district or parish, to be called by the name of the parish of K., and constituted the district or new parish of K. into a perpetual cure, and declared that the curate thereof, and his successor, should be perpetual curates, thenceforth and for ever, of the new parish, and appointed a salary for the perpetual curate; and in 1856 a new church was erected, which was situate in the old parish of K.:—Held, that the curate of the new parish of K. was not entitled to any stipend from the owner of the tithes of K. *Att.-Gen. v. Ashe*, 10 Ir. Ch. R. 309.

Held, also, that the owner of the tithes was not bound to repair the chancel of the new church of K. *Id.*

5. Of Portioner.

8. An incumbent of one parish is capable of tithes in another as a portioner, or in nature of a portioner, but it is incumbent on him, as claiming against a common right, to prove his title strictly, either by producing

an actual grant, or evidence of usage, affording by presumption legal evidence of a grant. Evidence of usage to receive certain mixed tithes by an incumbent in another parish as a portioner, or in the nature of a portioner, is not of itself evidence of a right to receive the tithes of all descriptions which lands may produce under any circumstances. *Carlile v. Blain*, 1 Y. & J. 123.

1. To bill for tithes by lessees of spiritual impropiator against occupiers alone, mere non-payment, coupled with evidence of pernanacy by landlord of premises for a few years, and of loose reputation of title in him as a portioner, unsupported by any document, does not constitute a defence, and the case will not be sent to law. *Wolley v. Platt*, M'Clel. 468.

The title of a portioner must be either proved by showing grant under which he claims, or, if it has been lost, by that species of evidence which would enable the Court to presume that such a grant once existed. *Id.* 473.

Whenever a portion of tithes is claimed, actual pernanacy of these tithes from a long and remote time ought to be proved. *Id.* 476.

2. The Court will not make a decree in favour of rector claiming tithes in kind of lands not within his parish, for which he has for many years received a money payment by way of composition, which defendant does not pretend to insist on as a modus, nor will it grant a commission to ascertain boundaries of such lands without a previous inquiry, whether the plaintiff is entitled to any and what tithes on such lands by trial at law or on issue; nor can he take advantage from a former decree in favour of a predecessor of plaintiff, and a verdict obtained by him on an issue under it, especially if the intermediate rectors have taken no step of advantage from such suit. *Sanders v. Longden*, 4 Price 117.

3. When a defendant, in a suit for tithes by a rector, makes out a clear defence as portioner, claiming under the successive grantors of the Crown of the possessions of one of the dissolved monasteries, a right to some of the great tithes of the rectory, yet, if neither can ascertain and show specifically what were the tithes which belonged to the rector or to the monastery, the Court has no means of assisting either party in availing himself of his title. The Court will not decree an account in favour of the rector under such circumstances, where he has never had perception; but they will retain the bill to give him an opportunity of taking an issue, or proceeding by commission, ejectment, or by action on the statute. The *onus probandi* is not on the portioner, if there has been no perception on the part of the rector. *Boulton v. Richards*, 9 Price 671.

4. A title (admitted) in portioners to tithes of corn, grain, and hay, and some other, but not all the great tithes arising within the parish, in a case where nature and extent of tithe due did not otherwise appear than by an admission in those terms in the answer, the plaintiff giving no evidence of his claim, so that it could not be ascertained in what character, whether as rector or otherwise, he was entitled:—Held, not to give him a right also (as a necessary incident on the title to

tithe of hay) to the tithe of clover, vetches, and other grasses, or food cut green, and applied for fodder for owner's cattle. *Semble*, that consumption of such titheable articles by owner's husbandry cattle, is not an available defence to a case to establish a right to the tithe of them. *Lewis v. Young*, 13 Price 394; M'Clel. 113. Reversed 2 Bli. N. S. 83.

5. A portion of tithes is distinct from tithe annexed to a rectory. *Dornes v. Mooreman*, Bunb. 189.

6. A usage to pay to the rector of the parish one-twentieth only, instead of the tenth, of the titheable matters of lands in an extensive manor, proved to be of very great antiquity, and supported by evidence, that the manor, though in modern times reputed to be within the parish and rectory, was anciently a parish of itself, was held to be a void usage, no evidence being adduced of its having had any legal origin:—Held, also, that it was impossible to treat the rector as a portioner, so as to deprive him of his common law right, and impose upon him the burden of proof required from a portioner; and that, it being clear that the manor (whatever might have been the case formerly) was at the present time within the parish and rectory, the legal union of the manor to the rectory would clothe the rector with the common law right to the tithes of the district so legally united to the parish. *Kensington (Lord) v. Pugh*, Younge 125.

7. Upon a bill for tithes by the lessee of a prebendary, against the occupier of a farm, he, by way of defence, suggested that his farm was part of the possession of a dissolved monastery; that the farm was situate in a district which had formerly been a distinct parish, and was still distinct in some respects; that all the lands in that district had paid from time immemorial only one-twentieth, instead of one-tenth of the produce; and that the other twentieth was a portion of tithe belonging to the farm, as part of the lands of the dissolved monastery:—Held, that assuming the district to have been a distinct parish, the presumption arising from evidence tending to prove one moiety to have been a portion of tithes is rebutted, the other moiety not being accounted for; and that the common law right of the parson to tithes applied as much to the whole of two united parishes, as to the tithes of one of the parishes before the supposed union. *Wilson v. Kensington*, 5 Bli. N. S. 475; 1 Cl. & F. 1.

8. To a bill in equity, by L. and his lessee, against an occupier of lands, stating a seizure of the corn, grain, hay, and grass, yearly arising within a certain district or portion of land in the parish of C., and praying an account of clover, vetches, and other grasses cut green, the defendant pleaded that he was not seized of any tithes within the parish of C., except such as belonged to the parsonage of Cannon (the district, etc.), which was an impropriate rectory, to which the tithes of clover, etc., cut and taken without being made into hay, did not belong, etc. Issue being taken upon this plea, the vicar of C. (not being a party to the suit) was examined as a witness, and deposed that there was no endowment, that he was entitled to the small tithes, and that he had always received a money

composition for the small tithes, including the parsonage of Cannon. The bill was dismissed, and the decretal order affirmed on appeal. *Lewis v. Bridgman*, 8 Bli. N. S. 907; 2 Cl. & F. 738.

A portioner entitled to tithe hay is not necessarily entitled to tithe of clover, tares, vetches, and grass cut and carried away green, *semble*. S. C. 3 Sim. 316.

A portioner is not entitled to an issue as a matter of right. *Ib.*

1. The *primâ facie* meaning of the word "*portio*," in an old document relating to tithes, is not a part of all the tithes of a parish, but all the tithes of a part of a parish. *Scarlet v. Luoton School*, 10 Bli. N. S. 592; 4 Cl. & F. 1. Affirming 2 Y. & J. 330.

6. Inclosure Acts. Effect.

2. An inclosure Act directed part of a waste to be sold, tithe free, to defray the expenses of the inclosure. The rector was not otherwise a party; and the saving clause was, of all claims except of the lord and of the commoners; yet the rector's right to the tithes of the waste sold tithe-free, was gone. These inclosure bills are not to be considered as merely private Acts. *Riddell v. White*, 1 Anstr. 281.

3. Under an Act for inclosing lands in the townships of A., S., and W., directing the commissioners to allot to the rector of the parish of W., in lieu of the tithes of the townships of S. and W., so much of the lands to be inclosed in the township of S., and of the titheable part of the township of W., as should, quantity, quality, and situation considered, contain, or be equal in value to, two-fifteenth parts of the titheable places thereof, and to make the rector of W. and the vicar of B., in lieu of the tithes of a part of the lands in the township of S. and A., to which they were entitled, a like allotment, equal to two-fifteenths of such lands, and declaring that, after the enrolment of the award of the commissioners, all tithes arising within the lands inclosed should cease, an award by which the commissioners allotted to the rector of W., "in lieu of the tithes of S. and A.," lands more in quantity than two-fifteenths of the lands inclosed in S. and A., but less than two-fifteenths of the lands inclosed in S., A., and W., without any allotment in lieu of the tithes of W.; is a bar to the claims of tithes in W. The award would not be vitiated by error in the allotment. The Act having directed the commissioners, in estimating the proportion, to have regard to quality and situation; deficiency in quantity is not proof of error. *Cooper v. Thorpe*, 1 Swan. 92; 1 Wils. 55. See 4 Barn. & C. 36.

4. A modus of 10s. a year was payable to an impropriate rector, in lieu of all the tithes of a farm, to which farm were appurtenant rights of common in two several townships B. and C. Under an inclosure Act, to which the impropriator was a party, the common lands in the township of B. were inclosed, and allotments made to the impropriator, in lieu of all tithes, moduses, prescriptions, and customary payments. The Act directed, that when the allotments should be made to the impropriator, all

tithes, moduses, prescriptions, and customary payments should cease, and be for ever extinguished. By a contemporaneous Act, to which the impropriator was not a party, the common lands in the township of C. were also inclosed:—Held, that the impropriator being only entitled to a modus in respect of the farm and the commons appurtenant, and the modus having been extinguished under the provisions of the first-mentioned Act, he was not entitled to tithes of the allotments made in respect of the farm under the other Act. *Jackson v. Douglas*, Younge 391.

5. Bill by the impropriate rector of A. for predial tithes of lands allotted under an inclosure Act. The defence was, that the land allotted was awarded in lieu of a right of common in A., appurtenant to a tenement in the parish of B., and that the tenement in B. was protected from all tithes by a farm modus of 20s., payable to the rector of B., and therefore that the modus for the tenement protected the allotment. The Court, however, decreed an account. By the common law, and also by general presumption, all tithes are due to the incumbent of the parish where they arise; and, therefore, tithes arising upon a common are due to the incumbent of the parish in which the common is situate, not to the incumbent of the parish in which the tenement to which the common is appurtenant is situate, if that same tenement be in a different parish. Custom may, however, vary this. When the tenement is in one parish and the common in another, the incumbent of the farm is not of right, and by the common law, independently of custom or prescription, entitled to the tithes arising upon the common; and if the common be inclosed, the allotment will become, by the general rule, for the purpose of tithes, parcel of the parish in which it is actually situate. *Carlisle v. Blain*, 1 Y. & J. 123.

6. Commissioners, under an inclosure Act, were to allot by their award to the rector of the parish so much of the lands so inclosed in the township of S., and of the titheable parts of the township of W., as should, quantity, quality, and situation considered, contain, or be equal in value to, two-fifteenth parts of the titheable places thereof, in lieu of tithes arising within the same lands. After enrolment of the award of the commissioners, all tithes arising within the lands inclosed were to cease; but there was a saving to all persons (other than the persons to whom any compensation by virtue of the Act in respect of the interest for which such compensation should be made), of all such interest as they had in respect of the said lands. Before the passing of the Act, an award, by which the commissioners allotted to the rector, in lieu of the tithes of S. and A., lands more in quantity than two-fifteenths of the lands inclosed in S. and A., but less than two-fifteenths of the lands inclosed in S., A., and W., without any allotment expressed to be in lieu of the tithes of W., is not a bar to the rector's claim of the tithes in W. *Cooper v. Thorpe*, 2 Russ. 78.

7. The right to the tithes of an allotment generally follows the right to the old tenement in respect of which the allotment is made. *Blackford v. Kirkpatrick*, 6 Beav. 232; 12 L. J., N. S., Ch., 108.

III. GRANTS. CONSTRUCTION OF.

1. A grant by Edw. 6 of certain tithes originally appropriated to a dissolved priory by the description of *omnes illas decimas garbarum granorum bladorum feni lanae et agnellorum ac alias decimas nostras quascunque*, etc. :—Held, to pass the rectory and all tithes. *Holdsworth v. Fairfax*, 3 Cl. & F. 115; 8 Bli. N. S. 882.

2. "Grant of herbage," held not to mean agistment. *Scott v. Lamson*, 7 Price 267.

3. The words "tithes" and "hereditaments," occurring amongst words of general description in a grant, after a particular description of the thing intended to be passed, will not pass "tithes in gross." *Att.-Gen. v. Eardley (Lord)*, Dan. 271; 8 Price, 39.

4. The words "white tithes" have no general meaning, but are applicable to distinct things in distinct parishes. The meaning, therefore, of those words, as applicable to a particular parish, is to be ascertained only from the usage in that parish. *Becher v. Clave*, 1 Y. & Coll. 448.

5. Bill for tithe wood in the forest of Dean, by virtue of a grant of all tithes, issuing *de assartis*, within the forest, *de novo assartatis et assartandis*. Upon proof, it appeared that the lands were always woodlands and never grubbed up, and that no tithe was ever paid. The Court construed the meaning of *assart* to be only such lands as have been grubbed up, and made fit for tillage, and dismissed the bill. *Evans v. Newell*, Bunb. 128; *Bond v. Barrow*, id. 312.

6. A rectory, extending over the manor of A., and comprising among others the chapelry of Lucton, which included the township of Lucton, came into the hands of the Crown, James I., by letters-patent, granted to the trustees of the Lucton School, together with other tithes within the manor of A., all the tithes yearly growing or renewing in Lucton. And by other parts of the same grant, the tithes of hay are specially granted as to particular lands, not the lands in question. Under this grant, tithes of corn and grain, and every other species of tithe, except that of hay and agistment, had been always levied without dispute, but payment of the latter had, it appeared, been habitually withheld, though not without litigation. Upon a suit being instituted for the recovery of these tithes :—Held, that the grant, whether or not it carried the rectory, was a grant of all the tithes in Lucton, and that the grantees were entitled to the benefit of whatever legal presumption would have been available for the rector, and that their claim must be rebutted by the same evidence which would have been required against his. *Scarlet v. Lucton School*, 10 Bli. N. S. 592; 4 Cl. & F. 1. Affirming 2 Y. & J. 330.

7. The word "tithes" is continually found in ancient instruments used to denote tithes, *quæ* tithes, or a commutation for them, and may mean either one or the other, as the subsequent usage explains. *Norton v. Hammond*, 1 Y. & J. 94.

IV. LEASES.

8. Upon lease of tithes by lay impropiator, if the tithes of the particular lands are excepted, it might admit of construction that

lessor is entitled to that which he excepts; but if former owner of tithes upon a lease has made a parol declaration that he is not entitled to the tithes of those lands, that declaration is in itself important evidence, and gives a construction to the exception in the lease. *Norbury v. Meade*, 3 Bligh 212.

9. The lessee of a rector, in whose lease there is an exception of various small tithes *nominatim*, and of all the tithes belonging to vicar, is not entitled to tithe of potatoes, though he has always received some of the small tithes in kind not mentioned in the lease *speciatim*, either as demised or excepted, and particularly for geese and pigs. *Cuntiffe v. Taylor*, 2 Price 329. But see *Masters v. Fletcher*, Younge 25.

10. A lessee of rectory for three lives, who had made a derivative lease, brings a bill for tithe in kind, and to establish a custom of setting out corn in shocks :—Held, the bill is properly brought, though the tithes are out in lease to prevent collusion between lessee and occupiers. *York (Archbishop) v. Stapleton*, 2 Atk. 136.

11. A person with notice that the small tithes of a certain parish are payable to the vicar obtains an assignment of a lease of the great and small tithes, the grantors of such lease being the trustees of a charity who are entitled to the great tithes only, but who have always in form granted leases of both kinds of tithe. The assignee being unable to recover the small tithes at law, procures at law an apportionment of the rent. The Court, under such circumstances, will relieve against the apportionment. *Att.-Gen. v. Dixon*, 1 Y. & Coll. C. C. 614; 11 L. J., N. S., Ch., 396.

12. Bill by the purchaser, at an auction, of tithes for three years, against an occupier, for an account and satisfaction. It was objected that, tithes lying in grant, the plaintiff, as a lessee by parol, could not maintain the suit, but the tithe owners having been originally made defendants to the suit, and on their disclaimer dismissed, the Court supported the plaintiffs' title, and decreed an account. *Williams v. Jones*, Younge 252.

13. Bill praying account of tithes, and merely stating that inappropriate rector demised tithes to plaintiff, demurred to for want of title; but on argument plaintiff was allowed to amend by making inappropriate rector a party, on payment of 5*l.* costs. *Jackson v. Benson*, McClel. 62; 13 Price 131.

14. Lessee of tithes filing bill for satisfaction of them, need not set forth his lessor's title. *Crathorne v. Taylor*, 2 Bro. P. C. 512.

15. Plea of 13 Eliz., c. 20, for non-residence, allowed to bill by lessee of tithes. *Bokenham v. Bentfield*, 1 Com. 392.

16. Usage as to tithes was admitted, to explain a lease of a farm with all tithes, against the very word "tithe," the Court considering it as a lease. *Quaintrell v. Wright*, Bunb. 274.

17. A lease of tithes or other matter which lies in grant, for all the time the lessor should be vicar, is good, and conveys a freehold. *Brewer v. Hill*, 2 Anstr. 41.

18. Disclaimer of title to tithes by rector binds his lessees. *Leathes v. Newitt*, 4 Price 374.

V. IN LONDON.

1. The right of exemption from tithes, and the mode of computing them in the deanery of St. Paul's, London. *St. Paul's (Warden) v. Lincoln (Bishop)*, 4 Price 65.

2. A certain customary payment in London, in lieu of tithes, may be good so as to exempt an individual house, if usually made a sufficient time to acquire the character of customary in the Ecclesiastical Court, though within time of memory, and not general through the place or parish. *St. Paul's (Warden) v. Kettle*, 2 Ves. & B. 1.

Mere non-payment of tithes under stat. 37 Hen. 8, c. 12, is no answer to a claim for them; as it would be no answer to a claim for tithes at common law. *Ib.*

Bill had been filed under stat. 37 Hen. 8, c. 12, to recover 2s. 9d. in the pound for tithes, and an issue was refused, under these circumstances: first, misleading; the defendants not stating customary payments by their answer, but adopting *ore tenus* payments disclosed by the answer to their cross bill, instead of moving for leave to file a supplemental answer: secondly, the improbability of establishing those payments, after two unsuccessful trials at bar in another cause. *Ib.*

3. Decree, under the stat. 37 Hen. 8, for payment of tithes in London as to warehouses erected by the East India Company upon the site of old buildings, and occupied by them, at 2s. 9d. in the pound upon the value, to be let, without an issue, no specific customary payment in lieu of tithes being alleged. *Antrobus v. East India Co.*, 13 Ves. 9.

4. Notwithstanding the statute and decree 37 Hen. 8, c. 12, the Court of Chancery has jurisdiction upon the subject of tithes in London. An account was decreed according to the improved rent. Another defendant, setting forth his lease at a low rent and a fine, and alleging by answer that he had never heard of any greater rent being paid, there being no evidence against it, was held liable only according to that rent. *St. Paul's (Warden) v. Crickett*, 2 Ves. J. 563.

5. A parson sues for 2s. 9d. per pound for tithes of houses in London, under the stat. 37 Hen. 8. But an issue was directed to try whether less than that sum had ever been paid, although there was no proof of any regular modus. *Bonnet v. Treppass*, 4 Bro. P. C. 650. Affirming Bunb. 106; Gilb. Eq. Rep. 191.

The books of former rectors may be produced in evidence, upon an issue to try whether there had been any variation as to sums paid for tithe in London. *Ib.*

6. By the stat. 37 Hen. 8, c. 12, all houses in London shall pay tithe according to their ordinances, except the houses of noblemen; therefore, a surmise that a house in London was a priory, and discharged from tithe by the pope's bull, and by the stat. 31 Hen. 8, which gave the possessions to the Crown, will not prevent a consultation being awarded on a prohibition prayed against a suit in the Spiritual Court. *Green v. Pipe*, Moore 912.

7. A bill lies in the Exchequer for non-payment of tithes in London, according to the decree in 37 Hen. 8. *Langham v. Baker*, Hardr. 116.

8. Houses in St. Saviour's, Southwark, shall pay tithe, it being the only provision made for the minister. *Pocock v. Twimash*, Bunb. 102.

9. The term "rent," used in a decree, under statute 37 Hen. 8, c. 12, relating to tithes in London, means rent actually and *bonâ fide* received, without fraud or covin, and not the annual value of the premises let. Fines, to whatever amount, paid on the renewal of leases of dwelling houses, are not to be considered as increase of rent, or to be taken into calculation in estimating the amount of tithes due, provided the rent reserved is equal to that at which the houses have been at any time before let. *St. Paul's (Minor Canons) v. Crickett*, 5 Price 14.

10. The clergy of the city of London were, by a decree made under the authority of an Act of Parliament, 37 Hen. 8, c. 12, declared entitled to 2s. 9d. in the pound of the rent by the year of all houses, shops, etc., as and for tithe. The Blackwall Railway Company's Act empowered that company to remove certain houses, and it declared, that for indemnifying the rectors, etc., against such loss as might accrue to them from the railway taking down houses, etc., and until new houses should be erected on the ground which should be cleared, of such an annual rent or value that the tithes actually payable therefor should be fully equal to the tithes or yearly sums of money payable for the houses quitted by the occupiers, the company should pay tithes for the houses quitted by the occupiers "according to the last assessment thereof to the 25th of March last," and such sum or sums should diminish in proportion to the tithes actually payable for new houses erected and occupied on ground which should be so cleared. In respect of all the houses taken by the company, with the exception of two, annual payments had been taken in lieu of tithes, at a rate, in each instance, below 2s. 9d. in the pound on the annual value agreed between the rector and the occupiers. The rector claimed to be paid 2s. 9d. in the pound upon the annual value of all the premises taken by the company:—Held, reversing the decision of the Court below, that where there had been an agreed rent, but the rector had received less than 2s. 9d. in the pound, he was not now entitled to receive 2s. 9d. in the pound; that the object of the Act was only to give indemnity to the rector; and that the term "assessment" had reference to the arrangement throughout the parish, whereby the amount of tithes to be paid to the 25th of March 1839 had been understood, agreed, and settled. *London & Blackwall Railway Co. v. Letts*, 3 H. L. Ca. 470; 15 Jur. 996. S. C. *nom. Letts v. London & Blackwall Railway Co.*, 6 Rail. Ca. 687. Reversing 5 Hare 605; 4 Rail. Ca. 530; 11 Jur. 669. And see *Letts v. London Corn Exchange Co.*, 1 De G. M. & G. 398; 21 L. J., Ch., 684.

Held, also, reversing the decision of the Court below, that the amount of tithe payable by the company was to be credited with the tithes actually payable to the rector in respect of new houses, and not merely with the sums actually received by the rector in respect of such new houses. *Ib.*

Held, affirming the decision of the Court below, that the word "assessment" did not mean the assessment to the poor-rate. *Ib.*

1. Form of reference to the Master to ascertain the value of the London Corn Exchange in regard to its liability to tithe under the Act 37 Hen. 8. c. 12. *Letts v. London Corn Exchange*, 1 De G. M. & G. 398; 21 L. J., Ch., 684.

2. By the decree made under the London Tithe Act (37 Hen. 8. c. 12), it is provided that the inhabitants of London shall pay 2s. 9d. in the pound for tithe upon the rent reserved; or if a less rent is reserved by reason of any fine, or if the owners are also occupiers, then the tithe is to be paid at the same rate upon the rent at which the premises were last letten for without fraud or covin:—Held, that the decree assumes that every house has a rent attached to it or representing it, and except in case of invariable rents which have remained, or are assumed to have remained, unchanged since the passing of the Act, the word rent, as there used, means rack-rent, and where the house is not let, it means the full value to let. *Vivian v. Cochrane*, 4 De G. M. & G. 818; 1 Jur., N. S., 809; 25 L. J., Ch., 553; 3 W. R. 254.

The defendant was the lessee of premises in London, which were let for a term of sixty years at a reserved rent (including insurance) of 102l. 10s., in consideration of the lessee laying out 2,000l. in building thereon; the improved annual value of the property after the building was completed was 250l.:—Held, that under the statute, the defendant must be considered as owner of the house during the term, and that the tithe must be paid at 2s. 9d. in the pound on the full annual value of 250l. S. C. 4 Hare 167; 14 L. J., N. S., Ch., 89; 9 Jur. 8.

The second resolution in *Skidmore v. Bell* (2nd Inst., 660), to the effect that such houses as were never letten to farm, but inhabited by the owner, are a *casus omissus*, and shall pay no tithes by force of the decree, is not now law. *Id.*

VI. WHETHER GREAT OR SMALL.

3. Peas and beans planted in rows are small tithes. *Nicholas v. Elliott*, Bunb. 19.

4. Clover seed is a small tithe, and, as such, due to vicar. *Wallis v. Pain*, 2 Com. 633; Bunb. 344.

5. The tithe of tare seed held to be a small tithe. *Dams v. Benn*, Jac. 95.

6. Agistment is a predial tithe. *Scarr v. Trinity College*, 3 Anstr. 760.

7. The tithe of a horse malt-mill is a personal tithe, and the tenth part of the clear profits arising from corn ground in such mill, over and above all incidental charges, is to be paid as the tithes thereof, and the corn ground therein is to be tithed by the tenth toll-dish. *Chamberlaine v. Newte*, 7 Bro. P. C. 3.

8. Tithes are by law denominated and adjudged great and small, according to the nature of the thing, and not from the mode of cultivation; therefore, tithes of beans and peas, whether sown in fields or gardens, are great tithes, and do not fall under the denomination of tithes of gardens. *Sims v. Bennet*, 7 Bro. P. C. 29; Eden 382.

9. Potatoes being in their nature a small tithe, the sowing them in small quantities

makes no alteration. *Smith v. Wyatt*, 2 Atk. 364; 9 Modd. 336.

The distinction between great and small tithes might arise at first from the former producing greater, and the latter smaller quantities. *Id.*

Though Lord Chancellor J. Holt, in *Wharton v. Lisle* (3 Lev. 365), held tithes should be determined, whether great or small, from their quantity, the judgment was contrary. *Id.*

If potatoes in gardens should be called small tithes, and great in fields, it must vary every year in every parish. *Id.*

Where arable is turned into pasture, it is an agistment tithe, and becomes a small one from a great one. *Id.*

10. To a vicar's bill for an account of all small tithes the defendants answered that the right to all tithes, as well small as great, became vested in the rector, and in the owners of the lands by grants and conveyances, and that they and their tenants held the lands, with the tithes, or free from all tithes whatsoever; but that some occupiers paid annually to the vicar, in respect of their house, certain small sums in the name of "privy tithes," which the defendants alleged were personal tithes, and not compositions for small tithes. The vicar, unable to produce an endowment, gave secondary evidence showing that the vicarage was endowed generally with small tithes. There was no evidence that any small tithes were ever paid to or claimed by the rector, or the persons who became entitled to the rectory:—Held, first, that the defendants, after failing to show title to the small tithes in themselves or the owners of the lands, could not be heard to say that the small payments in the name of privy tithes were compositions; secondly, that, in the district in which those lands are situated, privy tithes are not personal tithes, but are the same as small tithes; and thirdly, that where there is evidence that the vicarage was endowed with small tithes, the vicar's right to them is established against all occupiers of lands within the parish as to which no particular discharge is proved, although no small tithes have ever been paid by them. *Clee v. Hall*, West 148; 7 Cl. & F. 744. Affirming S. C. *nom. Hall v. Godson*, 2 Y. & Coll. 153.

VII. OBLATIONS AND EASTER OFFERINGS.

11. Oblations, obventions, and offerings are one and the same thing; though obvention is the largest word, and is in the nature of tithe. Offerings are reckoned among personal tithes, and such as arise from the labour and industry of the parishioner are payable by custom to the parson or vicar, either occasionally at sacraments, marriages, burials, churching of women, etc., or at constant stated periods, as at Easter, etc. By stat. 2 & 3 Edw. 6, c. 13, they are to be paid to the parson of the parish where the party dwells. 2 Inst. 659, 661. *Grant's case*, 11 Co. 16; *Lawrence v. Jones*, Bunb. 173; *Egerton v. Still*, 1 Bunb. 198; *Cartheron v. Edwards*, Amb. 72.

Easter offerings are due of common right, though demanded by custom, for they are a composition for common tithes. *Id.*

VIII. OF WHAT PAYABLE.

1. Lamb's wool shall pay tithe, though the lambs had paid tithes two months before; and tithe shall be paid for agistment of yearlings, because a new increase. *Baker v. Sweet*, Bunb. 90.

2. Tithe milk should pay every tenth meal where there is no custom. *Bate v. Sprackling*, Bunb. 20.

Hop-poles shall not pay tithe, nor hops till they are picked, and then every tenth measure before they are dried. *Id.*

3. All the garden ground in England shall pay tithe; and turnips, though pulled and sowed ever so often on the same land, shall pay tithe. So shall aftermath pay tithe, but not after-pasture, unless by custom, *ut semble, sed quere*. *Benson v. Watkins*, Bunb. 10.

4. Saddle-horses shall pay no tithe, neither shall cattle for the plough or pale, nor cattle killed for the use of a man's own family. *Underwood v. Gibbon*, Bunb. 3; *Fisher v. Loman*, *id.* n.

5. If a man depastures unprofitable cattle, he shall pay tithe in proportion to the number of the cattle and the value of the land, generally at the rate of 2s. in the pound; so, if they are travelling cattle which come and go. *Smith v. Johnson*, Bunb. 1.

So are cattle fed on a meadow ground after it is mowed, unless a custom be to the contrary. *Id.*

6. Agistment-tithe is not within the 2 & 3 Edw. 6, c. 13, s. 3. *Ellis v. Saul*, 1 Anstr. 342.

Agistment-tithe is the tithe of the herbage eaten by cattle not titheable; it is not tithe of the improvement of the cattle. When grass has been cut for hay, no tithe is due for the after-pasture. *Id.*

7. Agistment-tithe is not claimable for after-pasture, where lands have been mown in the same year, and paid tithe. *Batchellor v. Smallcombe*, 3 Madd. 12.

8. As to payment for keep of tithe animals, see *Jenkinson v. Royston*, 5 Price 495.

9. Though beasts of the plough are exempt from tithe, because, by the labour of such cattle, tithes of another kind arise, yet, if oxen are turned to grass, and fattened for sale, they shall from such time pay tithe for the herbage they eat, being in no wise beneficial to the parson in any other tithe. *Edmond v. Sandys*, Show. P. C. 192.

10. Agistment is a predial tithe. *Carr v. Trinity College*, 3 Anstr. 760.

11. Horses kept on one farm for its cultivation, and used occasionally on another farm, in a different parish, shall not pay agistment tithe; otherwise, if habitually so used. *Filerwood v. Button*, 2 Anstr. 498.

12. Sheep kept principally for the sake of folding, if sold out of the parish before shearing time, shall pay agistment-tithe. *Hoves v. Carter*, 2 Anstr. 500.

13. By 2 & 3 Edw. 6, c. 13, s. 5, all barren heath or waste land shall pay tithe after seven years' improvement and conversion into arable or meadow; and the suggestion for a prohibition against the Spiritual Court must be proved within six months after the prohibition granted, for it is an affirmative suggestion, which six months shall be computed by the calendar, and begin to run from the teste of the prohibi-

tion. *Thomas v. Gifford*, 2 Show. P. C. 92; *Straker v. Baynes*, *id.* 308.

14. Tithes for barren cattle are due of common right, according to the value of the land, but they may be paid for by custom or prescription. *Holbeech v. Whadcocks*, Hardr. 184.

Tithes payable by custom shall be paid, though the lands be not rented. *Id.*

15. Tithes are payable for herbage eaten by travellers' horses. *Guilbert v. Eversly*, Hardr. 35.

16. A modus of 1d. for every sheep, and a ½d. for every lamb, brought into the parish after Candlemas, and sold out before shearing time, it is a wool modus, not an agistment modus. *Garnons v. Barnard*, 1 Anstr. 320.

17. If a farm has a right of common appendant in another parish, tithe of wool paid for the farm discharges from agistment-tithe of the sheep in both parishes. *Riddell v. White*, 1 Anstr. 290.

18. Where vicar is by endowment entitled to tithes of peas and beans, set and planted in rows in gardenlike manner, the use of a plough instead of a spade makes no difference. *Austen v. Nicholas*, 7 Bro. P. C. 9.

19. Wood ground grubbed up pays tithe, and is not exempt for seven years as barren land, within the stat. Edw. 6. *Beardmore v. Gilbert*, Bunb. 169.

20. Timber trees above twenty years' growth are titheable, if cut and corded for fuel, *aliter non*. *Greenaway v. Kent*, Bunb. 98. And it is not the growth of the trees alone that will privilege them, but the use that is made of them. *Buckle v. Vanaore*, *Acton v. Smith*, *Franklin v. Jones*, *Comper v. Layfield*, Bunb. 99. n.

21. Whether tithe wood was due of common right, the Court will not determine. *Jordon v. Colley*, Bunb. 61.

22. Lops and tops of ancient pollard oaks and ashes are exempt from tithes; the use to which wood is applied, does not determine the right to tithes. *Walton v. Tryon*, Ambl. 130. Dick. 244.

All coppice woods are liable to tithes. *Id.* 131.

The circumstance of loppings being tenant right profits, and therefore not part of the inheritance, affords no rule as to the liability to tithes. *Id.*

The subsequent use of a thing cannot add a titheable quality to it, which it had not before. *Id.* 132.

Wood cut, to be burnt in the house, is not exempt of common right, but by special custom. *Id.*

All timber trees of twenty years' growth, and their lops and tops, are freed from tithes, to whatever use they are put, except in cases of fraud; and this is by the Statute of *Silva Cædua*, 45 Edw. 3. *Id.*

The Statute of *Silva Cædua* is declarative of the common law. *Id.*

Wornbeam not timber. *Id.* 133.

Germins growing from stools of old timber trees pay tithes. *Id.*

If timber-trees be cut before twenty years, the boughs and branches shall be always titheable. *Id.*

Pollards that have once gained their privilege shall not lose it. *Id.* 134.

It is a question of fact, whether beech of twenty years' growth is timber. *Id.* 135.

1. By Edw. 6, c. 13, land in its own nature not fit for tillage, pays no tithe for seven years after improvement; but if not fit for tillage, by reason of woods, etc., pays tithe presently after improvement. *Stockwell v. Terry*, 1 Ves. 115.

2. Turnips (sown after the corn is cleared) fed with sheep and barren cattle, shall pay tithes. *Swinfen v. Digby*, Bunb. 314.

3. Vetches and clover are a great tithe, but, when cut green for cattle used in husbandry, tithes are not due. *Hayes v. Domse*, Bunb. 279. But in *Dorman v. Currey*, Dan. 206, Richards, C. B., said this was a case which ought not to have been introduced into a book of reports. In *Hodgson v. Smith*, *id.* 279. n., it was held that tares, whether green or ripe, are a great tithe, and belong to the rector.

4. Tithe herbage shall not be paid for sheep shorn out of the parish, because they are *animalia fructuosa*. *Poor v. Seymour*, Bunb. 313.

5. Tithes are payable for the after-depasturing of sheep on turnips, etc. *Coleman v. Barker*, Gilb. Exch. Rep. 231.

6. Head-lands only large enough to turn the plough upon, shall not pay tithes; neither shall an ancient mill. *Chapman v. Barlow*, Bunb. 184.

Black cherries growing wild in hedges, and used as fences, shall pay tithe. *Id.*

7. Tithe of lambs is not divisible, as wool is. *Boys v. Ellis*, Bunb. 139.

8. Wood cut from hedges is titheable, although used on the farm. *White v. Smith*, Tambl. 306.

9. Wood used for hop poles upon the farm, for hurdles, for hurdling sheep, for repairing hedges, for land draining on the farm, and for fuel in the husbandry house, is not exempt from tithes by the common law, but may be so by custom. *Willis v. Stone*, 1 Y. & J. 262.

10. As to tithe for oak-wood springing from stumps or germins of eighty years' old trees, formerly felled. *Evans v. Rowe*, McClel. & Y. 577.

11. In construing the stat. of 45 Edw. 3, c. 3, with reference to the law on questions of the tithe of wood, the phrase *gras-bois* or great wood:—Held, to mean wood of the original trees which either are timber by common law, or are accounted timber by local custom when of twenty years' growth or upwards. *Evans v. George*, 12 Price 76.

Of such timber trees, those only which are termed maiden trees or trees sprung from seed or mast, and have obtained twenty years' growth, are exempt from tithe of wood as timber. *Id.*

Germins, or trees of whatever age or size they may be, growing from old stools, stumps of roots of timber, trees which have been felled:—Held, not to be so exempt by reason of the privilege of timber. *Id.*

12. Wood springing from the roots or stools of trees is titheable, and neither its own age, nor the age of the trees from the roots or stools of which it sprung, will exempt it. *Chichester v. Seldon*, T. & R. 245.

13. Trees of the growth of twenty years or upwards, sprung from the roots or stools of old trees formerly cut down, are within the exemption of the 45 Edw. 3, c. 3, and are not

titheable. *Louzon v. Pryse*, 4 Myl. & C. 600; 10 L. J., N. S., Ch., 103; 5 Jur. 310.

14. Stubble mowed, and used as fodder or manure, is not titheable. *Tennant v. Stebbing*, 3 Anstr. 640.

15. Grass cut, and given green to the beasts of the plough, shall not pay tithe. *Collyer v. Howes*, 2 Anstr. 481.

16. Tithes of peas and beans have been held to be comprised in the description of "tithes of corn." *Att.-Gen. v. Ward*, 11 Beav. 203; 17 L. J., N. S., Ch., 485; 12 Jur. 807.

17. Consumption of titheable articles in the family of the land occupier, is not a ground of exemption. *Quare*, as to green peas. *Williamson v. Lonsdale (Lord)*, 5 Price 25.

18. Lucerne, tares, clover, and all other artificial grasses cut green, and given severed to husbandry horses, etc., employed on the farm on which they are grown, are not, therefore, exempt, by general custom, from the render of tithes, unless the farmer have no other fodder or sustenance of any sort on the farm on which such horses, etc., may be subsisted, without necessarily having recourse to such green food. *Dorman v. Sears*, 6 Price 338.

19. Tares and other artificial grasses, cut green, and given to husbandry horses used in the cultivation of the farm, are not liable to the payment of tithes, where there is not sufficient sustenance of any other description for the horses on the farm. And whether there was or was not sufficient sustenance, is a question of fact, and the subject of inquiry before the Master. The tithe of tares, clover, and other artificial grasses cut green, and consumed by husbandry horses, is in the nature of an agistment-tithe; and is not agistment-tithe, following all the circumstances of agistment-tithe. Where a farm was situate in two parishes, and tares and other artificial grasses were cut green in one parish, and carried to the farm buildings, which were situate in the other parish, and there given to husbandry horses used in the cultivation of the whole farm; it was referred to the Master to inquire whether the proportion of the produce of the lands consumed by the horses was in proportion to the labour of the horses employed in each parish. *Austin v. Allen*, Younge 585.

20. Tithes of fish are only payable by custom, and cannot be claimed as mere personal tithe *deductis expensis*. *Kelynaock v. Gravas*, 2 Bro. P. C. 446.

21. Turkeys titheable; but if tithes are paid of eggs, then none to be paid for the chickens. *Carleton v. Brightwell*, 2 P. W. 462.

Mills are titheable, but they are only to pay a personal tithe of the clear gains, after all manner of charges deducted. *Id.*

Acorns are small tithes, if gathered and sold; but if they drop from the trees in the season, and the owner's cattle eat them, they shall pay no tithe. *Id.* And see *Hetl.* 27.

22. On a bill by a vicar for the tithe of mills, the defendant set forth that the mill was an ancient mill, and was built before living memory, and that tithes had never been paid, but that they had always been considered as exempt from tithes. The exemption was considered as sufficiently laid. *Townley v. Colegate*, 2 Sim. 297; 6 L. J., Ch., 159; *Brownne v. Woolley*, 2 Sim. 305.

Tithe is not payable in respect of corn, belonging to the parties, ground at their own mills, and afterwards sold to the public. *Id.*

1. Account of tithes decreed of ancient mills, altered by addition of two new mill stones. *Manby v. Taylor*, 3 Ves. & B. 71; 9 Price 249.

2. A water-mill is titheable as a predial and local tithe in respect of the person to whom it is due, but as a personal tithe in the mode of accounting. *Hall v. Machet*, 3 Anstr. 915.

3. Where a miller grinds his own corn at his mill, and afterwards sells the flour, he is not liable to the payment of tithes of his mill in respect of that corn. *Austin v. Elphinstone*, Younge 586.

4. A new mill erected on the site of an ancient mill is exempt from tithes; but if it is built partly on the site of the ancient mill, and partly on a new site, it is not exempt. *Newcome v. Mathew*, 5 Sim. 243.

IX. EXEMPTION AND PRESCRIPTION IN NON DECIMANDO.

5. In a suit for tithe, defendant by answer set forth that the lands were parcel of a priory, whose lands were discharged by order; yet held good. *Page's case*, Hardr. 322.

6. The King's prerogative will not discharge him from tithes for the ancient demesnes of the Crown, though he be capable of a discharge *de non decimando*, by prescription. *Croft v. —*, Hardr. 315.

7. Upon a bill for tithe, an issue was directed to try if the lands in question belonged to any religious order that claimed to be discharged, *quandiu in propriis manibus*:—Held, that if the lands were in lease at the dissolution, or an estate for life or in tail were upon them, the reversioner should have the benefit of the discharge, for that was only suspended during the particular estates; but if an escheat had happened, it was doubted whether they would have been discharged, having been aliened by feoffment before the Statute of *Quia Emptores Terrarum*, by an abbey, to hold of them by certain services. *Sed scous*, of a discharge by unity, for that must be perpetual, and continue so at the time of the dissolution. *Wilson v. Reedman*, Hardr. 190; *Harpur's case*, 11 Co. 23. And see *Canterbury's (Archbishop) case*, 2 Co. 46.

A tenant for life or years is not within the statute for discharging tithes heretofore part of the possessions of a Cistercian abbey; but a tenant in tail, having the inheritance, is discharged, *quandiu in propriis manibus*, etc. 8. C. Hardr. 174.

8. Unity of possession of manor and rectory will not exempt demesne lands from payment of tithes, when they come to be severed. *Fox v. Bardwell*, 2 Com. 498.

9. Lands exempted from tithes, as being part of the demesnes of an ancient monastery, when enclosed by Act of Parliament, shall not be made liable to tithes by the general words of the Act. *Pratt v. Hopkins*, 7 Bro. P. C. 12.

10. Plea of stat. 13 Eliz., c. 20, for non-residence, was allowed to bill by lessee of tithes. *Bokenham v. Benfield*, 1 Com. 392.

11. He who hath the inheritance of the

Cistercians, Hospitallars, and Templars is discharged from tithes, but his lessees, etc., shall pay them. *Stathome's case*, Dyer 277, pl. 60.

12. Church being void and dilapidated is no ground of discharge from payment of small tithes to the impropriate rector on the motion of an agreement having been entered into between the rector and the parishioners, by which the ecclesiastical duties have been dispensed with, in consideration of abandonment of small tithes. *Meade v. Norbury*, 2 Price 338.

13. To a bill for tithes, even by a lay impropriator, prescription *in non decimando*, or presumption from mere retainer, without colour of title, is no defence, and will not be sent to law. *Bernay v. Harvey*, 17 Ves. 119.

14. A prescription *in non decimando* can only be set up for a large tract of country, well known as a distinct district. *Nagle v. Edwards*, 3 Anstr. 703.

15. The lessee of the land cannot claim to hold discharge of tithes under any covenant with his lessor. *Brewer v. Hill*, 2 Anstr. 414.

16. There cannot be prescription *in non decimando* against a lay impropriator; but it is not necessary to produce the deed of severance; it is sufficient to show that it existed; where defendant, and those under whom he claimed, had been upwards of 130 years in the pendency of the tithes, a bill by impropriator was dismissed. *Fanshaw v. Rotherham*, 1 Eden 276.

At common law no man could avail himself of a discharge from tithes by grant without producing it. *Id.* 293.

The stat. of Hen. 8 is silent as to the manner in which a person must make out his right to tithes against the church or patentees standing in the place of the church; and only provides for the assurance and recovery of them, like temporal possessions, in the King's Court. *Id.* 294.

17. If lands were in possession of a greater monastery at the dissolution, and no evidence of payment of tithe, they shall be considered discharged. *Lamprey v. Rooke*, Amb. 291.

18. Prescription *in non decimando* even against a lay impropriator:—Held, not good. *Bury St. Edmunds Corporation v. Evans*, 2 Com. 643; Bunb. 345.

19. A prescription *in non decimando* cannot be supported against a lay impropriator, any more than against a spiritual rector. *Charlton v. Charlton*, Bunb. 325.

20. Bill by a lay impropriator for tithes of part of the possessions of the priors of St. John of Jerusalem, which were exempt *quandiu propriis manibus*, etc.; and then defendant set forth the stat. 31 Hen. 8, with the clause of discharge, and also the stat. 32 Hen. 8, whereby these priories, with all privileges, etc., were vested in the Crown, and that no tithes in kind had been paid to the Crown ever since:—Held, a good exemption. *Hanson v. Fielding*, Bunb. 214; Gilb. Eq. Rep. 225.

21. The long-contested question, whether constant non-payment of tithes is evidence of an exemption against a lay impropriator, was agitated in this case, but not determined. *Fisher v. Christ Church (Dean)*, Bunb. 209.

1. Unity of possession of a manor and rectory will not exempt the demesne lands from tithes when they come to be severed. *Fox v. Bardwell*, 2 Com. 498; Bunb. 327.

2. An exemption from tithe extends to a right of common as well as to the estate to which it is appurtenant. *Lambert v. Cumming*, Bunb. 158.

3. Lands which were parcel of a monastery of the Cistercian order are only discharged from tithes *quoad in propriis manibus*; and the method to prove whether the lands were purchased before or after the council of Lateran, is to show a payment of tithes, which will induce a presumption that they were purchased after. *Lord v. Turk*, Bunb. 122.

4. Proof of exemption resting only on belief and hearsay is not admissible. *Clark v. Dashwood*, Bunb. 66.

5. Where an exemption from tithe is insisted upon, because the lands were parcel of one of the greater monasteries, plaintiff must show that the lands were in the abbot's hands, and that they were discharged in his hands; for the stat. 31 Hen. 8 extends only to such. *Hanking v. Gay*, Bunb. 37.

6. Where the land in question is part of a bishop's palace, the exemption goes along with the land; but where the land was belonging to a monastery, the prescription must be set forth. *Benning v. Dovee*, Bunb. 26.

7. A county or a hundred cannot prescribe in *non decimando* for things titheable of common right; *aliter*, if not titheable of common right. *Hick v. Woodson*, 2 Salk. 695.

8. Evidence of an exemption depends on usage, and a posterior one is evidence of the antecedent, for no other can be had. *York (Archbishop) v. Stapleton*, 2 Atk. 137.

9. Construction and effect of very ancient documentary evidence (opposed to a case of uninterrupted non-payment), in a suit for tithes, as applied to the claim, and to a defence of prescription in *non decimando*, on the ground of the lands having belonged to a religious house. To support such a defence, the lands must be shown to have belonged to a religious house before time of legal memory; it is not sufficient to show that lands were in the hands of religious house at time of dissolution. *Markham v. Smith*, 11 Price 126.

In claiming an exemption from tithes for particular lands, they must be accurately described in defendant's pleadings, and their local situation, etc., set out. *Id.*

10. An exemption from tithes on the ground of the lands having belonged to a monastery of a privileged order, does not rest on prescription; but the owner must show satisfactorily that the monastery was seised of the lands before the council of Lateran, and also at the time of the dissolution. In order to support a general exemption in *non decimando*, it must be shown that the lands were part of the possessions of a monastery before the time of legal memory; but it is seldom that such fact can be distinctly proved, and therefore it must usually depend upon presumptive evidence. *Norton v. Hammond*, 1 Y. & J. 94.

11. Where a *non decimando* was set up for lands as part of the possessions of a monastery which was dissolved by or came into the hands of Henry VIII., and the answer alleged

that such lands were, at the dissolution, in the hands or occupation of the abbot, discharged of all tithes, without stating in what manner they were discharged, whether by bull, order, or prescription; the Court, upon the effect of the whole answer, considered it might understand it to mean prescription. Where there are no ancient documents to support the presumption of a prescription in *non decimando*, the modern evidence of usage must be carried back a great way to satisfy the Court that it is acting upon a presumption supported by usage of considerable antiquity. *Fritchett v. Honeyborne*, 1 Y. & J. 185.

12. As to exemption of lands from tithes as having been part of possessions of abbey at time of dissolution, which was also supported by evidence of non-payment, other parcel of the same manor, however, paying tithes. *Carysfort (Earl) v. Wells*, McCl. & Y. 600.

13. In making out a defence, grounded on an alleged discharge in the hands of the Hospitallers by prescription, it is not necessary to show possession by them at the time of memory; usage of non-payment not, in the absence of all conflicting evidence, to be accounted for, except upon the hypothesis of such a discharge, constitutes a *prima facie* case of prescription. *Donnison v. Elsley*, McCl. & Y. 1.

The privileged orders were capable, like every other religious order, of having their lands discharged of tithes by a real composition, or by prescription; the lessee, under the Crown's grantee, of lands which had belonged to the knights of St. John of Jerusalem, and his under-tenant, may defend themselves against a demand for tithes just as they might have done if their lands had belonged to an order not privileged. *Id.*

14. Lands which were held discharged from tithes before time of memory, by one of the alien priories, and, coming to the Crown on their suppression, were granted to a lay person, and, by him, to one of the greater monasteries, in whose hands they remained till the dissolution, are no longer exempt. *Page v. Wilson*, 2 Jac. & Walk. 513.

By common law all land is equally charged with tithe; there can be no exemption inherent in the land. *Id.* 528.

15. The right of exemption from tithes, and the mode of computing them in the deanery of St. Paul's, London. *St. Paul's (Wardens) v. Lincoln (Bishop)*, 4 Price 65.

16. It is not sufficient for a vicar, who rests his case on presumption of an endowment from evidence of perception, to prove that he has received the tithes claimed from the rest of the parish generally, and even from part of the district in which the defendant's lands are situate, unless he carry it to the part for which the exception is claimed by the defence; and the vicar not doing so, proof on the part of the defendants that no tithe has ever been paid for their lands, will entitle them to an issue; nor will the Ecclesiastical Survey, stating vicar to be entitled to tithe in parish, generally supply the absence of proof of perception from the particular lands. *Armstrong v. Hewitt*, 4 Price 216.

17. If exemption is pleaded for lands as having belonged to a dissolved priory, and it is proved they belonged to a free chapel, it is sufficient. *Ward v. Shepherd*, 3 Price 620.

1. Where exemption was claimed under 2 & 3 Edw. 6, c. 13, issue was directed as to facts entitling party thereto. *Kingsmill v. Billingsley*, 3 Price 465.

2. The answer to a bill for an account of tithes, having insisted upon what was equivalent to a prescription *in non decimando*, and defendant's evidence going to the same point, the Court will not permit the evidence to be read to support a different defence, viz., a presumption that the tithes had been granted to the owner. *Nash v. Thorn*, 2 Cox 197.

3. Held, under the circumstances, and upon the evidence stated in the following report, that lands within a parish were not exempted from tithe by a money payment of ancient date and proof that no tithes had ever been rendered. *Graves (Lord) v. Fisher*, 8 Bli. N.S. 934; 3 Cl. & F. 1.

4. Where tithes have never been paid since the dissolution, the Court will presume all facts, which, consistently with the evidence in the cause, would give legal origin to an exemption from the payment of tithes. *Humphreys v. Wagstaff*, 1 Russ. & M. 529.

5. A party setting up an exemption from vicarial tithes for part of his farm, as being the demesne lands of a priory or monastery, the tithes of which were excepted from the endowment of the vicar, is bound to prove, that his lands actually were the demesne lands: and it is not sufficient for him to show that the priory had a manor and lands in the parish; that, on the dissolution of monasteries, the manor and lands devolved to the Crown, by whom the same, together with the rectory, were granted to persons under whom the defendant claimed title; and that the defendant's farm was known by the name of the Manor Grange, which, it was insisted, meant the demesne lands: and, therefore, where a defendant set up such an exemption, but did not actually prove that his lands were the demesne, and there was evidence of the receipt, for a century past, of a composition for tithes for the farm in question, though alleged by the defendant to be paid for a part of the farm only, which he admitted not to be demesne lands, the Court decreed an account, with costs. *Young v. Merchant*, 3 Y. & J. 467.

6. An exemption from tithes was claimed, as to certain copyholds, on the ground of unity of possession of the rectory, manor, and lands, in one of the greater monasteries, dissolved by 31 Hen. 8; other copyholds of the manor had belonged to the monastery at the dissolution, and were subject to tithe:—Held, nevertheless, that the exemption was good, because the monastery might have granted out the latter copyholds before the union of the rectory, and the former after it. *Monck v. Huskisson*, 1 Sim. 280.

7. The 1 & 2 Vict., c. 109, does not create any new grounds of exemption from payment of the rent-charge in lieu of tithe, or establish exemptions in cases in which they could not have existed independently of the Act; and the 18th section relates to cases of the possession or enjoyment of exemption, and to the evidence to be required of such possession or enjoyment. In order to show an exemption two things are necessary: first, the title to the lands giving a legal capability of exemption, *e.g.*, being derived from an ancient monastery; and, secondly, the enjoyment of the exemption

for the period specified in the Act. Therefore, a petition claiming exemption exclusively on the ground of non-payment of tithe, etc., for sixty years next before the signing of the certificate of tithe-composition, was dismissed, and with costs, the Court, after argument, holding that it had jurisdiction so to dismiss it although the statute is silent as to costs. *Chambers v. Shannon (Earl)*, 5 Ir. Eq. R. 335.

8. Where lands were not formerly in the possession of the dissolved monasteries, unity of possession of the lands and tithe will not extinguish the title. Therefore, where the petitioner derived title under a lease for lives renewable for ever of lands and the tithes thereof, made in 1700, the Court refused to declare the land tithe free on a petition presented under the 1 & 2 Vict., c. 109, s. 16, though no tithes had been paid since 1700, there being no proof that the lands were abbey lands, and no notice of the proceedings having been given to the reversioner. *Denny v. Devonshire (Duke)*, 1 Ir. Ch. R. 401.

The 20th section of the stat. 1 & 2 Vict., c. 109, enacting that the provisions therein before contained with respect to the establishment of exemption, etc., from tithes, shall not extend to any case where the tithes of any land shall have been demised by deed for any term for life or years, or where any composition for tithes shall have been made by deed or writing, by the person entitled to such tithes, with the owner or occupier of the land for any such terms for life or years, and such demise or composition shall be subsisting at the time of the passing of the Act, nor to any suit for establishing a claim to tithes then pending, means that the exempting clauses of the statute are not applicable to the case of the owner of tithes demising them to the owner or occupier of the land chargeable with those tithes; but a person actually entitled to the common ownership both of lands and the tithes thereof is not, merely because he has derived his title under a lease making separate demises of each, disentitled by that section to hold the lands tithe free. 8. C. 1 Ir. Ch. R. 657.

X. SETTING OUT AND PAYMENT.

9. The tithe calf is the tenth in order of birth. *Carrington v. Cornock*, 4 Sim. 217.

10. Where peas grown in fields, but gathered green, were gathered by women and children in small baskets or aprons, and from those emptied into sacks, each sack being computed and intended to contain three bushels, and when the sacks amounted in number to ten one sack was set out for the tithe, and when there were not ten each sack was calculated to contain three bushels, and upon that presumption a tenth of the whole was measured out and tendered for the tithe, and if there were a surplus over ten sacks the surplus was measured in the same manner:—Held, that this was a good mode of setting out the tithe, though it was objected by the vicar that the peas ought not to be put into sacks till the evening, and he had seen the whole measured, and by that means knew that he had the actual tenth; it being, however, shown in evidence that it was the usual mode of tithing

in the neighbourhood, and that any other mode would greatly injure the peas, as exposure to sun and air for any time after they were gathered, would destroy their bloom, and diminish their value in the market; it being also shown in evidence that the sack was a measure of three bushels, and that the occupier gave the vicar his choice of sacks, and did not insist upon his accepting the sack without giving him an opportunity of seeing and measuring the contents of any of the sacks he chose. *Funshawe v. Brittain*, 2 Y. & J. 575.

The incumbent is entitled to the milk of the tenth day, morning and evening, and not to the tenth meal; and the milk of the whole herd of cows must be rendered on one and the same day. *Ib.*

The tithe of lambs is due when the animals are dropped, but payable when they are able to live without their dams; and, therefore, where the occupier removed lambs out of the parish, immediately after they were dropped:—Held, that he was liable to pay for the value when fit to be weaned. *Ib.*

It is easy to state the principle on which the tithe of vegetables in a garden, gathered for the consumption of a family, is to be rendered, but very difficult to imagine in what manner the principle is to be applied in practice, and, therefore, requires a mutual spirit of accommodation on the part of the vicar and the occupier. *Ib.*

1. Defendant, in suit by bill in equity for tithes, relying on defence of tithes having been duly set out, may (notwithstanding cause be at issue) bring action of trespass for not carrying them away. Court refused injunction to restrain him. *Bradley v. Bensted*, 13 Price 221; *McClell. 80.*

2. The tithe of calves is to be set out when they are fit to be weaned, and to live alone on the same food with the cow. *Bearbrook v. Tyler*, Jac. 560.

The proper mode of tithing hay is by the fork and rake. *Ib.*

The rule that involuntary rakings are not titheable, does not extend to hay. *Ib.*

3. The tithe of the clear profit being only due, the rent is the first deduction; and in the case of a new mill in the occupation of the owner, a yearly value, in the nature of a rent, is to be set upon it and deducted. *Hall v. Machet*, 3 Anstr. 915.

A farmer may cut a field in any portions most convenient, provided he sets out the tithe of all then cut, before any is carried, and provided it be not done vexatiously. *Ib.*

4. Parishioners only bound to cut the grass, and to lay it into heaps or cocks, but not bound to make it into hay. *Fos v. Ayde*, 2 P. W. 523. And see *Woodnoth v. Cobham (Lord)*, Bunb. 180; *Bennet v. Peart*, in Scacc. 1786.

5. Tithes of hay ought to be paid in grass cocks. *Smithson v. Dodson*, 9 Mod. 117.

6. Clover hay is titheable in the cock, not in the swathe. *Collyer v. Homes*, 3 Anstr. 954.

But where, by the usual mode of husbandry, clover-hay is not made into cocks at all, the farmer may set out the tithes in the swathe. *S. C.* 2 Anstr. 481. *S. P. Baker v. Athill*, *id.* 491.

7. Setting out tithes cannot be dispensed

with, even although the uncertainty of the weather prevents the corn from being put in shocks at all. *Franklin v. Gooch*, 3 Anstr. 682.

8. A custom of tithing, by throwing aside every tenth sheaf, as the corn is about to be carried, is bad. Tithes must be set out so that the rector may compare them with the other parts. Where, by the custom, notice of tithing is to be given, an hour's notice is not sufficient. *Tennant v. Stubbing*, 3 Anstr. 641.

9. Where tithe milk is due in kind, it must be set out by every tenth morning's meal, and every tenth evening's meal. *Cullimore v. Bosworth*, 7 Bro. P. C. 57.

10. The tithe of hops is to be set out by the tenth measure after they are picked, and not by the tenth hill, as soon as the vines are severed from the ground. *Tyers v. Walton*, 7 Bro. P. C. 18.

11. Tithes of wool are due at shearing-time, and are a satisfaction for pasturage for the year past, ending at that time, but not for subsequent pasturage. If the farmer, after shearing-time, depasture sheep, and sell them before the next shearing-time, tithe of pasturage is due for them. — *v. Gold*, Ambl. 149.

12. Tithes of wood must be set out on the spot at the time of felling. It is impossible, at the time of cutting, to say to what use it will be applied. *Walton v. Tryon*, Ambl. 132; *Dick*, 244.

13. The usual time for tithing lambs is when they can live without a dam (about Michaelmas). A custom, therefore, to tithe them on St. Mark's Day, 25th April, was held unreasonable. *Reignolds v. Vincent*, Bunb. 133.

14. If there be any custom in a parish for the manner of tithing milk, as, to carry it to the church porch, or parsonage-house, that must be observed by the parishioner; but if there be no particular custom, the parishioner is obliged, *de jure*, to pay a tenth meal, to milk the cows at the usual place of milking into his pails, and the parson is obliged to fetch it away from the milking-place in his own pails, in a reasonable time; but if he does not fetch it before the next milking-time, the parishioner may justify the pouring the milk on the ground, because he then has occasion for his own pails. *Dodson v. Oliver*, Bunb. 73. And see *Carthem v. Edwards*, Ambl. 72.

15. In debt for not setting out tithes, the setting them out and taking them away by plaintiff himself, is not good within the stat. 2 & 3 Edw. 6, c. 16. *Sed secus*, if taken away by a stranger. *Anon.*, 2 Show. 184.

16. Tithes for agistment of cattle are payable by the owner of cattle. So in the case of commoners. *Pory v. Wright*, Hardr. 184; *Underwood v. Gibbon*, Bunb. 3; *Fisher v. Leman*, *id.* n.

And where tithe is payable, it shall be paid by the occupier of the ground, and not by the agistor. *Ib.*

17. If a man has a nursery of trees, and sells them, and pulls them up himself, he shall pay the tithe; otherwise, the vendee shall pay it, as in the case of corn sold standing; but if sold after severance, the vendor must pay it. *Grant v. Hedding*, Hardr. 380.

XI. MODUS.

See also XX. post.

1. *Validity*, 6721.
2. *Proof of*, 6725.
3. *Issue at Law*, 6727.
4. *Other Matters*, 6730.

1. *Validity*.

1. A distributive modus is unreasonable, and not good. *Turton v. Clayton*, Bunb. 80.

2. A modus is bad where the time of payment is uncertain. *Goddard v. Keeble*, Bunb. 105; *Phillips v. Symes*, Bunb. 173; *Blacket v. Finney*, Bunb. 198; but whether it can be supplied by evidence, vide *Taylor v. Walker*, Bunb. 267. It seems it may, if the day of payment be omitted in the answer. *Gibb v. Goodman*, Bunb. 328. *Sed secus*, if in a cross bill to establish a modus. *Id.*

3. Modus of 1*d.* for orchards and gardens is good. *Franklyn v. St. Cross Hosp.*, Bunb. 79; but they must be ancient gardens. *Perrot v. Markwick*, there cited.

4. Modus of 1*s.* per acre for marsh, and 4*d.* per acre for upland; payable at Michaelmas for hay and all small tithes (except hops), held good. *Bate v. Hodges*, Bunb. 125.

5. Work done by carrying a cartload of turf to the parson's house, in lieu of tithes of hemp, flax, and hay, was disallowed as a modus. *Tully v. Kilner*, Bunb. 126.

6. Modus of 4*s.* at Easter in lieu of tithe hay of a farm is bad. *Burnell v. Coates*, Bunb. 129.

7. Modus of 1*d.* at Easter for hay, and 2*s.* 8*d.* for hay and small tithes, is good. *Finch v. Maisters*, Bunb. 161.

8. Modus of 8*d.* for a cow, and 4*d.* for a heifer, in lieu of milk and calves, is good. *Phillip v. Symes*, Bunb. 171.

9. Modus of 1*s.* in the pound for pasture, according to the value of the land, is too rank and void. *Smith v. Roocliff*, Bunb. 20; *Harrison v. Sharp*, Bunb. 174.

10. Nine cartloads of log-wood, a hog'shead of cider, and 2*d.* per acre, for eighteen acres:—Held, good. *Woolferston v. Manmaring*, Bunb. 279.

11. Modus of 4*l.* 10*s.* per annum for a farm of 30*l.* per annum, is too rank. *Kennedy v. Goodwin*, Bunb. 301.

12. If a parishioner has ten lambs, the tenth is due to the rector on St. Mark's day; if nine he shall have one, paying ½*d.*; if eight, he shall have one, paying 1*d.*; if seven, he shall have one, paying 3*d.*; but for less than seven, the rector shall have no lamb, but ½*d.* for each under seven. Where there were ten lambs, after the parishioner had taken two, the rector shall choose his lamb. And the like *modus decimandi* was established as to pigs, so as to poultry: for every cock and drake, three eggs, payable on Wednesday before Easter; and for every hen and duck, three eggs in lieu of tithe eggs, and chickens and ducks hatched in the parish. This modus was established without a trial. *Brinklow v. Edmonds*, Bunb. 307.

Modus of ½*d.* for each calf is good. So ½*d.* for each sheep dying before shear-day. So a smoke-penny for firewood. So 4*d.* per

month for wool of each 100 sheep shorn in the parish. *Id.*

Part of the milk of a farm for the whole is a bad modus. *Id.*

13. Modus of 6*s.* 8*d.* for one calf, if ten, but it was not said, "and so less in proportion, if under ten; this is bad, but 4*d.* for milk payable at Easter is good. *Gibb v. Goodman*, Bunb. 329.

14. Modus of 12*s.* an acre for low meadow lands, and 8*d.* for high ones, in lieu of tithe hay:—Held, good. *Pole v. Gardiner*, 7 Bro. P. C. 5.

15. What shall be said to be a good modus, *quare*. — *v. Munson*, 1 Barn. K. B. 292.

16. Modus pleaded in bar against tithe of hay, that within the parish of W. there were several townships, and that the occupiers of each township, time out of mind, had paid certain sums of money in lieu of tithes of hay, which sums were respectively collected by constables, and then the whole, which amounted to 15*s.* 4½*d.*, was by some of them paid to rectors as a modus for the whole parish: modus held good. *Hereford (Bishop) v. Comper*, 3 Swan 158.

17. Modus of 5*s.* payable out of every yard of land is valid. *Cart v. Hodgkin*, 3 Swan 160.

18. Modus for foreigners to pay 4*d.* per acre yearly for herbage and hay tithe is good. *Monson v. Chapman*, Fitzg. 119; 2 P. W. 566; Mos. 266, 279.

A modus, that every occupier of land within the parish of A., living out of the parish, shall pay 1*d.* an acre for all pasture lands within the parish; but if he lives within the parish, to pay the tithes in kind; a good modus. *Id.*

19. A modus that in consideration the parishioners made the tithe grass into hay, therefore the parishioners, inhabitants within the parish, were to pay no tithes for the herbage of dry and unprofitable cattle, and though proved that the parishioners, time out of mind, had paid no tithe of its herbage, yet the Court held it to be a material objection to the modus, that foreigners living out of the parish made the tithe grass into hay, and yet paid tithe herbage. *Fow v. Ayde*, 2 P. W. 520.

The Court held it to be a void modus, that the making of tithe grass hay should not only excuse that ground from paying tithes for herbage, but that perhaps a small quantity of meadow ground, by making the grass thereof into hay, should excuse the greater part of the ground of that parish from paying tithe herbage. *Id.* 521.

A modus in relation to the tithe due to the parson, may be a good bar to the payment of a small tithe due to the vicar, because all the tithes did at first belong to the parson, during which time he might agree to this modus. *Id.* 522.

20. A modus for tithe of corn for the inhabitants of such a tenement, and the lands therewith, usually enjoyed, void for uncertainty, in regard the tenement may be uninhabited, and the lands often shifted, and let with other farms. *Carleton v. Brightwell*, 2 P. W. 462.

21. A modus may extend to hops or clover (though lately brought into England) if it covers all small tithes. *Green v. Austin*, Lut. 1071.

22. A parol agreement to accept a modus in

lien of tithes, will not bind the parson, but it will excuse the parishioners from the penalties of 2 Edw. 6. *Breamer v. Thornton*, Hardr. 203.

1. Milk is exempt from tithe, by a custom that the parson shall for so many weeks have the sole milking of all milch cows in the parish. And apples or other fruit in an orchard shall not pay tithes, if there be a modus to pay a groat for every hogshead of cider, or 2s. per annum in lieu. *Hill v. Harris*, 2 Show. 461.

2. Where a modus of 20s. was set up by a parishioner, and the parson had entered into a special agreement to accept that composition, and had for many years given a receipt for it, and had also agreed to be paid moreover 10l. yearly, a bill by the parson for tithes generally was dismissed, the Court holding him to his agreement; but the Lords reversed the decree, and ordered the Court of Exchequer to hear the cause on the right of tithe, notwithstanding the agreement. And the Court having, on further hearing, directed issues to try the validity of the modus, the Lords, on further appeal, affirmed the decree. *Dent v. Buck*, Colles's P. C. 182.

3. Where a parishioner insisted on a modus, and it appeared that the parishioners had usually paid differently, the alleged modus will be disregarded, and he will be decreed to account for the tithe in kind; and where the matter is plain, the Court will not direct the modus to be tried at law. *Charleton v. Bayly*, Colles's P. C. 206.

4. Where a modus is too rank, defendant must account for tithe in kind. *Benson v. Watkins*, Bunb. 10.

5. For a milch cow and calf, 17d. is good for the calf and milk. So for a milch cow without calf, 11d. for the milk. So for a heifer and calf, the first year, 13d. for the milk and calf; all payable at Michaelmas. For cider, made of apples grown in the parish, 8d. per hogshead. For hoard apples, 1d. For firewood spent on the farm, a hearth-penny. For fruit, herbs, roots, and other garden stuff, a garden-penny. For a colt, 1d.; all payable at Easter. *Roe v. Ezeeter (Bishop)*, Bunb. 57.

6. Modus of 12d. for a milch cow is too rank, and so is 6d. for any calf killed and sold. *Franklyn v. St. Cross Hospital*, Bunb. 78. But it has since been held, that 6d. for a calf is good. *Reynel v. Aokland*, id. 78. n.

7. Account of vicarial tithes decreed against a modus of 1s. per acre for each acre of marsh land, for tithe of hay and all other vicarial and small tithes, the vicarage appearing to have been established by endowment in 1367, within legal memory. *Scott v. Smith*, 1 Ves. & B. 142.

8. Annual payment of 1d. by each occupier for tithe of hay, a good modus, but an issue granted. Modus for turnips, bad, being of too recent introduction into this country to be the subject of immemorial usage. *Leyson v. Parsons*, 18 Ves. 173.

9. Issue directed to try modus of 1s. per acre, in lieu of tithe hay; modus of 1s. 6d. and 2s. per acre for tithe hay, held rank. *Heaton v. Cooke*, Wightw. 281.

10. Modus of 1d. for each lamb, where number did not exceed four; 1s. where number did not exceed five; 1s. 8d. where number did not exceed six, and so increasing:—Held, not

rank, and sent to an issue. *Asken v. Greenhow*, 2 Price 314. n.

11. Issue directed on modus for certain lands amounting to 1s. per acre for all tithes, notwithstanding apparent rankness. *O'Connor v. Cook*, 6 Ves. 665. See 8 Ves. 535.

Rankness of modus is only evidence as to the immemoriality of payment, and not an objection in point of law. Distinction as to rankness between modus for tithe of particular things and a farm modus. *Id.* 672.

12. A modus payable by the owners of the land covered by it, is good. *Ord v. Clarke*, 3 Anstr. 638.

13. The Court will not decree against a farm modus on the ground of rankness. *Atkins v. Willoughby de Brooke (Lord)*, 2 Anstr. 397.

14. A modus of 1d. for every sheep, and ½d. for every lamb, brought into the parish after Candlemas, and sold out before shearing time, is a wool modus, not an agistment modus. *Garnons v. Barnard*, 1 Anstr. 320.

15. A modus of every tenth day's cheese during twenty weeks from Holyrood day, in lieu of tithe of milk, is good, *semble*. *Wake v. Russ*, 1 Anstr. 295.

16. A modus of a 1d., in lieu of tithe of hay, of the lands occupied with each house in the parish, is bad. *Travis v. Oxtou*, 1 Anstr. 308.

A modus bad in law received by the vicar, is proof of endowment of the tithe for which the modus was paid. *Id.* 309.

17. A modus of 2d., payable by every householder inhabitant in the parish, for all tithe of fuel, of fruits, of agistment, and of wood, is a good modus. *Bennet v. Read*, 1 Anstr. 322.

Another modus of 3d. for all sheep carried out of the parish between Candlemas and shearing time, covering the same place and persons, does not contradict the former modus for agistment, but is only to be taken as limiting it in the extent covered by the latter. *Id.* 323.

A modus covering a parish or district, is rather a custom than a prescription, and may often be good when a prescriptive modus covering particular lands would be bad. *Id.* 329.

18. Modus set up since 13 Eliz. does not bind the successor. *Anon.*, Lofft. 66.

19. If it appear that a pecuniary payment has been made for any sort of tithes, the Court will help the imperfect manner of setting out the modus. *Mallock v. Browne*, Amb. 423.

20. Issue directed whether a modus extended to modern orchards; and was so found, and decree for account accordingly. *Butcher v. Hill*, Amb. 376.

21. A fother of hay as a modus in lieu of tithes:—Held, uncertain and void. *Fenwick v. Lambe*, Amb. 365.

22. Doubtful modus not determined by a court of equity without a trial at law. *Chapman v. Smith*, 2 Ves. 506.

An exception in the alleged modus, that it was not to be paid when the land should be planted with hops, not fatal on the face of it in point of law. *Id.*

23. A modus for rabbits, part in kind and part in money, may be good. *Walton v. Tryon*, Amb. 135; Dick. 244.

24. A modus to take part of the tithes for the

whole, has always been held a void custom. *York (Archbishop) v. Stapleton*, 2 Atk. 138.

1. In a suit by rector for tithe of lambs, the defendant insists on a modus of 3*d.* for every lamb, payable on St. Mark's day, or so soon after as demanded. This modus is not void at law, but its validity shall be determined by a jury. Where plaintiff claims tithes in kind, and defendant sets up a modus, if plaintiff declines trying the modus at law, it shall be taken against him *pro confesso*. *Giffard v. Webb*, 7 Bro. P. C. 15.

2. In a defence of modus for produce of an ancient farm, it is indispensably necessary to show, by evidence, that a farm is ancient. *Stuart v. Greenall*, 9 Price 106.

Tithe of milk held to be within the payment for cow and calf, laid as a modus in lieu of tithe of such cow and calf. *1b.*

3. Modus of 4*d.* for every milch cow and calf, and 3*d.* for every heifer and calf, in lieu of tithe of calves and milk; and modus of 3*d.* for every hogshead of cider, and 1*d.* for fruit, in lieu of tithe of apples, pears, etc., are bad. The union of articles distinctly titheable, in one modus, is objectionable. *Short v. Lee*, 2 Jac. & Walk. 464.

4. A modus of 1*d.*, payable for every occupier of land, in lieu of the tithe of hay, held bad. A modus of 1*s.* for a milch cow, in lieu of the tithe of milk, held rank. *Busk v. Lewis*, Jac. 363.

Modus for every occupier of land to pay 1*d.*, in lieu of the tithes of calves, bad. *1b.*

5. A farm modus for part of a farm, may be valid. *White v. Lisle*, 3 Swan. 344.

6. Modus for pasture land, stated to be in lieu of the tithes of all titheable matters, yearly arising, etc., covers too much. *Lake v. Skinner*, 1 Jac. & Walk. 9.

7. A modus of 1*d.*, in lieu of the tithe of hay, of every inhabitant or occupier of a house, and having any land at, or belonging to, or used or enjoyed with, any house, is invalid. The decree of the Master of the Rolls on the other moduses, affirmed. *Blackburn v. Jenson*, 3 Swan. 132. And see 2 Ves. & B. 359.

8. Measure of oatmeal, payable in lieu of tithe of corn and grain, is a good modus. *De Whelpdale v. Milburn*, 5 Price 485.

9. Modus of 1*d.*, payable at Martinmas by every owner of a garden or garth within the parish, called a garth penny, in lieu of tithes of articles produced in such gardens, as covering potatoes and turnips, is good. *Williamson v. Lonsdale (Lord)*, 5 Price 25.

10. A modus for agistment-tithe, in satisfaction of all tithes, made in years when the grass land was otherwise cultivated, was holden bad. *Mould v. Wyat*, 2 Ken. Ch. 38.

A modus of 1*d.*, commonly called a plough-penny, payable, etc., by the several occupiers of lands in tillage within the said parish, for and in lieu and satisfaction of all small predial tithes, arising, etc., upon land so in tillage, as covering field turnips and potatoes, is bad. *1b.*

11. Modus of 2*d.* for a day's math of grass is good, the quantum being matter of evidence. *Cockburn v. Hughes*, 3 Price 408.

12. Modus of 1*d.* a cow for milch cows summered on lands within a parish, disallowed, because of the uncertainty of the word "summered." *Rumney v. Beale*, Dan. 35.

13. Modus of 5*s.* for every ten calves, where there happens to be ten, in lieu of tithe of such calves, and also of tithe milk of cow belonging to such calves, called renew cows, or cows having had each a calf within the year, preceded by modus of 1½*d.* for every cow called a renew cow, or a cow that has had a calf within the year, and is full of milk, in lieu of tithe of milk of such cow, cannot be supported as being inconsistent. *Layng v. Yarborough*, 4 Price 383.

Modus of 1*s.* for every tenth fleece, in lieu of tithe of the ten fleeces, is rank; 3*d.* for a lamb, or 2*s.* 6*d.* for every tenth lamb, in lieu of tithe of such ten lambs, not held rank, but issue directed; so for every tenth pig; so as to geese. Modus for tithes of articles of modern introduction cannot be supported, because of the anachronism; 1*s.* 6*d.* in lieu of tithe of rape seed, when sold in seed, bad for uncertainty: 4*d.* for messuage and garth; 2*d.* for every cottage and garth; 1*d.* for every strip cow; 4*d.* for every foal; 2*s.* 6*d.* for every tenth lamb, in lieu of tithe of such ten lambs, are good moduses. *1b.*

14. Modus of 3*d.* a year for every cow, and 6*d.* for every calf, in lieu of tithes of cows, calves, and milk, is good. A modus of 1*d.* a year, in lieu of tithe of gardens, is good, and may be so pleaded without stating that it is payable for ancient gardens. *Prevost v. Bennett*, 2 Price 272.

15. Modus of 3*l.* payable for certain tithes within township, the occupier of each farm or tenement within such township respectively paying his ratable proportion, is bad for uncertainty, even in an answer. *Wolley v. Hadfield*, 3 Price 210.

16. Modus of 10*d.* a score for agistment of sheep, bad. *Mytton v. Harris*, 3 Price 19.

17. Modus may exist for artificial grasses used in improvement of hay; modus of 3*d.* for a lamb, not rank; modus of 4*d.* for a cow in lieu of milk not supported by proof of modus for every cow with calf; modus of 1*s.* for every seventh pig on the ninth day, held good, after some doubt. *Bertie v. Beaumont*, 2 Price 303.

18. The defendants to a bill by a rector for tithes of hay, set up a modus of 2*d.* for each load of hay, of the weight of one ton, payable at Easter by the several occupiers, in lieu of tithes of hay grown from Easter in the year preceding inclusive; and they, by their answer, further stated that the amount of the modus payable to the rector under such custom had been usually ascertained by a person on behalf of the rector inspecting the ricks of hay made within the parish in each year, and forming an estimate of the number of loads of one ton weight contained in each rick, upon which estimate the whole of the annual modus payable to the rector was calculated, but that this mode of estimating the weight formed no part of the custom. It also appeared that, in a suit instituted in the Exchequer by the same rector against some occupiers for the tithe of hay in the same parish, an issue had been directed, and the jury having found that 2*d.* for every load of hay of the weight of one ton had been immemorially paid to the rector at Easter in each year, by the several occupiers of lands, in lieu of the tithes of hay, the rector's bill had been dismissed with costs:—Held, that the

alleged modus was bad in law, and the account ought to be directed against the defendants, without directing an issue as to the validity of the modus. *Goodenough v. Powell*, 2 Russ. 219.

1. A modus of 1½d. for every milch cow, if under seven, kept and fed on the lands, in lieu of the tithe of milk and calves of such cows; 2s. 4d. if the milch cows and calves shall amount to seven, and not seventeen; and the like sum of 2s. 4d. for every ten milch cows after the first seven, in lieu of tithe of milk and calves of such cows, considered good. A modus of 2d. for every house and garden, in lieu of garden stuff, considered good; but held to cover only gardens annexed to houses for the use of the houses, and not to market-gardens or the like. *Pritchett v. Honeyborne*, 1 Y. & J. 135.

2. A modus of 6d. in the pound, on an ancient rent, held bad, as a shifting and uncertain modus. The following moduses were held good, viz., 2d. for every milch cow called a new cow, that is, a cow that had more than one calf, in lieu of the tithe of milk of such cow; 1d. for every milch heifer, or whey of her first calf, in lieu of the tithe of milk of such milch heifer or whey; 1d. for every far cow or strip, that is, a milch cow that has not had a calf within the year, in lieu of the tithes of such far cow, and the milk thereof; 1d. for every calf under five within the year; for five calves, the value of ¼d. a calf; six calves, up to fourteen inclusive, a calf in kind, or its value; fifteen calves, a calf in kind, or its value, and the value of half a calf more; sixteen calves, to twenty-four inclusive, two calves in kind, or their value, and so on in proportion; the like modus for fowls; 1d. for every garden; and 4d. for a hen called a loak hen, in lieu of tithes of eggs and young poultry. The following moduses, namely, for every number of lambs within the year, under five, nothing; five lambs, the value of ¼d. a lamb; six lambs, and up to fourteen inclusive, a lamb in kind or its value, and the value of half a lamb more; sixteen lambs, up to twenty-four inclusive, two lambs in kind, or their value, and so on; the like modus as to fleeces; the same to geese were considered bad, nothing being paid under five. *Norton v. Hammond*, 1 Y. & J. 94.

3. A district modus, to be good, must cover all the lands in the district; and, therefore, where a modus was pleaded for a particular district, and it appeared from the evidence that certain farms within the district never paid or contributed, the modus was considered bad. *Miller v. Jackson*, 1 Y. & J. 65.

4. Modus for the cover of clover, *eo nomine*, as distinct from a modus for the acre of hay:—Held, not objectionable, either on the ground of the former being an article of modern introduction in agriculture since legal memory, or as not being *per se* a subject matter of modus distinct from, and independently of, natural grass made into hay; and that although the modus for hay was laid generally as a parochial modus, without any exception, as hay made of clover. *Davies v. Moseley*, 13 Price 423; M'Clel. 143.

5. Moduses of 7d. for every milch cow, in lieu of tithe for calf and of milk of such cow; 5d. for every heifer, in lieu of tithe of calf and milk of such heifer; 4d. for every hogshead of

cider, and so in proportion for a greater or less quantity, in lieu of tithes of apples, etc.; 1d. for hoard or hoard-penny, in lieu of tithe for apples, hoarded, etc.:—Held, to be legal, and issues directed to try them. *Holwell v. Blake*, M'Clel. 559.

6. Modus of sum of money in groes, payable to vicar on his induction, in lieu of certain tithes during his incumbency, is bad. So, also, in such a payment, with a further annual payment of smaller sum in lieu of certain tithes during the same period. *Manby v. Taylor*, 9 Price 249.

7. Where defendants who had pleaded certain farm moduses, in lieu of the tithes of their respective farms, proved, by a series of terriers and vicars' receipts, the payment and acceptance, for about a century back, of the several sums alleged by them to be moduses, in satisfaction of the tithes of lands, called in the terriers and receipts by the same names as the farms of the defendants; and also proved that tithes in kind had never been paid for such lands; yet the defendants not having by their answers, nor by evidence, distinctly described and established the boundaries of their respective farms:—Held, that the defence of modus could not be supported, but in decreeing an account of the tithes, the Court expressly directed that the decree should be without prejudice to the defendant's making use of the same defence at a future time, in case, on further inquiry, they should be able to distinguish the actual boundaries of their farms. *Rudd v. Champion*, Younge 173.

8. A district modus of 4s., for hay and agistment, was pleaded as payable by the owners or occupiers of lands within that district; but it was also stated by the answer, and proved by the evidence, that the modus had uniformly been paid by the owner and occupiers of two closes within the district:—Held, that as a modus must be paid and payable by those whom it protects, this circumstance would be fatal to the modus, unless explained, which it was in the present case, by the fact of two closes being proved to have been allotted to particular individuals in fee, on condition of their satisfying the modus. *Gibson v. Peacock*, Younge 184.

9. A modus of 1½d. payable by every occupier of land in the parish, for every cow kept by him within the parish, in lieu of the tithes of the milk and calves of such cow, is good. *Tomlinson v. Lymor*, 4 Sim. 467.

10. A modus payable by every householder, in lieu of all tithes of hay, without regard to the fact whether such householder has, or has not, hay, is valid; but otherwise if it be alleged to be payable only when the householder has hay. 6d. in lieu of a tithe pig is rank. A modus for fruit and garden-stuff is good, though it be not alleged to be growing in a garden. *Gronow v. Edwards*, 2 Russ. & M. 102.

11. A modus of one egg for a hen, and two for every cock kept on the farm of the occupier, in lieu and satisfaction of the tithes of the eggs produced by such hens:—Held, void. *Lonsdale v. Heaton*, Younge 58.

12. Moduses of 1½d. for every cow calving and being milked within the year ending at Easter, in lieu of the tithe of milk and calf

of every such cow; of 1*d.* for every cow not calving, but being milked, within the year ending at Easter, in lieu of the tithe of milk of such cow; of 4*d.* for every colt foaled; of 3*d.* for every lamb; of 1*d.* for every sheep shorn, in lieu of the tithe of wool; and of 1*d.* for every garden, in lieu of tithes of the produce of such garden:—Held, good moduses, but issues offered. *Luton School v. Scarlet*, 2 Y. & J. 380. Affirmed *sub. nom. Scarlet v. Luton School*, 4 Cl. & F. 1; 10 Bli. N. S. 592.

1. A custom that the rector shall occupy, from Lady-day to Michaelmas in each year, forty acres, part of a fen, consisting of about 1,200 acres, in lieu of the tithes of all hay and fodder arising on the fen, is a valid custom. *Sparke v. Ivatt*, 7 L. J., Ch., 158.

2. Issue directed to try a modus of 37*l.* a year, payable half-yearly, alleged to be payable in satisfaction of all the vicarial tithes of certain farms, constituting a particular hamlet within the parish, notwithstanding the presumptive rankness of the modus; and though it appeared from ancient documents that the whole tithes of the land in the parish, at a date long subsequent to the time of legal memory, were of less annual value than the sum pleaded as a modus, and notwithstanding there was no evidence of any payment of tithes, the validity of the ancient documents, and their application to the subject being, however, questioned, and a great deal of parol testimony being adduced in support of the modus, uncontradicted by any parol evidence to the contrary. *Strong v. Denchfield*, 2 Y. & J. 594; Affirmed 4 Bli. N. S. 136.

3. Where a township modus of 5*l.* 3*s.* 10*d.* was pleaded as covering all the lands in a particular township, in lieu of predial tithes, and it appeared from the evidence that, for a great many years, several small sums amounting to about the sum pleaded, had been paid by the inhabitants severally, and not collectively, to the rector, the Court held that though some of the payments might be good moduses, or prescriptive payments for their respective farms, yet that they could not together make a good township modus. To render a township modus good, it ought to be payable by each and every of the inhabitants, and ought not to be collected by the rector. *Jackson v. Benson*, 2 Y. & J. 45.

4. The occupiers of land in a parish which consisted of three species of land called uplands, townlands, and marsh or moorlands, set up three different moduses in respect of the lands within each designation; namely, 4*d.*, 6*d.*, and 8*d.* per acre. Issues were directed to try the validity of the moduses. The jury found in favour of all the moduses; and further found that there was a natural mark or boundary distinguishing the uplands from the marshlands, but there was no fixed boundary to the lands called the townlands:—Held, that none of the moduses could be supported, it appearing from the evidence and the finding of the jury, that there were no fixed and immemorial boundaries to the townlands, and it being also consistent with the evidence that part of the marshlands might have been converted into lands of another description. *Ward v. Pomfret*, 6 Jur. 568.

5. The rankness of a modus is not strictly

speaking an objection to it in point of law; but courts of equity, judging both of the fact and the law, in the absence of the original deeds of agreement, determine from the gross absurdity of the bargain that no such bargain ever was made. The same may be said of an annuity given from time immemorial in purchase of the tithes. *Knight v. Waterford (Marquis)*, 4 Y. & Coll. 283; 10 L. J., N. S., Exch. Eq., 57; 5 Jur. 818.

6. In a bill for tithes the defendant set up a modus for outners (persons dwelling out of the parish but holdings lands within it), to pay 4*d.* per acre for all ancient pasture lands:—Held, that such modus was good in law. *Byron v. Cooper*, 11 Cl. & F. 556; 8 Jur. 991. Reversing on this point *Cooper v. Byron*, 3 Y. & Coll. 467; and on a re-hearing, S. C. *nom. Cooper v. Hewson*, 4 Y. & Coll. 269.

7. Commentary on the inferences to be drawn from the value of money at various times, in forming a judgment as to the validity of the modus. *Cooper v. Hewson*, 4 Y. & Coll. 269. Affirming S. C. *nom. Cooper v. Byron*, 3 Y. & Coll. 467, on a re-hearing.

8. In a suit for tithes by an ecclesiastical rector against the occupiers, the defendants set up a modus of 1*l.* 17*s.* 9*d.*, as covering the tithes of four townships in a parish, which were claimed by the plaintiff. The latter proved by documents older than those produced by the defendants, that separate moduses, amounting to 1*l.* 17*s.* 9*d.*, had been paid for separate portions of the four townships:—Held, that the modus pleaded was bad. *Harcourt v. Pierson*, 5 Sim. 368.

9. In a suit for tithe of hay, the occupier pleaded a modus of 2*d.* an acre at Easter, for and in lieu and satisfaction of the tithe of hay on ancient meadows, and went on to state that such modus of 2*d.* an acre, in lieu of tithe of hay, was meant and intended to cover, and in fact covered, tithe of agistment of all cattle depastured on the ancient meadows thereafter until Candlemas in each year; but if the ancient meadow-lands were depastured after Candlemas, and before they were laid up to be mown, then tithe in kind of agistment became payable to the vicar. The evidence went to establish the modus of 2*d.* an acre for tithe of hay of ancient meadows, but not the agistment:—Held, that, as tithe agistment was not claimed in this cause, the variation in the modus as proved, and as laid in the answer, was not fatal to the defence, but that it might be treated as if the modus proved had been pleaded as a modus for tithe of hay only. *Pope v. Farthing*, Younge 263.

2. Proof of.

10. A defendant insisting on a modus as an outner, must prove himself to have been such at the time his lands became titheable; his being so described in the bill, not sufficient. *Lake v. Skinner*, 1 Jac. & Walk. 9.

11. As to the preponderance of conflicting evidence as to title in tithe causes. *Peto v. Dalton*, 6 Price 232.

12. Modus of sum of money laid as payable in lieu of tithes of hay, and all small tithe, is not supported by proof of payment for hay, and non-payment of hay in kind or any small tithes

either in kind or *sub modo*. Payments laid as moduses, and proved to have been always paid within memory, and not opposed by evidence of their origin:—Held, sufficiently proved to establish them on a defence of moduses, although all the witnesses called them compositions. *Driffild v. Orrell*, 6 Price 324.

1. Parol evidence of payment for hay and agistment is rebutted by evidence of modus having been established at law and equity for hay. *Williamson v. Thompson*, 9 Price 197.

A modus covering both these tithes is suspicious, and requires strict proof that it is a payment in lieu of both. Evidence of payment, however, was sent to be tried by jury. *Id.*

2. Modus of 4d. for every cow in lieu of tithe of milk, is not supported by proof of modus for every cow with calf. *Bertie v. Beaumont*, 2 Price 303.

3. On question of parochial modus referred to a trial at law, testimony offered as evidence of reputation in proof of custom on which right to the advantage of *modus decimandi* was founded, that money payments, constituting alleged modus, had been uniformly made beyond living memory, and that witnesses had heard old persons, who at that time occupied lands in the parish and were long since dead, say that it had always been the custom to make such payments, was held admissible evidence of reputation against an objection taken of interest in making such a declaration on the part of such deceased persons on whose information the evidence was founded. *Moseley v. Davies*, 11 Price 162.

4. It is no objection to evidence of reputation, that deceased person from whom it came was liable to pay tithes. *Harwood v. Sims*, Wightw. 112.

5. Evidence of reputation, as to the payment of a farm modus, is inadmissible, on the ground that hearsay evidence is not admissible on a question of private right. And therefore, and in obedience to this rule, the evidence of old persons, who deposed to having heard their parents and relations, and other persons, since dead, state that a certain farm modus was payable in respect of a particular farm, was rejected. Where certain payments, alleged to be farm moduses, were proved by persons who had known the farms for many years, some of them for more than half a century, and who had actually occupied the farms, to have been uniformly paid to the rector in lieu and satisfaction of the tithes alleged to be covered by the moduses:—Held, that the moduses were not so clearly disproved by several terriers signed by the rector, churchwardens, and inhabitants, containing entries to the following effect:—"Tithe rents due to the rector 35l. 16s. 10d." "The tithes due to the rector are small tithes, Easter offerings, and great tithes; for which last a composition tithe rent throughout the parish is at present paid to the rector," as to authorise the Court, sitting in equity, to overrule them and disregard the evidence of usage upon which they were founded; and the terriers being evidently erroneous in some particulars, the Court refused to decree an account of tithes in kind, but offered the rector an issue or to retain his bill for a year, with liberty to bring an action. *Lonsdale v. Heaton*, Young 58.

6. Where a modus is laid with exceptions, it

may be proved by some witnesses who speak to a general modus, and others who speak to the exceptions. A second set of depositions taken upon the same interrogatories, rejected. *Hadow v. Barnett*, 1 Y. & Coll. 164.

7. Modus set up for hay, hemp, and flax is so far proved by receipts for money payment made for hay, hemp, and flax, for forty-five years back, although earlier receipts describe it as payable for hay only, which would have otherwise been conclusive against the occupiers, as that the payment must be made the subject matter of an issue. The payment being called a hay-rent in receipts, is no objection to them as evidence of the existence of a modus. *Manby v. Lodge*, 9 Price 231.

8. Evidence of reputation cannot be received in support of a farm modus. The evidence required to establish a farm modus, is, first, the clear identity of the farm by metes and bounds; secondly, the antiquity of the farm; and, thirdly, immemorial payment of the modus. But it cannot be expected that any testimony should be adduced that the lands comprising the farm were cultivated together before the year 1189, and that the payment was then made. It would be as reasonable to require the actual production of the deed of composition. There seems to be no reason why the same evidence which establishes a parochial modus, viz., usage as far back as can be reasonably traced of the payment being made on one side, and tithes in kind not having been demanded on the other, should not be good evidence of a farm modus, and such seems to be the result of the authorities. *Pritchett v. Honeyborne*, 1 Y. & J. 135.

9. The defendant having set up a farm modus in answer to a bill for tithes, issues were directed to try whether the ancient farm consisted of the lands mentioned in the answer, and whether a certain modus had been immemorially payable for the tithes arising upon it. The jury found that the farm consisted of these lands, together with four other closes, and was covered by a modus. The circumstance that the jury found the ancient farm to consist of other lands besides those mentioned in the pleadings, is no ground for a new trial, unless the plaintiff can show that he has evidence with respect to those four closes which, upon the supposition that they are parcels of the alleged ancient farm, might materially vary the substance of the case. *Bailey v. Semell*, 1 Russ. 239.

10. Where a district modus was pleaded, and it appeared from ancient documents that the modus could not consistently with those documents have existed at the time of legal memory, the Court decreed an account of tithes in kind, and refused an issue, notwithstanding the payments were proved to have existed for a great number of years. *Müller v. Jackson*, 1 Y. & J. 65.

Evidence that sums had been collected from the inhabitants by a person employed by the person, and from a list furnished by him, affords strong presumption that the payments are farm moduses, and not a district modus. *Id.*

11. Issue directed to try the validity of a modus laid for a very small district, though the map attached to the answer varied from that given in evidence by the defendants, and

though the defendants relied on evidence of reputation to prove the bounds of the district. The lands of smaller monasteries which were surrendered to the King, after the 27 Hen. 8, c. 28, and were, at the time of their surrender, free from tithes, are within the protection of 31 Hen. 8, c. 13, s. 21. To show that a monastery held lands discharged from tithes by prescription at the time of its dissolution, positive evidence must be given that the monastery existed prior to the time of legal memory; but if this evidence be given, its possession of the lands before that period may be left to presumption. Under the general pleading, that the lands were, at the time of the dissolution, held, discharged "by prescription, or other lawful ways and means," the defendants may give evidence of any legal discharge. A witness is not disqualified from proving the payment of a modus, on the ground of being an owner of the lands in question, unless it be clearly proved that he is an owner at the time of his examination. The stat. 3 & 4 Will. 4, c. 42, s. 26, does not render a man, who has sworn before the Act, a competent witness afterwards. Whether that Act extends to equitable proceedings, *quære*. Matthew Paris is not evidence of the establishment of the order of Franciscans in Italy. *Barnes v. Stuart*, 1 Y. & Coll. 119; 4 L. J., N. S., Exch. Eq., 25.

1. Where it appears in evidence that Quakers have been convicted for non-payment of their tithes or prescriptive payments, it is strong evidence that a township modus, in respect of those tithes, does not exist. *Jackson v. Benson*, 2 Y. & J. 45.

2. Modus laid to have been immemorial, and payable by every occupier growing hay:—Held, not to be disproved by evidence of endowment in 1253, and of contributory payments by every occupier indiscriminately. *Atkins v. Drake*, M'Clel. & Y. 213.

3. The evidence of a witness in support of a modus for milk and calves, is receivable, notwithstanding he occupies a cottage and garden in the parish. An owner of lands in the parish is a good witness to prove the custody of old receipts for moduses alleged to be payable for his lands, notwithstanding he has agreed to contribute to the costs of the suit. Old receipts for tithes and moduses expressed merely to have been given to A. for sums received of him by B., on account of C., sufficiently appear to relate to the parish, it having been proved that persons of those names were respectively, at the dates of the receipts, owners of lands in the parish, and curate and rector thereof; and such receipts having been found by A. amongst his late father's papers, under whom he claimed, are admissible in evidence to prove the moduses. *Tomlinson v. Lymer*, 4 Sim. 469.

4. Modus alleged in answer to be payable in lieu of tithes, is not supported by proof of payments of a large amount. *Fisher v. Graves*, M'Clel. & Y. 362.

Where a payment in lieu of tithes of the ancient demesne lands of a manor was proved to have been paid to and accepted by the rector for the time being, upwards of a century, and, from the recitals in a lease in the reign of Car. I., there was strong ground to presume that it existed before that period, and there was no evidence of tithe in kind ever having been rendered; yet it being manifest, from

certain ordinances and other ancient documents produced and proved in the cause, that the payment had its origin subsequent to time of legal memory, the Court, notwithstanding the antiquity of the payment, decreed an account. *Id.* 363.

5. Depositions of defendant, who set up a farm modus, allowed to be read *de bene esse* in favour of co-defendant, who set up other farm moduses. Deposition of witness, who states himself to have been interested in cause, but duly released, cannot be read until Court has, by inspection of documents creating such interest and release, satisfied itself thereon. *Wolley v. Brownhill*, M'Clel. 324. S. P. 13 Price 500.

Plaintiffs, having read a passage from answer ending thus, "but have not set forth an account of such titheable matters, on account of the expense thereof, and for the reasons herein mentioned," the Court refused to permit a distinct part of the answer, which contained the reasons referred to, to be read as evidence for the defendants. *Id.* 326.

In proving farm modus, defendant is bound first to prove distinctly that the farm was an ancient farm, and then to show the particular payment in respect of that ancient farm. *Id.* 331.

6. If, in a suit for tithes, the plaintiff, to prove his title as tithe owner, reads passages from the answers, in which the defendants state their belief, that as to certain matters, the lands in question are covered by moduses; this constitutes a *prima facie* case for the moduses; and it becomes the business of the plaintiff to overthrow them, and that of the defendant to sustain them. *Carrington v. Jones*, 2 L. J., Ch., 11.

7. A modus established by verdict of jury on an issue, is conclusive on judge in equity. *Davis v. Moseley*, 13 Price 423; M'Clel. 143.

8. Where the Commutation Act passed pending a suit between the rector and occupier, and in the course of proceedings under the Act an action was brought to try the validity of a modus, which was found against by the verdict:—Held, that the verdict was admissible, not as conclusive, but as matter of evidence against the occupier, and that the plaintiff might, by a supplemental bill, put in issue the fact of the verdict stated in it, in order that he might prove it at the hearing. *Morris v. Ellis*, 13 Sim. 1; 6 Jur. 547.

3. Issue at Law.

9. Where a parishioner insisted on a modus, and it appeared that the parishioners had usually paid differently, the alleged bonus will be disregarded, and he will be decreed to account for the tithe in kind; and where the matter is plain, the Court will not direct the modus to be tried at law. *Charlton v. Bayley*, Colles's P. C. 206.

10. The Court will direct an issue to try a modus, though not proved exactly as laid in the bill. *Laithe v. Christian*, Bunb. 340.

11. Modus for clover, instead of saying modus for grass:—Held, sufficient, and issue directed to try modus for grass. *Wood v. Harrison*, Ambl. 563.

12. Issue directed to try modus of 12d. an

acre, in lieu of tithe hay: moduses of 1s. 6d. and 2s. per acre for tithe hay, held rank. *Heaton v. Cooke*, Wightw. 281.

1. Issue directed on modus of certain lands, amounting to 1s. per acre for all tithes, notwithstanding apparent rankness. *O'Connor v. Cook*, 6 Ves. 665. See 8 Ves. 535.

2. Bill for tithes, glebe, and right of common. Defendant insisted on a modus. Though the modus appeared to be too rank, yet the Court would not determine upon any of the points until plaintiff had established his right at law. *Sweetapple v. Kingston*, Bunb. 238; *Chamberlain v. Spencer*, id. n.

3. In a suit for tithe hay, the defendants, by their answer, only set up several moduses by the name of straw tithes. An issue in this case proper to try whether the moduses insisted on by the defendants, in their answers, have been time out of mind paid and payable for and in lieu of tithe hay in kind. *Harrington v. Horton*, 4 Bro. P. C. 624.

4. Where modus is set up, but not proved by clear legal evidence, a court of equity ought not, in the first instance, to decree an account, but should direct an issue to try validity of modus. *Whitehead v. Travis*, 7 Bro. P. C. 49.

5. A modus being clearly invalid as laid, the question of law is decided without directing an issue on the question of fact. *Blackburn v. Jepson*, 3 Swan. 132.

6. Where defendant states in his answer that modus has been immemorially paid to vicar in lieu of tithes, and vicarage is shown to have been endowed within time of legal memory, Court will allow modus to be re-stated, so as to take issue to try modus. *Prevost v. Benett*, 1 Price 236.

7. Old terriers, recording that tithe of hay is payable in kind, signed by rector and churchwardens, overseers, and some of resident parishioners, are good evidence to rebut the presumption of a farm modus, attempted to be established by proof of money payment having been uniformly rendered within living memory; and the absence of any evidence, even of reputation that tithe had ever been taken in kind, and that though such terriers are not proved to have been signed by any persons interested in the farm. Nor will the Court grant an issue in such case. *Nycton v. Harris*, 3 Price 19.

8. The amount of money payments laid as moduses in answer to vicar's claim, being totally inconsistent with value of vicarage, as established by ancient documents, usually put in evidence, is not sufficient (where the payments have been uniform and uninterrupted) to induce the Court to dispense with an issue. It seems no objection to lay a modus, that it excepts articles of modern introduction *specialim*. *Jee v. Hockley*, 4 Price 87.

9. Modus of 1s. for a Welch cow in lieu of tithe of milk of such cow sent to issue. Modus of 1½d. for every calf fallen or dropped in the parish in lieu of tithe of such calf, is not proved if evidence add a qualification to custom. *Leathes v. Newett*, 4 Price 355.

10. Modus of 15s. payable on Easter Monday by all the occupiers of land in the township, etc., or some or one on behalf of all, in lieu of tithe of grass growing within the same township, whether the same be mown or made into hay, or eaten by barren and unprofitable cattle covering the tithe of agistment, if there be

evidence given of its having been paid, and for the tithe of agistment, will be sent to an issue. *Williamson v. Lonsdale* (Lord), 5 Price 25.

11. Where tithe of corn has never been paid within memory in the parish, and a contributory payment exempting the whole parish is paid by certain, though not all of the owners and occupiers of estates, the question whether it is a farm or district modus must go to issue. *De Whelpdale v. Milburn*, 5 Price 485.

12. If modus be laid in answer to case resting on endowment as covering several titheable articles, it must be proved to be payable for all of them. A doubt from evidence as to that extent is not sufficient to direct an issue. *Kempson v. Yorke*, 8 Price 13.

13. Where evidence in support of tithes, and in support of modus, was very strong and conflicting, an issue was sent to law to determine the question. *Taylor v. Cook*, 8 Price 650.

14. Doubtful modus not determined by a court of equity, without a trial at law. *Chapman v. Smith*, 2 Ves. 506.

15. Where a modus was pleaded as covering tithe of hay and agistment, and many receipts for the modus were produced, in some of which it was stated to be paid in lieu of tithe hay, and in others in lieu of tithe hay and joistige, and there was parol evidence of reputation, that the payment covered both hay and agistment, the Court would not decree an account of the tithe of agistment, but left the vicar to an issue. *Gibson v. Peacock*, Younge 184.

16. To a vicar's bill for tithes, except of corn and grain, the defendants pleaded a modus, as covering all tithes payable to the vicar. No endowment was produced, nor was there any admission or evidence of the tithes to which the vicar was entitled. An issue was directed to try the modus, which issue was found in favour of the vicar. On the further hearing on the postea, the Court referred it to the Master to inquire to what tithes the vicar was entitled. *Strong v. Denchfield*, Younge 272.

17. A township modus of 4l. was set up in lieu of the tithes of corn and grain. It appeared from a grant in the time of Queen Elizabeth, that the then extended value of the tithes of the parish, which comprised ten other townships, besides the one in question, was 10l. only, the entire quantity of land comprised in the parish being 8,000 acres, and the quantity contained in the particular township 600. From the evidence in the cause, the modus appeared to have been paid and received for upwards of 150 years, though there was some discrepancy in the evidence, whether the modus covered hay only, or hay and corn:—Held, that the value stated in the grant was not conclusive evidence of the actual value, and that the question of rankness, and also the question as to what the modus covered, were properly questions for the consideration of a jury, and an issue was accordingly directed. *Rededale* (Lord) v. *Welby*, Younge 202.

18. In a suit for tithes, the defendants alleged that their several farms formed parts of a district of land of considerable extent, for which district a modus was payable in lieu of tithes. The defendants, by their answers, and in schedules and maps annexed thereto, stated and described the boundaries and abutments of the district of land, and also of their several farms, as comprehended within that district. Witnesses

were examined with reference to the boundaries who proved the general accuracy of the maps annexed to the answers of the defendants; but deposed, that, to their belief, three small closes of land (no part of the farms of any of the defendants), which were stated by the maps to be within the district, were not in fact within the district:—Held, that this discrepancy was not sufficient to destroy the modus, and that, if it were, still it would be necessary to have the opinion of a jury, as to the accuracy of the maps, and the descriptions in the answers. *Rudd v. Wright*, Younge 147.

1. Money payments in lieu of tithes, although made as far back as living memory can reach:—Held, not to be moduses where they were apportioned by reference to the poor rates. An issue will not be granted to try the character of such payments. *Walter v. Holman*, 4 Price 171.

2. In pleading, case proved should correspond with case laid. Therefore, where, in answer to bill for tithes, certain customary payments were alleged, and some payments which, from their smallness, appeared customary, were shown in evidence, without making out moduses as laid, Court of Exchequer, without issue, decreed for plaintiff. *Blake v. Veyrie*, 3 Dow 189.

3. The defendants to a bill by a rector for tithes of hay, set up a modus of twopence for each load of hay, of the weight of one ton, payable at Easter by the several occupiers in lieu of tithes of hay grown from Easter in the year preceding, inclusive; and they, by their answer, further stated that the amount of the modus payable to the rector under such custom had been usually ascertained by a person, on behalf of the rector, inspecting the ricks of hay made within the parish in each year, and forming an estimate of the number of loads of one ton weight contained in each rick, upon which estimate the whole of the annual modus payable to the rector was calculated, but that this mode of estimating the weight formed no part of the custom: it also appeared that, in a suit instituted in the Exchequer by the same rector against some occupiers for the tithe of hay in the same parish, an issue had been directed, and the jury having found that 2*d.* for every load of hay of the weight of one ton had been immemorially paid to the rector at Easter in each year by the several occupiers of lands, in lieu of the tithes of hay, the rector's bill had been dismissed with costs:—Held, that the alleged modus was bad in law; and the account ought to be directed against the defendants, without directing an issue as to the validity of the modus. *Goodenough v. Powell*, 2 Russ. 219.

4. In a suit by the rector for tithes, the defendants pleaded a modus as covering their lands, as part of a district or tract of land, called Allesley Park; the defendants, in support of their defence, proved the boundaries of the district, and proved by terriers, rectors' books, and other documents, and also by parol testimony, the existence of the payment as a modus for the district, for upwards of 150 years. The rector gave in evidence Pope Nicholas's taxation, various inquisitions and surveys, in which the rectory, and the district in respect of which the modus was pleaded, were estimated at values wholly inconsistent and

irreconcilable with the existence of the alleged modus:—Held, that the rankness of the modus, as compared with the value stated in the ancient documents, was not a sufficient ground to disturb so ancient a payment without an issue. And an issue being accordingly tried, and a verdict found for the defendants, thereby establishing the modus:—Held, after verdict, that it was for the jury to consider the weight due to the documentary evidence produced by the rector, and whether it ascribed to the rectory and the district their actual value at the time, or whether that evidence bore internal marks of its being erroneous in those respects. And an application for a new trial, on the ground that such consideration of the evidence ought not to have been left to the jury, was refused. *Bree v. Beck*, Younge 211.

5. The defendant having set up a farm modus, in answer to a bill for tithes, issues were directed to try whether the ancient farm consisted of the lands mentioned in the answer, and whether a certain modus had been immemorially payable for the tithes arising upon it. The jury found that the farm consisted of these lands, together with four other closes, and was covered by a modus. The circumstance, that the jury found the ancient farm to consist of other lands, besides those mentioned in the pleadings, is no ground for a new trial, unless the plaintiff can show that he has evidence with respect to those four closes, which, upon the supposition that they are parcels of the alleged ancient farm, might materially vary the substance of the case. *Bailey v. Sewell*, 1 Russ. 239.

6. *Semble*, an issue to try money payment set up as a farm modus, may be granted on the parol evidence of a single witness, uncorroborated by other evidences, but his testimony must be positive and distinct, and should apply to everything necessary to be proved before the jury, in order to establish the fact intended to be tried. If it be insufficient or unsatisfactory in any of those respects, the Court will not grant an issue, but will proceed to decree an account of the tithes. *Wolley v. Underhill*, 13 Price 500; M'Clel. 317.

7. A double issue may be directed to try the validity of a farm modus; the inquiry being, first, as to the existence of the ancient farm; secondly, as to the payment of the modus. *Bryan v. Parker*, 1 Y. & Coll. 170.

8. Where, after two trials of an issue on a modus in a tithe cause, in both of which defendant (in equity) obtained verdicts, the Court dismissed bill as to tithes covered by modus, with all costs at law and in equity, except the costs of the first trial of the issue, as to which they ordered each party to pay his own costs,—the question raised by motion for new trial having been doubtful. *Stuart v. Greenall*, 13 Price 755; M'Clel. 705.

9. On a bill filed by a perpetual curate against occupiers for the tithes of hay and certain small tithes, it appeared probable, from the evidence, that previous to the year 1715 the curate only received the tithes by permission of the lay impropriator; but it was proved that since that period he had, to a certain extent, received tithes, or a compensation for tithes, and that no tithes of any description had ever been demanded by, or paid to, the lay

impropriator:—Held, that the curate's title to tithes was established; but issues were directed to try the existence of certain moduses set up by the defendants. *Oliver v. Latham*, 1 Y. & Coll. C. C. 243; 6 Jur. 206. Affirmed 1 Ph. 408; 13 L. J., N. S., Ch., 149.

1. Where the defendants in a tithe suit set up by their answer certain yearly payments as moduses, but insisted that, if the same, for any reason, were not good and valid moduses from time immemorial, they must be taken to have been payable as a good and valid real composition, made with the assent of all parties whose assent was necessary thereto, and before the restraining stat. of 13 Eliz.:—Held, upon a re-hearing, that the allegation as to the composition was not shaped as stating a fact in the alternative, but only as introducing an argument, and, therefore, might be rejected as surplusage; and that the defendants, under the circumstances of the case, were entitled to an issue as to the modus. *Janus College (Oxford) v. Gibbs*, 1 Y. & Coll. 445. And see S. C. 1 Y. & Coll. 145; 4 L. J., N. S., Exch. Eq., on original hearing.

2. Where the circumstances appearing on the evidence in a tithe suit were inconsistent with the statement in the bill as to the modus set up, the Court refused to direct an issue to try its existence. *Cooper v. Byron*, 8 Y. & Coll. 467. Affirmed on a re-hearing S. C. *nom.* *Cooper v. Hewson*, 4 Y. & Coll. 269.

3. The validity of a modus for outners to pay 4d. an acre for ancient pasture land, having been established, the rector was allowed to take an issue to try whether it applied to ancient pasture lands which, after being meadowed or ploughed up within the time of legal memory, were re-converted to pasture; and the House reserved costs and further directions till such issue should have been determined. *Byron v. Cooper*, 11 Cl. & F. 558.

4. To a bill by the rector for an account of tithes against the owners of the manor and the lands in the parish, the defendants set up a modus of 13l. 6s. 8d. By the documents coming out of the possession of the defendants, it appeared that 13l. 6s. 8d., and also 8s. 9d. not pleaded, had been paid by the owner of the manor and lands for different considerations expressed in the documents, and at different times of the year, from 1607 until 1823; when the then owners of the fee agreed to discontinue the money payments, and thenceforward to pay tithes in kind:—Held, that in such a case the Court would decree an account of the tithes, without requiring the plaintiff to establish his right at law either in an issue or by an action; that in such a case, if upon the evidence the existence of the modus as pleaded were doubtful, the Court would direct an issue and not leave the plaintiff to his action at law. *Raine v. Cairns*, 4 Hare 327. Affirmed *sub. nom.* *Cairns v. Raine*, 12 Cl. & F. 833.

4. Other Matters.

5. As to the propriety of bill to establish moduses, see *Rudge v. Chapman*, 2 Com. 697.

6. Rector of M. claiming tithes in kind, the occupier and landlord filed a cross-bill to establish modus payable to rector of S. by the lord of the liberty of which the lands were

parcel. It was objected, first, that the rector of S. not disputing the modus, a bill would not lie to establish it; second, that the other owners of lands in the liberty should have been parties. Bill dismissed. *Woolston v. Wright*, 3 Anstr. 801.

7. A defence of modus is wholly inconsistent with a defence in *non decimando*. *Norton v. Hammond*, 1 Y. & J. 94.

8. Defendant cannot plead a payment as a modus, and afterwards insist upon the same payment as a composition, requiring six months to determine it. *Wolley v. Brownhill*, M'Cl. 317; 13 Price 500.

9. Bill lies to perpetuate the testimony of witnesses to prove a modus; but *quere*, if it will lie to establish a modus. *Somerset v. Fotherby*, 1 Vern. 185.

10. Where occupiers file a bill against a party to establish a modus, pending a suit instituted against them by the same party for the tithes, it is not necessary for them, in support of their bill, to have the defendant's admission of their occupation. *Fisher v. Ariott*, 2 Y. & Coll. 208.

11. One entire payment may be due for many distinct sorts of tithes; it is no objection that it falls unequally on the parishioners by being as heavy on the occupiers of small as of large tenements and farms. *Bennet v. Read*, 1 Anstr. 327.

12. Defence to bill for tithes of a district modus where the defendants do not state on record, and prove by evidence, an occupation therein, must fail. *Jenkinson v. Royston*, 5 Price 495.

13. In a suit for tithes, an admission by the defendant of the plaintiff's right to a specified modus, in lieu of tithes, which cannot be sustained, in consequence of its being defectively pleaded, is an admission of his title to the tithes. *Wharton v. Child*, 7 L. J., Ch., 106.

14. The commissioner appointed under an inclosure Act stated that lands in the parish were subject to a modus, which "extended only to the lands when occupied by the owners thereof," or by residents, but that such lands become liable to the payment of tithes, the amount of which he specified in a schedule, when otherwise occupied, or "if converted into tillage." A resident owner built in one of his fields, then subject to the modus, a house, attached to it a garden, and planted fruit trees on the rest of the field:—Held, that by the planting of the fruit trees there had not been a conversion into tillage so as to destroy the modus and render the land subject to the increased tithe. *Dudman v. Vigar*, 6 L. R., H. L., 212; 42 L. J., C. P., 294; 29 L. T., N. S., 552.

The conversion into tillage of any part of the land, if such conversion had actually taken place, would not under this award make the whole field, but only that part of it which was so converted, liable to the increased tithe. *Id.*

15. The case of a money payment in lieu of tithes made upon an annual value is not like that of an ordinary composition, and it requires strong evidence to make out that such a payment is to be treated as a composition; and if the annual payment is less than the annual value, the mere circumstance of the receipt of the annual payment will not es-

tablish it as a composition. *Letts v. London Corn Exchange Co.*, 1 De G. M. & G. 398; 21 L. J., Ch., 684.

Whether, assuming such a payment to be made and received as a composition, the same notice is necessary to determine the composition as is requisite in the case of one relating to a common render of tithes. *Quære. Ib.*

XII. CUSTOM.

1. Tithes are not due by particular custom. *Buxton v. Hutchinson*, 2 Vern. 46.

2. Where a titheable article has been introduced into a parish within time of memory, but the mode of tithing it has always been uniform, the Court will support the established practice, *semble*. *Baker v. Athill*, 2 Anstr. 492.

3. Where a customary manner of tithing is generally alleged, defendant cannot be let in to prove a particular manner of tithing. *Boughton v. Wright*, Bunb. 186.

4. Custom that the occupiers are to give notice of setting out of tithes, or an allegation that there is some such custom, is uncertain and bad. *Beaver v. Spratley*, Bunb. 333.

5. The words "white tithes" have no general meaning, but are applicable to distinct things in distinct parishes. The meaning, therefore, of those words, as applicable to a particular parish, is to be ascertained only from the usage in that parish. *Becher v. Clayc*, 1 Y. & Coll. 448.

6. The reasonableness of setting out every tenth turnip instead of every tenth heap of turnips for the parson, must depend upon whether, by that mode of tithing, the parson has an opportunity of seeing that the tithe is fairly laid out. *Clarke v. Clarke*, 2 Y. & Coll. 245.

7. A usage to pay to the rector of the parish one-twentieth only, instead of the tenth, of the titheable matters of lands in an extensive manor, proved to be of very great antiquity, and supported by evidence that the manor, though in modern times reputed to be within the parish and rectory, was anciently a parish of itself, was held to be a void usage, no evidence being adduced of its having had any legal origin:—Held, also, that it was impossible to treat the rector as a portionist, so as to deprive him of his common law right, and impose on him the burden of proof required from a portionist; and that, it being clear, that the manor (whatever might have been the case formerly) was at the present time within the parish and rectory, the legal union of the manor to the rectory would clothe the rector with the common law right to the tithes of the district so legally united to the parish. *Kensington (Lord) v. Pugh*, Younge 125.

8. A custom to pay the seventh lamb, pig, fleece, or gosling, if there be seven, instead of a tenth only of the value of the lambs, pigs, fleeces, or goslings, in lieu of the tithes of such lambs, etc., and if there be seventeen, then a lamb, pig, fleece, or gosling, and so an additional lamb, etc., for every successive ten:—Held, void. *Prichett v. Honeyborne*, 1 Y. & J. 135.

9. It is not correct to plead, that by custom

used and approved in P., and nineteen other parishes, no tithes of a particular kind were due and payable to rector of P. *Page v. Wilson*, 2 J. & W. 521.

No custom *in non decimando* can be good, unless for wood, and for a known and ancient district, not less than a county or hundred. *Id.* 524.

A custom in part of a hundred, exempting hedges and hedge-rows less than a rod in width from tithes of wood and underwood, is bad. *Id.* 531.

10. *Semble*, a custom of rendering one in ten parcels of corn set up together in the quantity of ten sheaves to each, called kivers or riders, in lieu of corn and hay produced in the same year, is not good. *Legh v. Glogg*, 8 Price 492.

11. Custom that landowner should take the two best lambs out of ten, and the tithe owner the next best, is bad. *Hall v. Malby*, 6 Price 240.

12. Uncertainty and unreasonableness as to time of taking tithe, and payment for keep, if not taken at that time, vitiates custom. *Jenkinson v. Royston*, 5 Price 495.

Custom to pay for every foal 1*d.*; for every milch cow 2*d.*, and for every heifer that had but one calf 1*d.*, for and in lieu of milk, and "all profit arising by such cow or heifer, except the calf," is good, notwithstanding the redundancy of expression. *Ib.*

As to money payment for pigs and geese, dependent in amount on their number. As to custom as to tithe of wool, hemp and fable, rape seed, onion seed, reeds, eggs, etc. *Id.* 496.

13. As to validity of custom of taking eleventh instead of tenth of article, in consideration of labour bestowed, and where there is an option on part of farmer, which of two ways tithe shall be taken in; issues will be granted to try such questions. *Cookburne v. Hughes*, 3 Price 408.

14. The established course of setting out the milk is, that the entire meal of the whole herd of cows shall be set forth every tenth day, both morning and evening; and where a custom to the contrary is alleged, it must be formally pleaded or supported by such evidence as will warrant a court of equity in directing an issue to try its validity. *Full v. Hutchings*, 7 Bro. P. C. 78.

15. A lessee of rectory for three lives, who had made a derivative lease, brings a bill for tithe in kind, and to establish a custom of setting out corn in shocks:—Held, the bill is properly brought, though the tithes are out in lease, to prevent collusion between lessee and occupiers. *York (Archbishop) v. Stapleton*, 2 Atk. 136.

A modus to take part of the tithes for the whole, has always been held a void custom. *Ib.*

16. Tithes of fish are only payable by custom, and cannot be claimed as a mere personal title, *deductis expensis*. *Kelynaok v. Gravas*, 2 Bro. P. C. 446.

Bill for tithe of fish according to the custom; plaintiff set forth a decree, *temp.* Car. 2, signed by 130 parishioners, and acquiescing in the custom, yet the Court sent the plaintiff to law. *S. C. nom. Gravas v. Kelynaok*, Bunb. 239.

At law a verdict was found for plaintiff,

and the barons decreed accordingly; but defendants afterwards appealed to the Lords, by whom the decree was affirmed. *Id.* 258.

1. Bill for tithe of fish, taken at sea, brought within the parish of H., and there sold, and also for fish sold at sea, and the vessel brought back to the parish of H., also for fish taken by the inhabitants, and sold at another port. Plaintiff was impropriate rector of the parish of H., and claimed the tithe as due by custom; but he did not prove his custom:—Held, a good custom, for one tithe may be made by custom and another by common right. *Scarborough (Lord) v. Hunter*, Bunb. 43.

2. The usual time for tithing lambs is when they can live without a dam (about Michaelmas); a custom, therefore, to tithe them on St. Mark's Day, 25th of April, was held unreasonable. *Reynolds v. Vincent*, Bunb. 133.

3. Custom that owners of cattle, fed on common lying in two parishes, should pay tithes for agistment in parishes where they respectively reside:—Held, good. *Mickleburgh v. Crisp*, 2 Bro. P. C. 444.

4. Bill by a rector of a parish against householders, claiming payments in respect of their houses, either as tithes or in lieu of tithes, or as a rate-tithe. He did not by his bill specifically state whether he claimed in respect of a modus proper or of a special custom affecting all houses in the parish, or in respect of prescriptive rights affecting the particular houses, but at the bar contended that there was a custom. With reference to the claim on the ground of modus proper, the evidence showed that he claimed a distinct annual sum as payable by the occupier of each house in the parish; and he claimed also an additional annual payment in respect of every additional building which might be erected on the site of any building already liable. With reference to the ground of prescription, the evidence showed that as to three of the householders their houses had been erected within memory; as to the fourth, the date of the erection of his house was not known, and a payment for one hundred and twenty years was proved, but the amount paid had varied; down to 1811 it was 8s. per year, and then it was increased to 14s. With reference to the ground of custom affecting all the houses in the parish, whenever built, the custom alleged was, that as to new houses the annual amount payable was such as should be agreed upon, and if no agreement could be come to, then to be ascertained by reference to the amounts paid for other buildings of a like nature. There was no personal evidence of the custom, and the account books referred to, though they showed payments, did not show on what principle the custom was founded:—Held, that the claim could not be supported as a prescriptive right; and that, as grounded on a custom—first, the custom, if well alleged, was too uncertain; and, secondly, that it was not alleged with sufficient distinctness, and the bill was dismissed. *Champneys v. Buchan*, 4 Drew. 1041; 5 W. R. 461.

XIII. TITHE PRESCRIPTION ACT AND STATUTE OF LIMITATIONS.

5. The Statute of Limitations cannot be

pleaded to a bill for tithes. *Marston v. Cley-pole*, Bunb. 213.

6. A bill for an account of tithes received from the occupiers by a person claiming under an adverse legal title, will not lie. *St. Asaph (Bishop) v. Williams*, Jac. 349.

7. A bill for tithes having been filed within the period limited by the statute 3 & 4 Will. 4, and amended after that period for the purpose of adding another party:—Held, sufficient as against the last party, inasmuch as the bill and amended bill formed but one record. *Thorpe v. Mattingley*, 2 Y. & Coll. 421; 8 L. J., N. S., Exch. Eq., 9.

8. A suit was instituted for the tithes of a particular district in a parish. The whole tithes of that parish had been demised by general words, but it was not asserted that the lease had been granted with a view to the tithes claimed by the bill, or that the lessee had paid or received anything on account of them:—Held, that the outstanding lease did not prevent the operation of the Statute of Limitations running as regarded the particular tithes claimed. *Ely (Dean and Chapter) v. Bliss*, 5 Beav. 574; 11 L. J., N. S., Ch., 351; 6 Jur. 496.

The right to tithes as against an ecclesiastical corporation, aggregate is barred under the 3 & 4 Will. 4, c. 27, by non-payment for twenty years. *Id.*

Where, on a bill for tithes of a district of the parish recently brought into cultivation; plea, non-payment and no acknowledgment of the right within twenty years (under 3 & 4 Will. 4, c. 27) before the commencement of the suit; it appeared from the bill, by way of evidence, that the district was not exempt: that a decree was obtained in 1813 in favour of the lessees of the plaintiff for the tithes generally, and which might have included this particular tithe; and that in 1831 a lease was granted of the tithes of the rectory generally, and was subsisting at the time the act took effect, but no payment or receipt of tithes in respect of the particular district was ever made:—Held, that, showing a right of action and the non-payment during above the period prescribed by the Act, the plea was good. *Id.*

The Act 2 & 3 Will. 4, c. 100, is unaffected by the provisions of the Act 3 & 4 Will. 4, c. 27; the interpretation clause of the latter Act, although enacting that the word "land" shall in its meaning extend to tithes, has reference to an estate in tithes, and not to tithes as a chattel, and the 2nd section, therefore, does not embrace the case of a render of tithes as a chattel by the person bound to pay to the tithe owner. S. C. 2 De G. M. & G. 459.

9. The statute 2 & 3 Will. 4, c. 100, brings down the period of legal memory from the time of 1 Rich. 1 to the time of the commencement of the two incumbencies (not being together less than sixty years), and three years of a third incumbency, but does not create a new ground of exemption, or destroy the right to tithes upon mere proof of non-payment or non-render during two such incumbencies, and three years of a third, in cases where proof of non-payment, or non-render, from the time of 1 Rich. 1, would, before the statute 2 & 3 Will. 4, c. 100, have established no exemption. *Salheld v. Johnston*, 1 Hare 196; 11 L. J., N. S., Ch., 201; 6 Jur. 210. Reversed 1

Macn. & G. 242; 1 H. & Tw. 329; 18 L. J., N. S., Ch., 493; 14 Jur. 1. And see S. C. at law, 2 Mann. Gr. & Sc. 749; 18 L. J., N. S., Exch., 89; 2 Exch. Rep. 256.

1. Courts of equity are not bound in tithe causes to any limitation in point of time for which tithes are sought, although, *à convenienti*, it has been usual to confine the account to the period of six years where the Court sees no reason to depart from such usage. *St. Paul's (Wardens of) v. Lincoln (Bishop)*, 4 Price 86.

2. In a bill for tithes in the Exchequer, the Court decrees payment of tithes to the time of the filing of the bill; but in Chancery, to the time of the decree. *Carleton v. Brightwell*, 2 P. W. 463.

3. In a suit in equity for an account of tithes, the defendant set up an award, which declared that a certain sum should be paid in lieu of tithes, provided the whole lands were subject to tithes; but if only subject to tithes according to a specified terrier, then a different sum was awarded. The defendant's counsel also set up at the hearing the stat. 53 Geo. 3, c. 127, as a bar to the recovery of tithes for more than six years. The statute was not pleaded by the answer of the defendant:—Held, that the award, not being final, was void, but that the plaintiff was only entitled to an account of tithes for six years before the filing of the bill. *Goode v. Waters*, 20 L. J., N. S., Ch., 72.

4. To a bill filed for tithes against occupiers of lands in July 1833, the owner was made a defendant in January 1835:—*Quære*, whether he was defendant to a suit commenced within the time limited by the Act, 2 & 3 Will. 4, c. 100, s. 3, that is, within a year from the 17th August 1832. *Plowden v. Thorpe*, 7 Cl. & F. 137; West 42; 4 Jur. 211.

5. Deed creating composition real, will not be presumed from payment of 20*l.*, in lieu of tithe for two hundred years. *Estcourt v. Kingscote*, 4 Madd. 140.

6. The consent of the ordinary to composition real may be presumed from length of time. *Sambridge v. Clerk*, 1 Anstr. 372.

7. An agreement was made between the rector and inhabitants of a parish, allotting lands in lieu of the ancient glebe with some additions, on account of the rector losing certain rights of common by an inclosure, and also providing an annual stipend, or pecuniary compensation in lieu of tithes. The successor declined abiding by the agreement, unless on an increase of stipend, and an amicable suit was instituted in chancery, to which the ordinary, but not the patron, who was the King, was made a party; and the parishioners agreeing to increase the stipend, a decree was made by consent to ratify the article of agreement. This agreement was acquiesced in for eighty years (forty of which the rector, against whom the decree was made, remained incumbent):—Held, that as to the pecuniary composition the agreement was not binding, the patron not having been party thereto; and the composition being made as respected the past value of tithes, without any regard to future increasing value. *Cholmley v. Att.-Gen.*, 7 Bro. P. C. 34. S. C. *nom. Att.-Gen. v. Cholmley*, 2 Eden 304; Amb. 510.

8. In 1593 the parish church of K. (a

rectory) having become ruinous, the parishioners of the adjoining parish of W. (a perpetual curacy) entered into an agreement under which the parishioners of K. were admitted to the use of their church and to the benefit of all usual ecclesiastical offices, which were thenceforward performed by the incumbents for the time being of W. for the parishioners of both parishes. From 1606 onwards there was no separate presentation to the benefice of K., but no formal union of the livings of W. and K. was made, although the holders for the time being of the living of W. were cited, and made official returns and paid charges, as rectors of K. In 1844 the Tithe Commissioners awarded a tithe rent-charge in respect of lands at K. which then were, and had since remained, the property of the defendants and their predecessors in title. The holder of the benefice of W. claimed the tithe rent-charge upon the ground that there had been a union of his benefice with that of K., and that the profits of the latter benefice belonged to the holder of the united benefices:—Held, that there had been no legal or effectual union upon which the claim could be founded, and also that no receipt of the tithe rent-charge by the defendants or their predecessors in title could be shown, and the defendants were therefore not liable to account. *Att.-Gen. v. Durham (Earl)*, 46 L. T. 16.

Semble, the statute limiting the time for recovery of tithes (2 & 3 Will. 4, c. 100) would not have operated to bar the claim. *Id.*

Semble, also, the remedy for arrears would have been against the occupier, not the owner, of the lands charged. *Id.*

Semble, also, antagonistic cases cannot be combined by co-plaintiffs in an action, and that the attorney-general was not a proper party to the present proceedings, his claim being founded upon a case which could only succeed if the case of the informant and co-plaintiff should fail. *Id.*

The object of the Tithe Prescription Act, 2 & 3 Will. 4, c. 100, to be inferred from its preamble, as explained by the enacting part, was to prevent the expense and inconvenience of suits for tithes, by establishing certain limitations of time, after which claims of moduses and discharges should not be questioned. And the effect of the Act, as applicable to claims of exemption, is not only to facilitate the proof of exemption *de facto* for the time past, but to dispense with the proof (which was before required from laymen) of any legal origin of such exemption. *Id.*

And *semble* (though the opinion of the majority of the judges consulted was to the contrary), that the Act applies to cases in which it appears that the lands have paid tithes of some titheable matters, other than those for which the exemption is claimed, and even where such last-mentioned matters are of modern introduction, as well as to cases in which the lands have been enjoyed without payment of any tithes. *Id.*

But:—Held, that at all events it is sufficient, even in a case of the former description, for the occupier to allege and prove that his lands have been enjoyed for the prescribed period, without payment of the tithes demanded, unless the party claiming the tithes shall

specifically allege as well as prove that other tithes have during that period been paid. And, therefore, where a bill by a vicar for some particular tithes contained no such allegation, and the defendants alleged and proved that their lands had been enjoyed for the prescribed period, without payment of the tithes demanded, or any money or other matter in lieu thereof, it was:—Held, that the Court could not notice the fact that tithes of other matters had been paid for the same lands, although that fact was clearly established by the evidence in the cause; and, therefore, that whether the fact were so or not, the defence set up was, upon these pleadings, a complete answer to the plaintiff's demand, and the bill was accordingly dismissed. *Ib.*

Semble, that a modus proved to have been acted upon for the prescribed period cannot be defeated on the ground of rankness. *Ib.*

1. The Commissioners of Church Temporalities in Ireland having filed a bill for the recovery of tithe rent-charge, in respect of which there had been no payment or acknowledgment in writing for the then previous twenty years, and the defendants having pleaded the Statute of Limitations, to which the plaintiffs demurred:—Held, that tithe rent-charge is neither "tithes" nor "land," but "rent" within ss. 1, 2 of the Statute of Limitations, that the plaintiffs' claim was barred, and that even if it were "composition" within s. 1 of that Act, still, the plaintiffs not being transferees of the immunity from the Act, which as to composition rent-charges was enjoyed by spiritual corporations sole, could not recover. *Commissioners of Church Temporalities in Ireland v. Grant*, 11 L. R., Ir., 430.

XIV. SUBTRACTION.

2. As to the evidence of fraud in case of subtraction of tithe, etc. *Hall v. Maltby*, 6 Price 240.

3. Bill for tithe of lambs; the ewes were kept by defendant, in the parish of D. (where the demand lay), all the year until Christmas; when they were ready to drop their lambs, he removed to the parish of S. (where there was only a small modus for lambs), and there kept until Lady-day for the convenience of forage; and at Lady-day they were driven back to D. Plaintiff complained of this as a fraud in the tithing. *Per curiam*, here is not a sufficient proof of fraud; and plaintiff's bill was dismissed. *Boys v. Ellis*, Bunb. 139.

Tithe of lambs is not divisible as wool is. *Ib.*

4. It is a fraud in equity to remove sheep fed in one parish to another before shearing and lambing seasons, and then driving them back again without accounting for tithe in the parish wherein they were depastured. *Hall v. Maltby*, 6 Price 240.

5. Where the occupier of lands, shortly before the lambing season, removed his ewes to part of his farm in another parish, which he occupied tithe free; and, shortly after the lambing season, removed back the ewes with their lambs to that part of his farm on which they had previously been depastured, where such as lived remained until the next shearing

time, and then rendered tithe of wool to the vicar, there being no direct evidence of the removal being fraudulent, and some evidence that the land to which the ewes were removed to drop their lambs was the most convenient for the purpose:—Held, that the vicar was not entitled to the tithes of the lambs, and that he was not entitled to the tithe of agistment of the ewes, from the time of their last shearing, down to their removal to drop their lambs; but that the tithe of wool at the next shearing was the whole that the vicar was entitled to. *Scott v. Smelt*, Younge 256.

6. If a sequestrator file a bill for subtraction of tithe during the vacancy, the bishop of the diocese must be made a party, because the sequestrator must account to him for his receipts. *Jones v. Barrett*, Bunb. 192.

XV. COMPOSITION.

1. *Validity*, 6734.
2. *Notice to Determine*, 6736.
3. *Other Matters*, 6736.

1. Validity.

7. Trover for a lamb and a sheaf of wheat; upon not guilty pleaded, the jury found, that Fountain Abbey, being of the order of Cesteaux, was exempted from tithe of their lands, *quos propriis manibus excolerent*: that the abbot was seised of the lands in question before the council of Lateran; that between the years 1216 and 1261 there was a composition between the abbot of F. and the prebendary of S. under their common seals, whereby the abbey should be free from tithe of all lands, tilled at their own charge, within the grange of H., and they should pay as tithe for all other lands five marks yearly to the prebendary; and that another composition was made (which did not appear to be confirmed by the patron and ordinary), whereby the prebend, and his successors in time to come, should yearly elect either to receive the tithes in kind, or five marks per annum in lieu, to be notified to the abbot before St. Thomas's day; and if the prebend should elect to receive the money, his right to the tithes of lamb and wool should be paid as formerly; and they further found that the possessions of the abbey came to the Crown by 31 Hen. 8, and that at the time of the trover defendants were proprietors of the lands in the grange of H., and that a lamb and sheaf were renovated upon the land: and whether or no tithes in kind should be paid for the lands was the question. *Per Hale, C. B.*—By the first composition, the abbot only was discharged, but, by the second, the abbot and his tenants were discharged of tithes of corn and hay only. The doubts in this case were, whether the second composition was good without a confirmation and an annual election, and also by whom and to whom notice was to be given since the dissolution. Afterwards this cause was argued again, when the Court held that the second composition did not affect the successors of the prebend, and that therefore the abbot was not bound by it; for by the

first composition the prebend and his successors were only bound *quandiu*, etc., and by the second composition the five marks go to recompense of all, whether *in propriis manibus*, or in the hands of the tenants. But to this it may be answered, that the successor may still elect whether to take the five marks or tithes in kind, and therefore he is at no prejudice:—Held, also, that the power of election is gone, for it cannot now be made according to the composition; and that therefore the first composition should stand *quoad terras in propriis manibus*, and for the others that tithe in kind may be taken as before. Judgment for defendant. *Ingolsby v. Wivell*, Hardr. 381.

1. When evidence of a payment in lieu of tithes was given, extending so far back as the reign of Charles I., but more ancient documents relating to the same parish, and among them the Ecclesiastical Survey of Henry VIII., made no mention of such payment:—Held, that an allegation of such payment having existed before legal memory was not supported. *Graves (Lord) v. Fisher*, 3 Cl. & F. 1; 8 Bli. N. S. 937.

2. A composition by way of retainer by parol, is good only for one year; but a parol lease of tithes, even for one year, is void. *Keddington v. Bridgman*, Bunb. 2.

3. In order to establish a real composition for tithes, the evidence must be such as to distinguish it clearly from a prescriptive payment. *Hames v. Swaine*, 2 Cox 179.

4. A real composition cannot be established without showing the deed by which it was created, or proving its existence. *Heathcote v. Mainwaring*, 3 Bro. C. C. 217.

5. A composition of 20s. yearly, out of the profits of T. manor, in lieu of tithes of J. park, is good. *Sambridge v. Benton*, 2 Anstr. 372.

The consent of the ordinary to composition real may be presumed from length of time. *Id.*

6. Deed creating composition real will not be presumed from payment for 200 years of 20l. in lieu of tithes. *Estcourt v. Kingscote*, 4 Madd. 140.

7. Lessee of tithes agreed with the owner of lands, for certain collateral considerations, not to take tithes in kind from the tenants of the lands for twelve years, but to accept a reasonable compensation not exceeding 3s. 6d. per acre, and thereto bound himself and his assigns. His under-lessee sued (in the name of a trustee, to whom he had nominally again under-leased), for tithes in kind against the tenant of the land, and had a decree. Such an agreement is void for the uncertainty of the sum to be paid. *Bremer v. Hill*, 2 Anstr. 413.

The lessee of the land cannot claim to hold discharged of tithes under any covenant with his lessor. *Id.* 414.

8. Where an agreement having been made between the rector and inhabitants of a parish, allotting lands in lieu of the ancient glebe, with some addition, in consequence of the rector's losing certain rights of common by inclosure, and also providing an annual pecuniary compensation in lieu of tithes, which, upon the successor's declining to abide by, an amicable suit was instituted in this court, to which the ordinary (but not the patron, who was the king) was made a party, and the parishioners agreeing to increase the

stipend, a decree was made, by consent, to ratify the articles:—Held, that this agreement, though acquiesced under for eighty years (forty of which, however, the rector, against whom the decree was made, had remained incumbent), was not binding as to the pecuniary compensation, the patron not having been a party, and the composition having been made only with regard to the past, and not to the future, increasing value of the tithes. *Att.-Gen. v. Cholmley*, 2 Eden 304; Ambli. 510. S. C. on appeal, *nom. Cholmley v. Att.-Gen.*, 7 Bro. P. C. 34.

9. A composition real, or grant of tithes made by a vicar to the lord of a manor, in consideration of his finding a priest to officiate in a chapel, etc., previously to 32 Hen. 8, c. 7, and supported by evidence of constant perception and compliance with the conditions on which it was made:—Held, to be valid. *Ridley v. Storey*, Dan. 157.

10. Though it is not necessary to produce the actual deed creating a composition real, still reasonable evidence must be given to make it probable that such a deed once existed; and the mere circumstance of the possession of a piece of land mentioned in various ancient documents as having been assigned to the curate, is not a sufficient ground for any such presumption. *Dent v. Rob.* 1 Y. & Coll. 1.

11. A verdict and judgment against a rector, obtained in proceedings in prohibition as far back as the year 1680, will, in case of any claim to tithes being made by a subsequent rector, be conclusive against him of the existence of a binding composition real. *Wynnriatt v. Lindon*, 8 L. J., N. S., Ch., 121; 3 Jur. 50.

A binding composition real need not have been made within the time of legal memory; and it is not necessary that the deed creating the composition real should be produced. *Id.*

12. To make out a defence to a bill for tithes of a composition real, it is not enough to show that the same money payment had been constantly received in satisfaction of tithes for a considerable period before 13 Eliz., but evidence must be given of the existence of an agreement in writing, and made between all proper parties interested; nor will issue be granted on such evidence, or costs allowed to those defendants who are occupiers. *Bennett v. Sheffington*, 4 Price 143.

13. An agreement with a former rector, by which benefits were given to the rectory in lieu of tithes, and which was decreed by the Court of Chancery to be carried into effect, is void; but his successor, whilst in the enjoyment of what was so given, cannot maintain a suit for the tithes. *Floden v. Thorpe*, 1 West 42; 7 Cl. & F. 137; 4 Jur. 211. Reversing S. C. *nom. Thorpe v. Mattingley*, 2 Y. & Coll. 421; 8 L. J., N. S., Exch. Eq. 9.

An agreement was made (in 1711) between the rector and the owner of the lands (who was also patron of the living), by which certain lands and a perpetual annuity were given to the rector in exchange for his glebe lands, and for the discharge of the lands occupied by the defendants from tithes. The agreement was, and continued to be, beneficial to the church, having been made with reference to the probable future increase in the value of the tithes; it was approved by the ordinary, and established by a decree of the Court of

Chancery, and acted on down to the filing of the bill, when the rector refused to accept the annuity, but still retained the lands allotted to him in the exchange, which were much more valuable than the old glebe lands:—Held, that, although it was open to the rector to put an end to the agreement as being void under the disabling statutes, he was not entitled to the aid of equity to enforce his legal title to the tithes while he retained part of the consideration for their discharge, contrary to the principle that he who seeks equity must do equity. *Id.* And see 5 Mees. & Welsb. 302.

1. By letters patent a rectory, with the appurtenances, was granted to the dean, etc., of York, and their successors, for the support and maintenance of a grammar school. In 1712 an arrangement was entered into between the dean and chapter and their lessee of the rectory, and the lord of the manor of a district within the rectory, to take a perpetual composition in lieu of the tithes of that district, and such arrangement was carried into effect by deeds of covenant executed by the dean and chapter and their lessee, and the lord of the manor; and the latter granted a perpetual rent-charge to the amount of the composition out of his estates. The composition or rent continued to be received by the lessees of the dean and chapter, for upwards of a century, when the dean and chapter, the rectory being then in their own hands, refused any longer to receive it, and filed their bill for tithe. The Court held, that the deed of covenant of 1712 was void under the Disabling Statute, and that the covenant was not binding on the dean and chapter, and that they were entitled to the tithes. *York (Dean & Chapter) v. Middleborough*, 2 Y. & J. 196.

2. In a suit for tithes by the rector, the defendant set up a real composition of 10s. as covering, with other lands, the lands in his occupation. In support of that defence, he proved that, in the reign of Charles II., the lands in question were divided among three persons, on a partition, and from which persons the title was regularly deduced by numerous instruments, many of which conveyed the tithes of the portions of the lands comprised in them; and, from some of them, it appeared that a money payment, parcel of a larger payment, amounting to 10s., was provided for the parson, in lieu of the tithes; he also proved that, in 1666, in an action, on the statute, for not setting out tithes, by the then rector, against an occupier of the lands, a verdict was found for the defendant. It appeared from the evidence that tithes had been rendered prior to the reign of Edward II.; but, from that period, no trace could be found of any tithe having ever been rendered; nor was there any evidence of the payment of the 10s., or any part of it; there was no reference in the pleadings, or in the evidence, to the actual deed of composition. The Court held, that there was not sufficient evidence from which a real composition could, in the present state of the law, be inferred; and decreed an account, with costs. It is clearly settled that mere non-payment will not support the defence of a real composition, nor be evidence from whence to presume the deed which must have been the foundation of it. *Lediard v. Anstie*, 3 Y. & J. 548.

3. The case of a money payment in lieu of tithes made upon an annual value is not like that of an ordinary composition, and it requires strong evidence to make out that such a payment is to be treated as a composition; and if the annual payment is less than the annual value, the mere circumstance of the receipt of the annual payment will not establish it as a composition. *Letts v. London Corn Exchange Co.*, 1 De G. M. & G. 398; 21 L. J., N. S., Ch., 684. And see *London & Blackwall Railway Co. v. Letts*, *Letts v. London & Blackwall Railway Co.*, 3 H. L. Ca. 470; 6 Rail. Ca. 687; 15 Jur. 995. Reversing 5 Hare, 605; 4 Rail. Ca. 530; 11 Jur. 669.

2. Notice to Determine.

4. A composition for tithes cannot be determined as to part, and continued as to the rest. *Reynel v. Rogers*, Bunb. 15.

5. Peremptory composition requires notice to determine it. *Anon.*, Lofft. 66.

6. Whether notice is necessary to determine a composition where a modus is insisted upon, *quære*. *Atkyns v. Willoughby de Brooke* (Lord), 2 Anstr. 397.

7. Notice to determine composition should be reasonable in point of time, and suited to convenience of farmer. A notice by parol at time of settling annual amount of the tithe due, the tithe owner telling the farmer that, "for the time to come," he requires the tithes to be paid in kind, sufficient. When the farmer pleads the composition as a modus, he cannot insist on no notice to determine having been given. *Leach v. Bailey*, 6 Price 504.

8. General allegation, in answer, that defendant could not be affected by notice to determine a composition in any way, is not sufficient intimation to plaintiff that defendant intended to rely on insufficiency of notice. *Bennett v. Noale*, Wightw. 324.

9. The same notice must be given to determine a composition for tithes as between landlord and tenant, and that although the defendant set up modus. *Bishop v. Chichester*, 2 Bro. C. C. 161.

10. A rector agreed to receive a money payment in lieu of tithes, upon the annual value of houses which were about to be pulled down. Other premises were built on their site of greater annual value. *Quære*, must a new rector, who has received the money payment, give the same notice, to put an end to such composition, as is requisite in regard to a common render of tithes. *Letts v. London Corn Exchange Co.*, 1 De G. M. & G. 398; 21 L. J., N. S., Ch., 684.

3. Other Matters.

11. A bill to establish a customary payment in lieu of tithes, does not lie upon a simple demand of tithes without suit. *Gordon v. Simpkinson*, 11 Ves. 509.

12. A vicar may avail himself of his general title for tithes, in opposition to a pecuniary composition, even though established by deed, executed by parson, patron, and ordinary. *Mortimer v. Lloyd*, 7 Bro. P. C. 44.

13. Defendant in tithe cause, having set up

defence of composition real, cannot afterwards rely on its being, in fact, a modus; such defence being double, and too uncertain. *Ward v. Shepherd*, 3 Price 608.

1. Where a money payment has been set up as a defence of a modus, it is a denial of plaintiff's title, and therefore cannot (failing as a modus) be used *pro hac vice* to defeat the immediate claim, as being a composition undetermined for want of six months' notice. *Wolley v. Brownhill*, 13 Price 501; *McClellan*, 317.

2. Composition for tithe puts an end to lien on the land; therefore, where produce of land is taken by sequestration, and sold, tithe owner cannot demand payment thereof out of that fund. *Dickinson v. Smith*, 4 Madd. 177.

3. A rector having come to an agreement with his parishioners for tithes, cannot in equity set up his own non-residence to avoid the agreement. *Atkinson v. Folkes*, 1 Anstr. 67.

An agreement between rector and parish for tithes, is not within the Statutes of Elizabeth. *Semble. Ib.*

4. Payment of a composition for the tithes of turnips, whether pulled or eaten off the ground, where neither party considered it as an agistment tithe. *Garnons v. Barnard*, 1 Anstr. 319.

5. Composition for tithes, received after the death of the incumbent by the successor, apportioned with reference to the respective periods of enjoyment. *Aynsley v. Wordsworth*, 2 Ves. & B. 331.

6. As to evidence of money payments in tithe causes. *Drake v. Smyth*, 5 Price 369.

7. Where the defendants, in a tithe suit, set up by their answer certain yearly payments as moduses, but insisted that, if the same, for any reason, were not good and valid moduses from time immemorial, they must be taken to have been payable as a good and valid real composition, made with the assent of all parties whose assent was necessary thereto, and before the restraining stat. of 13 Eliz.:—Held, upon a re-hearing, that the allegation as to the real composition was not shaped as stating a fact in the alternative, but only introducing an argument, and therefore might be rejected as surplusage; and that the defendants, under the circumstances of the case, were entitled to an issue as to the modus. *Jesus College (Oxford) v. Gibbs*, 1 Y. & Coll. 445.

8. Upon the application of a tithe owner, under the 4 Geo. 4, c. 99, s. 38, a receiver in a minor's cause was directed to pay over one year's arrear of tithe composition out of the proceeds of a distress for rent made by him upon a tenant, who was primarily liable to payment of the composition, but the tenant ought to have notice of such application. Where the amount is small, the tithe owner will not be compelled to apply to be examined *pro interesse suo*. *Hanhes v. Smith*, Sau. & Sc. 326.

9. In a suit by rector for an account of tithes against the owner of the manse and lands in the parish, *semble*, that the defendants were not bound by an agreement between the rector and the last owners of the fee to discontinue money payments, and pay tithes in kind, but were at liberty to relieve themselves

of the tithe as of an incumbrance on the estate, notwithstanding they had notice at the time of their purchase of the agreement between the last owners and the rector, and of the subsequent payment of tithes in kind. *Raine v. Cairns*, 4 Hare 327.

10. A rector, who took a composition for his tithes every Michaelmas, died in January 1841. The new rector was collated in the following April, and before harvest time he employed a surveyor to value the tithes. The surveyor furnished him with a report, stating what he considered ought yearly to be paid by each of the occupiers, as a composition in lieu of tithes. In August, the new rector required the respective occupiers to pay him, as a compensation for their tithes, the amount mentioned by the surveyor. The occupiers accordingly, in November 1841, made their payments according to the surveyor's report, for the whole year from Michaelmas 1840 to Michaelmas 1841:—Held, that the representative of the late rector was entitled to be paid by the new rector a proportion, according to the time which elapsed from Michaelmas 1840 to the late rector's death, of the composition which existed in the late rector's lifetime. *Oldham v. Hubbard*, 2 Y. & Coll. C. C. 209.

Semble, that a composition for tithes is within the stats, 11 Geo. 2, c. 19, s. 15, and 4 Will. 4, c. 22. *Ib.*

XVI. COMMUTATION AND TITHE RENT-CHARGE.

Commissioners and Practice under Acts.] 11. The parties to an action, brought upon a feigned issue, under the provisions of the Tithe Commutation Act, 6 & 7 Will. 4, c. 71, are not precluded by that Act from sustaining a bill of discovery in aid of the trial of such issue. *Morris v. Norfolk (Duke)*, 9 Sim. 472; 9 L. J., N. S., Ch., 273; 4 Jur. 1007.

12. Under the 6 & 7 Will. 4, c. 71, s. 45 (Tithe Commutation Act), the commissioners have a discretionary power to determine suits theretofore pending; but where they intend to do so, specific notice of such intention must be given. *Wetherell v. Weighill*, 3 Y. & Coll. 243; 8 L. J., N. S., Exch. Eq. 1; 2 Jur. 939.

In a suit for tithes, commenced before the passing of the Tithe Commutation Act, this Court refused, on motion, to suspend the proceedings on the mere ordinary notice of the commissioners under the Act, that they should, on a particular day, proceed to commute. *Ib.*

13. The commissioners under the Tithe Commutation Act, 6 & 7 Will. 4, c. 71, have no jurisdiction to interfere with suits for tithes which were pending in the Court of Exchequer when the Act was passed. *Girdlestone v. Stanley*, 3 Y. & Coll. 421; 3 Jur. 382.

Merger and Union of Benefices.] 14. The enactment of the Tithe Commutation Amendment Act (9 & 10 Vict., c. 73, s. 19), that every instrument purporting to merge any tithes, and made with the consent of the Tithe Commissioners, shall be absolutely confirmed and made valid both at law and in equity, in all respects, is not limited to cases in which the person executing the instrument has a title to the tithe, but operates as well where such per-

son has no estate in the tithe, as where his estate is insufficient to effect the merger. *Walker v. Bentley*, 9 Hare 629.

The intention of the Tithe Commutation Act is, that the lands on which the apportionment of the tithe in each parish is cast, and these lands only, shall be liable in respect of the tithe payable for any lands in the parish, and that lands on which no apportionment is cast shall not be liable to tithe. *Id.*

Lands which on the agreement and apportionment under the Tithe Commutation Act (confirmed by the Tithe Commissioners) are treated as free from tithe, cannot be afterwards made subject to tithe. *Id.*

The intention of the Legislature was to preclude all questions of merger of tithe in all cases where declarations of merger had not been made with the consent of the Tithe Commissioners, leaving the parties affected by an erroneous declaration to their remedy against the party making it; and such being the intention, the merger is effected, although the sanction of the commissioners has been erroneously given. *Id.*

The words "every instrument," in s. 19 of the Tithe Commutation Amendment Act, 9 & 10 Vict., c. 73, cannot be read as "every such instrument." S. C. 9 Hare 633.

1. In 1593 the parish church of K. (a rectory) having become ruinous, the parishioners of the adjoining parish of W. (a perpetual curacy), entered into an agreement under which the parishioners of K. were admitted to the use of their church and to the benefit of all usual ecclesiastical offices, which were thenceforward performed by the incumbents for the time being of W. for the parishioners of both parishes. From 1605 onwards there was no separate presentation to the benefice of K., but no formal union of the livings of W. and K. was made, although the holders for the time being of the living of W. were cited, and made official returns and paid charges, as rectors of K. In 1844 the Tithe Commissioners awarded a tithe rent-charge in respect of lands at K. which then were, and had since remained, the property of the defendants and their predecessors in title. The holder of the benefice of W. claimed the tithe rent-charge upon the ground that there had been a union of his benefice with that of K., and that the profits of the latter benefice belonged to the holder of the united benefices:—Held, that there had been no legal or effectual union upon which the claim could be founded, and also that no receipt of the tithe rent-charge by the defendants or their predecessors in title could be shown, and the defendants were therefore not liable to account. *Att.-Gen. v. Durham (Earl)*, 46 L. T. 16.

Seem, the statute limiting the time for recovery of tithes (2 & 3 Will. 4, c. 100) would not have operated to bar the claim. *Id.*

Seem, also, the remedy for arrears would have been against the occupier, not the owner, of the lands charged. *Id.*

Seem, also, antagonistic cases cannot be combined by co-plaintiffs in an action, and that the attorney-general was not a proper party to the present proceedings, his claim being founded upon a case which could only succeed if the case of the informant and co-plaintiff should fail. *Id.*

Ratability.] 2. The owner of the tithe rent-charge in a parish where money has been borrowed under the provisions of the 5 Geo. 4, c. 36, is liable to be assessed to the rate made for repayment of the money. *Small bones v. Edney*, 3 L. R., P. C., 444; 40 L. J., Ecc., 8; 24 L. T. 241; 7 Moo. P. C., N. S., 286.

Apportionment.] 3. Upon the death of a tenant for life, under a will executed before the Apportionment Act, 4 & 5 Will. 4, c. 22, of tithes which after the Act were commuted for a rent-charge, payable at fixed periods:—Held, that the award of the Tithe Commissioners was "an instrument under which the rent-charge was payable" within s. 2, and therefore the rent-charge was apportionable. *Heasman v. Pearce*, 8 L. R., Eq., 599.

Bequest.] 4. A testator gave to his trustees a tithe rent-charge held under an ecclesiastical lease for twenty-one years, which was in practice renewed every seven years on payment of a fine, upon trust to renew out of the proceeds, and to apply the surplus in a certain way during the life of his wife, and directed that after her death it should form part of his residuary estate. He gave his trustees power at any time to sell the leasehold interest. The lease having ceased to be renewable:—Held, that the persons interested during the life of the widow were entitled to receive the rent-charge free from any deductions for raising a renewal fund; and that a renewal fund which had been raised out of the income, but could not be applied for renewal, must be paid to the persons entitled to the income. *Maddy v. Hale*, 24 W. R. 452.

Held, on appeal, that the leasehold interest ought to be sold and the proceeds invested, and only the income of this fund, and of the renewal fund, applied as income. S. C. 3 Ch. D. 327; 45 L. J., Ch., 791; 85 L. T. 134; 24 W. R. 1006.

Distress for Arrears.] 5. An injunction will not be granted under the Companies Act 1862, ss. 87 and 163, to restrain proceedings under a distress for arrears of a tithe rent-charge. *Re Trimmaran Coal, Iron, and Steel Co.*, 24 W. R. 900.

Agreements respecting Payment.] 6. A landlord agreed to let, and a tenant agreed to take, a farm for a term of fourteen years, determinable at the end of the first seven years, at the yearly rent of 40*l.*, payable quarterly, "free of all outgoing," the landlord to abate 5*l.* per annum of the rent for the first two years, in consideration of the condition of the place, and to put the farm into repair, and the tenant to keep the same in repair:—Held, that under the words "free of all outgoing," the tenant was bound to pay the land tax and tithe commutation rent-charge. *Parish v. Sleeman*, 6 Jur., N. S., 385; 29 L. J., Ch., 96; 8 W. R. 166.

7. A tenant holding lands under an accepted proposal for a lease specifying the term, and bearing date prior to the 16th of August 1832, is liable to the payment of the tithe composition, and is not to be considered as a tenant from year to year within the 12th section of the 2 & 3 Will. 4, c. 119. *Langley v. Langley*, Ll. & G. temp. Plunk. 361.

XVII. COMMUTATION (IRELAND).

1. A receiver, appointed under the 1 & 2 Vict., c. 109, s. 30, to pay the tithe rent-charge, is bound to apply the sums received, in the first instance, in discharge of the rent-charge and costs, and has nothing to do with the payment of the head-rent to which the land may be liable. *Saunderson v. Stoney*, 2 Ir. Eq. R. 153.

2. The mode of service required by the 1 & 2 Vict., c. 109, s. 30 (Tithe Rent-Charge Act), with respect to the ten days' notice of a party's intention to apply for a receiver under that Act, is not applicable to the service of the order appointing such receiver, which must be served in the usual manner required by the justice of the Court for the service of its orders. *Mangan v. Massey*, 2 Ir. Eq. R. 106.

3. Where lands were apportioned with tithe composition for two parishes, the Court, upon a petition presented under the 1 and 2 Vict., c. 109, s. 16, referred it to the remembrancer to inquire and report in which of the parishes the lands were situated, and whether they were doubly charged with the rent-charge, and, if so, for which of said parishes they had been rightfully charged with tithe composition. *Armstrong v. Pepper*, 2 Ir. Eq. R. 89.

4. A purchaser of an estate, sold under a decree of the Court of Chancery, who confirmed his sale on the 28th of April, but whose purchase-deed was not executed until the 8th of December following, is liable for the tithe composition, which accrued due on the 1st of November, the lands being in the occupation of tenants from year to year. *Stewart v. Alexander*, 2 Jones 530.

A person, having a clear equitable estate in the lands greater than a tenancy from year to year, is a person liable to the tithe composition within the meaning of 2 & 3 Will. 4, c. 119, s. 12. *Ib.*

5. In a suit for the arrears of tithe composition in the names of the sequestrator of a parish, and of the bishop who died, the defendants may, nevertheless, proceed with a motion for costs. *Egan v. Doherty*, 2 Ir. Eq. R. 68.

6. A lessee of tithes may maintain a bill for the recovery of tithe composition, effected under the 2 and 3 Will. 4, c. 119. *Kane v. Potter*, 2 Jones 276.

The 2 & 3 Will. 4, c. 119, s. 30, applies only to cases of composition for tithes made between the tithe owner and tithe payer. *Ib.*

7. Upon application made by petition, under the 16th section of the Tithe Rent-Charge Act, 1 & 2 Vict., c. 109, claiming a partial exemption on the ground of a *modus decimandi*, it was referred to the remembrancer to report whether the lands in question were rightfully charged with tithe or tithe composition; and on the report of a *modus decimandi*, as contemplated by the Act, such lands were declared not to be chargeable with tithe composition, and the apportionment book directed to be altered by the proper officer accordingly, without prejudice to the previous liabilities of the parties applying; a copy of the order and summons to proceed thereunder, to be served, one month previously, on the churchwardens of

the parish, and on twelve of the tithe-payers, and to be posted on the usual places of posting notices of road sessions, with liberty for the tithe payers to appear on such reference. *Houston v. Kinahan*, 1 Ir. Eq. R. 470. *Patterson v. Kinahan*, *id.* 478.

8. *Semble*, a person in possession of land, under a contract for a lease thereof for a term greater than three years, but upon which an action at law could not be maintained, is not a person having an estate or interest therein greater than a tenancy from year to year, within the meaning of 2 & 3 Will. 4, c. 119, s. 12, though a court of equity would decree specific execution of the contract, on the ground of part performance. *Orpen v. Moore*, 2 Jones 435.

9. In answer to a petition for a receiver for payment of tithe composition, under 2 & 3 Will. 4, c. 119, s. 15, the respondent cannot set up as a defence that the lands are in the occupation of his under-tenants, who hold under unstamped accepted proposals in writing, executed prior to the 16th August 1832. *Orpen v. Allen*, 2 Jones 434.

10. On a summary petition under the 16th section of 1 & 2 Vict., c. 109, the Court has no jurisdiction to declare a certificate null and void; it can only amend the certificate apportionment as to the charge on the petitioner's lands. On such a petition, the Court has no jurisdiction to decide between the two conflicting certificates. *Connor v. Devonshire*, 1 Ir. Eq. R. 328.

11. The owner of a tithe composition, effected under 4 Geo. 4, c. 95, may sue for it by bill in equity, though he might have distrained the defendant for its amount. *Ryan v. Maher*, 1 Jones 595.

The jurisdiction of the Superior Court is not taken away in cases where the amount of the tithe composition demanded is within the jurisdiction of the Civil Bill Court. *Ib.*

12. An agreement for a lease at a gross rent, with a collateral covenant on the part of the tenant to pay the tithe rent-charge, would be void under the 2 & 3 Will. 4, c. 119; but, *semble*, an agreement by which the tenant offers to pay 100*l.* a year rent, and in consideration of the tithe rent charge, an additional sum of 5*l.* per annum, is not illegal, and would be specifically executed. *Davies v. Fitton*, 2 Dr. & War. 225; 4 Ir. Eq. R. 612.

13. Under 1 & 2 Vict., c. 109, s. 32, upon application by three or more persons in any parish, each charged with payment of 3*l.* or upwards, in respect of the tithe rent-charge, and who have given notice in the manner specified by the Act, the Quarter Sessions may vary the rent-charge, according to the price of corn. An order, reducing the rent-charge, recited that "Whereas, due notice having been first by them given, three owners and occupiers of land in the parish of T., etc., each charged with payment of 3*l.* and upwards in respect of the rent-charge payable in lieu of the composition for tithes made by certificate of, etc., applied to the justices of the peace at Quarter Sessions," etc. Afterwards, the incumbent proceeded by petition under the 30th section of the Act to recover the rent-charge which accrued from the gala-day after the order of Sessions, as if no reduction had taken place; and a rule nisi for a receiver having been

obtained, the respondents came in to show cause against it, relying upon the order of the Quarter Sessions:—Held, that the recitals in the order were not evidence of the facts thereby stated; and, as it now appeared that one of the three persons who signed the notice, and upon whose application the order was made, was not an owner or occupier of land in the parish, nor charged with payment of any portion of the rent-charge:—Held, that the Quarter Sessions had not jurisdiction, and that the order was a nullity. *Thompson v. Shiel*, 3 Ir. Eq. R. 135; Fl. & K. 53.

1. The registrar of the diocese is the proper officer to amend the tithe certificate and applotment, pursuant to an order made under the 1 & 2 Vict., c. 109, s. 16. *Adair v. Johnson*, 3 Ir. Eq. R. 61.

2. The Earl of A., being seised in fee under a grant to his ancestor by King James II., with a license to alien, to be held of the grantee and his heirs, *non obstante* the Statute of *Quia Emptores*, conveyed the lands to J. P. and his heirs in 1834:—Held, that no reversion being left in the Earl, the lands were not let, set, or demised within the meaning of the 13th section of the 2 & 3 Will. 4, c. 119 (Stanley's Act), and that, therefore, the estate of J. P. was liable to the tithe rent-charge. *Verschoye v. Perkins*, 13 Ir. Eq. R. 72.

3. *Quare*, whether a lay landowner can establish an exemption from tithe rent-charge by proof of non-payment, for one of the periods mentioned in the 1 & 2 Vict., c. 109, s. 18, without other proof of the legal origin of the exemption. The cases of the latter question considered. *Shiel v. Incorporated Society*, 10 Ir. Eq. R. 411.

4. The Court has a discretion to grant or withhold a receiver, under the 1 & 2 Vict., c. 108, s. 20 (Tithe Rent-Charge Act); therefore, though a *prima facie* title be stated in the petition, if a fair doubt be cast on it by the answering affidavit, the Court will not appoint a receiver. *Semble*, a certificate by the Commissioners under the Tithe Composition Act (4 Geo. 4, c. 99, s. 25), is valid, though it only finds generally that tithes are payable to a lay impropriator, without giving his name. *Semble*, also, the title to the tithes is not concluded by the certificate. *Greville v. Fleming*, 8 Ir. Eq. R. 201; 2 J. & L. 335.

A receiver refused to a lay impropriator to get in the tithe rent-charge, there being a contest in the parish, and the affidavit stating merely that he was lay impropriator. *Id.*

5. If the person liable to pay tithe rent-charge fail to do so within ten days after service of notice, the rent-charger is entitled to prepare his petition, and may refuse the arrears without the costs. What are reasonable costs in such a case. *Macartney v. Graydon*, 8 Ir. Eq. R. 99.

6. Under the 1st section of the Act for the Abolition of Tithe Composition in Ireland (1 & 2 Vict., c. 109), a plaintiff is entitled to dismiss his bill without payment of costs, although it was filed for the recovery of not only the tithe composition due for the years 1834, 1835, and 1836, but also of the arrears or additions recoverable therewith, under the provisions of the Million Act; and he may dismiss it against one of the several defendants, retaining it against the rest. As a general rule, the costs

in a court of equity follow the result. *Burgh v. Kenny*, 1 Ir. Eq. R. 264.

7. Service of subpoena to appear and answer a bill for tithe composition, may be effected out of the jurisdiction, under the 4 & 5 Will. 4, c. 82. *Anon.*, 1 Jones 561.

8. Where petitioners, under the stat. 1 & 2 Vict., c. 109, s. 16, praying that Whiteacre should be declared tithe free, alleged that those lands had constituted part of the possessions of the monastery of D., and were held by the friars and abbots free from tithes, and that, under a commission issued in the 18 Eliz., an inquisition was held, and the jury found that 150 acres of land in Whiteacre, with the tithes of the same, formed parcel of the monastery of D. and had been concealed from the Queen and her progenitors; and the petitioners also alleged that by letters patent in the 19 Eliz. 150 acres of land in Whiteacre, and the tithes of the same, were granted to W., under whom the petitioners alleged that they derived by lease made in the year 1700, demising Whiteacre and the tithes thereof for threelives with a covenant for perpetual renewal, and stated a composition made in 1833, and a certificate of the commissioner certifying the composition of the parish in which Whiteacre was situate (of which 47l. was assessed on Whiteacre), and also certifying that it was payable to the respondent; and the petitioners also alleged that, for sixty years anterior to the composition, Whiteacre was held by the owner and the tenants thereof tithe free. The respondent denied that Whiteacre was part of the possessions of the monastery, and insisted that, even admitting the statement of the petitioners as to the 150 acres to be true, it only led to the conclusion that to that extent alone were the lands of Whiteacre tithe free. The Court referred it to the Master to inquire whether Whiteacre was rightly charged with tithe composition, if the stat. 1 & 2 Vict., c. 109 had not passed, or if such composition had not been suspended. Evidence was entered into on both sides, and tendered to the Master, who declined to consider it; and, inasmuch as it appeared on the petition and the charge that the lands and tithes were separately demised by the lease of 1700, he found that Whiteacre would have been rightfully charged with tithe composition if the stat. 1 & 2 Vict., c. 109 had not been made, or if such composition had not been suspended. The Court, being of opinion that the lease of 1700 was susceptible of being construed to mean a demise of Whiteacre tithe free, and inasmuch as the respondent had not in his discharge rested his defence upon the view adopted by the Master, but had denied the title of W., the lessor of the petitioner, directed the Master to review his report, but ordered that notice of all further proceedings should be given to the person entitled to the reversion on the lease of 1700, who had not previously been made a party in the matter. *Denny v. Devonshire (Duke)*, 1 Ir. Ch. R. 657. Varying S. C. *id.* 401.

XVIII. ACCOUNT.

9. On the bill for tithe of agistment of "barren and unprofitable cattle," defendant, from plaintiffs' loose mode of pleading, sup-

posing it not to relate to sheep, made no defence as to them. Court refused the account as to them. *Turner v. Williams*, 3 Anst. 829.

1. It is the duty of courts of equity to decree tithes in kind, when satisfied that modus is either bad, or has not immemorially existed. *Short v. Lee*, 2 Jac. & Walk. 464.

2. Account of vicarial tithes decreed against a modus of 1s. per acre, for each acre of marsh land, for tithe of hay and all other vicarial and small tithes: the vicarage appearing to have been established by endowment in 1367, within legal memory. *Scott v. Smith*, 1 V. & B. 142.

3. Account of tithes decreed of ancient mill, altered by addition of two new mill-stones. *Manby v. Taylor*, 3 Ves. & B. 71.

4. Bill for tithes; answer admitting the right to one-third, and submitting to account, and claiming the other two-thirds, under a title derived from grant by Queen Elizabeth, submitting to be examined upon interrogatories, but not setting forth a description of the lands; the defendants having gone into evidence in support of their claim, pressed to have the bill dismissed generally; the plaintiff pressed for a general account; the M. R. decreed an account as to one-third, and as to two-thirds, the plaintiff declining to try the right at law, dismissed the bill. *Fworcroft v. Paris*, 5 Ves. 221.

An account of tithes is consequential upon the legal right; and therefore, if the least doubt is thrown upon it by *prima facie* evidence, the account cannot be decreed till the right is established at law. *Id.*

5. An account of tithes in kind decreed, notwithstanding evidence of payment of certain customary payments for upwards of a century, and evidence that numerous bills had been filed by vicars, but had been subsequently abandoned, it appearing, from the depositions and proceedings in an old cause, rather more than a century back, that the customary payments did not then exist, but that the then vicar had endeavoured to set them up. *Jackson v. Morris*, 1 Y. & J. 275.

6. A bill for an account of tithes received from the occupiers by a person claiming under an adverse legal title, will not lie. *St. Asaph (Bishop) v. Williams*, Jac. 349.

7. Bill by the purchaser, at an auction, of tithes for three years, against an occupier, for an account and satisfaction. It was objected that, tithes lying in grant, the plaintiff, as a lessee by parol, could not maintain the suit; but the tithe owners having been originally made defendants to the suit, and on their disclaimer dismissed, the Court supported the plaintiffs title, and decreed an account. *Williams v. Jones*, Young 252.

8. A., being entitled to parcels of tithes, was made defendant in suit by person also claiming to be entitled to tithes against occupiers; he joined with occupiers in answer, and insisted on his right to tithes: Court retained bill for one year, with liberty to bring an action; if not, bill to be dismissed with costs. Action was brought against occupiers, and verdict for plaintiffs. On further hearing, account against occupiers decreed and occupiers and A. to pay costs. *Wing v. Murrell*, M'Clel. & Y. 620.

See also XX. 3 post.

XIX. EVIDENCE.

1. *Ecclesiastical Surveys*, 6741.
2. *Maps*, 6741.
3. *Receipts and Books of Account*, 6741.
4. *Terriers*, 6742.
5. *Other Documents*, 6744.
6. *Discovery and Production*, 6744.
7. *Other Evidence*, 6745.

1. Ecclesiastical Surveys.

9. The Ecclesiastical Surveys are admissible to prove an ancient endowment, and, aided by perception of small tithes, though not of all, will give the vicar a right to tithes of articles of modern introduction against the lessee of the rector. *Cunliffe v. Taylor*, 2 Price 329.

10. The evidence affirmed by Ecclesiastical and Parliamentary Surveys, either for or against a modus, is entitled to very little weight. *Atkins v. Drake*, M'Clel. & Y. 123.

11. A valuation of tithes made by surveyor, at the instance of rector, if it can be distinctly proved to have been made with reference to certain money payments in lieu, is evidence to fix rector with an acknowledgment of such payments. *Bertie v. Beaumont*, 2 Price 303.

12. The Ecclesiastical Surveys are admissible to prove an ancient endowment, and, aided by perception of small tithes, though not of all, will give the vicar a right to tithes of articles of modern introduction, against the lessee of the rector. *Cunliffe v. Taylor*, 2 Price 329.

2. Maps.

13. Producing map of lands of which the farm was stated to consist, and proving the accuracy of the description of the lands in the map as compared with them in 1803 (with reference to the time of commencing the suit), is no proof of such farm being ancient, nor sufficient even to raise such a presumption, that it may be capable of further proof as to furnish ground for giving an opportunity of establishing it by issue. *Stuart v. Greenall*, 9 Price 106.

14. In a suit for tithes between a vicar and the occupier of a mill, an old map of the parish, belonging to the lord of the manor, was not admitted as evidence for the defendant. *Newcombe v. Mathew*, 5 Sim. 243.

15. A tithe commutation map is not, under 6 & 7 Will 4, c. 71, s. 64, admissible in evidence as showing the boundary of land in a case of disputed title. *Wilberforce v. Hearfield*, 5 L. R., Ch. D., 709; 46 L. J., Ch., 584; 25 W. R. 861.

3. Receipts and Books of Account.

16. Old receipts by churchwardens to parishioners for contributions by the latter to the modus, rejected as evidence. *Atkins v. Drake*, M'Clel. & Y. 213.

17. A receipt, even of more than fifty years old, offered to be put in to prove a money payment, purported by it to have been received in lieu of tithes, is not admissible evidence of the fact of such customary payment having been acted on, so as to establish a defence of a modus, unless it can be proved who the parties to the receipt were, and in what character they stood; and unless proof be given of the handwriting or death of the party giving it. *Manby v. Curtis*, 1 Price 225.

1. An old receipt of former rector in hands of a defendant for a money payment in lieu of tithes, where there was a probability of its having come to him from a predecessor in the same way, admissible evidence to support modus. *Bertie v. Beaumont*, 2 Price 303.

2. Evidence of rector's handwriting to receipts, by comparison with his signature in registrar's books, the entries in which it was his duty to sign:—Held, sufficient in a tithe suit. *Taylor v. Cook*, 8 Price 650.

3. Entry in parish register of different moduses, the sum total of which was in handwriting of deceased vicar, admitted as evidence. *Perigal v. Nicholson*, Wightw. 63.

4. An account-book of a former vicar produced by a witness, who deposed that he had received it from his aunt, who resided with his father, who was the son of the vicar, and that he had frequently seen the book in his aunt's possession, and had heard her say it belonged to his grandfather:—Held, not to be admissible evidence. An occupier of lands in the parish, but who had been examined as a witness on both sides, proved the handwriting of the plaintiff (the vicar) to receipts for alleged moduses. An objection to his evidence on the ground of interest was overruled. Receipts given by the parish clerk for the use of the vicar, for small tithes, the handwriting of the parish clerk being proved, were rejected as evidence, on the ground that the parish clerk was living, and his agency for the vicar could not be inferred, but must be proved. *Thompson v. Perryman*, Young 598.

5. In a suit for tithes by an ecclesiastical rector against the occupiers. Old accounts found in the custody of the personal representative of a deceased tithe collector of a former rector were received, although there was no evidence to show by whom they were made out. The defendants set up a modus of 1*l.* 17*s.* 9*d.* as covering the tithes of four townships in a parish, which were claimed by the plaintiff. The latter proved, by documents older than those produced by the defendants, that separate moduses, amounting to 1*l.* 17*s.* 9*d.*, had been paid for separate portions of the four townships:—Held, that the modus pleaded was bad. *Harcourt v. Peirson*, 5 Sim. 368.

6. In a tithe suit by a vicar, old overseers' accounts mentioning that a sum had been received from the vicar, in respect of a modus payable to him, are admissible for the defendants. *Ward v. Pomfret*, 5 Sim. 475; 2 L. J., N. S., Ch., 22.

Plaintiff had subpoenaed the defendants' agent to produce, at the hearing, a parish book in his custody:—Held, that as it was a public document, and in the possession of the defendants' agent, the defendants were entitled to have it produced and read at the hearing for their benefit. *Id.* 476.

7. Entries by the lord's steward may be admitted to prove a modus to the vicar in discharge against the lay person. *Woodnoth v. Cobham*, Bunb. 180.

8. The bishop's registry office is the proper custody for the sequestrator's accounts, with reference to their admissibility on questions of right to tithes. *Pulley v. Hilton*, 12 Price 625.

9. A book, in handwriting of A., purporting to be an account of tithes collected by him seventy years ago, cannot be read in evidence

without proof that A. was collector at that time. And in a suit for tithes by lessee of an ecclesiastical corporation aggregate to which the rectory belonged, ancient documents in their possession, purporting to be accounts furnished by some of their members employed to collect tithes, and appearing to have been approved and settled, are admissible in evidence; and the statutes of the body, enjoining the appointment of collectors, together with the internal evidence of the documents and their coming out of proper custody:—Held, sufficient proof of their being collectors. *Short v. Lee*, 2 Jac. & Walk. 464.

As to the principle on which entries in a rector's books are admitted as evidence for his successors. Entries of tithes received in books of ecclesiastical corporation aggregate entitled to a rectory, are evidence for their successor. *Quare*, whether entries in books of lay impropriator in fee, of tithes received, are evidence for those claiming under him. *Id.* 478.

10. Vicar's books were admitted in evidence, though they contained private entries and memorandums of the vicar not relating to the parish, and though one of the books had remained for many years in the hands of a representative of a deceased vicar, instead of having been delivered to the succeeding incumbent. *Miller v. Jackson*, 1 Y. & J. 65.

11. Vicar's books are evidence to show that money payments received in lieu of tithes are founded on, and regulated by, a criterion not in existence beyond legal memory—e.g., the poor rates. *Walter v. Holman*, 4 Price 171.

12. Ancient receipts of a payment as a modus for hay, accompanied by rector's books, in which were contained entries of receipts for hay of persons who, from defendant's title-deeds, appeared to have been then owners of estate, good evidence of payment as a farm modus. *Brazier v. Mytton*, M'Clel. & Y. 613.

13. A receipt for payment (by person sued by vicar for tithes) of plaintiff's bill of costs, is evidence that suit resulted in favour of vicar. So also is an entry to that effect in a former vicar's books. *Parsons v. Bellamy*, 4 Price, 190.

4. Terriers.

14. Terriers alone not sufficient to prove a modus. *Lake v. Skinner*, 1 Jac. & Walk. 20.

15. Terriers are not documents of such conclusive authority as to exclude all other evidence. *Atkins v. Drake*, M'Clel. & Y. 213.

An entry, purporting to be a terrier, in an old book called a parish registry, produced from an old iron chest in the vicarage house, of which the only key was kept by the vicar, and accompanied by other suspicious circumstances, admitted in evidence at N. P., and left to jury to receive its due weight, found by them not to be authentic, and therefore rejected by Court. *Id.* 214.

16. The three legitimate repositories of terriers and vicar's books, to make them evidence, are the parish chest, the registry of the bishop, and the registry of the archdeacon. *Armstrong v. Hewitt*, 4 Price 216.

17. A terrier found in the archdeacon's registry is admissible. *Potts v. Durant*, 3 Anstr. 789.

A terrier, although not signed by the im-

propriate rector, nor any person for him, is evidence against him as to tithes due to him in the parish. *Ib.*

1. A terrier cannot be received in evidence unless it comes from the proper repository; the registry of the diocese, or a copy from the parish registry, if the original cannot be found. *Atkins v. Hatton*, 2 Anstr. 387.

2. A terrier, though signed by churchwardens only, is admissible evidence in a suit for tithes, by a portioner against an occupier. *Lewis v. Bridgman*, 3 Sim. 316.

3. A single terrier, unsupported by usage, is not sufficient to establish a modus. To support a parochial modus, it is not sufficient for the defendant to prove the non-render: he must go further, and show the acceptance of the modus for some time, and to some extent. *Lynes v. Lett*, 3 Y. & J. 405.

4. A terrier without date, and bearing the signatures of various persons, having no addition or designation affixed to their names, is admissible in evidence on behalf of the vicar, if produced under circumstances showing it to be a genuine document. *Hall v. Farmer*, 2 Y. & Coll. 145.

5. Old terriers recording that tithe hay is payable in kind, signed by rector and churchwardens, overseers, and some of the resident parishioners, are good evidence to rebut presumption of farm modus attempted to be established by proof of money payment having been uniformly rendered within living memory, and the absence of any evidence, even of reputation, that tithe had ever been taken in kind, and that, though such terriers are not proved to be signed by any persons interested in the farm. *Mytton v. Harris*, 3 Price 19.

6. Copy of a lost terrier rejected as evidence. *Leathes v. Newitt*, 4 Price 355.

7. In a suit for tithes by an ecclesiastical rector against the occupiers, a terrier signed by a vicar, churchwardens, and inhabitants, and which was tendered by the defendants, was rejected. *Harcourt v. Peirson*, 5 Sim. 368.

8. Terriers are evidence of tithes merely personal. *Townley v. Colegate*, 2 Sim. 297; 6 L. J., Ch., 159; *Bronne v. Woolsey*, 2 Sim. 305.

9. The omission, in the earlier two or three of a series of old terriers, of any notice of money payments set up as moduses, does not destroy the evidence of the existence of the moduses, arising from the subsequent terriers which do notice them: nor even a variation in the amount of one of the sums, and a qualification of the payment of it occurring in one of them, where the payments relied on are supported by the testimony of witnesses, who prove that such payments have been in fact made accordingly. *Stuart v. Greenall*, 9 Price 106.

10. Modus claimed for hay was described in terriers to be for all grass, "except clover and the like":—Held, this was no proof of modus being modern. *Franklin v. Spilling*, 3 Anstr. 760.

11. Terriers, in stating the rights of the vicar, contained the following entry, "Item, small tithes, as hemp, flax, geese, and ducks":—Held, that they afforded strong evidence that the endowment carried all small tithes, and that the true construction of the terriers was, that it was intended by them to state, that the vicar was entitled to small tithes, as, for example, hemp, flax, geese, and ducks. *Gibson v. Peacock*, Younge 184.

12. A money payment of 5s. yearly at Lammas by every occupier of lands or tenements within a district set up as a modus, when of all tithe hay within district, although proved *prima facie* in point of fact:—Held, to be disproved as a modus for all the hay in the whole township by the evidence of terriers stating that "in the district, only 5s. per year for all the hay in their (the occupiers') crofts," was payable; the parol testimony of the money payment, and the evidence of terriers, being quite consistent with each other, there being nothing contradictory in the terriers so limiting and specifying the object and consideration of the sum proved to be paid generally throughout the parish in lieu of hay, to such hay as was grown in crofts. *Drake v. Smyth*, 8 Price 692.

13. A township modus of 6l. was pleaded, and was supported by several terriers, and by a great deal of parol evidence; but in an earlier terrier the modus was stated to be 6l. 0s. 4d., from which it was contended, that the immemorability of the payment was disproved: the Court held that this terrier alone was not sufficient, as opposed to the other evidence, to defeat the modus; and that the additional 4d. might either have been introduced into the terrier by mistake, or might have been a small fee for the collection. A modus of 13s. 4d. was pleaded as payable on the first Sunday after old St. Michael's day, by the occupiers of lands within the township of A., and the township of B., of which the occupiers in A. contributed and paid 10s., and the occupiers of lands in B. contributed and paid 3s. 4d., in lieu of the tithes of hay and grass in and throughout the townships, and which modus had been accustomed to be paid on the altar-table of the parish church. The payment was supported by several ancient terriers, but which only stated the 13s. 4d. as payable for the township of A. and B., without referring to any contribution:—Held, that the modus, as pleaded, was supported by the evidence; that the contribution was a private arrangement between the townships, by which the vicar was not bound, and that he had his remedy against any part of both townships for the entire modus. A modus was pleaded as payable by the occupiers of lands within two townships; the external boundaries of both the townships were clearly and distinctly made out in evidence, but the witnesses deposed that the lands in these two townships were intermixed, and could not be extinguished:—Held, that the boundaries were sufficiently proved. *Warrington v. Sadler*, Younge 288.

14. Where certain payments, alleged to be farm moduses, were proved by persons who had known the farms for many years, some of them more than half a century, and who had actually occupied the farms, to have been uniformly paid to the rector, in lieu and satisfaction of the tithes alleged to be covered by the moduses:—Held, that the moduses were not so clearly disproved by several terriers, signed by the rector, churchwardens, and inhabitants, containing entries to the following effect:—"Tithe rents due to the rector, 35l. 16s. 10d.;" "That tithes due to the rector are small tithes, Easter offerings, and great tithes, for which last a composition tithe-rent

throughout the parish is at present paid to the rector," as to authorise the Court, sitting in equity, to overrule them and to disregard the evidence of usage upon which they were founded; and the terriers being evidently erroneous in some particulars, the Court refused to decree an account of tithes in kind, but offered the rector an issue, or to retain his bill for a year, with liberty to bring an action. *Lonsdale v. Heaton*, Younge 58.

Where terriers state the rector to be entitled to the small tithes of the parish, the expression is so general and indefinite, as not to exclude the possibility of the existence of money payments, in lieu of the small tithes; and, therefore, where terriers so stated, but the parol testimony proved money payments for nearly a century back, in lieu of certain small tithes, a decree for tithes in kind of those articles was refused, and the rector left to an issue or action. *Id.*

1. On a vicar's bill for tithe of agistment, no endowment being extant, the plaintiff produced a series of terriers, commencing from the year 1685, describing the several rights of the rector and vicar, and enumerating, among the rights of the former, a sum of 2*l.* in lieu of the tithe hay, and, among the rights of the vicar, tithe calf, and all small and petty tithes. On the part of the defendants, a number of terriers were also produced, commencing from 1749, conflicting with those produced by the vicar in some respects, but all containing the 2*l.* as payable to the rector in lieu of tithe hay cut and grassing, and gave evidence of the general reputation that the sum was payable for both. There was no evidence of perception of the tithe of agistment by either rector or vicar. The Court declined to decree for the vicar, but offered him an issue. *Willis v. Farrar*, 2 Y. & J. 217.

5. Other Documents.

2. Matthew Paris is not evidence of the establishment of the order of Franciscans in Italy. *Barnes v. Stuart*, 1 Y. & Coll. 119; 4 L. J., N. S., Exch. Eq., 25.

3. Bishop Wells' *liber de ord. illationibus vicariorum* received in evidence. *Tucker v. Wilkins*, 4 Sim. 362.

4. A book found in the Heralds' Office, purporting to be an account of the possessions of a monastery, is not admissible evidence of that fact. *Lygon v. Strutt*, 2 Anstr. 601.

5. An instrument purporting to be an endowment without the seal, and another purporting to be an inseximus thereof under the seal of the bishop, were rejected as coming out of private hands, unconnected with the matter in dispute. *Potts v. Durant*, 3 Anstr. 789.

6. A copy of a faculty granted in 1613 admitted as evidence in a tithe suit, it being produced from the custody of a person whose rights were abridged by it, and there being evidence that the original could not be found in the proper depository, which was destroyed by the great fire of London. *Isham v. Wallace*, 4 Sim. 25.

7. Book from registry of Lincoln, containing *inter alia* what were called copies of endowments of certain vicarages, was received as evidence of an endowment of vicarages in

Northampton. *Leonard v. Franklyn*, 4 Price 264.

8. The question being, whether the appointment of a curate belonged to the vicar of the parish or to a corporation, entries in old books of the corporation were not received as evidence against the vicar, to show that the corporation had from time to time appointed the curate. *Att.-Gen. v. Warwick*, 4 Russ. 222.

9. The minister's accounts and the royal grants are, when they so state, usually considered as sufficient evidence that certain premises were part of a dissolved monastery. *Pierrepont v. Scarlet*, 2 Y. & J. 330.

10. An original ancient book, containing, amongst other matters concerning a particular see, the entry of the endowment of a vicarage by a former bishop, to whom the rectory was granted by the Crown, with licence to appropriate, and coming from the registry of the diocese, is evidence of the endowment. But regularly, a copy of an entry is not admissible. *Woolley v. Brownhill*, McCl. 321. S. P. 13 Price 600.

11. The proceedings (properly authenticated) of the Tithe Commissioners are public evidence of the matters therein stated, and to be received as such. *Giffard v. Williams*, 38 L. J., Ch., 597; 21 L. T., N. S., 575; 18 W. R. 56.

12. The applotment book of a parish is not evidence to prove the value of the benefice in years previous to the establishment of tithe composition in the parish. *Hogg v. Garrett*, 12 Ir. Eq. R. 559.

13. An inseximus of an inquisition admitted as evidence in a tithe cause. *Donnison v. Elaley*, McCl. & Y. L. Affirmed *sub. nom. Elaley v. Donnison*, 2 Bli., N. S., 94.

14. The ecclesiastical survey, stating vicar to be entitled to tithe of parish generally, will not supply the absence of proof of perception from the particular lands. *Armstrong v. Hewitt*, 4 Price, 216.

6. Discovery and Production.

15. Miller carrying on trade of mealman is obliged to discover, on suit for tithes, the quantity, though not the price, of meal ground. *Chapman v. Pilcher*, Wightw. 15.

16. A plaintiff in a tithe suit is not entitled to a production of receipts for moduses and compositions, given to the defendants by the plaintiff and his predecessors, some of these receipts relating to tithes not sued for, and the others being evidence for the defendants and not for the plaintiff. *Tomlinson v. Lymer*, 2 Sim. 489.

17. Bill by an impropriate rector against occupiers for an account of tithes, and against a portionist requiring a discovery from the latter of the deeds under which he claimed to be entitled to the portion of tithes to which the bill admitted him to be entitled, alleging that the deeds would show not only the title of the portionist to the tithes claimed by him, but also the title of the plaintiff to the tithes demanded by him of the occupiers. Demurrer by the portionist to the discovery allowed. *Compton v. Grey (Earl)*, 1 Y. & J. 164.

18. A defendant, who had pleaded moduses to a bill for tithes filed by the rector's lessee, was ordered, on motion, to produce all the documents in his possession which had belonged to a former lessee of the rectory, and

also all the other documents in his custody relating to the matters in dispute, except those which tended to show the existence of the moduses. *Tomlinson v. Booth*, 4 Sim. 461.

1. The Court will not, on bill for tithes, praying discovery of documentary evidence, order tithe book of former rector, shown to have been in the possession of defendant's attorney, unless it clearly appear, from admissions in the answer, that it would assist plaintiff's case. But if there be enough shown to give colour for the application, Court will not give costs to the defendant. *Bligh v. Benson*, 7 Price 205.

2. As to how far vicar, plaintiff in tithe cause, is compellable to produce for inspection, etc., vicar's books, and those of predecessors, admitted by him in his answer to cross bill by defendant to be in his possession, and to contain entries relating to payments of sums of money as compositions, corresponding in amount with money payments set up by defendant as modus relied on. The costs of all proceedings had for obtaining the discovery by such means, must be paid by party acquiring it. *Firkins v. Lowe*, 13 Price 193; *McCl. 73*.

3. On cross-bill, plaintiff cannot compel discovery of defendant's title to tithes, though defendant must answer whether they have or have not been conveyed away to another person. *Glegg v. Legh*, 4 Madd. 193.

4. The defendant in a tithe suit, who denies the rector's title, cannot, by a cross bill, compel the rector to discover the evidence of his title; therefore, where the rector, by his answer to such a cross bill, refused to set forth under what deed or deeds the rectory was conveyed to the persons under whom he claimed, exceptions to the answer, which had been taken on the ground of that refusal, were overruled. *Bellwood v. Wetherell*, 1 Y. & Coll. 211; 4 L. J., N. S., Exch. Eq., 23.

5. The dean and chapter of C., being rectors of a parish, leased all the tithes belonging to the rectory; the lessees filed a bill for tithe of hops against the occupiers, to which the vicar was made a party as claiming that tithe. The occupiers then filed a cross bill against the dean and chapter and their lessees, for a discovery and production of documents: demurrer by the dean and chapter allowed. *Tooth v. Canterbury (Dean)*, 3 Sim. 49.

6. Plaintiff in tithe cause, lessee of vicar, ordered on motion, on part of defendant, to bring in and deliver to clerk in court books, papers, etc., stated in affidavit to be in his possession, and to belong to vicar, who was not a party to suit. *Foreman v. Cooper*, 11 Price 515.

7. Other Evidence.

7. As to the preponderance of conflicting evidence as to title, in tithe causes. *Petch v. Dalton*, 6 Price 232.

8. As to evidence of old persons of the nature and extent of a farm. *Brazier v. Mytton*, *McCl. & Y.* 613.

9. As to evidence in tithe matters. *Bullen v. Michel*, 4 Dow 297.

10. As to evidence to support the existence of an ecclesiastical rectory. *Boulton v. Richards*, 9 Price 483.

11. In a tithe suit by a vicar, for small tithes,

depositions of deceased witnesses in an old suit, by the rector, for great tithes of the parish, were received as evidence. *Ward v. Pomfret*, 5 Sim. 477; 2 L. J., N. S., Ch., 22.

12. Court will not, on motion, order depositions in tithe cause in Exchequer to be read in a tithe cause in this court, against any other occupiers of lands in same parish, though objects of both suits and the interest of parties were the same. *Goodenough v. Almay*, 2 Sim. & S. 481.

13. The proof of the title of the vicar to some small tithes, and that the other small tithes had never been paid to the rector, is not necessarily sufficient to establish the right of the vicar to such other small tithes, especially where some of the evidence is opposed to the vicar's claim. Where, in a suit for small tithes by the vicar against occupiers, the rector is a defendant, and disclaims, the Court may use the disclaimer for the purpose of founding upon it a decree for the particular tithes demanded by the plaintiff in a suit, but not for the purpose of proving the right of the vicar to such tithes. *Salkeld v. Johnston*, 1 Hare 196; 6 Jur. 210.

14. The plaintiff, who was entitled to tithes arising on the defendant's land, served the defendant with notice that he had, by a certain indenture and lease, demised those tithes for a term of years. The plaintiff afterwards filed the bill for an account of the same tithes. It appeared that the lessee disclaimed all interest in the tithes, and the lessee also put in a disclaimer in the cause:—Held, that upon the disclaimers the Court might safely make a decree upon the evidence then before it, without directing an inquiry with reference to the alleged demise. *Mounsey v. Burnham*, 1 Hare 15.

See also II. ante.

XX. SUITS RESPECTING.

1. Parties, 6745.
2. Pleading, 6747.
3. Issue at Law, 6748.
4. Costs, 6749.
5. Other Matters, 6750.

1. Parties.

15. To a bill for tithes by the bishop and sequestrator during the incapacity of the incumbent, the incumbent must be a party. *London (Bishop) v. Nicholls*, Bunb. 141.

Bill for tithes by the bishop and sequestrator during the incapacity of the incumbent, dismissed, the incumbent not being a party. *Id.*

16. Decree in time of Car. 1, for payment of 40l. per annum out of particular lands, formerly part of the forest of B., to the vicar in lieu of tithes. In a bill against the landowners to establish a right for this 40l. per annum, it is not necessary that the occupiers, as well as landowners, should be made parties to the bill. *Cuthbert v. Westwood*, Gilb. 320.

17. Rector ought not to be made defendant in vicar's suit for an account of small tithes charged to be withheld by occupiers, on a claim by rector. *Williams v. Price*, 4 Price 156.

18. It is multifarious for rector and vicar to join in suit for tithes respectively due to them. *Exeter College v. Rowland*, 6 Madd. 94.

19 In a suit by an improprie rector for

tithes, when the defence is, that the tithe in question is vicarial, and vicar, who is a defendant, dies during the suit, it is not necessary to make the new vicar a party, if the plaintiff will waive the account subsequent to his induction. *Dames v. Benn*, Jac. 95.

The vicar is a necessary party to a bill for tithes, by the improper rector against an occupier, when the defence made is that the tithes in question are payable to him. S. C. 1 Jac. & Walk. 513.

1. Bill by plaintiffs as lessees of the rector of W., for a portion of great and small tithes in S., a neighbouring parish; the vicar of S. who might be entitled to the small tithes, is a necessary party. *Baily v. Worrall*, Bunb. 115.

2. To a bill to establish a customary payment in lieu of tithes, the ordinary must be a party. *Gordon v. Simpkinson*, 11 Ves. 509.

A bill to establish a customary payment in lieu of tithes does not lie upon a simple demand of tithes without suit. *Id.*

3. Bill to establish a custom, the owner of the inheritance must be a party. *Spender v. Potter*, Bunb. 181.

4. Where a lay impropriator is not a necessary party, and ought to demur, if he does not, but suffers the cause to go to the hearing, the Court will not give him costs. *Williamson v. Hutton*, 9 Price 187.

5. Impropriator must be party to bill against his lessee to establish a modus. *Glanvil v. Trelanney*, Bunb. 70.

6. To a bill by a vicar against occupiers for certain tithes, impropriators ought to be omitted as parties, although the defendants allege that it is uncertain, whether these lands are or are not within the parish; and that the impropriate rectors had always received or demanded the tithes: occupiers only are necessary parties. *Cooke v. Blunt*, 2 Sim. 417.

7. An impropriator is not a necessary party to a bill by a vicar against occupiers; and, if made one, he may demur. Bill dismissed against him, but, under circumstances, without costs. *Williamson v. Lonsdale* (Lord), Dan. 171.

8. Where impropriate rector, not being an occupier, is made party to bill for tithes, and a decree is made for plaintiff, he is not (but under particular circumstances) liable to pay costs. *Petch v. Dalton*, 8 Price 9. See also *S. P. Leathes v. Newitt*, *id.* 566.

9. Where an equitable lessee of tithes, having a right to call for the conveyance to him of the legal interest, had neglected to do so previously to instituting a suit for the recovery of part of those tithes; and upon the refusal of the rector to join as co-plaintiff in the suit, had made him a co-defendant:—Held, that he was not entitled to the costs arising from the rector's refusal to join, and that the rector was entitled to his costs. *White v. Gardner*, 1 Y. & Coll. 385.

10. A., being entitled to parcel of tithes, was made defendant in suit by person also claiming to be entitled to tithes, against occupiers, joined with them in answer, and insisted on his right to tithes. Court retained bill, with liberty to bring action; if not, bill to be dismissed with costs; action determined by verdict for plaintiff. On further hearing, account against occupiers was decreed, and they and A. were ordered to pay costs. *Wing v. Murrell*, M'Clel. & Y. 620.

11. The landlord is not a necessary party to a bill for an account of tithe filed against his tenants; but where he had been made a party by amended bill, on a suggestion made by his tenants in their answer, the bill was dismissed against him without costs. *Thorpe v. Mattingley*, 2 Y. & Coll. 421; 8 L. J., N. S., Exch. Eq., 9.

12. In general a landlord cannot be made a defendant to a bill for tithes against his tenants. But if he is charged with having got into his possession, from his tenants and other persons, documents for the purpose of preventing the plaintiff from obtaining evidence from them in support of his demand, the landlord cannot demur to the bill. *Day v. Drake*, 3 Sim. 64.

13. Bill praying account of tithes, and merely stating that impropriate rector demised tithes to plaintiff, demurred to for want of title; but on argument, plaintiff was allowed to amend, by making the impropriate rector a party, on payment of 5l. costs. *Jackson v. Benson*, M'Clel. 62; 13 Price 131.

14. Landowner, not being an occupier, made defendant in a suit for tithes, is entitled to have the bill dismissed as against him, with costs, but if he mixes in defence, etc., it will be dismissed without costs. *Markham v. Smith*, 11 Price 126.

15. A vicarage being under sequestration for debt, the occupiers paid their tithes, and certain alleged moduses to the sequestrator:—Held, that the vicar might, notwithstanding, file his bill against the occupiers for an account and satisfaction of their tithes, without making the sequestrator a co-plaintiff, though no fraud or collusion between the occupiers and the sequestrator was alleged. *Warrington v. Sadler*, Younge 283.

In a bill to establish a modus against the lessee of the impropriator, the owners of the impropriation must be parties. *Id.*

16. One owner of lands in a township may sue for himself and the others, to establish a contributory modus for all the lands there. *Chayter v. Trinity Coll.*, 3 Anstr. 841.

17. On bill to establish modus against dean and chapter as rector, the ordinary and patron are necessary parties. *De Whelpdale v. Milburn*, 5 Price 485.

18. A bill to establish a modus should be filed by certain owners and occupiers of land within the parish, on behalf of themselves, of all other owners, occupiers, etc. And the ordinary should always be a party. *Hales v. Pomfret*, Dan. 142.

19. Ordinary is a necessary party defendant to bill for establishing modus. *Cook v. Butt*, 6 Madd. 53.

20. Though a modus be laid in all the occupiers, yet suing part of the occupiers is sufficient, each being liable for the whole. *Hardcastle v. Smithson*, 3 Atk. 247.

21. Rector of M. claiming tithes in kind, the occupier and landlord filed a cross bill to establish a modus, payable to the rector of S., by the lord of the liberty of which the lands were parcel. It was objected, first, that the rector of S. not disputing the modus, a bill would not lie to establish it; secondly, that the other owners of lands in the liberty should have been parties; bill dismissed. *Woolaston v. Wright*, 3 Anstr. 801.

22. Where an impropriator's right does not

come in question, he need not be made a party to a bill for subtraction of tithes. *Carte v. Ball*, 3 Atk. 500.

1. If a sequestrator file a bill for subtraction of tithes during the vacancy, the bishop of the diocese must be made a party, because the sequestrator must account to him for his receipts. *Jones v. Barrett*, Bunb. 192.

2. In a tithe suit, if a defendant is not charged with having done some specific act to incite the parishioners to resist the payment of the tithes, he may have his name struck out of the bill, upon payment of the tithe demanded, and the costs of the suit, except such parts of the bill or proceedings as relate exclusively to the defendants. *Goold v. Prendergast*, 1 Jones 298. And see *Green v. Prendergast*, id. 299. n.; *Thompson v. Callaghan*, id. 300. n.

2. Pleading.

3. If the executor of a person brings a bill for tithes, he need not offer to accept the single value, he not being entitled by the statute of Edw. 6 to the treble value. *Anon.*, 1 Vern. 60.

4. In a bill for the single value of tithes, it is not necessary expressly to waive the treble value. *Wools v. Walley*, 1 Anstr. 100.

5. A bill for tithes used formerly to waive the penalties, but not of late, because the single value is only prayed. *Att.-Gen. v. Vincent*, Bunb. 393.

6. Bill for tithe of corn and grain. Demurrer, because the single value was not barely demanded, but the bill was for a discovery only, to enable the plaintiff to recover the treble value: *non allocatur*, for that tithes were suable in the Exchequer before the statute. *Sed quare*, because it is contrary to the practice to have such a bill, without alleging that plaintiff is content to receive the single value only. *Driver v. Man*, Hardr. 190.

7. In a bill for tithes, complainant did not show how he was entitled to them, yet held good. *Stone v. Ludlowe*, Hardr. 321.

8. A vicar need not set forth how he is entitled to tithe herbage and small tithes. *Ayde v. Klover*, Bunb. 7. *S. P. Goole v. Jordan*, Bunb. 144.

9. The Court would not determine whether there was any difference between a lay and spiritual impropriator, in setting out his title to tithes. *Burnell v. Coates*, Bunb. 129.

10. To a bill for tithes, defendant must set out quantities and values of the tithes particularly: it is not sufficient to deny generally the taking the titheable matter. *Baker v. Planner*, Bunb. 108.

11. In a bill for tithes by a lay impropriator, the title must be shown. *Penny v. Hoper*, Bunb. 116.

12. In an information for tithes, the value of them must be set forth. *Hardnycke v. Newra*, Hardr. 4.

13. In a bill for vicarage tithes, plaintiff did not set forth whether they became due to him by prescription or endowment. Defendant, by answer, admitted that the tithes were the vicar's due; but the bill was dismissed upon the merits. *Button v. Honey*, Hardr. 130.

14. It is not correct to plead that by certain custom used and approved in P. and nineteen

other parishes, no tithes of a particular kind were due and payable to rectors of P. *Page v. Wilson*, 2 Jac. & Walk. 521.

15. In plea of payment of composition to bill for tithes, time when or where is not necessary to be stated. *Mytton v. Harris*, Wightw. 111.

16. Lessee of tithes filing bill for satisfaction of them, need not set forth his lessor's title. *Crathorne v. Taylor*, 2 Bro. P. C. 512.

17. A trivial incorrectness in setting out the tithe of wool, and for which amends had been tendered, and the non-payment of Easter dues, which were never demanded, are not sufficient to prevent a bill from being dismissed. *Baker v. Athill*, 2 Anstr. 493.

18. It is not uncertain or multifarious in bill for account of tithes, bill having stated, as the foundation for plaintiffs' claim, a decree made pursuant to Act of Parliament, also to charge two other distinct sources from which he derives his right, and on which he rests his title, the basis of those two latter being, first an agreement anterior to decree, charged to have been confirmed by Act of Parliament passed ten years before former Act; and, secondly, custom founded on immemorial usage, there being nothing uncertain or real. *Owen v. Nodin*, 13 Price 478; *McClell*, 238.

19. In debt on the statute of 2. Edw. 6 for tithes out of plaintiffs' parish, a general allegation is sufficient, without showing a title; defendant was not alleged to be *subditus domini regis*; yet held good because he was called *occupator terre*. *Phillips v. Kettle*, Hardr. 173.

20. Where, in a suit for tithes, the title to the rectory is in issue, to a cross bill praying a discovery of the title, the rector cannot demur, although no other title is set up. *Bowman v. Lygon*, 1 Anstr. 4.

21. Plea of former decree, for payment of tithes, where a modus of lands alleged to be covered by it was improperly stated, so that the Court could not direct an issue, is not a good plea in bar to bill brought for establishing modus. *Collins v. Gough*, 7 Bro. P. C. 94.

22. Defendant was permitted to go into evidence of his right to tithes, where his title appeared likely to be clearly established, although he had inaccurately stated the subject-matter of his defence in his answer. *Wilmot v. Hellaby*, 5 Price 355.

23. Defendant, in answer to bill for account of tithes in kind, must set forth an account of titheable matters taken by him, although he relies on a defence of a composition or modus; or it will be a ground of exception. *Whistler v. Wigney*, 8 Price 1.

24. To bill against occupier for amount of tithes, arising from farms and lands situate within the township of K., in the parish of L.; a plea, that defendant did not occupy any lands or farm within parish of L., or titheable places thereof, allowed. *Warrington v. Mothersill*, 7 Price 666.

25. If vicar, claiming an account of tithes throughout the whole parish, by bill in equity, prove his right in part of the parish only, the objection, that the claim is too largely laid, is not a ground for dismissing the bill. *Scott v. Lawson*, 7 Price 267.

Plea of Modus.] 26. Unnecessary words used

in the laying a modus which would make it indefinite, may be expunged. *Ellis v. Saul*, 1 Anstr. 341.

1. Though modus be pleaded, yet the quantities and value of tithes must be set forth. *Gumley v. Fontleroy*, Bunb. 60.

2. If a *modus decimandi* be alleged no otherwise than by answer to a bill for tithes, defendant must answer all other parts of the bill: but if he pleads it, he need not answer any other matter. *Langham v. —*, Hardr. 130.

3. Misdemeanor of modus in Exchequer always occasions decree for tithes in kind. *Anon.*, Loftt. 66.

4. Modus for clover, instead of saying modus for grass:—Held, sufficient, and issue directed to try modus for grass. *Wood v. Harrison*, Amb. 563.

5. Not necessary to use the word modus in laying it; nor a particular day of payment. A modus may be overruled for rankness, if for a specific thing; if otherwise, will be sent to trial. *Richard v. Evans*, 1 Ves. 39.

6. A bill to establish a modus for every ancient farm, stating that the whole parish consisted of ancient farms, but not setting forth the abutments of each, is bad. *Scott v. Allgood*, 1 Anstr. 16.

7. Modus claimed for lands as part of an ancient estate, without naming ancient estate, or setting forth the abutments, or any descriptions of it, or of the lands of defendant in it, is bad. *Wood v. Wray*, 3 Anstr. 838.

8. A bill to establish a farm-modus, setting out the abutments of the farm, and stating that the modus had immemorially been paid for the said farm, is good, without stating it expressly to be an ancient farm. *Stowell (Lord) v. Atkins*, 7 Anstr. 564.

If an action is brought by the lessee of tithes for subtraction, it is a sufficient ground for filing a bill to establish a modus. *Id.* 566.

A bill to establish a modus will not lie, where the parson has not sued for tithes in kind. *Id.*

9. If it is not stated in an answer to bill for tithes which set up modus, in respect of what titheable article the modus is laid, it is bad for uncertainty, and no evidence can supply it. But it is sufficient if from whole answer it can be collected to what article it refers. *Bourke v. Isaac*, 2 Price 299.

10. Uncertainty as to metes and bounds in pleading modus is bad. *Gillebrand v. Scotson*, 4 Price 267.

11. Modus laid to be payable "by certain occupiers," uncertain and insufficient. *De Whelpdale v. Milburn*, 5 Price 485.

12. Where a modus is pleaded for a particular description of lands, it must be alleged in the answer that defendants occupy such lands. *Stuart v. Greenall*, 9 Price 106.

13. Moduses, introduced by stating that they are payable by occupiers in lieu of tithes within and throughout parish (except the occupiers of several other farms and lands), not otherwise describing them than by their respective names:—Held, ill pleaded for uncertainty. *Wright v. Southwood*, 5 Price 607.

14. Money payment alleged to be a modus in lieu of tithe of lands and of the wool of the first shearing of such lambs, or in lieu of

tithe of such lambs:—Held, ill pleaded in the alternative; so also if pleaded as a composition. Such money payment may be relied on at hearing as a composition, if charged to be so in the answer, in case it should not be a modus. *Leach v. Bailey*, 6 Price 504.

15. Defendant, in answer to bill for account of tithes in kind, must set forth an account of titheable matters taken by him, although he relies on a defence of a modus or composition; or it will be a ground of exception. *Whistler v. Wigney*, 8 Price 1.

16. Defendant to a bill for tithes put himself upon one modus in his defence, and proves another. There must be a decree against him. *St. Paul's (Warden) v. Morris*, 9 Ves. 164.

3. Issue at Law.

17. In suit for tithes, jurisdiction of equity is limited to discovery and account. Title must be tried at law, and if disputed, equity has no jurisdiction to make a decree. *Norbury v. Meade*, 3 Bligh 211.

18. Where a title to tithes in a layman is clearly made out, though not supported by possession, the Court will decree an account without an issue. *Lygon v. Strutt*, 2 Anst. 602.

19. When a bill is filed for an account of tithes against one who had a lease of his own and the other tithes in the parish, and the whole question in the cause turns upon the validity of the lease, and of the notice given to determine it, this Court will not proceed till those points are settled at law. *Boushier v. Morgan*, 2 Anstr. 404.

20. In what cases and under what circumstances a person claiming title to tithes must have his right established at law, before he can come into a court of equity for an account and satisfaction. *Hantrey v. Daniel*, 7 Bro. P. C. 21.

21. The right to compel an account for tithes being consequential to the legal title, and a rector having *prima facie* a title to all the tithes in turn, it seems that, in questions between the rector and vicar, a court of equity ought not to make a decree in consequence of its opinion of the vicar's title, and in derogation of that of the rector, until the title of the vicar has been established by the decision of a jury, unless such title is made out in the most clear and satisfactory manner. *Barnard v. Garnons*, 7 Bro. P. C. 105.

22. When a defendant in a suit for tithes, by a rector, makes out a clear defence, as portionist, claiming under the successive grantees of the Crown, of the possessions of one of the dissolved monasteries, a right to some of the great tithes of the rectory, yet, if neither can ascertain and show specifically what were the tithes that belonged to the rector, or to the monastery, the Court has no means of assisting either party in availing himself of his title. The Court will not decree an account in favour of the rector, under such circumstances, where he has never had perception, but they will retain the bill, to give him the opportunity of taking an issue, or proceeding by commission, ejectment, or by action on the statute. The *onus probandi* is

not on the portionist, if there has been no perception on the part of the rector. *Boulton v. Richards*, 9 Price 671.

1. An account of tithes is consequential upon the legal right; and, therefore, if the least doubt is thrown upon it by *prima facie* evidence, the account cannot be decreed till the right is established at law. *Fowcroft v. Parris*, 5 Ves. 221.

2. In a suit for tithes, by a rector, against the owner and occupier of a farm, part of the demesnes of a manor of which the owner was the lord, he, in order to prove that he was entitled to two-thirds of the tithes of the farm, produced a grant from Queen Elizabeth to one of his ancestors, of a chapel with the tithes belonging to it, within his lordship, and also his title deeds, in some of which tithes, in others, tithes of corn, grain, and hay, and in others, tithes and portions of tithes, in the parish and several other places, were conveyed, but in none of them were the tithes of the farm mentioned specifically, except in an old lease of the farm, in which the lord's part of the tithes, together with ingress, egress, etc., were reserved. The witnesses proved that one-third only of the tithes of the farm and the rest of the demesnes had been paid to the plaintiff and his predecessors, and that one of them having employed a person to value the tithes of the parish, pointed out, to the valuer, the farm and other demesnes as being titheable in the thirtieth only. The Court refused to decree an account until the plaintiff had established his right at law. *Hughes v. Davies*, 5 Sim. 331.

3. Rector is entitled, as a matter of right, to issue at law as to tithes where he sues alone. *Williams v. Price*, 4 Price 156.

4. Where an adverse title to tithes is set up and established against a demand by rector who offers no evidence to impeach title, he is not entitled to an issue. *Wilmot v. Hellaby*, 5 Price 355.

5. Rector is not entitled to issue where defendant sets up a grant of a portion, and constant non-payment of tithes, which defence is not impeached by plaintiff. *Baker v. Baker*, Wightw. 397.

6. A landowner cannot, like a rector, insist on an issue as a right, but in doubtful cases it is granted. *Cairns v. Raine*, 12 Cl. & F. 833. Affirming *S. C. nom. Raine v. Cairns*, 4 Hare 327.

7. Bill for tithes, glebe, and right of common. The two latter points being proper at law, the Court retained the bill until plaintiff had ascertained his title, and in the meantime would not decree the tithes. *Sweetapple v. Kingston*, Bunb. 238.

8. The right to compel an account for tithes being consequential to legal title, and a rector having *prima facie* title to all the tithes in turn, it seems that, in questions between the rector and vicar, a court of equity ought not to make a decree in consequence of their opinion of vicar's title, and in derogation of that of the rector, until the title of the vicar has been established by the decision of a jury, unless such title is made out in the most clear and satisfactory manner. *Barnard v. Garnons*, 7 Bro. P. C. 105.

9. Bill for tithe of conies by custom, to pay every tenth coney, or the value of it. De-

fendant, by his answer, denied the custom, whereupon the Court directed an issue to try it. *Randall v. Head*, Hardr. 188.

10. The language of endowment being ambiguous, and it being unexplained by any other documents, and there being no parol testimony on either side on which any reliance could be placed, the Court declined making a decree, but directed an issue. *Wyld v. Ward*, 3 Y. & J. 192.

11. Court will not direct an issue to try composition real, where defendant, by his answer, only alleged a modus. *Bennett v. Neale*, Wightw. 324.

12. Evidence so old as to be unintelligible, issue was directed. Evidence of reputation of certain lands having been enclosed, in pursuance of agreement, not admissible. *Leathes v. Newitt*, 4 Price 355.

13. In a suit for tithes, there was no proof of payment for a very long period; all the evidence which could tend to prove a legal exemption (claimed by the occupier) was adduced at the hearing; but as that would not, in the opinion of the Court, justify a jury in finding for the exemption, an issue was refused. *Ross v. Aglionby*, 4 Russ. 489.

14. Where, in a suit for tithes, the question depends entirely on the construction of ancient documents, the judge in equity is more competent to draw the proper conclusion than a jury; and in such case, an issue will not be directed. *Fisher v. Graves (Lord)*, McCl. & Y. 362.

15. Under what circumstances a new trial of an issue, directed to try vicar's right to tithes, ought to be refused. *Brownlow v. Davis*, 7 Bro. P. C. 83.

As to Modus.] See XI. 3 ante.

4. Costs.

16. If more tithes are claimed than defendant has kinds of titheable goods, it is practice in Exchequer to dismiss bill with costs. *Anon.*, Loftt. 66.

17. Plaintiff sued for thirteen different species of tithes, and proved but one; yet the Court decreed costs generally. *Smith v. Morgan*, Bunb. 335. But see *id.* n.

18. Where two defendants were sued for tithes, and one made default, the Court decreed the whole costs against the other, and left him to get the contribution as he could. *Lloyd v. Macknorch*, Bunb. 138.

19. If to a bill for tithes, the defendant does not show a previous tender, or make one by his answer, plaintiff shall have an account; if the tender be only by answer, defendant shall account with costs; but if made before, he shall save his costs, and that a tender may be made after answer. *Anon.*, Bunb. 38. See *Exeter (Bishop) v. Trenchard*, Bunb. 47.

20. Bill for tithes; modus set up as a defence. Motion by defendant to pay up arrearages of modus with costs up to time, refused; but plaintiff proceeding and then abandoning suit, costs after tender allowed to defendant. *Bristol (Dean) v. Donnesthorpe*, 1 Anstr. 272.

21. The application to equity by cross-bill to establish moduses against a bill to overturn them being matter of favour, costs in equity

are never allowed. *Morrell v. Gregson*, 11 Price 421.

1. Where defendant in tithe cause sets up modus, and is desirous of protecting himself from costs, he should move for an order that plaintiff accept sums admitted to be due by answer, or proceed at peril of costs, and Court will notice such tender by minute. The motion may be made without notice, or payment of money into court. *Davis v. Moseley*, 9 Price 211.

2. If claim of plaintiff in tithe suit be larger than he can support, the Court will give costs against him for the excess up to the time of his giving notice of abandoning any part of the excessive demand by the bill. *Wolley v. Brownhill*, 13 Price 500; M'Clel. 317.

3. Plaintiff, in suit for tithes, having commenced action at law for treble value, ordered, on motion, to elect law or equity within six days, with costs on either course abandoned, and of the motion. *Taunton v. Glyde*, 10 Price 129.

4. Where defendant in tithe cause submits to part of plaintiff's demand, the Court will, on motion for that purpose, on part of defendant, refer it to Master in any stage of proceeding to ascertain what is due, and to tax costs; the defendant undertaking to pay the amount, without prejudice to any other question in the cause. *Lowe v. Firkins*, 11 Price 453.

5. Vicar, after issue directed to try modus, suffering modus to be taken *pro confesso*, pays costs. *Drake v. Smyth*, M'Clel. & Y. 380.

As to costs in general, of issue at law, relative to tithes. *Id.*

6. An account of tithe hay being decreed, the defendant appealed from so much as directed an account in respect of lands in the township of S., and the decree was to that extent ultimately reversed; pending the appeal, the plaintiff took the account as to all the lands, including those in the township of S.; the Court, on application, declining to restrain him from so doing. On an application for costs:—Held, that it was convenient that the whole account should be taken at the same time, and the Court refused to make plaintiff pay costs of account, as to the township of S., but made him pay his own costs in respect of that part of the account. *Id.*

As to evidence of money payments in tithe causes. S. C. 5 Price 369.

7. On issues directed by a court of equity to try a modus, though established by two verdicts, the plaintiff is entitled to his costs at law only, and not in equity. *Clifton v. Orchard*, 1 Atk. 610.

8. Where improper rector, not being an occupier, is made party defendant to bill for tithes, and decree is made for plaintiff, he is not (but under particular circumstances, as to which see *Leathes v. Nemitt*, 8 Price 562) liable to pay costs. *Petch v. Dalton*, M'Clel. 9. See also *Leathes v. Nemitt*, *id.* 566, and *Williamson v. Hutton*, 9 Price 187.

9. Where a district of about 370 acres, within the ambit of the parish, was found, on an issue at law, to be extra-parochial, the rector's bill for the tithes thereof was dismissed with costs; the plea to the bill having been overruled, with liberty to amend, and the amended plea put in and allowed:—Held, that the

defendant was entitled to the costs of correcting his own error, but that he was entitled to such costs as if his amended plea had been first put in; and in taxation the Master will, without any special direction, exercise a discretion as to the taxing the costs of informal proceedings. *Clayton v. Meadows*, 2 Hare 26.

Of Parties improperly joined.] See 1 *supra*.

5. Other Matters.

10. Particular course pursued on hearing of tithe cause. *Lowe v. Firkins*, M'Clel. 595. S. P. *Drake v. Smyth*, 5 Price 375.

11. In suit for account of tithes, defendant cannot pay money into court before answer. *Hull v. Matthews*, 2 Anstr. 444.

12. Defendant in suit by will in equity for tithes, relying on defence of tithes having been duly set out, may (notwithstanding the cause be at issue) bring action of trespass for not carrying them away; Court refused an injunction to restrain him. *Bradley v. Bensted*, 13 Price 221; M'Clel. 80.

13. Where defendants had described their farms by so many acres, and an objection was taken at hearing to want of sufficient description of locality, the Court permitted the cause to proceed, suggesting that, if the objection was insisted on, leave would be given to defendant to file interrogatories for purpose of enlarging the description. *Wright v. Southwood*, 5 Price 607.

14. A vicar having granted an annuity charged on his benefice, and being entitled to compensation for tithe arrears, under the 3 & 4 Will. 4, c. 100, may be restrained from receiving the same until answer put into a bill filed against him for raising the arrears of the annuity. *Stannus v. Robinson*, Hay. & J. 622.

15. In a suit for account of tithes, defendant cannot pay money into court before answer. *Hull v. Mathens*, 2 Anstr. 444.

Reference to Master.] 16. Reference, whether several tithe causes should be consolidated, not of course before answer. *Keighley v. Brown*, 16 Ves. 344.

17. Where defendant in tithe cause submits to part of plaintiff's demand, the Court will, on motion for that purpose, on part of defendant, refer it to the Master in any stage of proceedings, to ascertain what is due, and to tax costs, the defendant undertaking to pay the amount, without prejudice to any other question in the cause. *Lowe v. Firkins*, 11 Price 453.

18. Form of reference to the Master to ascertain the value of the London Corn Exchange, in regard to its liability to tithe, under the Act 37 Hen. 8, c. 12. *Letts v. London Corn Exchange Co.*, 1 De G. M. & G. 398; 21 L. J., Ch., 684.

19. A reference as to whether a receiver over improper tithes should proceed against the defaulters by bill in equity or otherwise, was granted upon the motion of the receiver, with the concurrence of the plaintiff. *Callaghan v. Reardon*, Sau. & Sc. 682.

XXI. OTHER CASES.

20. Tithe owners cannot control the farmer in his mode of cultivation or consumption of

produce of his ground, provided he act *bonâ fide*, and without fraud. *Lewis v. Younge*, 11 Cl. 129; 13 Price 394.

1. Bill to enforce contribution under an agreement, by owners and occupiers of land in a parish, to defend and prosecute tithe suits at joint expense, dismissed upon doubtful evidence, and long delay. *Stone v. Yea*, Jac. 426.

2. Bequest of pure personality to "the secretary for the time being of the association for buying impropriate tithes, and vesting them in the Church of England," is void under the Statute of Mortmain, 9 Geo. 2, c. 36, notwithstanding the 13 & 14 Vict., c. 94, s. 23. *Denton v. Manners (Lord)*, 4 Jur., N. S., 724; 27 L. J., Ch., 623; 2 De G. M. & G. 675. Affirming 25 Beav. 38.

Quære, whether a bequest of pure personality to "the Tithe Redemption Trust for the Church in England and Wales" would be valid. *Id.*

3. Under the powers created by the statute 17 Car. 2, c. 3, B., by his will, dated in 1671, gave all the tithes of hay, corn, grain, and all other tithes, great and small, of the parish of B., to H. F., his heirs, etc., to the use of a preaching minister, to be nominated by H. F. and his heirs. In 1706, T. F., the descendant and heir of H. F., conveyed the tithes with other hereditaments in trust, for the payment of creditors, and upon a bill in equity filed by the creditors, they were sold under a decree of the Court, and in 1716 conveyed to R. F. and J. H., a trustee for R. F., and their heirs, etc., in trust as to the tithes of B., to the use of a preaching minister, to be nominated by R. F. and his heirs. J. H. survived R. F., and became seised of the legal estate, and his descendant and heir, in 1826, conveyed the tithes of B., etc., to T. L. F., the heir of T. F., upon the original trusts. Before this conveyance (in 1821), T. L. F., who then had the equitable estate in the tithes of B., appointed E., the preaching minister of B.:—Held, upon a bill in equity by T. L. F. and E., against occupiers of lands in B., for an account of tithes, that the title derived under the will of F., and the decree of sale for payment of debts was good in equity, and the appointment made by T. L. F. before he had the legal estate, valid. *Holdsworth v. Fairfax*, 8 Bli. N. S. 882; 3 Cl. & F. 115.

4. The 28 Hen. 8, c. 11, s. 3, gives the "tithes, fruits, oblations, obventions, emoluments, commodities, advantages, rents, and all other whatsoever revenues, casualties, or profits, certain and uncertain, offering or belonging to any" dignity, prebend, or benefice therein mentioned, which shall accrue between the concurrence of a vacancy and a new appointment to the appointee. The 5 & 6 Will. 4, c. 30, directs the profits of dignities or benefices without cure of souls becoming vacant during the existence of a certain ecclesiastical commission to be paid to the treasurer of Queen Anne's Bounty, who is to keep an account of the receipts and expenses, and retain the balance until he shall be otherwise ordered "by competent authority." By a subsequent statute, the Crown is declared entitled to appoint, notwithstanding the existence of the commission in question, three persons to certain prebends therein named. One of these appointees having duly demanded

from the treasurer of Queen Anne's Bounty the profits received by him during the vacancy, brought an action for money had and received to recover them. A special verdict (on a verdict found in his favour) declared these to be "the net profits of the prebend":—Held, that a judgment for the plaintiff given on this verdict could not be sustained, because it did not distinguish the sources from which these profits might arise, nor show whether they were derived from the corpus of the prebend, to which he was individually entitled, or from sums due to him in respect of his share of the funds of the corporation aggregate, of which as prebend he was a member. *Repton v. Hodgson*, 3 H. L. Ca. 72.

5. A bill was filed by a tithe-owner claiming tithes against several occupiers of land who had not rendered any tithe, and disputed the plaintiff's title to it. One of the defendants was a Quaker, and applied to the plaintiff, on that ground, to dismiss the bill against him, which the plaintiff consented to do, provided the Quaker's answer admitted the actual title of the plaintiff, so as to enable the plaintiff to obtain his tithes against the Quaker by the ordinary proceedings before justices in the country. The draft of the Quaker's proposed answer was then shown to the plaintiff, and was by arrangement altered, so as not to deny the plaintiff's title, but so as to object merely on the grounds of religious scruple entertained by him as a Quaker. On this answer being produced in evidence, the plaintiff recovered his tithes before the justices, and the further prosecution of the suit against the Quaker became unnecessary. On motion by the plaintiff, the suit was dismissed against the Quaker defendant; but as it appeared upon the affidavits and the draft of the answer, as originally prepared, that the defendant had, previously to and at the time when the bill was filed, disputed the plaintiff's title, the bill was dismissed, without costs of the suit or of the motion. *Wright v. Barlow*, 5 De G. & Sm. 43; 15 Jur. 1149.

TITLE.

- *On Sales of Land.* See VENDOR AND PURCHASER, XI.
- *On Grants of Leases* See LANDLORD AND TENANT, VI.
- *Disputing Landlord's Title.* See LANDLORD AND TENANT, XV.
- *Discovery of.* See PRACTICE (DISCOVERY, PRODUCTION, AND INSPECTION).
- *Plea of.* See PRACTICE (PLEA).
- *Of Account.* See PRACTICE (FUNDS AND SECURITIES IN COURT).

See also TITLE DEEDS.

- I. POSSESSORY, 6751.
- II. PRESUMPTION OF, 6752.
- III. PRELIMINARY TO RELIEF IN EQUITY; 6753.

I. POSSESSORY.

6. Upon possession for many years, the origin of it not appearing, and no title, except

as *cestui que trust*, under a term to raise a sum of money, the Court would not presume any other title, and, therefore, decreed the plaintiff to be let into possession on payment of the charge, but with reluctance, and, upon the laches, refused an account of the rents even from the filing of the bill. *Acherley v. Roe*, 5 Ves. 565.

1. Possession is the criterion of title to a personal chattel; the property therefore changed by sale in market overt. That rule adopted by the Bankrupt Law; distinction as to landed possession not even *prima facie* evidence. Legal title in contemplation of bankruptcy, protected by the previous equitable title. *Hiern v. Mill*, 13 Ves. 122.

2. A good title may be made to an estate, though the origin cannot be shown by any deed or will; but it must be shown that there has been such a long uninterrupted possession, enjoyment, and dealing with the property, as affords a reasonable presumption that there is an absolute title in fee-simple. *Cottrel v. Watkins*, 1 Beav. 361.

3. Where title is defective and acquiesced in, with knowledge of its being so, then the possession is quieted. *Shine v. Gough*, 1 Ball & B. 444.

4. Where the possession of an estate can be referred to a good and valid title, equity will not refer it to a title obtained by fraud or disseisin. *Conry v. Caulfield*, 2 Ball & B. 255.

5. Grants presumed upon the principle of quieting possession. *Hillary v. Wallen*, 12 Ves. 252.

6. If a person, having the mere right, obtain possession by contract with him who has it, he cannot be remitted to his mere right, but must hold the possession accordingly as he received it, because it was his folly to take possession in that manner without recovering it by lawful means. *Saunders v. Annesley (Lord)*, 2 Sch. & Lef. 108.

Nonpayment of rent reserved on a lease, though for upwards of twenty years, shall not bar the lessor from recovering possession at the expiration of the term. *Id.* 106.

7. No decree can be made for a plaintiff who states his title under a deed from one out of possession contrary to the statute 32 Hen. 8, c. 9; but if his suit comprises different portions of equity, it may be bad *pro tanto* without being affected throughout. If any part of the plaintiff's equity is untouched, he may proceed on so much. *Byrne v. Frere*, 2 Moll. 157.

8. A verdict being against the will, the heir is entitled, although a new trial is directed, to be left in possession, provided no danger of insolvency to answer for the interim rents and profits, in the event of the will being established. Devisee casually in the occupation of real estate after death of testator, or let into possession by the favour of the occupiers, acquires no right. The heir, on the death of his ancestor in possession, may enter and remove everybody, except the widow, who has a right to stay until her dower is assigned to her. *Lloyd v. Trimleston (Lord)*, 2 Moll. 81.

9. Where a trustee of a term of years, upon the usual trusts for securing annuities, has taken possession of the estates under the trusts, the Court, although all arrears of the annuities may afterwards be paid, will not order pos-

session to be given up to the grantor, except upon such terms as will enable the trustee to resume it, and to receive the rents, the moment the annuities are again in arrear. *Jenkins v. Milford*, 1 Jac. & Walk. 629.

Injunction to Quiet Possession.] See INJUNCTION, II. x.

See also EASEMENT—LIMITATIONS. STATUTE OF—QUIA TIMET. BILL OF.

II. PRESUMPTION OF.

10. Where a conveyance was, *inter alia*, of four acres and a half, dispersed in the common field of A., in 1784, and a subsequent conveyance was made in 1818, reciting an allotment under an Act passed in 1801, for inclosing part of the parish of A., in lieu of five acres of common field lands:—Held, that, in the absence of anything to raise the presumption of the allotment having been made in respect of other lands, the Court would assume it to have been made in respect of the common lands comprised in the deed of 1784, and the title in 1841 to be unobjectionable. *Major v. Ward*, 5 Hare 604.

11. When a rent, which was to cease upon payment of a certain sum of money, was charged upon, and payable out of, several denominations of land, and there was evidence to show that it had not been paid by or demanded from the owners of one of those denominations for upwards of a century: but there was nothing to show that it had not been regularly paid out of the other denominations:—Held, that the Court would not presume, either that the redemption money was paid, or that that portion of the land had been released. *Warren v. Bateman*, Fl. & K. 448.

12. If an executrix sues in that character, she must produce probate, though she could make out her title as legatee of a lease for years. *Gleeson v. Cooke*, 1 Hog. 294.

13. Where, from the answer itself, there is strong presumption against defendant's title and which is impeached by the bill, Court will grant a receiver. *Stitmoll v. Williams*, 6 Madd. 49.

14. No presumption of a grant of mines against an express reservation on a sale many years ago, merely from permitting expenditure without claim. *Norway v. Rowe*, 19 Ves. 156.

15. The Court must govern itself by a moral certainty upon title, for it is impossible there should be a mathematical certainty. *Hillary v. Waller*, 12 Ves. 252.

16. To make good a title to the residue of an old term, mesne assignments, which cannot be produced, will be presumed even at law. *White v. Foljambe*, 11 Ves. 350.

17. Land had been in the possession of the parish officers for nearly sixty years, and no evidence that it had ever been in the possession of any other person since the will of the testator, the date of which was unknown. There was some slight evidence of a house which once stood on it having been an almshouse. The Court treated it as parish land, and directed a mortgage to be made to repay

funds borrowed for its improvement. *Re Dixon's Trust*, 1 W. R. 244.

1. Presumption of title need not be founded on what is believed to have happened, but what may have happened. *St. Mary Magdalen College (Oxford) v. Att.-Gen.*, 3 Jur., N. S., 675.

2. The heir and executor of T. having disputed whether certain estates, of which T. died seised or possessed, were real or personal estate, all that appeared was that P., the original owner, through whom both claimed, as far as was known, died seised of the freehold. The heir-at-law of P. having sued T., the litigation was compromised by a deed conveying to T. all the estate and right of such heir, and no other claim was ever heard of, nor was T. disturbed in possession:—Held, that, assuming that P. died seised of the fee, and that all the interests of other claimants were conveyed to T., the presumption was that T. also impliedly acquired the fee. *Tudury v. Sacher de Pina*, 7 L. T., N. S., 115.

3. In 1586, property was, in consideration of 273*l.*, demised for 2,000 years at a small rent, and the lessor covenanted, if required by the lessees within seven years, to convey the fee to the lessees without further payment. In documents dated in 1664, 1681, and 1690, the property was treated by the persons claiming under the lessees as held in fee simple. But in documents dated in 1716 and 1758, it was considered doubtful whether it was freehold or leasehold, and in 1777 and 1778 it was treated as leasehold:—Held, that the presumption up to 1715 was, that it was fee simple; that such presumption was not destroyed by the subsequent doubts, and a purchaser in 1859 of the fee was held bound to take the title. *Jeffreys v. Machu*, 29 Beav. 344.

See also LIMITATIONS. STATUTE OF.

III. PRELIMINARY TO RELIEF IN EQUITY.

4. When a discovery is necessary of the deed under which plaintiffs' title arises, and relief is prayed to have it produced at all trials at law, and to have attested copies, account of profits will be decreed without having the title first established at law. *Townsend v. Ash*, 3 Atk. 337.

5. Injunction denied to stay an interloper's trading to the East Indies till the validity of the East India Company's patent has been tried. *East India Co. v. Sandys*, 1 Vern. 127.

6. The Court will not interfere, even to secure the fund, upon the application of a person who does not show any title. *Brown v. Duabridge*, 2 Bro. C. C. 321.

7. Bill for account of goods landed at a certain quay, the plaintiff claiming a right of toll by prescription. Defendant denied plaintiff's title, and refused to discover the goods:—Held, he was not compellable till plaintiff had established his right at law. *Northleigh v. Luscombe*, Amb. 612.

8. When a bill prayed an injunction to restrain the defendant from proceeding in an ejectment, on the ground that one of the lives upon which the lease depended still ex-

isted; it was dismissed, as plaintiffs had not established their title to the lease. *O'Donnell v. Nolan*, 4 Dr. & War. 153.

9. Where the whole right of the plaintiff depends on the execution of a contract which he has entered into, that right must be first established by him before he can make it a foundation for proceedings to enforce a right against another person. Demurrer allowed, with liberty to amend. *Fryer v. Cooke*, 12 L. J., N. S., Ch., 487.

10. On bill stating intent of defendant to encroach on plaintiff's land, etc., by building; defendant by answer claiming the title to land himself; motion for injunction was refused, not being sufficient to try title on. *Bateman v. Johnson*, Fitzg. 106.

11. Injunction granted to prevent the obstruction of ancient lights against a lessee of an ecclesiastical corporation, subject to the plaintiffs establishing their right to the easement in an action. *Sutton v. Montfort*, 4 Sim. 559.

12. Where there is a fair doubt, whether the law would give damages for the piracy of a work, a court of equity will not maintain an injunction granted *ex parte*, but will leave the plaintiff to establish his legal right, before it interferes in his behalf. *Byron (Lord) v. Dugdale*, 1 L. J., Ch., 239.

13. Where the copyright of a work has been assigned by the author to the plaintiff, and the plaintiff and author swear that A. (a stranger to the suit) has only a qualified interest in the work, but A., in an affidavit filed by the defendant, swears, that, under a bargain between him and the author, he has the entire copyright of the work, but does not state any deed of assignment; the plaintiff cannot obtain an injunction till he has established his right at law. *Lovndes v. Duncombe*, 1 L. J., Ch., 51.

14. Bill stated the plaintiff to be lessee of an ancient mill, and that defendant had erected flood gates and other works on the river, which obstructed plaintiff's mill, and prayed that defendant might be decreed to pull down these works, and be restrained from erecting new ones, such works having been erected above three years. Such a bill will not lie until the right be established at law, and a demurrer for want of equity is good. *Weller v. Smeaton*, 1 Cox 102; 1 Bro. C. C. 572.

15. The Court will not generally, in doubtful cases, restrain by injunction the infringement of an asserted legal right, until its validity has been established by an action at law; but *secus*, where there has been long uninterrupted enjoyment under a patent, that being regarded as *prima facie* evidence of title. *Stevens v. Keating*, 2 Ph. 333.

Issue at Law. When Directed.] See PRACTICE (ISSUES AND TRIAL BY JURY).

Bill Retained with Liberty to bring an Action at Law.] See PRACTICE (ISSUES AND TRIAL BY JURY).

See also COPYRIGHT, XII. v.—PATENT, VII. XI. 5.

TITLE DEEDS.

- *Discovery of.* See PRACTICE (DISCOVERY, PRODUCTION, AND INSPECTION).
 - *Delivery of Deeds and Deposit in Court.* See PRACTICE (DEPOSIT IN COURT CUSTODY AND DELIVERY OUT OF DOCUMENTS AND RECORDS).
 - *Right to Deeds as between Mortgagor and Mortgagee.* See MORTGAGE, XI.
 - *Right to Deeds and Covenants for Production on Sales of Land.* See VENDOR AND PURCHASER, XVI.
 - *Discovery and Production of by Purchaser without Notice.* See VENDOR AND PURCHASER, XXV. VI.
- See also DEEDS—LOST AND DESTROYED INSTRUMENTS—NOTICE—RECTIFICATION AND CANCELLATION—REGISTRATION—SOLICITOR.

I. CUSTODY, 6754.

II. SPOILATION OF DEEDS AND OTHER DOCUMENTS, 6755.

III. SUPPRESSION, 6756.

I. CUSTODY.

1. Title deeds are incident to the possession under a freehold title. *Strode v. Blackburne*, 3 Ves. 225.

2. Deeds which relate to two distinct properties will not be delivered to the owner of the largest property, unless he exonerates the previous holder by an unqualified covenant to produce them. The original covenantee not a necessary party to a suit for the purpose of obtaining such a covenant. *Ruscoe v. Richards*, 1 Jur. 304.

3. Bill for delivery of title deeds, and injunction to restrain setting up of outstanding term, to which no affidavit as to title deeds was annexed. Plea overruled, because it should have been confined to so much of bill as related to outstanding terms, and because that part of bill which related to title deeds should have been demurred to for want of affidavit. *Hook v. Dorman*, 1 Sim. & S. 227.

4. F. and W., as solicitors for the tenant for life, held the title deeds, which afterwards passed into the possession of W. and C., their successors. The tenant for life died, and the estate then stood limited, first to F. and W. for five hundred years to secure a sum of 2,000*l.*, with remainder to trustees for six hundred years to secure a jointure and portions, with remainder to A. B. in tail. A. B. being an infant, a suit was instituted on his behalf, in which the 2,000*l.* was raised on the security of the term. Upon that occasion, F. and W. covenanted with the mortgagees to produce the title deeds from time to time, and not to part with them; but they were relievable from the covenant on certain terms. A receiver was appointed in the suit, and the Court directed the costs of the solicitors of the suit to remain charges upon the estate at interest. W. and C. were solicitors in the suit for A. B. *Hotham v. Somerville*, 5 Beav. 360; 6 Jur. 861.

A. B., upon coming of age, presented a petition for the delivery of the title deeds:—Held, that (independently of the covenant) W. and C. held the deeds for A. B., and not for the termors; but the covenant having

been entered into for the benefit of the infant, F. and W. were not bound to part with the deeds until released from their covenants:—Held, also, that W. was not entitled to hold the deeds for the trustees of the term of six hundred years, or for any costs other than those of seeing himself properly released from the covenant, and that he had no right to require them to be delivered to the receiver in the cause. *Id.*

5. One lends money on a security, which he is advised by a lawyer to be a good one, yet if it proves otherwise, and he has notice that another made title to it, he must deliver up all the writings relating to it, but not the mortgage deed, for there may be covenants in that for the payment of the money. *Opie v. Godolphin*, Pre. Ch. 548.

6. A. devised 10,000*l.* to trustees in trust, to be laid out in land, and to be settled on B. for life, without waste; remainder to trustees and their heirs for the life of B. to support contingent remainders, with a power to B. to make a jointure; remainder to the heirs of the body of B.; remainders over; and by the same will, devises lands to B. to the same uses, and dies, leaving C. executor. B. sues C., the executor, for the deeds relating to the lands that are in his hands, and to have the money laid out in lands and settled. Decreed, by the Master of the Rolls, that B. had but an estate for life in the lands, and so not entitled to the deeds, but that they were to be brought into court, and that the lands to be bought with the money were to be settled on B. for his life only; remainder to his first, etc., sons: but by the opinion of Ld. Ch. King, B. was decreed to have an estate tail in the lands devised, and consequently to be entitled to the deeds relating thereto, though, as to the lands to be purchased, that being executory and in the power of the Court, B. was to be but tenant for life, with remainder to his first, etc., sons. *Papillon v. Voice*, 2 P. W. 471; 2 Kel. 27. But see 1 Sch. & Lef. 223.

7. The Court will not take a trust deed out of the possession of the bankrupt's trustees. *Exp. Holder*, 3 Dea. & Ch. 276; 2 L. J., N. S., Bk., 64.

8. Where the plaintiff in a suit is the personal representative of a person who could not have sued, and through her of one who was entitled to sue, the bill will not be dismissed on that ground. *Carter v. Sanders*, 2 Eq. Rep. 891.

The personal representative of a person may maintain a suit regarding the title deeds of the testatrix's real estate. *Id.*

A deposit of title deeds by the heir at law of a testatrix to secure a private loan will not prevent the creditors of the deceased person from proceeding against the deposites. *Id.*

Where an executrix borrows money, saying that part of it was wanted for the administration of the estate, the *onus* is thrown on the lender of showing how much was wanted for such purpose. *Id.*

9. Where there was a devise to S., a single woman, who was appointed executrix for life, and a gift to trustees for sale, in the event of her death or marriage; the Court, on the application by the trustees for the custody of the title deeds, or that S. should be ordered to give an undertaking, refused to make any

order. *Taylor v. Sparrow*, 9 Jur., N. S., 1226; 9 L. T., N. S., 438.

1. A testator devised his real estate in strict settlement, giving to trustees a power of sale and exchange, to be exercised with the consent of the person entitled in possession, if of full age; and he bequeathed his residuary personality to the trustees upon the trusts declared concerning the moneys to arise from sales under the power. Shortly after his death a decree was made at the suit of the first tenant for life, then an infant, for the execution of the trusts of the will. Parts of the estate were sold under the power, and the money paid into court, and a large fund was there applicable to the purchase of real estates. After the tenant for life came of age inquiries were directed as to the investment of part of the funds in real estate, and as to the propriety of applying for a private estate Act, which inquiries were still being prosecuted. Shortly after this the tenant for life applied to the Court, that the trustees might be ordered to deliver to her the title deeds of the estate, subject to the limitations of the will, which application was refused by Stuart, V.-Ch.:—Held, that as a suit affecting the estates was being prosecuted, the custody of the deeds did not depend on the question who had the legal right to them, but on the question what custody was most convenient for the purposes of the suit; and that the Court of Appeal would not interfere with the discretion of the Vice-Chancellor on the subject. *Stanford v. Roberts*, 6 L. R., Ch., 307; 19 W. R. 552.

2. A person who is out of possession, and whose ultimate right to obtain and keep possession of the title deeds depends on the validity of his title, may maintain a suit for the delivery up to him of the title deeds, if the evidence of his title is not in his own power, and depends on the production of the deeds of which delivery is prayed. *Whittingham v. Cusack*, 6 Ir. R., Eq., 451.

A suit by a person claiming a legal title to land, praying discovery and delivery up of the title deeds, against a person who had the deeds, and merely claimed to hold them as a stakeholder for whoever had the legal title, the deeds having been brought into court on an interlocutory motion, and another suit having been subsequently instituted in which the questions as to the title of the lands could be decided, the plaintiff in the first suit offered the defendant to consent that the deeds in court should be transferred to the second suit, and the first dismissed with costs; the defendant having declined to consent, and put the plaintiff upon terms to bring the first suit to a hearing:—Held, that the plaintiff in that suit should pay the costs of it up to the service of the notice of consent, and the defendant those incurred afterwards. *Id.*

Rights of Owners of Particular Estates.] See FEE TAIL, XIV.—HUSBAND AND WIFE, VI. VIII.—JOINTURE, VI.—LIFE. ESTATE FOR, III. II.—MORTGAGE, XI.—PARTITION, VIII.

II. SPOILIATION OF DEEDS AND OTHER DOCUMENTS.

3. Marriage articles destroyed, made good by decree. *Bates v. Heard*, Dick. 4.

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4. Bond having been cancelled by obligor, lands settled according to bond by decree. *Arnold v. Barrington*, Dick. 5.

5. Deeds destroyed, plaintiff decreed to hold and enjoy. *Garland v. Radcliffe*, Dick. 11.

6. Same in case of a will destroyed. *Hayne v. Hayne*, Dick. 18.

7. Will destroyed, but decreed as set forth in bill. *Hampden v. Hampden*, Dick. 26.

8. Heir destroys will decreed to convey estate to plaintiffs, as by will stated. *Woodroffe v. Wood*, Dick. 32.

9. If a bond is taken away fraudulently and cancelled, the obligee shall have the same benefit as if it were existing. *Savage v. Browne*, Finch 184.

10. Copy of a note, taken by one who had been entrusted with the note, and was since dead, on which was written an acknowledgment that nothing was due, allowed to be read as evidence, though not proved to be a true copy, and though the defendant had sworn there was no such acknowledgment on the note, it appearing, when the note was produced, that the bottom of it was torn off. *Winne v. Lloyd*, 2 Vern. 608.

11. An account touching a personal estate being decreed, the defendant endeavoured to charge the plaintiff with a great debt, due to the estate, but defendant having opened a bundle of papers relating to that demand, which had been sealed up and left in his hands, and altered them so that it could not be known what papers might have been taken out, the defendant's demand was for that reason disallowed. *Wardour v. Beresford*, 1 Vern. 452.

12. A. devises lands to several persons, and after his death, one who was a friend to the heir at law snatches the will out of the executor's hands, and tears it in pieces; the pieces being gathered up and stitched together, a bill is brought to establish the bill, and decreed the devisees to hold and enjoy, and the heir to convey to them. *Haines v. Haines*, 2 Vern. 441.

13. A., by answer, confessed he had in a passion burnt his marriage articles, but it being proved that he had produced them after the time he said they were burnt, he was committed, and though he made oath he had them not, and could not produce them, yet the Court would not discharge him, till he consented to admit the articles to be as in the bill. *Sanson v. Ramsey*, 2 Vern. 561.

14. Where deed is wilfully destroyed, everything is to be presumed against the party in odium spoliatoris, and therefore, parol evidence of the person who prepared the draft, though at the distance of several years, is admissible, to prove the general contents of it. *Delany v. Temison*, 3 Bro. P. C. 659.

15. In taking account before the Master, one of the parties is charged with 4,000*l.* as the value of a note which he had wilfully destroyed. The Master, by his report, allows this charge; and upon an exception being taken to the report for so doing, the Court first allowed, and afterwards overruled, the exception: but upon an appeal, an issue was directed to try the fact of spoliation and what damage was sustained thereby. *Borrett v. Goodere*, 4 Bro. P. C. 679.

16. Where a bond is burnt or cancelled by

accident or mistake, or where it is procured to be delivered up by fraud, equity will set it up against a surety, though extinguished at law. *Skip v. Huey*, 3 Atk. 93.

1. Though in a personal legacy, where the will is destroyed or concealed, the rule is to cite the executor into the Ecclesiastical Court, yet the legatee may properly go into equity on the head of spoliation and suppression; and there are several cases where, if spoliation or suppression be proved, it will change the jurisdiction, and give the Court of Chancery a jurisdiction which it had not originally, as in *Hunsdon's (Lord) case*, Hob. 109, where the title was merely at law; yet, this being a suppression of the title deeds, the plaintiff had a decree in equity for possession and quiet enjoyment. *Tucker v. Phipps*, 3 Atk. 360.

2. Evidence, the same here as at law, on a casual destruction of deeds, but otherwise where a spoliation. *Cookes v. Hellier*, 1 Ves. 234.

3. Bond by husband, to permit wife to dispose, and cancelled by him, subsists in point of law, and the benefit of it decreed for her executor. *Pawlett v. Delaval*, 2 Ves. 670.

Accidental Destruction or Loss.] See LOST AND DESTROYED INSTRUMENTS.

III. SUPPRESSION.

4. Defendant suppresses a marriage settlement, whereby a remainder in tail is limited to plaintiff's father, all prior estates being spent:—Decreed, plaintiff to hold and enjoy the estate. *Eyton v. Eyton*, 2 Vern. 380; Pre. Ch. 116.

5. Where a deed or will is suppressed by the heir, the party claiming under such deed or will, decreed to hold and enjoy, and the heir or suppressor of the deed, etc., to convey. *Dalston v. Coatesworth*, 1 P. W. 731. Affirmed 3 Bro. P. C. 550.

6. The defendant suppresses a settlement, but upon proof that it came to his hands, the party entitled shall hold and enjoy the lands, according to the settlement. *Eyton v. Eyton*, 4 Bro. P. C. 149.

7. Suppression of deeds, tantamount to spoliation, in respect to presumption against the party suppressing. *Bowles v. Stewart*, 1 Sch. & Lef. 209.

A renewal taken by tenant for life of a lease for lives, is a trust for the benefit of those in remainder; and a fine levied by the heir of such tenant for life, keeping possession of the title deeds, will not bar those in remainder; nor will any length of time during such a suppression of deeds. *Ib.*

A principal is answerable for the act of his agent, in concealing or suppressing deeds, though not done with the knowledge of the principal. *Ib.*

TOBAGO.

See COLONIES AND COLONIAL LAW, X. XXXIV.

TOLERATION ACT.

8. As to the Toleration Act and doctrines of religion condemned by law. See *Att.-Gen. v. Pearson*, 3 Meriv. 353.

9. No new right is given by the Toleration Act, but only an exemption from the penal laws. *De Costa v. De Paz*, 2 Swan. 490; Dick. 258; Ambl. 228.

10. The Act of Toleration, 1 Will. & M., c. 18, was made to protect persons of tender consciences, and to exempt them from penalties; but to extend it to clergymen of the Church of England, who act contrary to the rules of discipline of the Church, would introduce the utmost confusion. *Trebec v. Keith*, 2 Atk. 501.

TOLLS.

— *For Railway Traffic.* See RAILWAY.

— *Of Turnpikes.* See TURNPIKE, I.

See also LIGHTHOUSE—PRACTICE (RECEIVER) and other SPECIFIC TITLES.

11. Though validity of custom of toll has been established in a former suit, yet this Court has jurisdiction to decree an account of toll. *Norfolk (Duke) v. Myers*, 4 Madd. 83.

12. Plaintiffs having first established their title to tolls at law, equity will decree account of such as are subtracted. *Reading (Mayor) v. Winkworth*, 5 Price 473.

13. A private Act of Parliament imposed a duty of 2s. per chaldron upon all coal "imported and landed at the town of H., or otherwise brought or delivered within the limits of the town." The Act gave a remedy against the shipowner by distraining the ship and tackle as well as the coals in default of payment. At the time that the Act was passed no coals were brought into H. except by sea:—Held, that coals brought into the town by railway were liable to the duty, and not only sea-borne coals; and that the railway company, as the persons who brought the coals into the town, were primarily liable to pay the duty. *Great Eastern Railway Co. v. Harwich (Mayor)*, 41 L. T. 533.

Seemle. A power of distress implies an antecedent right of action. *Ib.*

14. Bill for tolls for landing goods in plaintiff's manor, dismissed as proper at law. *Disney v. Robertson*, Bumb. 41.

15. A bill for beaconage, which plaintiff claimed by letters-patent, and defendants admitted to have paid, though they insisted they had paid it in their own wrong, dismissed as proper at law. *Boston (Mayor) v. Jackson*, Bunb. 101.

TOLZEY COURT.

16. An attachment of the goods of the defendant in an action of debt in the Tolzey Court of Bristol is only a process to compel the appearance of the defendant, and does not make the plaintiff a secured creditor within the meaning of s. 16, sub-s. 5 of the Act

of 1869. The effect of an attachment in the Tolzey Court being the same as that of a foreign attachment under the custom of the Mayor's Court of London. *Exp. Sear, Re Prior*, 17 L. R., Ch. D., 74; 44 L. T. 887; 51 L. J., Ch., 448.

TONTINE.

1. In 1792, 32,000*l.* were raised by way of tontine, viz. by subscribers, who were to receive during the lives of *cestui que vient* nominated by them annuities proportioned to the amounts subscribed, which were secured by conveying to trustees freehold lands, upon trust to raise an annuity of 880*l.*, and divide it among the subscribers during the lives of their *cestui que vient*. Each subscriber had a debenture handed to him, in which the amount of his subscription and of his annuity at that date, and the name and age of the *cestui que vie* were set forth; and it was expressly provided in the deed, that any person holding the debenture might give a receipt for the annuity due on the debenture, and that no payment could be made to any subscriber without his producing the debenture at the time of payment:—Held, that the annuity to which a subscriber was thus entitled was an interest in lands which could not pass by delivery of the debenture, but required a deed, and in the case of a married woman required a fine (before 1833). *Re O'Hara's Tontine*, 3 Jur., N. S., 1145; 6 W. R. 45.

The provision, that any person holding the debenture should have power to give a receipt, only operates so as to discharge the trustees, and does not enable the right itself to pass by delivery. *Ib.*

2. A tontine is a contract for value, and therefore within the exceptions of s. 17 of the 16 & 17 Vict., c. 51. *Oldfield v. Preston*, 8 Jur., N. S., 107; 31 L. J., Ch., 256; 10 W. R. 257; 5 L. T., N. S., 650; 3 De G. F. & J. 398.

An interest accruing immediately under a tontine does not create the relation of predecessor and successor, so as to make succession duty payable in respect of the accrued interest. *Ib.*

Where a father subscribed to a tontine in the names of three of his children, two of whom died before the time appointed for the commencement of the Act, but the third survived it:—Held, in the absence of evidence to the contrary, that such surviving child took, not by succession, but in its own right, by way of advancement, and that no duty was payable in respect thereof. *Ib.*

3. The circumstance that policies of a life insurance company are still in force, and that the liabilities of the company upon them cannot be settled for many years, is not sufficient to render it inexpedient to make an order for winding-up such a company under the provisions of the Winding-up Acts. *Exp. Dec, Re Universal Tontine Life Insurance Co.*, 3 De G. & Sm. 112.

TOTAL LOSS.

See INSURANCE, III. VIII.

TOWAGE.

See SHIPPING.

TOWN.

- *Councils*. See LOCAL GOVERNMENT.
- *Intersected Lands in, under Lands Clauses Act*. See LANDS CLAUSES ACT, V. x.
- *Improvements*. See CHARITY, IV. v. 10
- LOCAL GOVERNMENT, VII.

4. *Quare*, whether Teddington, in Middlesex, is a town within the Lands Clauses Act (8 & 9 Vict., c. 18), s. 128. *London & South-Western Railway Co. v. Blackmore*, 4 L. R., H. L., 610.

TRADE.

- *Noxious and Offensive*. See NUISANCE, II.
- *Fixtures*. See BANKRUPTCY, XVIII. i. 10
- XIX. xiii.—FIXTURES.
- *Restrictive Covenants in Leases*. See LANDLORD AND TENANT, I. vii.—XII.
- *Restrictive Covenants on Sales of Land*. See VENDOR AND PURCHASER, XVIII.
- *Contracts in Restraint of with Articled Clerks*. See SOLICITOR, I. III.
- *Goodwill*. See GOODWILL.
- See also BANKRUPTCY—EXECUTOR AND ADMINISTRATOR, X. vii.—TRADE MARK—USURY.

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1. *Reasonableness and Consideration*, 6758.
2. *Breach*, 6760.
3. *Distance. How measured*, 6762.
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5. *Payment of Penalty or Damages*, 6762.
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II. TRADE NAME AND STYLE.

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I. CONTRACTS IN RESTRAINT OF.

1. *Reasonableness and Consideration*, 6758.
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4. *Assignment*, 6762.
5. *Payment of Penalty or Damages*, 6762.
6. *Proceedings*, 6762.

1. Reasonableness and Consideration.

1. Contracts entered into between two persons, to restrain one of them from setting up, or exercising a particular trade or employment, within a certain limited district, and for a valuable consideration, are valid. *Chesman v. Nainby*, 1 Bro. P. C. 234. And see *Whittaker v. Home*, 3 Beav. 383.

2. Contract with the proprietors of a theatre not to write dramatic pieces for any other, legal, as a similar restraint of a performer would be; not resembling a covenant restraining trade generally. *Morris v. Coleman*, 18 Ves. 437.

Covenant restraining trade within particular limits, or partners from carrying on the same trade for their private benefit, good. *Id.*

3. Specific performance of agreement to sell goodwill of trade, and exclusive use of secret therein. *Bryson v. Whitehead*, 1 Sim. & S. 74; 1 L. J., Ch., 42.

Trader may sell secret in trade, and restrain himself generally from use of it. *Id.*

4. Upon the sale of the business of a general merchant in a country place, the vendor agreed to give a bond for a sum of 1,600*l.* as liquidated damages, if he should be thereafter concerned in any "trading establishment" within a neighbouring district, comprising a considerable section of the county of Cornwall:—Held, that this was not too general a restraint of trade, and specific performance of the agreement was decreed at the suit of the vendor. *Avery v. Langford*, 1 Kay 663; 18 Jur. 906; 23 L. J., Ch., 837; 2 W. R. 615; 2 Eq. Rep. 1097.

In construing the condition of such a bond, a court of law would take into consideration the surrounding circumstances at the time of executing the bond, and would consider the words "trading establishment" to mean an establishment for any trade likely to interfere with the goodwill, which was the subject of the sale. *Id.*

5. A. agreed to take B. as his servant, "at such wages as might from time to time be agreed on," and B., on his part, agreed to serve A., and not to set up trade for himself within a limit of three miles, and for two years after being employed or leaving the service of his master, his successors, or assigns. B. accordingly entered into and continued in A.'s service, at the wages agreed on:—Held, that there was a good and valuable consideration to support the agreement as against B., and the Court enforced it. *Bennell v. Inns*, 24 Beav. 307; 26 L. J., Ch., 663.

6. A. having become bankrupt, and his assignees being about to sell his stock in trade, B. agreed to purchase the same, and to carry on business in partnership with his son, and to employ A. in the management of the business, in consideration of A. executing a bond. The agreement was duly carried out:—Held, that there was good consideration for the bond, and A. was restrained from carrying on business contrary to the terms of the bond. *Clarkson v. Edge*, 10 Jur., N. S., 871; 33 L. J., Ch., 443; 12 W. R. 618; 33 Beav. 227; 3 N. R. 283.

7. A covenant by a vendor of a business not to carry on the same business within 200 miles of a certain place is not unreasonable, as in restraint of trade, if by reason of the

character of the business such a limit of exclusion is necessary for the protection of the purchaser. *Harms v. Parsons*, 9 Jur., N. S., 145; 32 L. J., Ch., 247; 11 W. R. 250; 7 L. T., N. S., 815; 32 Beav. 328; 1 N. R. 175.

Upon a sale by the defendant to the plaintiffs of a business of a horsehair manufacturer, the defendant agreed not to buy, sell, manufacture, or directly or indirectly interfere in the trade or business of a horsehair manufacturer, except for the benefit of the plaintiffs; and subsequently, in a deed of assignment (executed in pursuance of the previous contract) the defendant covenanted that he would not, directly or indirectly, carry on the business of a horsehair manufacturer within 200 miles from B., without the consent in writing of the plaintiffs, except for their benefit and at their request. The defendant, besides being a manufacturer of horsehair, was, at the time of the sale, a general dealer in unmanufactured horsehair; he also purchased and sold manufactured horsehair, which was usual both with dealers and manufacturers:—Held, upon evidence as to the mode of carrying on the business, that the limit of 200 miles was reasonable; also that the defendant had sold so much of the business as belonged to that of a horsehair manufacturer, though forming part also of the business of a horsehair dealer; and that he must be restrained from the purchase and sale of manufactured horsehair. *Id.*

8. W. entered the service of C. as a shopman at weekly wages, and covenanted not to carry on business within one mile of the shop at any time thereafter. The business was afterwards moved to another shop close by, and sold by C. to J., together with the goodwill and beneficial interest thereof. W. then left the shop, and set up business within a mile of the old shop:—Held, that the covenant was not unreasonable, and endured for the life of W., though the original covenantee should cease to carry on business altogether, and that the covenant was not affected by the removal of the business to another shop near at hand, though it might have been otherwise if the business had been removed to quite a different neighbourhood:—Held, also, that such a covenant added to the value of the goodwill, and, therefore, was part of the goodwill, and assignable with it, and did, in fact, pass by the sale of the goodwill and beneficial interest to J., so as to give him a right of action. *Jacoby v. Whitmore*, 49 L. T. 335; 32 W. R. 18.

9. The plaintiff, a brewer, sold a piece of land to the trustees of a freehold land society, who covenanted with him that he, his heirs and assigns, should have the exclusive right of supplying beer to any public-house erected on the land, but the plaintiff did not enter into any covenant to supply it. The defendant, a member of the society, who was also a brewer, acquired a portion of the land with notice of the covenant, and erected on it a public-house, which he supplied with his own beer. The plaintiff filed a bill in equity to restrain the defendant from supplying beer, alleging that the plaintiff had always been ready to furnish a sufficient supply of good beer at a fair price:—Held, that the covenant was not void either for uncertainty or want of mutuality, or as being an unreasonable re-

straint of trade, or because it purported to be perpetual, and that, though it was in terms positive, it was in substance negative, and that the Court could interfere by injunction to restrain the defendant from acting in contravention of it. *Catt v. Tourle*, 4 L. R., Ch., 654; 21 L. T., N. S., 188; 38 L. J., Ch., 665; 17 W. R. 939.

1. Although public policy requires that every man shall be at liberty to work for himself, and shall not deprive himself or the State of his labour, skill, or talent, it is equally a principle of public policy that a man shall be enabled to sell to the best advantage anything that he has acquired by his labour, skill, or talent, and when that advantage requires him to enter into stipulations he may do so, provided such stipulations, however restrictive upon himself, are not unreasonable, having regard to the subject matter of the contract. *Leather Cloth Co. v. Lonsont*, 9 L. R., Eq., 345; 39 L. J., Ch., 86; 18 W. R. 572; 21 L. T., N. S., 661.

Upon the formation of a company for the purchase and working of a process of manufacture introduced into this country from America, the agreement for the purchase contained a provision that the vendors "will not directly or indirectly carry on, nor will they, to the best of their power, allow to be carried on by others, in any part of Europe, any company or manufactory having for its object the manufacture or sale of productions now manufactured in the business or manufactory of the vendors, and will not communicate to any person or persons the means or processes of such manufacture, so as in any way to interfere with the exclusive enjoyment by the purchasing company of the benefits hereby agreed to be purchased":—Held, that the restriction contained in this clause was not greater, having regard to the subject matter of the contract, than was necessary for the protection of the purchasers, and was capable of being enforced against the vendors. *Ib.*

2. The Taff Vale Railway Company covenanted with the Bute Dock trustees, first, that the company would, as far as they were able, cause all goods carried along the Taff Vale Railway, or any branch thereof, to be shipped or unshipped in the Bute Dock; and second, that, for all goods carried over the Taff Vale Railway, or any branch thereof, which should be shipped or unshipped in "any dock, canal, or cut whatsoever other than" the Bute Dock, the company would pay the trustees the wharfage and dockage dues to which they would have been entitled if the goods had been shipped or unshipped in the Bute Dock. The Taff Vale Company subsequently took a lease of the Penarth Harbour and Dock Railway, and used this harbour and dock for the shipment and unshipment of goods which passed along the Penarth Railway, and along the Taff Vale Railway:—Held, that the above covenants were not in restraint of trade. *Taff Vale Railway Co. v. Macnabb*, 6 L. R., H. L., 169; 42 L. R., Q. B., 153; 22 W. R. 65.

3. Agreements in restraint of trade are against public policy and void, unless the restraint they impose is partial only, and reasonable in relation to the objects of the contract; and also unless they are made upon a real and *bonâ fide* consideration. *Collins v.*

Looke, 4 L. R., App. Cas., 674; 48 L. J., P. C., 68; 41 L. T. 292; 28 W. R. 189.

Where the object of an agreement is to parcel out the stevedoring business of a particular port amongst the parties to it, and so to prevent competition at least amongst themselves, and also, it may be, to keep up the price to be paid for the work:—Held, that such agreement is not invalid if carried into effect by provisions reasonably necessary for the purpose, though the effect of them might be to create a partial restraint upon the power of the parties to exercise their trade. *Ib.*

A provision that if a particular merchant named in the agreement should refuse to allow the stevedoring of any ship to be done by the party entitled to it under the agreement, and should require one of the other parties to do it, such party so required should give an equivalent to the party who lost the stevedoring, is not unreasonable either as regards the party entitled or as regards the merchant. *Ib.*

But a provision that in the case of ships passing out of the hands of merchants named in the contract into the hands of other merchants, who should not choose to employ the party entitled under the agreement, all the parties thereto are deprived of the work, cannot be justified. It is obviously detrimental to the public, is entirely beyond anything the legitimate interests of the parties required, and is utterly unprofitable and unnecessary, at least for any purpose which can be avowed. *Ib.*

A clause which stipulates that all matters in difference which should arise touching the agreement should be submitted to arbitration, and prohibits any action being brought in respect of the matters actually submitted to arbitration, is a collateral and independent agreement, and an award thereunder is not a condition precedent to such action, except as regards such sums as under the agreement are not payable until the amount thereof has been ascertained by such award. *Ib.*

4. W. was engaged by a firm of brewers at Burton as a servant. Before entering their employment he signed an agreement that he would not, "from two years from his quitting their service, either directly or indirectly, sell, procure orders for the sale, or recommend, or be in any wise concerned or engaged in the sale or recommendation, either on his own account, or for any other person or persons, of any Burton ale, or beer, or porter, or of any ale, or beer, or porter brewed at Burton," other than that brewed by them. In a suit by the firm to enforce the agreement against him:—Held, that as the restriction was unlimited as to space, and also that as it was greater than was necessary for the firm's protection, the agreement was void, as being in restraint of trade, and against the policy of the law. *Allsopp v. Wheatcroft*, 21 W. R. 162; 15 L. R., Eq., 59; 42 L. J., Ch., 12; 27 L. T., N. S., 372.

5. There is no absolute rule that a covenant in restraint of trade is void if it is unlimited in regard to space. The question in each case is whether the restraint extends further than is necessary for the reasonable protection of the covenantee. If it does not do that, the performance of the covenant will be enforced, even though the restriction be unlimited as to

space. *Allsopp v. Wheatcroft* (15 L. R., Eq., 59) disapproved; *Leather Cloth Co. v. Lonsont* (9 L. R., Eq., 345) followed. *Rousillon v. Rousillon*, 14 L. R., Ch. D., 351; 49 L. J., Ch., 339; 42 L. T. 679; 28 W. R. 623.

1. A covenant in restraint of trade, although it is unrestricted in respect of space, is reasonable, and therefore good in law, if it relates to the use of a trade secret. *Hagg v. Darley*, 38 L. T., N. S., 312; 47 L. J., Ch., 567.

The purchaser of the business of certain manufacturers and sellers of well-known disinfectants by his statement of claim alleged that the mode by which those disinfectants were manufactured was a secret; that the vendors of the business (of whom the defendant was one) had, at the time of the sale, entered into a several covenant not to carry on the business of manufacturers or sellers of such disinfectants, or other articles of a similar kind, within fourteen years from that date, and that the defendant had infringed this covenant. A demurrer to so much of the statement of claim as related to this covenant, on the ground that the covenant was too general, and therefore bad in law, was overruled. *Ib.*

2. In determining whether a contract is a hard bargain, the Court will not (if there be valuable consideration) consider whether the consideration is sufficient, but whether one party has taken an unfair advantage of the position of the other party. In consideration of A. employing B. at a weekly salary of 21s. to go about London and sell oil for him, B. agreed that he would not, for twelve calendar months after the determination of the agreement, which was determinable on a week's notice on either side, sell oil within a radius of eight miles from the General Post Office. After a year's employment B. determined the agreement, and then commenced selling oil on his own account within the prohibited area:—Held, that the agreement not being a hard bargain, and being for valuable consideration, A. was entitled to an injunction. *Middleton v. Brown*, 47 L. J., Ch., 411; 38 L. T., N. S., 334.

3. A legal consideration of any value is sufficient to support a contract in partial restraint of trade; and the Court will not inquire as to its adequacy. *Gravely v. Barnard*, 43 L. J., Ch., 659; 18 L. R., Eq., 518; 30 L. T., N. S., 863.

The plaintiff, a surgeon, engaged the defendant (who was not qualified to practise, but was studying with a view to pass the necessary examination) to assist him in his practice, the engagement being terminable at the will of either party. Subsequently the defendant, previously to going up to pass his examination, executed, at the request of the plaintiff, a bond which was conditioned to be void if the defendant should not practise within certain limits, but which contained no express agreement on the part of the plaintiff to continue the defendant's employment. The defendant remained in the employment for about three months afterwards, and was then dismissed. He subsequently commenced practising within the prescribed limits, and a suit was instituted to restrain him from so doing:—Held, that an agreement by the plaintiff to continue the defendant's employment on the old terms could be inferred; that there was

consideration to support the bond; and that the plaintiff was entitled to an injunction. *Ib.*

Held, also, that the point was one that ought to be decided on motion without waiting for the hearing. *Ib.*

4. In April 1870 A. agreed with B., a milk seller, to serve him at weekly wages for a certain time, and not to carry on the same business on his own account within two miles of his house for two years after quitting his service. At the time of the execution of the agreement A. was a minor, but he represented himself to be of age, and he attained his majority eighteen months before leaving B.'s service. He left it in April 1872, and immediately afterwards set up in business within the prescribed limits, and obtained many of B.'s customers:—Held, that B. was entitled to an injunction to restrain him. *Cornwall v. Hawkins*, 26 L. T., N. S., 607; 41 L. J., Ch., 435; 20 W. R. 653.

2. Breach.

5. A. agreed to act as assistant to B. in his business of surgeon and apothecary, and by deed covenanted with him that he would not at any time after he should cease to act as B.'s assistant, and whether the deed should be in other respects determined or not, carry on or exercise the profession and business of a surgeon and apothecary in the town of C., or within the compass of five miles therefrom. The deed contained a proviso that it should be lawful for A., by giving one month's notice, to determine the deed and the covenants and agreements therein contained, subject nevertheless and without prejudice to any rights of action which might have accrued, or which might accrue thereafter to B., by virtue of the deed, and for the true performance of the covenants therein before contained, on the part of A., not to carry on the profession or business of a surgeon and apothecary at C. A. by due notice determined the deed "and the covenants and agreements therein contained," and then proceeded to practise as a surgeon and apothecary at C. An injunction to restrain him was granted in the terms of the covenant. *Giles v. Hart*, 5 Jur., N. S., 1381; 1 L. T., N. S., 164.

6. Agreement, by which, in consideration that plaintiff would purchase defendant's premises and stock of wine, and would pay 2,000*l.* as a premium for the goodwill of defendant's business of a wine merchant, defendant agreed that he would not, by himself or agent, or otherwise howsoever, either directly or indirectly set up, embark in, or carry on the business or trade of a wine and spirit merchant at C., or at any other town or place within the three counties of C., A., and M.:—Held, that defendant had broken the agreement by supplying wine to persons, resident in C. and in other towns and places within the counties of C., A., and M., and solicited by him, within C. and the other towns and places, personally, and by his agents, though he had no place of residence, warehouse, cellars, or place of business within C. or the other towns and places. *Turner v. Evans*, 17 Jur. 1073; 2 De G. M. & G. 740.

7. A. undertook to manage the business of B., a chemist, and agreed that he, A., would not carry on the business of a chemist either

in his own name or for his own benefit, or in the name or names or for the benefit of any other person, within seven miles of the place. He afterwards solicited orders for another chemist within the seven miles:—Held, that this was not a breach of his agreement. *Clark v. Watkins*, 9 Jur., N. S., 142; 11 W. R. 319; 8 L. T., N. S., 8; 1 N. R. 342.

1. A covenant not to be engaged in a specific trade, "or in any matter or thing whatsoever in anywise relating thereto," within a given district, does not prevent the covenantor from lending money to a person engaged in such trade within the limits, upon mortgage of his trade premises, although he may know that the mortgagor has no means of paying the debt except out of the profits of the business. *Bird v. Lake*, *Bird v. Turner*, 1 Hem. & M. 338.

A mortgagor expressly charging the debt upon such profits, would be a breach of covenant. *Ib.*

Semble, also, there is nothing in such a covenant to prevent the covenantor from buying any number of houses within the district, fitting them up and selling them for the purpose of the trade in question, provided he has no direct interest in the businesses carried on in them after such sales respectively. *Ib.*

2. In granting an injunction the Court is bound to consider the amount of injury which may be thereby inflicted on strangers to the suit and third parties. *Maythorn v. Palmer*, 11 L. T., N. S., 261; 13 W. R. 37; 11 Jur., N. S., 230.

A plaintiff filed a bill for an injunction to restrain the defendant from setting up or entering into business, on his own account or otherwise, within a specified distance from the plaintiff's place of business, and in contravention of a covenant into which he had entered with the plaintiff to that effect. The defendant was, after leaving the plaintiff's service as a coachmaker in 1862, employed by a Mr. W. as his foreman; and on the occasion of his being so taken into service, viz., in January 1863, Mr. W. wrote to the plaintiff, who replied "that the defendant would not suit him as a foreman." Mr. W. nevertheless engaged him as such, and he remained in his service nine months before proceedings were instituted by the plaintiff. Mr. W. was not a party to the suit, which was instituted in December 1863:—Held, that the bill must be dismissed; but, as the defendant had improperly disputed the question of the distance, without costs. *Ib.*

3. The defendant agreed to sell his business premises and goodwill to the plaintiff, and not to set up in the same business in the neighbourhood, the plaintiff agreeing to employ the former. The sale was carried out, the defendant employed for a short time, and then dismissed for alleged neglect of his work. Some months afterwards the defendant committed a breach of the negative covenant. A bill having been filed for specific performance of such covenant, the Court, at the hearing, granted an injunction to restrain the breach, but, not being satisfied as to the *bona fides* of the dismissal and the evidence of neglect, without costs. *Daggett v. Ryman*, 16 W. R. 302; 17 L. T., N. S., 486.

4. D. sold his business, goodwill, fixtures, etc., to N., and covenanted not to carry on or

be concerned or interested in the business of a tailor within five miles of the former shop. D. then engaged himself to his nephew, carrying on the same trade within a quarter of a mile of the former place of business, and whose name was the same as his own, as a journeyman, at a weekly salary:—Held, that this was within the spirit and letter of the covenant, and an injunction was granted. *Newling v. Dobell*, 19 L. T., N. S., 408; 38 L. T., N. S., 408.

5. An agreement by a man not to carry on a particular business, directly or indirectly, either alone or in partnership with, or with the assistance of, any other person, is broken by his carrying it on as manager to another person. *Dales v. Weaver*, 18 W. R. 993.

6. A restrictive covenant that the covenantor will not carry on a certain business in his own name or that of any other person is not violated by his acting as manager at a weekly salary to another person carrying on the same business. *Allen v. Taylor*, 39 L. J., Ch., 627; 22 L. T., N. S., 651; 18 W. R. 888. Affirmed 19 W. R. 35.

On the sale of his business the vendor agreed that he would not exercise or carry on the trade, either in his own name or that of any other person or persons, in a particular town:—Held, that his managing the business of another person in the same trade in the town, at a weekly salary, was not a breach of the agreement. S. C. 19 W. R. 556; 24 L. T., N. S., 249.

7. A. agreed to act as traveller for B. during a certain period, and during that time not to engage in any other business, with liberty for either party to determine the agreement, on giving six months' notice, and paying 500*l.* to the other. A. gave six months' notice, but refused to pay the sum:—Held, that the agreement was not determined, and an injunction was granted to restrain A. from acting contrary to his agreement. *Thornton v. Kendall*, 1 N. R. 391; 11 W. R. 352.

8. A covenant not to carry on, or be concerned in carrying on, either directly or indirectly, the business of a saddler, or sell any goods in any way connected with that trade within a distance of ten miles from C. under a penalty of 100*l.*, to be paid by way of liquidated damages for every such offence, is broken by selling goods as a journeyman in the employment of a person carrying on the particular trade in C.; and the breach will be restrained by injunction. *Jones v. Heavens*, 4 L. R., Ch. D., 636; 25 W. R. 460.

9. A., for valuable consideration, covenanted with B. that he would not carry on certain businesses within ten miles of the town of O., and would not "by publication, advertisement, circular, or otherwise hold himself out to have been, nor seek to induce others to believe him to have been, formerly connected in trade, either as partner, manager, or servant, with B." A. and B. had carried on business in copartnership at M. and O.; and B. still continued to carry on business at those places:—Held, that the covenant was not unnecessarily wide for B.'s protection, nor in general restraint of trade; and that an advertisement issued by A., in which he described himself as "late of O. and formerly of M.," was a breach of the covenant. *Wolmershausen v. O'Connor*, 36 L. T., N. S., 921.

3. Distance. How measured.

1. Under a contract not to carry on business within a given distance, the distance is to be measured in a straight line upon a horizontal plane, and not by the nearest practicable mode of access. *Duignan v. Walker*, 1 Johns. 446; 28 L. J., Ch., 867; 7 W. R. 562; 33 L. T. 266.

4. Assignment.

2. A milkman carrying on business in three places, took the defendant into his service. The defendant agreed, as regarded the milkman, his assignees, and successors, not to carry on a similar trade within certain limits. A. sold his branch business at one of the three places to the plaintiff, who retained the defendant in his service:—Held, that the plaintiff, as assignee and successor of part of the business, was entitled to the benefit of the defendant's contract. *Bennell v. Inns*, 24 Beav. 307; 26 L. J., Ch., 663.

5. Payment of Penalty or Damages.

3. The condition of a bond contained a recital that W. had agreed to become the managing clerk of H., a solicitor at A.; and that it was thereupon agreed that W. should enter into a bond not to practise as a solicitor at or within fifty miles of A., and that if he did so, then, if he should pay to H. 1,000*l.* as liquidated damages, the bond should be void. On breach by W.:—Held, that it was not intended to be satisfied by the payment of the sum named, and that the Court would therefore interfere by injunction. *Howard v. Woodward*, 10 Jur., N. S., 112; 34 L. J., Ch., 47; 13 W. R. 132; 11 L. T., N. S., 414.

4. A surgeon at W., upon taking an assistant, required him to give his bond in a penalty not to practise at W. Afterwards he discharged the assistant, who thereupon commenced practice at W. The surgeon filed a bill to restrain him, to which the defendant demurred. The Court overruled the demurrer, holding that, notwithstanding the pecuniary penalty, the plaintiff was entitled to a remedy in equity. *Fox v. Soard*, 33 Beav. 327.

See also PENALTY.

6. Proceedings.

5. An injunction to restrain a man in the exercise of his trade refused before answer. *Jackson v. Barnard*, Ridgw. 259.

6. Undertaking upon sale of the goodwill of a trade, not to carry on the same business, and to use the best endeavour to assist the purchaser, etc. The remedy for the breach is an action of issue *quantum damnificatus*; and an injunction against proceeding under a judgment for the consideration, upon affidavits before answer, was refused. *Shackel v. Baker*, 14 Ves. 468.

7. Bill for an account, under covenant upon sale of goodwill not to carry on the trade; the usual course a bill of discovery for an action. *Scott v. Mackintosh*, 1 Ves. & B. 503.

8. On a sale by a wine merchant of his stock in trade and business, he covenanted that he would not set up or carry on at C., or in any other place within the counties of C., A., or M., the business of a wine and spirit merchant. The vendor gave up his place of business at C., and had no place of business within the prescribed district, but he solicited and obtained orders within it:—Held, that the question, whether this was a breach of the covenant, was too doubtful to entitle the plaintiff to an injunction without bringing an action. *Turner v. Evans*, 2 De G. M. & G. 740.

9. The plaintiff, a surgeon, engaged the defendant (who was qualified to practise, but was studying with a view to pass the necessary examination) to assist him in his practice, the engagement being terminable at the will of either party. Subsequently the defendant, previously to going up to pass his examination, executed, at the request of the plaintiff, a bond which was conditioned to be void if the defendant should not practise within certain limits, but which contained no express agreement on the part of the plaintiff to continue the defendant's employment. The defendant remained in the employment for about three months afterwards, and was then dismissed. He subsequently commenced practising within the prescribed limits, and a suit was instituted to restrain him from so doing:—Held, that an agreement by the plaintiff to continue the defendant's employment on the old terms could be inferred; that there was consideration to support the bond; and that the plaintiff was entitled to an injunction. *Gravely v. Barnard*, 18 L. R., Eq., 518; 43 L. J., Ch., 659; 30 L. T. 863.

Held, also, that the point was one that ought to be decided on motion without waiting for the hearing. *Id.*

II. TRADE NAME AND STYLE.

1. *In General*, 6762.
2. *Colourable User by Defendant of his own Name*, 6763.
3. *Right to on Dissolution of Partnership*, 6764.
4. *Right to of Patentee when Patent expired*, 6765.

1. In General.

10. The plaintiff in cases relating to trade names has not any property in the particular title, but he has a right to prevent others from personating his business by using such a description as would lead customers to suppose they were trading with the plaintiff. *Boulnois v. Peake*, 13 L. R., Ch. D., 513. n.

11. Before the Court will interfere to prevent one trader from making fraudulent use of the name of another, it requires to be satisfied not only that the course taken by the defendant is calculated to deceive the public, but that representation has been made to him by the plaintiff that it will have that effect. *Williams v. Osborne*, 13 L. T., N. S., 498.

12. In England the assumption of a name, the patronymic of a family, by a stranger,

who has never before been called by that name, is not the subject of a civil action, as by the English law there is no right of property in a person to the use of a particular name, to the extent of enabling him to prevent the assumption of his name by another. *Du Boulay v. Du Boulay*, 2 L. R., P. C., 490; 17 W. R. 594; 38 L. J., P. C., 36; 6 Moo. P. C., N. S., 31; 22 L. T., N. S., 228.

Aliter, as to the exclusive use of a name in connection with a trade or a business, which right is recognized, and a party assuming it, colourably or otherwise, being an invasion of another's rights, is a fraud, for which a remedy lies either at law or equity. *Ib.*

1. Representations contained on the blinds and brasses of a shop front, calculated to induce the public to believe that the owner is connected in business with a firm of established reputation, will be considered upon the same principles as govern rights in trade marks. *Glenny v. Smith*, 2 Dr. & Sm. 476; 11 Jur., N. S., 964; 13 W. R. 1032; 13 L. T., N. S., 11; 6 N. R. 363.

Therefore, where a tradesman, in addition to his own name upon his shop front, placed upon his sun blind and upon his brass plate the words "From T. & G." (in whose employment he had been), the Court, being of opinion that this was done in such a way as to be likely to mislead, and there being evidence that persons had been actually misled, granted an injunction to restrain such a use of the name of the firm "T. & G." *Ib.*

2. A trader, who has been a manager or a partner in a firm of established reputation, has a right, on setting up an independent business, to make known to the public that he has been with that firm; but he must take care not to do so in a way calculated to lead the public to believe that he is carrying on the business of the old firm, or is in any way connected with it. *Hookham v. Pottage*, 20 W. R. 720; 26 L. T., N. S., 755. Affirmed 21 W. R. 47; 27 L. T., N. S., 595; 8 L. R., Ch., 91.

An old-established tradesman of the name of Hookham took Pottage into partnership; the firm went under the name of Hookham and Pottage; differences arose, and the partnership was dissolved. Pottage set up for himself in the same line of business only seven doors off Hookham's shop, and put over his door, "S. Pottage, from Hookham and Pottage." A perpetual injunction, restraining him from using the name of Hookham, as it was calculated to deceive, was granted. *Ib.*

3. The mortgagee of stock in trade and goodwill, and of the right to use a name, never having used the name, and not intending to use the name, cannot obtain an injunction to restrain persons claiming under the mortgagor from using the name. *Beazley v. Soares*, 22 L. R., Ch. D., 660; 52 L. J., Ch., 201; 31 W. R. 887.

4. The use for many years of two words of common use,—Newcastle Chronicle,—as the name of a newspaper, does not give the owner of the newspaper an exclusive right to the use of one of the words,—Chronicle,—so as to entitle him to restrain the defendant from publishing in the same town a newspaper having for its name the word Chronicle, in conjunction with another, that is to say, Sporting Chronicle; the appearance and con-

tents of the two papers being dissimilar, there being no evidence of any one having been deceived, and no apparent intention to deceive on the part of the defendant. *Cowen v. Hulton*, 46 L. T. 897.

5. B. was the owner of and worked all the collieries in the parish of Radstock, in Somersetshire, and owned all the coal in that parish, with a small exception. She carried on the business of working the collieries and selling the coal in her own name, adding to it on her waggons and bill-heads the words "Radstock Collieries." The defendants, from 1868, carried on at Radstock the business of coal merchants as the "Radstock Coal Company," having depôts at various railway stations in the south and west of England, at which they sold different kinds of coal. They became in 1876 the lessees of and worked a colliery outside the parish of Radstock, but in a district or basin in which coal was raised similar to that raised within the parish; coal raised in the district, but outside the parish, being known in the market as Radstock coal. In 1873 the defendants began to sell coals at G., in Surrey, by means of a local agent, and in 1875 they bought the goodwill of a retail coal dealer named C. at G., who had become bankrupt. They then advertised themselves in the Surrey newspapers, and otherwise in the neighbourhood, as "The Radstock Colliery Proprietors and Factors, Coal and Coke Merchants (late C. & Co.)," and offered to supply coal of every description direct from the collieries:—Held, that the defendants were not entitled to use the name "The Radstock Colliery Proprietors," unless and until they should acquire a colliery within the parish of Radstock, or to use any style implying that their coal came from the parish of Radstock, unless and until they should become authorized to sell coals raised from a colliery within that parish. *Braham v. Beacham*, 7 L. R., Ch. D., 848; 47 L. J., Ch., 348; 38 L. T., N. S., 640; 26 W. R. 654.

Held, also, that the acts of the defendants being calculated to induce purchasers to believe that the defendants were selling the plaintiffs' coal, it was not necessary for the plaintiff to prove any instance of actual deception, or any actual damage. *Ib.*

2. Colourable User by Defendant of his own Name.

6. The plaintiff, Thomas Holloway, sold a medicine as Holloway's pills. The defendant, Henry Holloway, commenced selling pills as H. Holloway's pills, but in boxes, etc., similar to the plaintiff's, and with a view of passing off his pills as the plaintiff's. He was restrained by injunction. *Holloway v. Holloway*, 13 Beav. 209.

7. A blacking manufactory had long been carried on under the firm of Day and Martin, at 97, High Holborn. The executors of the survivor continued the business under the same name. A person of the name of Day having obtained the authority of one Martin to use his name, set up the same trade at 90½, Holborn Hill, and sold blacking as of the manufacture of Day and Martin, 90½, Holborn Hill in bottles and with labels having a general

resemblance to those of the original firm. He was restrained by injunction. Principles on which the Court interferes with the use of trade marks. *Croft v. Day*, 7 Beav. 84.

1. Where the manufacturer of an article of trade sells it under his own name, and the article attains great celebrity in the market under that name, the manufacturer does not thereby acquire such an exclusive right in the use of the name or title under which the article has been sold as to prevent the use of it, without fraud, by another person having the same name, in the sale of a similar article manufactured by himself. *Burgess v. Burgess*, 3 De G. M. & G. 896; 17 Jur. 292; 22 L. J., Ch., 675.

Therefore, where a father had for many years exclusively sold a sauce under the title of "Burgess's" sauce, the Court would not restrain his son from selling a similar article under that name, no fraud being proved. *Id.*

Delay from October to March in appealing from the refusal of a motion for an injunction held fatal to the appeal. *Id.*

2. Any person who by fair means has gained the knowledge of a trade secret, may, after the death of the original inventor, make and sell the article under the name of the original inventor, provided such person does nothing to induce the public to believe that the article sold by him is made by the successor of the original inventor. *James v. James*, 20 W. R. 434; 13 L. R., Eq., 421; 41 L. J., Ch., 353; 26 L. T. 568.

A member of the family of R. J., the original inventor of a secret preparation, having by fair means become possessed of the original receipt, made and sold the article by the name given to it by the original inventor, under the signature of R. J., his own name being R. J. J.:—Held, that he was not entitled, as against the successor of the original inventor, to sell the article under the signature of R. J. singly, or to represent that his was the only genuine preparation. *Id.*

3. Right to on Dissolution of Partnership.

3. Upon the dissolution of a partnership, which had been carried on for a considerable time by J. D. and others, as stuff merchants, under the style or firm of "J. D. & Co.," J. D. assigned all his shares, rights, and interests in the business, and the goodwill thereof, to his late partners and another, who thereupon proceeded to carry on business under a new style or firm, consisting of their own names with the addition of the words "late J. D. & Co." Upon a bill filed by them, J. D. was restrained by injunction from resuming or carrying on the business of a stuff merchant at or in the immediate neighbourhood, either alone or in partnership with any other persons whatsoever, under the style or firm of "J. D. & Co.," or in any other manner holding out that he was carrying on the business of a stuff merchant, in continuation of or in succession to the business carried on by the late firm of J. D. & Co. *Churton v. Douglas*, 1 Johns. 174; 28 L. J., Ch., 841.

4. E. and H. were partners under articles. One of the terms was, that on the decease of either partner his personal representative

should have the power, within three months, of electing to continue the share of the deceased partner; and if he declined, then the business, stock in trade, etc., were to be valued, and the surviving partner was to take the whole, giving security for the moiety late belonging to the deceased partner. E. died:—Held, that during the three months, or until E.'s personal representative should elect, the survivor H. was to be prevented by injunction from carrying on the business in any other form than what had been used in the life of E. *Evans v. Hughes*, 18 Jur. 691.

5. A. and B. carried on the business of a pencil maker, under the firm of A. and L. A. died, and B. carried on the business, under the firm of B. & Co., successors to A. and L. A.'s executor having commenced the same business, under the firm of A. and L., an injunction was granted to restrain him from using that firm until the right should have been tried at law. *Lewis v. Langdon*, 7 Sim. 421.

6. A partnership was carried on for fourteen years between B. and G. under the style of "B. & Co." On the dissolution, the assets were divided, but no arrangement was come to as to the style:—Held, that the name or style of "B. & Co." formed an undivided asset of the partnership which belonged to the partners in common after the dissolution, and that B. was not entitled to prevent G. using the style of "B. & Co." in his business. *Banks v. Gibson*, 34 Beav. 566; 34 L. J., Ch., 591; 11 Jur., N. S., 680; 13 W. R. 101; 6 N. R. 373.

7. R. Scott and W. Scott carried on business at N. and G., in partnership, under the firm of R. and W. Scott. By an agreement for dissolution, it was agreed that one of the partners should remain at N., but there was no stipulation by which either party bound himself not to continue the business, but only that they would not carry it on together. There was no disposition of the goodwill to the partner who remained at N. Neither party was to use the name of the firm except so far as might be necessary in winding up the partnership affairs. Shortly after the date of the agreement W. Scott retired from the business and set up business for himself at T., near N. The inscription used by the firm over the door of their place of business at G. had been "R. and W. Scott, of N." R. Scott made over his business at N. and G. to the defendants, who, at their premises at G., made use of the inscription, "Scott and Nixon, late R. and W. Scott, of N." On the application of W. Scott, the Court granted an injunction restraining them from using such an inscription, inasmuch as it amounted to a representation that they had succeeded to the business of the late firm. *Scott v. Scott*, 16 L. T., N. S., 143.

8. On a dissolution of partnership the whole of the stock in trade was purchased at a valuation by one of the partners, but no assignment was made of the goodwill of the business:—Held, that the outgoing partner was entitled to an injunction to restrain the use of his name in the style of the firm. *Scott v. Rowland*, 26 L. T., N. S., 391; 20 W. R. 608.

9. A trader who has been a partner in a firm of established reputation is entitled on setting up a separate business to tell the world that he has been with that firm, but he must not do so in a way calculated to lead the public to

believe that he is carrying on the business of the old firm. *Hookham v. Pottage*, 21 W. R. 47; 8 L. R., Ch., 91; 27 L. T. 595. Affirming 26 L. T. 755; 20 W. R. 720.

An old-established tailor took his foreman into partnership, and the business was carried on under the name of H. and P. The partnership was afterwards dissolved by a decree of the Court, in which it was provided that the business of the partnership should belong to master. The master accordingly kept up the shop under the name of H. & Co. Subsequently the foreman set up a shop only a few doors from the master's shop, and painted over the door the words "P., from H. and P."—Held, that, having regard to the manner in which the names were painted up, the foreman had done that which was calculated to lead the public to suppose that he was still connected with the old firm, and that the master was entitled to an injunction. *Id.*

1. Two ladies, V. C. and M. W., carried on business in London in partnership under the firm of C. and W. V. C. married L. After this a decree for dissolution was made, and it was ordered that "the said partnership business, and the leasehold premises, trade fixtures, stock-in-trade, goodwill, and business," should be sold as a going concern to M. W. or to L. and wife, whichever should be the highest bidder. M. W. became the purchaser of all the property directed to be sold. L. and wife, who carried on business in Paris under the firm of C. et Cie., commenced an action to restrain M. W. from carrying on the business under the style or firm of C. and W.:—Held, that L. and wife had no right to restrain M. W. from using the name of the old firm. *Levy v. Walker*, 10 L. R., Ch. D., 436; 48 L. J., Ch., 273; 27 W. R. 370; 39 L. T. 654.

4. Right to of Patentee when Patent expired.

2. The Court will restrain the use by a third party of an arbitrary name, which a plaintiff has invented and applied to a particular class of goods as sold by him, and which has thus become identified with the plaintiff's goods, where the sale of that class of goods is open to the world. *Young v. Macrae*, 9 Jur., N. S., 322.

But where the class of goods is a patented article, no such protection will be afforded; for the name becomes identified with the goods, not because they are the plaintiff's but because he alone, as patentee, can make and sell them; and if the goods are the same, but made or manufactured in a totally different way and from a totally different natural source, so that there is no infringement of the patent, a third party may use the name fixed upon by the patentee. *Id.*

3. A trade-mark describing the articles on which it is impressed as "patented," is a proper one, if the statement was true at the time the mark was adopted, though the patent has been allowed to drop before its expiration. *Leather Cloth Co. v. Hirschfeld*, 1 N. R. 551; 1 Hem. & M. 295; 11 W. R. 933.

4. Where the inventor of a new substance has given to it a name, and, having taken out a patent for his invention, has, during the con-

tinuance of the patent, alone made and sold the substance by that name, he is nevertheless not entitled to the exclusive use of that name after the expiration of the patent. *Linoleum Manufacturing Co. v. Nairn*, 9 L. R., Ch. D., 834; 47 L. J., Ch., 430; 38 L. T., N. S., 44; 26 W. R. 463.

A company, under patents, made floor cloth of a new substance marked with the word "linoleum":—Held, that "linoleum" being the only name of the new substance, the company, at the expiration of the patents, was not entitled to the exclusive use of that word. *Id.*

5. In 1862 a patent for improvements in filters was taken out by S. C. in the name of himself and of his son G. C., aged seventeen. After his death in the same year, the business was carried on by the son, who made and sold filters under the title, and marked with a label as "S. C.'s Improved Patent Gold Medal Self-cleaning Rapid Water Filters." The patent of 1862 was allowed to lapse in 1865. In 1867 the son, who had then attained twenty-one, altered his label to "G. C.'s Improved Patent Gold Medal Self-cleaning Rapid Water Filters," above which was a medallion containing the royal arms, surmounted by the words "By Her Majesty's Royal Letters Patent." W. & Co., who had been in his employ, set up in business in the same town in 1876 as makers and sellers of filters, which were similar in appearance to those of G. C., and inscribed with "S. C.'s Patent Prize Medal Self-cleaning Rapid Water Filters, Improved and Manufactured by W. & Co."—Held, first, that the label used by G. C. was not a trade mark, but only a description of the article as made according to S. C.'s patent, which was common to all the public. *Cheavin v. Walker*, 5 L. R., Ch. D., 850; 46 L. J., Ch., 686; 36 L. T., N. S., 938. Reversing 46 L. J., Ch., 265; 33 L. T., N. S., 757.

Held, secondly, that there was nothing in W. & Co.'s label calculated to mislead the public by a fraudulent imitation of G. C.'s label. *Id.*

Held, thirdly, that G. C.'s label, coupled with the medallion of the royal arms, constituted a false representation that the patent was still subsisting, and disentitled him to relief by injunction. *Id.*

6. T. took out letters patent, which expired in 1844, for the manufacture of solid-headed pins, and carried on the business, under the firm of "T. & Co.," till 1838. In such business T. used parti-coloured labels, in pink and green, in which the pins were described as "patent pins," exclusively manufactured by T. & Co.; and had engraved plates and blocks for striking off such labels. In 1838 T. assigned the letters patent, together with his business and goodwill, and the right to use the plates, labels, etc., and the name of "T. & Co." to S. In 1839 S. became bankrupt. His assignees carried on the trade till 1841, when they agreed to assign the business, patent, plates, labels, etc., and the right to use the name of "T. & Co." to E., the plaintiff, who ever since carried on the business accordingly, and used the said labels. In 1853 E. discovered that V., the defendant, was using labels in palpable imitation of the plaintiffs:—Held, first, that E. was entitled to restrain such palpable imitation by V. Secondly, that E.

was not disentitled to sue by reason that the representations on his labels were no longer accurate, although the pins were not now protected by patent, nor manufactured strictly according to the patent, nor exclusively or at all by T., who had long since retired. Thirdly, that V. was not to be precluded altogether from representing that his pins were manufactured according to T.'s patent (now expired), but he was not to do so in a manner liable to mislead. *Edleston v. Vick*, 18 Jur. 7; 11 Hare 78; 1 Eq. Rep. 413.

Where there is a strong resemblance in matter, colour, and arrangement, the Court will presume that it is not fortuitous, but that it was intentional, with a view to mislead purchasers. *Id.*

1. When articles of a particular kind have become generally known in commerce by the name of an original manufacturer (or patentee as the case may be), any person has a right, after the expiration of the patent, to manufacture such articles and sell them under that name; but he may not by inscribing the name as a proper name, on his shop-front, or otherwise, lead the public to believe that he is selling as the agent for the original manufacturer. *Wheeler and Wilson Manufacturing Co. v. Shakespeare*, 39 L. J., Ch., 36.

III. LIBELLOUS AND MISLEADING CIRCULARS AND ADVERTISEMENTS.

2. The plaintiffs and defendants carried on business of a similar description. On the expiration of the term in a lease of certain works to the plaintiffs, where they had carried on their business, the defendants, fifteen months afterwards, had procured a lease of the same works, with the exception of certain mines of clay. The defendants issued a circular and card tending to lead the public to suppose that the defendants had succeeded to the business of the plaintiffs, and were working the same material as the plaintiffs had formerly used:—Held, that, although the words of the circular and card might be literally true, yet, if they tended to mislead the public, the Court would restrain them from further circulating or issuing such or any similar circular or card. *Harper v. Pearson*, 3 L. T., N. S., 547.

3. A circular was issued by parties recently in the employ of a firm of manufacturing engineers, which informed the trade and the public that they had commenced business on their own account, and made precisely the same goods as their former employers, with great improvements in the same, and could sell them at a much reduced price as being satisfied with smaller profits. It appeared that several customers of the former firm had been deceived by this circular, and removed their custom to the new firm:—Held, that the facts contained in the circular not being such as there stated, the same was a deceit upon the trade and the public, and, as such, an injunction granted to restrain the further issuing of the circular, sale, etc. *Stevens v. Paine*, 18 L. T., N. S., 600.

4. In an action to restrain the use by the defendant of the plaintiffs' trade name the issues were whether the name was a designation of machines of the plaintiffs' manufac-

ture, or of machines of a particular kind of construction; whether the defendant had used the name for the purpose of appropriating the reputation acquired by machines manufactured by the plaintiff company or not; and whether the defendant had by using the name induced purchasers to believe they were buying machines manufactured by the plaintiff company. Defendant, who sold (as wholesale agent in London of a company in Berlin) to persons in the trade only, described his machines in his circulars and price list as machines manufactured on the "Singer" system, or the "Singer improved system," and by his statement of defence alleged that, as the plaintiffs' patent had long since elapsed, they were not entitled to any monopoly of the right of advertising or selling machines manufactured on what was known in the trade as the "Singer system":—Held, that the plaintiff company had no exclusive right to use the word "Singer" as applied to sewing machines, and that there was nothing in the defendant's circular, price lists, and invoices calculated to deceive and induce purchasers to believe they were buying machines manufactured by the plaintiffs. Injunction overruled. *Singer Manufacturing Co. v. Loog*, 18 L. R., Ch. D., 395; 44 L. T. 888; 29 W. R. 699. Affirmed 8 L. R., App. Cas., 15; 52 L. J., Ch., 481; 48 L. T. 3; 31 W. R. 325. And see *Singer Manufacturing Co. v. Wilson*, 3 L. R., App. Cas., 376; 47 L. J., Ch., 481; 26 W. R. 664; 38 L. T., N. S., 303.

5. To obtain an interlocutory injunction restraining the defendant from issuing circulars, etc., stating the wrongful user by the plaintiff upon his manufactured articles of labels claimed by the defendant, and from threatening the plaintiffs' customers with legal proceedings for selling his articles bearing the labels in question, the plaintiff must satisfy the Court that the statements in the circulars, etc., complained of are in fact untrue. The fact that the defendant, having commenced actions against the plaintiff and his customers for injunctions restraining the wrongful user of the labels in question, had not thought fit to move for interlocutory injunctions:—Held, to be no ground by itself for granting the plaintiff the injunction sought for. *Anderson v. Liebig's Extract of Meat Co.*, 45 L. T. 757.

6. Joseph Thorley died in 1876, having for years carried on the manufacture of a condiment well known as "Thorley's Food for Cattle." His executors continued his business. In 1877 a company was formed for manufacturing the same article, and employed a brother of Joseph Thorley who was acquainted with the secret of the manufacture. The executors published in the newspapers an advertisement warning the public that any food purporting to be Thorley's food for cattle, and not signed "Joseph Thorley," was not the manufacture of the establishment carrying on business as Joseph Thorley, the proprietors of which were alone possessed of the secret for compounding the food. The executors also issued a circular to their customers warning them against the course pursued by the company "in seeking to foist upon the public an article which they pretend is the same as that manufactured by the late Joseph Thorley." The Court came to the con-

clusion that there was no substantial difference between the food sold by the executors and that sold by the company:—Held, that the advertisement and circular contained untrue representations calculated to injure the company in their trade, and that the issuing of them ought to be restrained by injunction. *Thorley's Cattle Food Co. v. Massam*, 14 L. R., Ch. D., 763; 42 L. T. 851; 28 W. R. 966. Affirming 41 L. T. 543; 28 W. R. 295.

1. The Court has now jurisdiction to restrain by injunction the publication of a libel injurious to trade. *Thomas v. Williams*, 14 L. R., Ch. D., 864; 49 L. J., Ch., 606; 43 L. T. 91; 28 W. R. 983.

In order to obtain an injunction in such a case it is sufficient for the plaintiff to show that the libel is calculated to injure his trade; it is not necessary that he should prove actual damage. *Ib.*

2. The Court has jurisdiction to restrain by injunction a person from making oral statements as well as written statements calculated to injure another person in his business; but with regard to oral statements such jurisdiction will be exercised with great caution. *Hermann Loog v. Bean*, 26 L. R., Ch. D., 306; 53 L. J., Ch., 1128; 51 L. T. 442; 32 W. R. 994.

3. The defendants, who were the owners of patents in Belgium and England for an invention for making glass lamp globes, by a deed executed in Belgium granted a licence to the plaintiffs to manufacture articles under their invention in Belgium, but not elsewhere. The deed contained a clause for submitting disputes to arbitration. The plaintiffs under this licence manufactured articles in Belgium and sold them in England. The defendants issued a circular warning persons engaged in the trade that the importation and sale of articles made in foreign countries under their invention, except by themselves, would be a violation of their patent. The plaintiffs brought an action to restrain the issue of this circular until the matters in dispute had been determined by arbitration:—Held, that the grant of the licence to use the patent in Belgium did not imply permission to sell the manufactured article in England in violation of the defendant's English patent, *Betts v. Willmott*, (6 L. R., Ch., 239) distinguished. *Société Anonyme des Manufactures de Glaces v. Tilghman's Patent Sand Blast Co.*, 25 L. R., Ch. D., 1; 49 L. T. 451; 32 W. R. 71.

Held, also, that where a trade circular is issued *bonâ fide*, an interim injunction will not be granted to restrain it unless it is in violation of some contract between the plaintiff and defendant, however much the balance of convenience may be in favour of granting it. *Ib.*
See also PATENT, VII. x.

IV. TRADE CUSTOM.

4. There being a surplus of a bankrupt's estate, interest allowed to creditors, where by the course of actual trading between the parties and settled accounts, interest was allowed for a certain credit. Accounts made up and delivered from time to time, upon that footing, held good evidence of a contract for the purpose. No allegation of proof of any general custom of trade, could, however, have had that effect; nor anything short of actual

evidence of contract between the parties. *Exp. Champion*, 3 Bro. C. C. 436.

5. A custom, that purchasers of hops shall leave them upon rent in the hop-merchant's warehouse for resale, undistinguished from his stock, will not prevent them from becoming the property of the hop-merchant's assignees upon his bankruptcy, as being in his possession, etc. *Thackthwaite v. Cook*, 2 Rose 105; 3 Taunt. 487.

6. By the statute 59 Geo. 3, c. 111, navy agents are entitled to make the usual charge for passing accounts before that Act, and to charge commission on the full amount of pay without being limited to the money passing through their hands. The defendants having received a sum as returned premiums, without bringing it to account for many years and alleging that they awaited the final adjustment of average; it was referred to the Master to inquire whether they were entitled to retain it, according to the custom of merchants. *Drury v. Atkins*, Tam. 76.

7. Teas are sold, to be paid for at appointed days, the sales being made according to the custom of the trade, whereby the goods, when sold, are left as pledge for full payment with the vendor, who in case of non-payment is at liberty to re-sell, and charge the loss to the original purchaser. The purchase money is not paid at the appointed time; the purchaser becomes bankrupt, and the vendor, having sold part of the teas before the fiat and the rest afterwards, gives the estate credit for the clear proceeds of the sales:—Held, that although there was no delivery of the goods, the original sale was a binding contract within the Statute of Frauds, and that the vendors were entitled to prove for the residue of the purchase money unsatisfied by the sale. *Exp. Moffatt, Re Tate*, 2 M. D. & De G. 170. And see 1 M. D. & De G. 282; 4 Jur. 659.

8. A quantity of tea is sold at a price, which is to be paid at a future day. After the day has elapsed the purchaser pays a sum on account, and writes to the vendors, who have retained the warrants in their possession, requesting them to await the arrival of the overland mail, and on its receipt to dispose of the tea. He afterwards becomes bankrupt:—Held, first, that the vendors have a lien on the tea for the unpaid purchase money; secondly, that an application to the Court for an order for sale is not improper or unnecessary; and thirdly, that the letter is a sufficient memorandum to entitle the vendors to costs. *Exp. Twining, Re Coles*, 1 M. D. & De G. 691; 10 L. J., N. S., Bky., 60; 5 Jur. 536.

9. By the usage of the iron trade warrants for goods "deliverable (f. o. b.) to A. B., or their assigns, by indorsement hereon, are considered to pass to the holders for value free from vendor's lien. *Merchant Banking Co. of London v. Phoenix Bessemer Steel Co.*, 5 L. R., Ch. D., 205; 46 L. J., Ch., 418; 25 W. R. 457; 36 L. T., N. S., 395.

10. Wharfinger's certificates were not documents of title, and their delivery passes no right to the goods; and no custom of trade can give them the effect of warrants or documents of title as against vendors. *Gunn v. Bolckow, Vaughan, & Co.*, 10 L. R., Ch., 491; 44 L. J., Ch., 732; 32 L. T., N. S., 781; 23 W. R. 739.

1. Evidence was admitted of a custom in Liverpool, that a lien on goods for a sum agreed to be paid there as freight continued:—Held, also, that where assignees of the bill of lading were resident in Sydney, in New South Wales, and there was no evidence that they were acquainted with the local usage in Liverpool, such evidence of custom was not admissible for the purpose of explaining the effect of the memorandum in the bill of lading, or of showing the terms on which the goods were shipped, in the construction of such bill of lading. *Miedbrodt v. Fitzsimon*, *The Energie*, 32 L. T., N. S., 579; 23 W. R. 932; 6 L. R., P. C., 306; 44 L. J., Adm., 25.

2. A right of general lien can only be established either by contract express, or necessarily implied, or by custom; and such a custom in a particular trade is not established by mere evidence of the popular opinion of the members of that trade that a right of general lien was or ought to be a privilege of their trade. *Exp. Provincial Bank, Re Spotten*, 11 Ir. R., Eq., 412.

3. By the custom of the London Dry Goods Market a broker who purchases for a principal as broker, but without disclosing the name of the principal, is liable for the price of the goods in case the purchaser does not pay. On the 3rd March 1876, C. sold to D., a broker, for undisclosed principals, eighteen casks of gum sandrac lying at the docks, and signed a delivery order in favour of D. The delivery order was indorsed by D. to B. & Co., his undisclosed principals, who deposited the same with the Imperial Bank as a security for advances. On the 18th March the bank lodged the order at the office of the Docks Company in Leadenhall Street, with a request for warrants, and notice of the order having been lodged was sent to the long room at the dock house. On the same day D., having heard that B. & Co. had stopped payment, paid C. for the goods, and sent his clerk to the long room, who arrived there before notice of the delivery order having been lodged by the bank had been received, and he, in the name of C., applied for a warrant for the goods, which was made out and delivered to him. C. subsequently indorsed the warrant to L., and gave him a second delivery order. On an action by the bank for a declaration that they were entitled to the goods:—Held, that under the circumstances C.'s lien as an unpaid vendor passed to D., and that the warrant in favour of C. having been obtained before the delivery order had been entered at the warrant office at the docks, D. was entitled to the goods. *Imperial Bank v. London and St. Katharine Dock Co.*, 36 L. T., N. S., 233; 46 L. J., Ch., 335.

4. The custom of letting a piano out on hire under an agreement by which upon the payment of the price fixed for the purchase by monthly instalments extending over a period of three years the hirer becomes the owner of the piano, and which is known as "the three years' hire system," is a well-established and good custom, and will, therefore, prevail to take a piano, hired under such an agreement, out of the order and disposition of the hirer on his becoming bankrupt. *Exp. Hattersley, Re Blanshard*, 26 W. R. 636; 38 L. T., N. S., 619; 8 L. R., Ch., 601; 47 L. J., Bky., 113.

5. An arrangement was made between W.,

R., and G., that W., a manufacturer, should consign cotton cloths to G. in Rangoon, paying him an inclusive commission. The goods were to be exported through R., who acted as shipping agent, and was to see to the goods being finished and packed, for which services he received a commission from G. A particular mark was by arrangement between the three parties adopted for the goods, of which some portions and the general arrangement were new, and other portions consisted of R.'s name and arms, and of a symbol which had formerly been used by G. After goods had been regularly exported for some years under this arrangement, W. ceased to send goods through R., and commenced exporting them to Rangoon through the agency of F., continuing to use the old mark, except that the name and arms of F. were substituted for those of R. At the same time R. commenced exporting other goods under the old mark. Cross actions were commenced for injunctions, in which R. set up an alleged custom in Manchester, giving the right to the trade marks to the shipping agent:—Held, upon the evidence, that no such custom existed. *Robinson v. Finlay, Ward v. Robinson*, 9 L. R., Ch. D., 487; 39 L. T., N. S., 398; 27 W. R. 294.

Held, also, that neither R. nor W. had any exclusive right to the use of the mark, and that both actions must be dismissed. *Th.*

6. A firm of merchants, formerly carrying on business at Calcutta, sued a firm at Manchester, who had acted as their agents on commission for the purchase and shipping to India of Manchester goods, to have the settled accounts between the parties, extending back for a period of nearly twenty years, opened; and to obtain repayment of certain alleged overcharges made by the defendants in their accounts with the plaintiffs. The defendants were charged with having bought goods at one price and invoiced them to the plaintiffs at an increased price; that having been instructed to buy white goods, they purchased grey goods and got them bleached, charging the plaintiffs more than the price of the grey goods plus the cost of bleaching; that they had not credited the plaintiffs with the discounts allowed to themselves; that they had charged for insurances that they had never effected; that they had sold their own goods to the plaintiffs at a profit; and that they had overcharged the plaintiffs in other ways. The main defences raised were, that the plaintiffs knew of the charges, and that they were in accordance with the custom of the Manchester trade, and that as regarded the insurances which had been charged for but not effected, the defendants had themselves insured:—Held, that the plaintiffs did not know of the overcharges, and that there was no custom of the Manchester trade to make such overcharges. *Williamson v. Barbour*, 9 L. R., Ch. D., 529; 50 L. J., Ch., 147; 37 L. T. 698.

7. Although a person who as principal employs a broker to transact business for him in a particular market is bound by the usage of that market, though unknown to him, provided the usage is one that merely regulates the mode of performing the contract, and does not change the intrinsic character of the contract, yet where the usage is one which gives the broker an interest at variance with his duty, as by

converting him into a principal instead of a mere agent to establish privity of contract between two principals, such a usage is not binding on a principal who, being ignorant of the usage, employs a broker to whom the usage is known to perform the ordinary and accustomed duties belonging to the office or employment of a broker. The principal is not bound to inquire what the usage may be, or whether there is any particular usage effecting the market in which he proposes to deal. *Robinson v. Mollett*, 44 L. J., C. P., 362; 7 L. R., H. L., 802.

A Liverpool merchant employed brokers of London to buy tallow for him in the London tallow market. They having other orders, bought in their own name a quantity sufficient to cover all their orders, and by letter they informed the merchant that they had bought on his account so many tons; but they did not mention the name of the seller. A few days after they sent him notice that they were ready to deliver to him so many casks of tallow in fulfilment or part fulfilment of his order, but they did not allude to any third party as the seller. He acknowledged the receipt of these notices without observation. There is a custom on the London tallow market for brokers when they receive orders to contract in their own names, and if their principals refuse to accept or deliver, to buy or sell against them, and charge them with the loss. The merchant was ignorant of this custom. On becoming aware of it, and of the mode in which his orders had been executed, tallow having in the meantime fallen, he refused to take the tallow:—Held, that as the brokers were employed to act as brokers only, the custom which converted them into principals was inconsistent with the employment, and as the merchant was ignorant of it when he gave his orders, he was not bound by the custom. *Id.*

See also BANKRUPTCY, XIX. xvi.

[Evidence of Trade Usage.] See PRACTICE (EVIDENCE).

[Custom of Brokers.] See PRINCIPAL AND AGENT, XI.—STOCK EXCHANGE, IV.

V. TRADE SECRET.

1. Injunction to prevent a chemist from selling a quack medicine, under a false and colourable representation that it was a medicine of the plaintiff, an eminent physician, refused. *Clark v. Freeman*, 11 Beav. 112; 17 L. J., N. S., Ch., 142; 12 Jur. 119.

2. Injunction to restrain a defendant from communicating certain recipes for medicines, and vending them, granted, on the ground that he had obtained a knowledge of the mode of preparing them by a breach of trust. *Yocatt v. Winyard*, 1 Jac. & Walk. 394.

Quere, whether a court of equity, in the exercise of its jurisdiction to decree the specific performance of an agreement, can interfere by injunction to restrain a party from divulging a secret in medicine which is unprotected by patent. In this case an injunction, which had been granted for that and other purposes, was dissolved, upon the affidavit of the defendant (an infant) denying the facts of the

case as represented by the plaintiff's affidavit in support of the injunction, and upon the ground that there was no secret in the alleged invention. *Williams v. Williams*, 3 Meriv. 157.

3. The Court does not recognise property in unpatented articles, and will not interfere to restrain the sale of spurious articles, though described to be the same as those manufactured by another, unless such articles are held out by the imitator to be the manufacture of that other person. Where B. invented and sold a secret medicine called chlorodyne, and F. advertised a spurious imitation of it as "the original chlorodyne," and the evidence showed that F.'s article was not mistaken for B.'s, but only that F. was taken to be the first inventor:—Held, that B. was not entitled to an injunction to restrain F. from issuing such advertisements. *Browne v. Freeman*, 4 N. R. 476; 12 W. R. 305.

4. An injunction granted to restrain the use of a secret in the compounding of a medicine not being the subject of a patent, and to restrain the sale of such medicine, by a defendant who acquired a knowledge of the secret in violation of the contract of the party by whom it was communicated, and in breach of trust and confidence. *Morison v. Moat*, 9 Hare 241; 20 L. J., N. S., Ch., 613; 15 Jur. 787. Affirmed 21 L. J., N. S., 248; 16 Jur. 321.

A plaintiff not having the privileges of a patentee may have no title to be protected in the exclusive manufacture and sale of a medicine against the world, but he may, notwithstanding, have a good title to protection against the particular defendant. *Id.*

The case of a secret acquired by a breach of faith or confidence, but communicated to a purchaser for value, without notice of any obligation affecting it, distinguished from that of a party whose claim of right to use the secret is that of a volunteer. *Id.*

The Court, in interfering in such cases, upon the grounds of faith or confidence, fastens upon the conscience of the party and enforces the obligation against him as it enforces, against a party to whom a benefit is given, an obligation to perform a promise upon the faith of which the benefit has been conferred, *semble*. *Id.*

If a partner in business in which a secret process of manufacture and composition of materials is used, who has not, under the partnership contract, a right to the knowledge of the secret, should openly take part in the manufacture, and should, with the knowledge and concurrence of his partners, be permitted to acquire a knowledge of the process and ingredients; the other partners will be considered to have waived a right to the preservation of the secret for their separate benefit, *semble*. *Id.*

The injunction restrained the sale of medicine by the defendant, under the name of the medicine prepared according to the secret prescription, not on the ground of the use of the name alone, but because it was by the name that the defendant was availing himself of the breach of faith and contract. Whether, apart from that ground of interference, the Court would have restrained the use of the name before the plaintiff's right had been established at law, *quere*. *Id.*

In June 1823, Morison, the sole inventor and proprietor of a medicine not protected by patent, upon the occasion of entering into partnership with Moat as manufacturers and vendors of the medicine, for the purposes of the partnership communicated to the latter the secret of compounding the medicine. By the partnership deed either partner was empowered to introduce another partner, by deed, to be attested by the other; and by mutual bonds of even date, Morison bound himself not to communicate the secret of compounding the medicine to any person, except a partner so introduced; whilst Moat bound himself not to communicate such secret to any person whomsoever. Morison afterwards introduced his sons, the plaintiffs, into the partnership; and Moat, shortly before his death, in breach of his bond, communicated the secret to the defendant, his son; and then by deed, duly attested by Morison, appointed the defendant his successor in the partnership. Shortly after the death of Moat, the defendant joined Morison and the plaintiffs, who were ignorant that he had obtained a knowledge of the secret, in executing a partnership deed, containing a clause declaring the defendant a sleeping partner, and another clause, by which the partners covenanted not to divulge the secret of compounding the medicines to any person whomsoever. The defendant also afterwards executed deeds reciting that the sole property in the secret was in Morison. Morison afterwards died, having by will bequeathed his property in the secret to the plaintiffs. After the determination of the partnership the defendant made use of his knowledge of the secret communicated to him by his father, in manufacturing medicine, which he sold as the medicine originally manufactured by Morison. Upon the application of the plaintiffs the Court granted an injunction restraining the defendant from selling, under the title or designation of "Morison's medicine," any medicine manufactured by the defendant; and also from compounding any medicines according to the secret mentioned in the plaintiffs' bill, and from in any way making use of such secret. *Id.*

1. Not against public policy that trader sells secret in trade, and restrains himself generally from use of it. *Bryson v. Whitehead*, 1 Sim. & S. 74; 1 L. J., Ch., 42.

2. Any person who by fair means has gained the knowledge of a trade secret may after the death of the original inventor, make and sell the article under the name of the original inventor, provided such person does nothing to induce the public to believe that the article sold by him is made by the successor of the original inventor. But he must not assert that his is the only genuine article, or suggest that the article manufactured by the successors of the original discoverer is spurious. *James v. James*, 13 L. R., Eq., 421; 41 L. J., Ch., 353; 26 L. T. 568; 20 W. R. 434.

A member of the family of R. J., the original inventor of a secret preparation, having by fair means become possessed of the original receipt, made and sold the article by the name given to it by the original inventor, under the signature of R. J., his own name being R. R. J.:—Held, that he was not entitled, as against the successor of the original inventor, to sell the article under the signature of R. J.

singly, or to represent that his was the only genuine preparation. *Id.*

3. A covenant in restraint of trade, although it is unrestricted in respect of space, is reasonable, and therefore good in law, if it relates to the use of a trade secret. *Hagg v. Darley*, 47 L. J., Ch., 567; 38 L. T. 312.

4. Joseph Thorley for many years manufactured and sold extensively an article called "Thorley's Food for Cattle," made according to a recipe communicated to him and not known to the public, and down to his death he was the only person who made it. His executors continued the business. Shortly after his death a company was formed by other persons, under the name of J. W. Thorley's Cattle Food Company, in which J. W. Thorley, a brother of Joseph Thorley, took a 1s. share. J. W. Thorley had been employed by Joseph Thorley, and knew the secret of the manufacture, and was employed by the company to conduct it. The company sold the same article under the name of "Thorley's Food for Cattle":—Held, that the company were not at liberty to use the name "Thorley's Food for Cattle" unless they took such precautions as would prevent purchasers from supposing that the article sold by them was manufactured at the original establishment of Joseph Thorley. *Massam v. Thorley's Cattle Food Co.*, 14 L. R., Ch. D., 748; 42 L. T. 851; 28 W. R. 966; 41 L. T. 543. And see *S. C.* 6 L. R., Ch. D., 574; 46 L. J., Ch., 707; 36 L. T., N. S., 848.

5. When a man has learnt a trade secret from his employer, and practised it after the employer's death, selling the article under the old name, he will not acquire such a right to the exclusive use of the name as a trade mark as will be protected in a court of equity. *Horenden v. Lloyd*, 18 W. R. 1132.

6. An article, the secret making of which was known only to one maker, had acquired a trade name. An injunction was granted, restraining the application of that name to a different article of the same class, so as to induce the belief that it was the plaintiffs' article. *Siebert v. Findlater*, 47 L. J., Ch., 233; 7 L. R., Ch. D., 801; 38 L. T., N. S., 349; 26 W. R. 459.

The plaintiff manufactured a fluid which he sold under the name of "Aromatic Bitters," and it was described by this name upon the wrappers of the bottles in which it was sold. It became, however, generally known in the market by the name of "Angostura Bitters," it having been originally manufactured at the town of Angostura, in Venezuela. The name of this town was afterwards, by a decree of the state, changed to Ciudad Bolivar. After this change had taken place, the defendant began to manufacture in the same town a different fluid, which he at first sold under the name of "Aromatic Bitters," but, having been restrained in an English colony from using that name, he adopted the name "Angostura Bitters," and placed it upon the wrappers of his bottles, also registering his wrapper at Stationers' Hall. His wrappers were very similar to those of the plaintiff, but they contained a statement that the fluid was prepared by the defendant. After this the plaintiff adopted the name "Angostura Bitters," and placed it upon his wrappers, and

he brought an action against the defendant, claiming an injunction to restrain him from imitating the plaintiff's wrappers, and from using the name "Angostura Bitters." At the time when the action was brought the plaintiff had ceased to carry on his manufacture at Ciudad Bolívar:—Held, that the defendant had been guilty of an attempt to deceive, and that, though he could not be restrained from using the name "Angostura Bitters," in case he should ever discover the plaintiff's secret, and manufacture the same fluid, yet he must be restrained from using the name so as to deceive the public into the belief that his fluid was the plaintiff's. *Id.*

It was alleged by the defendant that the plaintiff was dissatisfied to relief, because, at the time of the trial, he was using wrappers which contained a misrepresentation. The plaintiff did not begin to use those wrappers until after the action had been brought:—Held, that there was in fact no misrepresentation in the wrappers in question, but that, even if there had been, a misrepresentation not made till after the commencement of the action would not have affected the plaintiff's title to relief. *Id.*

VI. TRADE UNION.

1. The defendants, who were officers of a trade union, gave notice to workmen, by means of placards and advertisements, that they were not to hire themselves to the plaintiffs pending a dispute between the union and the plaintiffs. The bill prayed an injunction to restrain the issuing of the placards and advertisements, alleging that by means thereof the defendants had, in fact, intimidated and prevented workmen from hiring themselves to the plaintiffs, and that the plaintiffs were thereby prevented from continuing their business, and the value of their property was seriously injured and materially diminished:—Held, that the acts of the defendants, as alleged by the bill, amounted to a crime, and that the Court would interfere by injunction to restrain such acts, inasmuch as they also tended to the destruction or deterioration of property. *Springhead Spinning Co. v. Riley*, 6 L. R., Eq., 551; 37 L. J., Ch., 889; 16 W. R. 1138.

2. The rules of a trade union provided that the money arising from the subscriptions of its members should be applicable in various ways for their benefit. They also purported to regulate the affairs of that trade, and provided that any journeyman binding his son in a "foul shop" (being a shop in which non-union men were employed) should be fined, and not be entitled to any benefit until such fine had been paid. The plaintiff, a member of the union, who was alleged to have broken the rule as to apprenticeship, and who, having refused to pay the fine, had been expelled from the union, brought an action against the committee and trustees of the union claiming to be entitled to participate in its benefits, and that the defendants might be restrained from excluding him from such participation:—Held, that as the action was brought to enforce an agreement between members of a trade union "to provide benefits to members,"

within the meaning of the Trades Union Act 1871, s. 4, which the Court was not by that section enabled to enforce; and as, apart from the Act, the union was an illegal association, the plaintiff was not entitled to any relief. *Rigby v. Connol*, 14 L. R., Ch. D., 482; 49 L. J., Ch., 328; 42 L. T. 139; 28 W. R. 650.

The foundation of the jurisdiction of the Court to prevent a member of a voluntary association from being improperly expelled is the right of property vested in such member of which he is deprived. *Id.*

3. The central body of a society brought an action against a branch to restrain the latter from dividing certain funds in possession of the latter. Some of the rules of the society provided for benefits to members, and there were others which were in restraint of freedom of trade:—Held, that the action could not be maintained—(1) as it was brought to enforce an agreement between members of a trade union to provide benefits to members within the meaning of s. 4 of the Trades Union Act 1871; and (2) as the agreement could not have been enforced previously to that Act. *Duke v. Littleboy*, 49 L. J., Ch., 802; 43 L. T. 216; 28 W. R. 977.

In such cases it makes no difference whether a central society sues a branch, a society sues an individual, or an individual sues a society. *Id.*

4. By the Trades Union Act 1871, s. 4, it is provided that nothing in the Act shall enable the Court to entertain any legal proceeding instituted with the object of directly enforcing an agreement for the application of the funds of a trade union to provide benefits to its members. The plaintiffs, members of a trade union within the Act, sought for an injunction to restrain other members from applying the funds in a manner contrary to an agreement to provide benefits to members:—Held, that such an injunction would not be a direct enforcement of the alleged agreement, and that the Court might entertain the proceeding. *Wolfe v. Matthews*, 21 L. R., Ch. D., 194; 51 L. J., Ch., 833; 47 L. T. 158; 30 W. R. 828.

TRADE MARK.

See also TRADE, II.

- I. RIGHT OF PROPERTY IN, 6772.
- II. WHAT MARKS PROTECTED, 6774.

See also V. 1. post.

- III. ASSIGNMENT OF, 6777.
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- I. *General Principles*, 6777.
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- IV. *Evidence of Deception*, 6784.
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- VI. *Proceedings in respect of*.
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V. REGISTRATION UNDER TRADE MARKS ACT.

- I. *What may be Registered.*
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 1. *What Marks or Words*, 6789.
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- VII. *Costs*, 6794.
- VIII. *Other Matters*, 6795.

I. Right of Property in.

1. Charles I. having granted a charter to the Cardmakers' Company to use the Mogul stamp on cards, plaintiff, suggesting a sole right, as having appropriated it to himself conformably to the charter, moved for an injunction to restrain defendant; but Lord Chancellor refused it. The objection of the defendant taking away the plaintiff's customers by using the same mark (the Mogul stamp on his cards) is of no more weight than if one innkeeper should set up the same sign as another. But a cloth-worker may maintain an action against another of the same trade for using his mark, where it is done with a fraudulent design to put off bad cloths, or to draw away customers. The Court, however, will never establish a right claimed under a charter only from the Crown, unless the right has been first tried at law. *Blanchard v. Hill*, 2 Atk. 484.

2. There is no exclusive right in a subject not protected by patent, to prevent sale by another person under the same title, not assuming the name and character of the plaintiff. *Canham v. Jones*, 2 Ves. & B. 218.

3. There is no copyright in a trade mark. *Farina v. Silverlock*, 6 De G. M. & G. 214; 2 Jur., N. S., 1008; 26 L. J., Ch., 11; 3 W. R. 532; 4 W. R. 731.

4. A plaintiff and another person, who carried on distinct trades at different places of business, had derived from a common predecessor in their respective businesses the right to use the name of Dent as a trade mark. The defendant having infringed this right:—Held, that the plaintiff, without averring special damage, might sue alone for an injunction, and for the delivery up of the articles so marked to have the name erased. *Dent v. Turpin, Tucker v. Turpin*, 2 John. & H. 139; 7 Jur., N. S., 673; 30 L. J., Ch., 495; 9 W. R. 548; 4 L. T., N. S., 637.

Held, also, that he might sue alone for an account of profits made by the defendant out of articles so marked, and for payment to the

plaintiff of such part of such profits as he should be entitled to. *Id.*

5. There is no property in a trade mark, but a person who has been in the habit of using a particular mark may prevent other persons from fraudulently taking advantage of the reputation which his goods have acquired, by using his mark in order to pass off their goods as his, to his injury. *Collins Co. v. Browne, Collin's Co. v. Cohen*, 3 Kay & J. 423; 3 Jur., N. S., 929; 5 W. R. 676.

6. The jurisdiction of the Court, in the protection of trade marks, rests upon property, and fraud in the defendant is not necessary for the exercise of the jurisdiction. *Hall v. Barrons*, 10 Jur., N. S., 55; 33 L. J., Ch., 204; 12 W. R. 322; 9 L. T., N. S., 561; 4 De G. J. & S. 150; 1 N. R. 543; 3 N. R. 259.

If a name, impressed upon a vendible commodity, passes current in the market as a representation that the commodity has been manufactured by a particular person, the Court would not transfer to another person the right to use the name simply and without addition; but if it sold the business carried on by the owner of the name, it might give to the purchaser the right to represent himself as the successor in business of the first maker, and in that manner to use the name. *Id.*

Where the name of the first maker, once affixed to a manufactured article, continues to be used after his death, the name in time becomes a mere trade mark or sign of quality, and ceases to denote, or to be current as indicating, that any particular person was the maker, and would, therefore, be protected. *Id.*

7. An element in the right to property in a trade mark is the fact of the article to which the stamp or mark is affixed being in the market as a vendible article, with the stamp or mark at the time when it is imitated. *M'Andrew v. Bassett*, 4 De G. J. & S. 380; 4 N. R. 12, 123; 10 Jur., N. S., 550; 33 L. J., Ch., 561; 12 W. R. 777; 10 L. T., N. S., 442.

The essential ingredients for constituting an infringement of a right to a trade mark are—(1) that the mark has been applied by the plaintiffs properly—i.e., that they have not copied any other person's mark, and that the mark does not involve any false representation; (2) that the article so marked is actually a vendible article in the market; (3) that the defendants, knowing that to be so, have imitated the mark for the purpose of passing in the market other articles of a similar description. *Id.*

Although where a word is chosen as a trade mark which is in fact a geographical designation of a whole tract of country, where the raw material is grown whence a manufactured article is produced, there cannot be property in the word for all purposes, yet property in the word, as applied by way of stamp upon a particular vendible article, does exist the moment the article goes into the market so stamped, and there obtains acceptance and reputation, whereby the stamp gets currency as an indication of superior quality or of some other circumstance which renders the article so stamped acceptable to the public. *Id.*

8. Where the plaintiff attached to wire manufactured by him tallies marked with an anchor, and the defendant attached to his manufacture similar tallies marked with the

device of a crown and anchor:—Held, that the plaintiff was entitled to an injunction. *Edelsten v. Edelsten*, 1 De G. J. & S. 185; 9 Jur. N. S., 479; 11 W. R. 328; 7 L. T., N. S., 768.

Negotiations antecedent to a suit (save in a case of bad faith), unless amounting to a release or binding agreement, cannot be regarded. *Id.*

At law the proper remedy is by an action for deceit, and proof of fraud on the part of the defendant is of the essence of that action; but the Court will act on the principle of protecting property alone, and it is not therefore necessary for obtaining the injunction to prove fraud, or that the credit of the plaintiff was injured by the sale of an inferior article. *Id.*

An injury by loss of custom is sufficient to support a title to relief, and it is not necessary that proof should be given of persons having been actually deceived, in having bought goods with the defendants' mark, under the belief that they were of the manufacture of the plaintiff. *Id.*

An owner of a trade mark will not be deprived of remedy in equity, even if it is shown that all who bought goods bearing the mark from the defendant were well aware that the goods were not of the plaintiffs' manufacture. *Id.*

It is enough if the goods were supplied by the defendant for the purpose of being sold again in the market, nor is it necessary to show that any person was deceived, if the resemblance of the articles is such as would be likely to cause one mark to be mistaken for the other. *Id.*

1. The inventor of a sauce gave it the name of the Licensed Victuallers' Bellish, and designed a trade mark for labels on the bottles containing it, and employed his son to sell it. He permitted his son to describe himself in his circulars and invoices as the sole proprietor of the sauce. The son became bankrupt, and his trustee sold his interest in the sauce and its trade mark to the plaintiff, who sought to restrain the inventor from infringing the trade mark. The plaintiff did not know the defendant's recipe, but made a sauce which the witnesses deposed to be undistinguishable from the defendant's:—Held, that a trade mark could not exist in gross, and that as the plaintiff did not know the recipe for the original article, he could not have a right to affix the trade mark to a sham article for the purpose of imposing on the public. *Cotton v. Gillard*, 44 L. J., Ch., 90.

2. Though there is no exclusive ownership of the symbols which constitute a trade mark apart from the use or application of them, yet the exclusive right to use such mark in connection with a vendible commodity is rightly called property, and the jurisdiction of a court of equity to restrain the infringement of a trade mark is founded upon the invasion of such property, and not upon the fraud committed on the public. *Leather Cloth Co. v. American Leather Cloth Co.*, 10 Jur. N. S., 81; 33 L. J., Ch., 199; 12 W. R. 289; 4 De G. J. & S. 137; 9 L. T., N. S., 558; 2 N. R. 481; 3 N. R. 264.

The Court will not interfere for the protection of a trade mark, unless the mark used by the defendant is applied by him to the same kind of goods as the goods of the plaintiff,

and is such that it may be, and is mistaken in the market for, the trade mark of the plaintiff. *Id.*

Where a company having a patent for tanned leather cloth was in the habit of stamping as part of their trade mark the words "Tanned Leather Cloth, Patented," on all their goods, whether tanned or not:—Held, that the use of those words on goods not tanned disentitled the company to relief against an infringement of the trade mark. *Id.*

Where a trade mark contained an emblem, with such a collocation of words as amounted to an advertisement of the character and quality of the goods, and contained statements which, though true as regarded the original adopter of the trade mark, were calculated to deceive the public when used by his assignee, the assignee is not to be entitled to protection in the use of such trade mark. *S. C.* 11 Jur. N. S., 513; 35 L. J., Ch., 53; 13 W. R. 373; 12 L. T., N. S., 742; 11 H. L. Ca. 523; 6 N. R. 209.

Therefore, where a firm of manufacturers, "A. B. & Co.," using truly the stamp or mark of "A. B. & Co., makers," together with other representations, have sold the right to use their name and stamp to another firm, "C. D. & Co." (the stamp or mark not being a mere designation of the quality or shape of the article, but consisting of words containing representations which are no longer true), the purchasers will not be protected in a court of equity in the exclusive use of the name and mark. *Id.*

The right to a trade mark resembles copyright as a subject of property. The right which a manufacturer has in his trade mark is the exclusive right to use it for the purpose of indicating where, by whom, or at what manufactory the article to which it is affixed was made; and, as an accessory of property, a trade mark may be sold and transferred upon a sale and transfer of the manufactory of the goods on which the trade mark has been used to be fixed, and may be lawfully used by the purchaser. *Semble. Id.*

A trader may mark his own manufacture either by his name or by using any symbol or emblem; and if such symbol or emblem comes by use to be recognized in trade as the mark of the goods of such trader, no other trader has a right to stamp it upon his goods of a similar description, and as the usage of trade does not confine the name of a firm to the original partners only, but extends it to subsequent partners and transferees, the use of the trade mark by the new partners or successors of the original adopters is no fraud on the public, but only a statement that the goods are the goods of the firm whose trade mark they bear. If, however, the trade mark contains statements materially affecting the value of the goods, such statements must be judged as if made in separate labels or advertisements; the test being whether they are material misstatements, and calculated to deceive the public. *Semble. Id.*

Although a trader may have a property in a trade mark, giving him a right to exclude all others from using it, if his goods derive their increased value from the personal skill or ability of the adopter of the trade mark, he cannot give any other person the right to affix

his name or mark upon their goods, for the effect thereof would be to give them the right to practise a fraud upon the public. *Ib.*

Semble, a paper descriptive of a trade does not constitute a trade mark. *Ib.*

Where an advertisement or a trade mark states that which is not true, it cannot be made the subject of protection by the Court of Chancery. *Ib.*

Partnership.] 1. When in the judgment of the Court certain initial letters, surmounted by a crown, had, although originally representing the names of certain partners, become and were a trade mark; that is, a brand which had reputation and currency in the market as a well-known sign of quality:—Held, that as such the trade mark was a valuable property of a partnership constituted by successors to the original partners, but not having the same initials, as an addition to their works, and might be properly sold with the works, and therefore properly included as a distinct subject of value in the valuation to the surviving partner. *Hall v. Barrons*, 4 De G. J. & S. 150; 10 Jur., N. S., 55; 33 L. J., Ch., 204; 12 W. R. 322; 9 L. T., N. S., 561; 1 N. R. 543; 3 N. R. 259.

2. Upon the formation of a partnership with a person entitled to the benefit of a trade mark, the mark, in the absence of express provisions in relation to it, becomes an asset of the partnership. *Bury v. Bedford*, 4 De G. J. & S. 352; 10 Jur., N. S., 503; 33 L. J., Ch., 465; 12 W. R. 727; 10 L. T., N. S., 470; 4 N. R. 180. Affirming 9 Jur., N. S., 956; 32 L. J., Ch., 741; 11 W. R. 973; 8 L. T., N. S., 847; 1 N. R. 5.

3. B., an outgoing partner, claimed that by the terms of the deed of dissolution between himself and L., he was entitled to manufacture a particular article from an original recipe, the property of the late partnership, and to sell it as "L.'s soap" prepared by B.:—Held, that he was entitled to use the old trade name of the article as his trade mark, and to have it registered, although identical with that of the successors of the old firm. *Benbow v. Low*, *Low v. Benbow*, 44 L. T. 875; 29 W. R. 837.

4. H. Bollmann Condry and Mitchell carried on business together under the style of "Bollmann Condry & Co.," manufacturing and selling a disinfectant known as Condry's Fluid. After the dissolution of the partnership H. Bollmann Condry set up a business for the same purpose, under the name "H. Bollmann Condry," and Mitchell afterwards set up a similar business under the name of "The Condry's Fluid Company." H. Bollmann Condry sought to restrain Mitchell from using the name of Condry in connection with the article he sold as Condry's Fluid:—Held, that both the partners had an equal right to the use of the trade name of "Condry's Fluid"; and that Condry's contention failed because he had not shown fraud on the part of Mitchell such as to mislead the public into the belief that the article he sold was in reality manufactured by Condry. *Condry v. Mitchell*, 26 W. R. 269; 37 L. T., N. S., 766. Affirming 37 L. T., N. S., 268.

Alien.] 5. The plaintiffs, who were a company formed in the United States for manufacturing edge tools, which they exported to

different countries, sought to restrain the defendant, a manufacturer in England, from the use of their trade mark:—Held, upon demurrer, that every alien friend was entitled to apply to the Courts of this country for the restraint of a deceitful and fraudulent use of his trade mark practised in England. *Collins's Co. v. Cohen*, *Collins's Co. v. Brown*, 5 W. R. 676; 3 Kay & J. 423; 3 Jur., N. S., 929.

6. An alien may sue in this country to restrain this fraudulent appropriation of his trade mark, although the goods to which such trade mark applies are not usually sold by him in this country. *Collins's Co. v. Reeves*, 6 W. R. 717; 4 Jur., N. S., 865; 28 L. J., Ch., 56.

II. What Marks Protected.

7. M. & Co. were manufacturers of liquorice, and having made in this country a new description of goods from a mixture of juice extracted from roots obtained from Anatolia and Spain, they stamped upon the manufactured article the mark "Anatolia," and sold it to the public, and acquired a reputation for it in the market. This was the first use of the word in this way, though juice had previously been imported from Anatolia. The mark was immediately afterwards imitated by B., at the request of a customer, and attached to their liquorice made from Spanish roots:—Held (affirming 10 Jur., N. S., 492; 10 L. T., N. S., 65), that the word "Anatolia" so used was a trade mark, and that there had been a sufficient user and adoption of it by M. & Co. to give them a property in it as such. *McAndrew v. Bassett*, 10 Jur., N. S., 550; 33 L. J., Ch., 561; 12 W. R. 777; 10 L. T., N. S., 442; 4 De G. J. & S. 380; 4 N. R. 12, 123.

8. The name of the place of origin of an article may become a trade mark. *Radde v. Norman*, 14 L. R., Eq., 348; 41 L. J., Ch., 525; 26 L. T. 788; 20 W. R. 766.

An injunction will be granted on an interlocutory motion to restrain the use or imitation of the name of a place, used as a trade mark, if the plaintiff proves *prima facie* that such name in the market has come to mean his article obtained from such place. *Ib.*

9. The Court will not grant an injunction to restrain the issue of goods bearing labels containing a false representation, when such falsehood is not an infringement of any right vested in the plaintiff. *Batty v. Hill*, 1 Hem. & M. 264; 11 W. R. 745; 8 L. T., N. S., 791; 2 N. R. 265.

The persons to whom prize medals have been awarded by the Commissioners of the International Exhibition have not *ipso facto* any special property in the nature of a trade mark in the words "prize medal." *Ib.*

Therefore, where a person who had not obtained such a medal issued his goods with labels affixed to them bearing the words "prize medal, 1862," the Court refused to interfere at the instance of a person who had obtained such a medal. *Ib.*

10. An adjective, merely describing the quality of a manufactured article, will not be protected by the Court as a trade mark. *Raggett v. Findlater*, 29 L. T., N. S., 448; 22 W. R. 53; 17 L. R., Eq., 29; 43 L. J., Ch., 64.

Therefore, when the plaintiff, who dealt in malt liquors in London, sold stout, which was subjected by him to a particular treatment, under the name of "Nourishing London Stout":—Held, that he was not entitled to an injunction restraining the defendant from selling stout under the name of "Nourishing Stout." *Ib.*

1. The word "Patent" having come to be applied in common language to various manufactured articles as descriptive of a particular quality, without any reference to letters patent, the use of the words "patent thread" as part of the trade mark on an unpatented article, will not prevent a court of equity from protecting such trade mark. *Marshall v. Ross*, 39 L. J., Ch., 225; 8 L. R., Eq., 651; 17 W. R. 1086; 21 L. T., N. S., 260.

2. In 1847 Baron von Liebig discovered and published a process for making an extract of meat. The extract was made extensively at the Royal Pharmacy, Munich, and sold there, with the permission of the baron, as Liebig's extract of meat from 1861 to 1864. It became generally known in Germany and other countries, and the term Liebig's extract of meat became used as a term of art in scientific treatises. In 1864 Baron Liebig gave the Fray Bentos Company the right of using his name in connection with the extract of meat manufactured by them. In 1864 a company bought the business and property of the Fray Bentos Company, and by a deed-poll, dated the 12th April 1866, the baron granted to the plaintiff company the exclusive right and privilege to use his name in connection with the extract manufactured by them. The defendants, who had previously sold extract manufactured by the Fray Bentos Company, in 1866 began to sell as "Liebig's extract of meat" an extract manufactured by Mr. Tooth, in Australia, after Liebig's process. On a suit being instituted by the plaintiff company to restrain the defendants from so using the name Liebig's extract of meat:—Held, that the term having been used as a term of art to designate a well-known process long before 1861, the defendants were fully justified in using it, and the bill was dismissed with costs. *Liebig's Extract of Meat Co. v. Hambury*, 17 L. T., N. S., 298.

3. The plaintiffs purchased from a firm established in the United States knowledge of a secret mode of making crucibles, which had acquired a reputation in America as "Patent Plumbago Crucibles," although the process never had been patented:—Held, that they could not maintain a bill to restrain others from pirating this designation. *Morgan v. M'Adam*, 36 L. J., Ch., 228.

4. "Reading sauce" was first invented and introduced to the public by one James Cocks, but subsequently many manufacturers by unrestrained usage acquired the right to call their articles the "Reading sauce":—Held, that the description "the original Reading sauce" applied only to that made by James Cocks, and those claiming under him, and that they had a right to restrain other parties from using that designation without showing that any purchaser was actually deceived. *Cocks v. Chandler*, 40 L. J., Ch., 576; 11 L. R., Eq., 446; 19 W. R. 593; 24 L. T., N. S., 379.

5. The user by a dealer or a manufacturer

in connection with an article of manufacture of a single word, being a material part of a particular title to which as a trade mark another manufacturer has a right in connection with the same article, may be an infringement of the trade mark. *Ford v. Foster*, 41 L. J., Ch., 682; 7 L. R., Ch., 611; 27 L. T., N. S., 219; 20 W. R. 818.

The test whether a "fancy name" adopted by a manufacturer as a trade mark for certain goods has become *publici juris* is the question whether the use of it by other persons in connection with the same goods is calculated to deceive the public, so as to induce them to believe that in purchasing the goods so named they are purchasing goods of the original manufacturer. Consequently, a trade mark may have become *publici juris* among a certain class, as between the wholesale and retail dealers who will not be deceived by it, and yet may not have become *publici juris* as between the retail dealers and their ordinary customers. The misrepresentation, such, for example, as falsely calling himself a patentee, which will disentitle a person to relief in equity in respect of an infringement of his trade mark, must be such a misrepresentation as would prevent him from recovering nominal damages in an action brought to establish his right to the trade mark. *Ib.*

Since a misrepresentation, not forming a part of the trade mark itself, although used in connection with the trade mark, and with the article to which the trade mark applies, would be no answer to an action of a party to establish his title at law, neither will such a misrepresentation disentitle him to relief in equity. *Ib.*

Ford, a shirt manufacturer, gave the name Eureka to a particular shape of shirt invented by him, and stamped all such shirts with the words "Ford's Eureka Shirts," and with a statement that such words were his trade mark. He advertised the shirts, falsely calling himself the patentee of them, and he falsely described himself on his bill heads, etc., as patentee of the shirts. Shirts of the particular shape came to be commonly known in the trade as Eureka. Certain wholesale shirt manufacturers made shirts of the same shape, and stamped them in the same part of the shirts as "Eureka Shirts":—Held, that Ford was entitled to an injunction to restrain the wholesale manufacturers from using the word "Eureka" as applied to shirts not of Ford's manufacture, except that they were to be at liberty to advertise their shirts as "Eureka" in their trade lists. But having regard to his misrepresentations the account against them was confined to the time from the filing the bill. *Ib.*

6. In order to constitute a ground for interference by a court of equity to protect a manufacturer against the use, by another person, of the particular name of his manufactured article, it is not necessary that there should be a *mala mens* towards the first purchaser of the article thus imitatively designated. The fault of the imitator is, that the first purchaser may be enabled, through this unwarranted designation, to retail a simulated article at a lower price than would be demanded for the original article, and so the original manufacturer may be injured. *Wotherspoon v. Currie*, 5 L. R.,

H. L., 508; 27 L. T., N. S., 393; 42 L. J., Ch., 130. Reversing 18 W. R. 942; 22 L. T., N. S., 443.

A name may become a trade denomination, and as such the property of a particular person who first gives it to a particular article of manufacture. The employment of the name by another person for the purpose of describing an imitation of that article is an invasion of the right of the original manufacturer, who is entitled to protection by injunction. *Id.*

W. had been for many years a manufacturer of starch at a small hamlet in Scotland, called Glenfield, where there was a stream of water particularly suited for use in the manufacture. Under the name of "Glenfield starch" his goods had acquired a great reputation. He continued to use this name, though he removed his manufactory from Glenfield, and on the labels which were placed on the packets of his starch it was called the Glenfield starch. In 1868, C. set up starch works at Glenfield, and sold starch in packets labelled "Currie & Co., starch manufacturers, Glenfield." In colour these labels resembled those of W., but this colour was used by most starch manufacturers. C.'s agent represented his starch as "Glenfield starch," and he thereby obtained an increased sale for the article:—Held, that W. was entitled to an injunction to restrain C. from using the word "Glenfield" on his labels, and from representing his starch as Glenfield starch. *Id.*

1. Long user of a trade mark gives such a property in it to the owner that another person cannot adopt the same device, even though it is his "family crest." *Standish v. Whitwell*, 14 W. R. 512.

2. A trader may establish a trade mark by the use of a "crest," and anything which amounts to an imitation of the crest as a trade mark would be restrained by the Court. But the use of a different crest by another trader, if not accompanied by other indicia to make it a colourable imitation of the trade mark of the plaintiff, will not be restrained. *Beard v. Turner*, 13 L. T., N. S., 746.

3. A firm having adopted the letters "L. L." to designate a peculiar quality of whiskey sold by them, acquire an exclusive right to the use of those letters as a trade mark, though they were always preceded by the name of the firm upon the labels issued by them. *Kinahan v. Bolton*, 15 Ir. Ch. R. 75.

4. The name of a manufacturer, or "a system of numbers" adopted and used by him in order to designate goods of his make, may be the subject of the same protection in equity as an ordinary trade mark. *Ainsworth v. Wamsley*, 1 L. R., Eq., 518; 12 Jur., N. S., 205; 35 L. J., Ch., 352; 14 W. R. 363; 14 L. T., N. S., 220.

5. The plaintiffs and the defendants were bottlers of beer for export. The plaintiffs' label consisted of a bulldog's head on a black ground surrounded by a circular band, on which were the words "Read Brothers, London. The Bull Dog Bottling." The defendants' label represented a rough terrier's head on a black ground, surrounded by a red circular band, on which were the words, "Celebrated Terrier Bottling, E. Richardson." The plaintiffs' beer was well known in the colonies as the "Dog's Head" beer, and they alleged that the defendants, by exporting to certain colonies

beer with the terrier's head label, led to their beer being substituted and taken for the plaintiffs' beer:—Held, that the plaintiffs were entitled to an interim injunction restraining the continuance of the terrier's head in the label on the bottles of beer exported to such colonies by the defendants. *Read v. Richardson*, 45 L. T. 54.

6. A company under a grant from the owners acquired the exclusive right of importing and selling in Great Britain the mineral water produced by a natural spring called "Apollinaris," at Ahrweiler, in Prussia, which had for some years been known and sold in the English market under the name of "Apollinaris Water," and advertised and sold the same as "Apollinaris Water." Subsequently the defendant made and sold an artificial mineral water, being the chemical equivalent of the natural water, under the name and description of "London Apollinaris Water," possessing all the properties of the natural water:—Held, that the company was entitled to an interim injunction to restrain the use of the words "London Apollinaris Water," or of any other name of which the word "Apollinaris" so formed part as to be calculated to mislead the public. *Apollinaris Co. v. Norrish*, 33 L. T., N. S., 242.

7. Where A. introduces into the market an article which, though previously known to exist, is new as an article of commerce, and has acquired a reputation therefrom in the market by a name not merely descriptive of the article, B. will not be permitted to sell a similar article under the same name; and this, although the peculiarity of the name has long been in common use as applied to goods of a different kind. And it will make no difference that the plaintiff has also a trade mark which has not been taken by the defendant. *Braham v. Bustard*, 1 Hem. & M. 447; 11 W. R. 1061; 9 L. T., N. S., 199; 2 N. R. 572.

The word "Excoelsior" is one in which an exclusive right of user as a trade mark may be obtained. *Id.*

8. There may be a trade mark in a "title of a book," and an action for fraud will lie against a person using the title of a book already published for the purpose of passing off such book as that of a former author. *Dicks v. Yates*, 18 L. R., Ch. D., 76; 50 L. J., Ch., 809; 44 L. T. 660.

9. A manufacturer who has produced an article of merchandise, e.g., a new pattern of cloth, and applied to it a particular "fancy name," and sold it with a particular mark, under which name and mark it has obtained currency in the market, acquires an exclusive right to the use of such name and mark, and is entitled to restrain all other persons from using such name and mark to denote articles similar in kind and appearance, although he may have no exclusive right of manufacturing the article. *Hirst v. Denham*, 14 L. R., Eq., 542; 41 L. J., Ch., 752; 27 L. T., N. S., 56.

If the use of such name and mark, by any other person than the first inventor, has been adopted for the purpose of selling goods of an inferior quality, though of similar external appearance, so that purchasers may be misled into the belief that they are buying the goods of the first inventor, the injury to the first

inventor is one for which he is entitled to compensation in damages, and relief by injunction. *Ib.*

See also V. I. post.

III. Assignment of.

1. A corporate trade mark, granted by the Cutlers' Company at Sheffield to a person not free of the company, is, so far as the special acts governing the company are concerned, assignable. *Bury v. Bedford*, 4 De G. J. & S. 352; 33 L. J., Ch., 465; 10 L. T., N. S., 470; 12 W. R. 726; 10 Jur., N. S., 503; 4 N. R. 180. Affirming 9 Jur., N. S., 956; 32 L. J., Ch., 741; 11 W. R. 973; 8 L. T., N. S., 847; 1 N. R. 5.

The question, how far by the general law a trade mark is assignable, depends greatly upon the nature of the mark and the mode in which it has been used. *Ib.*

Whether a trade mark granted by the Cutlers' Company be legally assignable or not, a person who has purported to assign it for valuable consideration cannot dispute the validity of the assignment. *Ib.*

If a personal trade mark is in any respect less assignable than one referring to locality only or a mere device, the distinction must be limited to mere cases where the mark is so clearly personal as to import that the goods bearing it are manufactured by a particular person; and, *semble*, even in that case, the objection is rather to the right of using the mark than to its assignable quality. *Ib.*

B., being a non-freeman of the Cutlers' Company, acquired by grant from that company a corporate trade mark, consisting of the figure of a lion, and the letters J. B. O. S.; he also acquired by purchase from William Ash, the right to the exclusive use of a trade mark, "Wm. Ash & Co." He subsequently entered into partnership, and by the articles executed, the corporate trade mark, used with such other mark as might be agreed upon, should be a partnership asset. It was also agreed, that at the expiration of the partnership, the several partners should have the free use and enjoyment of the corporate trade mark for the remainder of their lives, either alone, or in partnership with any other persons. The firm, after carrying on business, in the course of which both the corporate trade mark and the mark "Wm. Ash & Co." were used, fell into difficulties, and the partners assigned all their estate and effects, both joint and separate, to trustees, for creditors. By the deed, the trustees were empowered to sell the trade, plant, etc., as a going concern. They accordingly afterwards sold the concern to H. B., and assigned to him the partnership property, and the corporate trade mark and the other marks of the firm, so far as they lawfully could. Shortly afterwards, B. entered into an arrangement with B. & Co., by which he authorized them to use the corporate mark, and he also used the corporate mark, and the mark "Wm. Ash & Co." himself. Thereupon, H. B. filed a bill to restrain him from so doing;—Held, that he was entitled to the exclusive use of both trade marks, and an injunction was granted accordingly. *Ib.*

2. A company purchased all the property, utensils, goodwill of business, and trade

marks of a manufacturer; this purchase would authorize the company, really carrying on business at the same place, to continue the use of the manufacturer's name and marks, so as to be protected therein against the infringement of the same. *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Ca. 523; 35 L. J., Ch., 53; 13 W. R. 873; 12 L. T., N. S., 742; 6 N. R. 209; 11 Jur., N. S., 513. And see S. C. 10 Jur., N. S., 81; 33 L. J., Ch., 199; 12 W. R. 289; 4 De G. J. & S. 137; 9 L. T., N. S., 558; 2 N. R. 481; 3 N. R. 264.

There may be a property in a trade mark which, on the sale of the right to manufacture the goods which it designates, may also be sold and transferred. *Ib.*

Persons of the name of Crockett manufactured leather cloth, and put on it a stamp, describing it as manufactured by them at New Jersey, U. S., and West Ham, Essex, and as being patented, and being tanned. A company bought their manufactured articles, their materials for manufacture, goodwill, and premises, at West Ham, and their trade marks. *Semble*, that on such a purchase, the continued use by the purchaser of Crockett's original label was not a fraud on their part; and if the use of it had been infringed, it might have been protected. *Ib.*

3. In substance there is no distinction between the sale of a business and goodwill by a trader himself, and a sale by his assignees in bankruptcy. *Hudson v. Osborne*, 39 L. J., Ch., 79.

Therefore, on sale of a business by a trader's assignees in bankruptcy, the trader has no right, upon setting up a fresh business after his discharge, to use the trade marks of his old business, or in any other way to represent himself as carrying on the identical business which was sold, although he has a right to set up again in business of the same kind next door to his old place of business. *Ib.*

In such a case it is no objection to the purchaser coming for the assistance of the Court, that he has continued to use the name of the old business which he found there. *Ib.*

4. Although the fact that a man has sold the goodwill of a business does not prevent him from setting up again immediately in the same trade, the Court will nevertheless restrain him from sending special solicitations to the customers of the old house asking them to deal with him at his new place of business, and it will not justify his conduct that he is not in any way holding himself out as continuing to carry on the old business. *Labouchere v. Dawson*, 13 L. R., Eq. 322; 41 L. J., Ch., 427; 25 L. T. 894; 20 W. R. 309.

IV. Infringement.

- I. *General Principles*, 6777.
- II. *In Particular Cases*, 6779.
- III. *By Wharfingers or Carriers*, 6783.
- IV. *Evidence of Deception*, 6784.
- V. *Compromise of Prosecution for*, 6784.
- VI. *Proceedings in respect of*, 6785.

I. GENERAL PRINCIPLES.

5. The essential ingredients for constituting an infringement of a right to a trade mark are—(1) that the mark has been applied by the

plaintiffs properly, *i.e.*, that they have not copied any other person's mark, and that the mark does not involve any false representation; (2) that the article so marked is actually a vendible article in the market; (3) that the defendants, knowing that to be so, have imitated the mark for the purpose of passing in the market other articles of a similar description. *M'Andrew v. Bassett*, 4 De G. J. & S. 880; 4 N. R. 12, 123; 10 Jur., N. S., 550; 33 L. J., Ch., 561; 12 W. R. 777; 10 L. T., N. S., 442.

1. Injunction against imitating a blacking label granted, though the difference appeared on a careful reading. *Day v. Binning*, C. P. C. 489.

2. In cases of alleged colourable imitations of trade marks, the Court has not to consider whether manufacturers could distinguish between the articles, but whether the public would probably be deceived by the alleged spurious imitation. *Shrimpton v. Lait*, 18 Beav. 164.

3. In an alleged infringement of a right to trade marks, the Court must ascertain whether the resemblances and the differences are such as naturally arise from the necessity of the case, or whether, on the other hand, the differences are simply colourable, and the resemblances such as are obviously intended to deceive the purchaser. *Taylor v. Taylor*, 23 L. J., Ch., 225; 2 Eq. Rep. 290.

The Court will restrain by injunction a trader from using such trade marks as, from their resemblance to the trade marks of another firm, are obviously intended to deceive the purchaser into the belief that he is buying the manufactures of this other firm, the differences being merely colourable, and not made *bonâ fide* for the purpose of distinguishing the articles. *Ib.*

4. In deciding the question of piracy of a trade mark, the colour of the marks cannot be taken into account, and the only test is a comparison of the uncoloured diagrams. *Nuthall v. Vining*, 28 W. R. 330.

5. The Court does not interfere to prevent the infringement of a trade mark, unless, in the first place, it has evidence that the public has been actually deceived, or is from inspection satisfied, that there is either an intention to deceive, or a probability of deception. *Cope v. Evans*, 22 W. R. 453; 18 L. R., Eq., 188; 30 L. T., N. S., 292.

Evidence of skilled witnesses, that in their opinion the public is likely to be deceived by the similarity of two trade marks, is not of itself sufficient evidence of infringement. *Ib.*

6. To entitle a trader to relief against an illegal use of his trade mark, it is not necessary that the imitation should be so close as to deceive persons seeing the two marks side by side; but the degree of resemblance must be such, that ordinary purchasers proceeding with ordinary caution are likely to be misled. *Seiwo v. Provezondo*, 1 L. R., Ch., 192; 12 Jur., N. S., 215; 14 W. R. 357; 14 L. T., N. S., 314.

The actual physical resemblance of the two marks is not the sole question for the Court, for if the plaintiffs' goods have, from his trade mark, become known in the market by a particular name, the adoption by the defendant of a mark or name which will cause his goods to bear the same name in the market, is as

much a violation of the plaintiffs' rights as the actual copy of his mark. *Ib.*

Although the defendant may have some title to the use of a name or mark, he will not be justified in adopting it, if the probable effect of his so doing is to lead the public to suppose, that in purchasing his goods they are purchasing those of the plaintiff. *Ib.*

7. Where, in a stamp used by the defendant as a trade mark, the form of the printed words, the words themselves, and the pictured symbol introduced among them, so much differed from that of the plaintiffs, that any person with reasonable care and observation must see the difference, and could not be misled into taking the one for the other:—Held, that there had been no infringement. *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Ca. 253; 13 W. R. 873; 35 L. J., Ch., 53; 12 L. T., N. S., 742; 6 N. R. 209; 11 Jur., N. S., 513. And see S. C., 10 Jur., N. S., 81; 33 L. J., Ch., 199; 12 W. R. 289; 4 De G. J. & S. 137; 9 L. T., N. S., 558; 2 N. R. 481; 3 N. R. 264.

8. The Court will not restrain the use of a label on the ground of its general resemblance to the trade mark of another manufacturer, if it is different in the points which a customer would look at in order to see whose manufacture he was purchasing. *Blacknell v. Crabb*, 36 L. J., Ch., 504.

9. When a trade mark is not actually copied, the existence of a fraudulent intention is a necessary element in the consideration of a case of this description. The party complained of must be proved to have done the act with the fraudulent design of passing off his own goods as those of the complainant. It is not necessary, however, to show an exact resemblance between the original and the counterfeit—it is sufficient if there is such a resemblance as will mislead an unwary purchaser. *Wotherpoon v. Currie*, 5 L. R., H. L., 508; 27 L. T., N. S., 393; 42 L. J., Ch., 130. Reversing 18 W. R. 942; 22 L. T., N. S., 443.

10. Fraud is not necessary to be averred or proved in order to obtain protection for a trade mark. *Singer Manufacturing Co. v. Wilson*, 47 L. J., Ch., 481; 3 L. R., App. Cas., 376; 26 W. R. 664; 38 L. T., N. S., 303.

11. Where there is a strong resemblance in matter, colour, and arrangement between the trade mark and its imitation, the Court will presume that this is not fortuitous but intentional, with a view to mislead purchasers. *Edelston v. Vick*, 18 Jur. 7; 11 Hare 78.

12. No trader has a right to use a trade mark so nearly resembling that of another trader as to be calculated to mislead incautious purchasers. The use of such a trade mark may be restrained by injunction, although no purchaser has actually been misled; for the very life of a trademark depends upon the promptitude with which it is vindicated. *Johnston v. Orr Ewing*, 7 L. R., App. Cas., 219; 51 L. J., Ch., 797; 46 L. T. 216; 20 W. R. 417. Varying S. C. *sub. nom. Orr Ewing v. Johnston*, 13 L. R., Ch. D., 434; 31 L. T. 67; 28 W. R. 220.

Quere, whether a ticket, which was a right-ful and *bonâ fide* trade mark of a trader using it, could be excluded by injunction from particular markets (though unimpeachable everywhere else) merely because in those markets it might be liable to be called by a

name which the mark of another trader had already acquired there. *Ib.*

If the goods of a trader have acquired in the market a name derived from a part of the trade mark which he affixes to them, a rival trader is not entitled to use a ticket which is likely to lead to the application of the same name to his goods, even though that name is not the only name by which the goods of the first trader have been known, or though it has been always used in conjunction with some other words. *Ib.*

Where a trader has a right to a trade mark on goods sold in a foreign market, an injunction will be granted to restrain the export of goods under another trade mark which may deceive the ultimate purchasers, although it would not deceive Englishmen or the dealers in the foreign market. *Ib.*

Injunction against the use of trade mark by defendant was made general, although the plaintiff had never used his trade mark except in the Indian market. *Ib.*

1. The test of the infringement of a trade name or trade mark is whether the acts alleged as an infringement are likely to mislead the public into dealing with the alleged infringer under the belief that they are dealing with the person who first used the name or mark. *Lee v. Haley*, 18 W. R. 181; 21 L. T., N. S., 546. Affirmed 39 L. J., Ch., 284; 5 L. R., Ch., 165; 18 W. R. 242; 22 L. T., N. S., 251.

The doctrine of the Court on this point will not be restricted by any technical rules as to the name or mark in which the tradesman has property. *Ib.*

When a name denotes a special article to persons in a particular trade, but is used vaguely by persons not in the trade, it is not a misdescription to sell by that name, to persons not in the trade, articles popularly included under the name, but not strictly within the meaning of the word as used in the trade. *Ib.*

L. & Co., coal merchants, established a branch business, and carried it on in Pall Mall as the "Guinea Coal Company." H. was their manager, known personally and by his peculiar handwriting to their customers. He left their service, and set up as "The Pall Mall Guinea Coal Company" in the Strand, and on being remonstrated with added "N.B. No connection with L. & Co." Subsequently H. removed to Pall Mall, with "Pall Mall Guinea Coal Company" on his blind, and numerous instances were in evidence of persons giving orders at his office for that of L. & Co. H. claimed the right to use the name "Pall Mall Guinea Coal Company." On motion to restrain the use of the name "Pall Mall Guinea Coal Company," the injunction was granted. *Ib.*

2. The office of a trade mark is to denote that the article bearing it was manufactured by the owner of a trade mark; and a man has no right to affix a trade mark to an article not manufactured by himself, except for the purpose of showing that the article was selected or examined, or certified by himself. *Hirsch v. Jonas*, 45 L. J., Ch., 364; 3 L. R., Ch. D., 584; 35 L. T., N. S., 228.

H., a London cigar dealer, registered a label at Stationers' Hall, and communicated the same to a manufacturer of cigars at Havannah, who supplied H. with a particular description of cigars under that label, with the addition

of the manufacturer's name and address. Afterwards the manufacturer commenced to sell the same description of cigars under the same label through a London agent. Upon motion by H., who alleged that he had an exclusive right, in the nature of trade mark, to the label:—Held, that the trade mark was the manufacturer's; and in the absence of evidence of a contract binding him to supply cigars of the particular brand to no one but H., the Court refused to grant an interim injunction to restrain the London agent from selling the cigars under the same label. *Ib.*

II. IN PARTICULAR CASES.

Colourable Imitation.] 3. The plaintiff invented and sold a medicine under his own name. The defendant also made and sold a similar medicine, and on his labels he used the plaintiff's name and certain certificates given of the efficacy of the plaintiff's medicine in such an ingenious manner as *prima facie*, though not in fact, to appropriate and apply them to his own medicine:—Held, that although there were other differences in the mode of selling, the proceeding was wrongful, and the defendant was restrained by injunction. *Franks v. Weaver*, 10 Beav. 297.

4. Injunction granted to restrain the defendant from running an omnibus having upon it such names, words, and devices as to form a colourable imitation of the words, names, and devices on the omnibuses of the plaintiffs. *Knott v. Morgan*, 2 Keen 213.

5. Injunction to restrain a party from making and sending to Turkey watches having the plaintiff's name or the word "warranted," engraved thereon in Turkish characters, in imitation of plaintiff's watches. *Gout v. Aleploglu*, 6 Beav. 69. n.

A man cannot acquire a property merely in a name or mark. *Ib.*

6. A. and B. filed their bill, alleging a right to a trade mark in the word "Ethiopian" upon black cotton stockings, acquired by A. and a former partner, deceased, praying an injunction and account of profits. Defendants denied plaintiffs' right to the mark as a trade mark, stating that other parties used the word prior to A. and his partner, but admitted that they (defendants) had copied the mark from plaintiffs' stockings, and denied any fraudulent intent in so doing. The evidence as to plaintiffs' right to the mark as a trade mark was very unsatisfactory;—Held, refusing a motion to dissolve an injunction, that defendants having made so complete a copy of plaintiffs' mark, the difference being only nominal, must be taken to have done so with an intent to gain an advantage to which they were not entitled:—Held, also, that, although the personal representative of A.'s deceased partner might have a right to participate in the property (if any) of the mark, A. had such an interest as to entitle him to file this bill. *Hine v. Lart*, 10 Jur. 106.

7. A trader produced and sold an ink which he designated "Stephens' Blue Black," and it was shown to the public in a label in white capital letters of large type. The defendant sold an ink in bottles similar in size, designated as Steelpens Blue Black," also in white capital letters of large type:—Held, that this

was a colourable imitation of the trade mark, and the defendant was restrained by injunction from the further use of it. *Stephens v. Peel*, 16 L. T., N. S., 146.

1. Schweitzer sold a preparation of cocoa labelled "Schweitzer's cocoatina." Atkins, who had been in his employ, set up business in partnership with a man also named Schweitzer, and sold a similar preparation of cocoa, labelled "Schweitzer, Atkins & Co.'s cocoatina":—Held, that this was a fraudulent and colourable imitation, and an injunction was granted accordingly. *Schweitzer v. Atkins*, 37 L. J., Ch., 847; 16 W. R. 1080; 19 L. T., N. S., 6.

2. B. & Co. for many years affixed a label or a trade mark to the bottles in which their ale was sold. D. & Co. adopted a label bearing a general resemblance to that of B. & Co., but differing from it in several particulars. Bill by B. & Co. to restrain D. & Co. from using such label dismissed with costs. *Bass v. Damber*, 19 L. T., N. S., 626.

3. The trade mark of the plaintiff consisted of the representation of an anchor. The defendant used the device of an anchor surmounted by a crown:—Held, to be a colourable imitation. *Edelsten v. Edelsten*, 1 De G. J. & S. 185; 9 Jur., N. S., 749; 11 W. R. 328; 7 L. T., N. S., 768.

4. When a name, whether of a place or of a person, has, by user by a particular maker of a particular article of manufacture, acquired a secondary signification in connection with that manufacture, and has obtained currency and value in the market as the trade denomination of that particular maker's goods, it becomes in connection with that manufacture the property of that maker as his trade mark or as part of his trade mark. *Wotherspoon v. Currie*, 42 L. J., Ch., 180; 5 L. R., H. L., 508; 27 L. T., N. S., 393. Reversing 18 W. R. 942; 22 L. T., N. S., 443.

The user of that name by another maker in connection with that manufacture will be prohibited, even though he may not copy the whole of the first maker's trade mark, whatever means such other maker may devise for the purpose of availing himself of the name; provided the Court is satisfied that those means are adopted in order to obtain a colourable right to use the name, and that the object and the probable result of such user would be to deceive unwary purchasers of such other maker's goods into the belief that they were buying the goods of the party to whom the right to use the name belongs. *Id.*

W., having acquired in connection with starch a property in the name of a small place, Glenfield, where he at one time made his starch, removed his works elsewhere, but continued to call his starch Glenfield Starch. C. went to Glenfield and also made starch there which he called Royal Palace Starch, but he printed on his labels conspicuously the word Glenfield as the name of the place where his starch was made. This starch was pushed in the trade as Glenfield Starch. As regards the first purchasers, the retail dealers, there was no deception; they well knew that in buying C.'s starch they were not buying that made by W.; and W.'s was the original Glenfield Starch:—Held, that this was a fraudulent use of the word "Glenfield," and an infringement of W.'s trade mark. *Id.*

5. The plaintiffs registered a trade mark for

worsted goods described as "a white selvage on each side of the piece having a red and white mottled thread interwoven the full length of the selvage between the edge of the piece and the edge of the selvage," and deposited a specimen at the Patent Office Museum. The specimen so deposited was undyed, and the selvage was white, the warp being white cotton and the woof white mohair, and nearly in the middle of the selvage was a compound warp thread composed of a thread of white cotton and a thread of Turkey red cotton twisted together. When the goods were dyed black the cotton threads took the dye imperfectly, so that the warp threads in the selvage became grey, while the woof became black, so as to make the selvage dark grey, with a dark red mottled line running along it. The defendants sold black mohair goods with a dark grey selvage of nearly the same shade as that of the plaintiffs, with a twisted thread running along its inner edge, which thread was originally white, red, and yellow, but in the course of dyeing the white became dark grey, and the yellow a dark olive, which could hardly be distinguished. The plaintiffs sought to restrain the sale of these goods as an infringement, and moved for an injunction. There was evidence that the selvage, though not actually white, was what was known in the trade as a white selvage:—Held, by Jessel, M. R., that as the plaintiffs' selvage was not white, and the mottled thread of the defendants was different, and in a different position from that of the plaintiffs, there was no infringement, and that an injunction must be refused. But held by the Court of Appeal, that the principles according to which the Court acts in preventing a man from passing off his goods as those of another are not altered by the Trade Marks Registration Act, and that the question could not be disposed of by simple inspection of the patterns without considering whether the selvage was not, according to the understanding of the trade, a white selvage, and if it was, then whether the differences in quality and position of the defendants' mottled thread were sufficient to distinguish the defendants' goods from those of the plaintiffs, so as to prevent purchasers from being misled, and that as there was a conflict of evidence on these points the motion must stand over till the trial, the defendants undertaking to keep an account. *Mitchell v. Henry*, 15 L. R., Ch. D., 181; 43 L. T. 186.

User of Plaintiff's Boxes or Labels. 6. The boxes of tin plates made at particular works at Carmarthen were, for a long series of years, branded with the mark "M. C. S." A lessee of those works, who had used that mark, subsequently removed his manufactory to other works, at a distance of forty miles, and there used the same mark. The Carmarthen works were, for some years, unoccupied; but afterwards D., and others as co-partners, having taken a lease of them, carried them on, and branded their boxes with the mark "M. C.," and styled themselves the "The M. C. Tin Plate Company." S. then obtained an injunction to restrain D. and his partners from using the mark "M. C." or the designation of "The M. C. Tin Plate Company"; but upon appeal the injunction was dissolved, with liberty to S.

to bring an action. *Motley v. Downman*, 3 Myl. & C. 1; 6 L. J., N. S., Ch., 308.

Principles and rules upon which the Court interferes, by injunction, in such cases. *Id.*

1. A., the inventor of a medicine, employed B., a foreigner residing abroad, to manufacture it for him there, and sold it in England for his own sole profit; a label and seal, denoting that the medicine was manufactured by B., and sold by A., were affixed to each of the bottles in which it was sold. The defendants imitated the labels and seals; demurrer allowed to a bill by A. and B. to restrain the imitation, and for an account of the sales of the spurious labels and seals, A. having no interest. *Delondre v. Shaw*, 2 Sim. 237.

2. A defendant sold tobacco-pipes packed in boxes or cases, upon which were labels or descriptions of a similar character to those of the plaintiff, using the plaintiff's name as being the real manufacturer, the defendant having a person in his employ of that name:—Held, that such colourable imitation and use of the labels and descriptions could be restrained by injunction. *Southorn v. Reynolds*, 12 L. T., N. S., 575.

3. A defendant was restrained from selling or exposing for sale, fireworks, not manufactured or sold by the plaintiff, in boxes bearing the plaintiff's labels. *Barnett v. Leuchars*, 14 W. R. 166; 13 L. T., N. S., 495.

4. A perpetual injunction will be granted to restrain a trader from filling and sending out to the public articles of his own manufacture in bottles, casks, or other receptacles having indelibly impressed thereon the name of another trader who manufactures an article of a like description, even although such trader places on such bottles, casks, or receptacles a label having his own name thereon. *Rose v. Loftus*, 47 L. J., Ch., 576; 38 L. T., N. S., 409.

5. The plaintiffs made and sold soda water in their own bottles, marked in the glass with their own name, followed by the words "Genuine Superior Aerated Waters," and pasted over the corks with reddish labels, bearing a royal crown and their own name. They charged the bottles and contents in one price per dozen to their customers, and allowed 3s. per dozen for the empty bottles. The bottles only cost them 1s. 6d. per dozen. The defendant, who had been a customer of theirs to some extent, being asked for a dozen of soda water by the plaintiffs' agent sent for that purpose, supplied twelve bottles, seven of which were not stamped in the glass with the plaintiffs' name, and about which no deceit or mistake could arise. The remaining five bottles so supplied bore the plaintiffs' name on the glass, and had been originally made and supplied by the plaintiffs, but to whom in particular did not appear. The labels on all the bottles so sold were similar in colour to the plaintiffs' labels, and had a royal crown, but had not the plaintiff's name on them. The water was not the plaintiffs' water. They, on such purchase, without asking for any explanation, filed a bill for an injunction to restrain the use, or vending, by the defendant of the plaintiffs' bottles generally, and obtained an *ex parte* injunction:—Held, that the *ex parte* injunction must be dissolved with costs, the Court being of opinion, upon the evidence, that the defendant was not shown to have

used the bottles either with an intention, or so as, in fact, to mislead the public. *Welch v. Knott*, 4 Kay & J. 747; 4 Jur., N. S., 330.

But the use of such bottles, so as in fact to mislead the public, although unintentionally, would be restrained. *Id.*

It is a serious error to allege, in a bill to restrain the improper use of a trade mark, that the trade mark complained of is "similar," when it is in fact the same, or *vice versa*. *Id.*

[By Wholesale Manufacturer.] 6. Where A. is ordered by B. to manufacture an article, and stamp it with a trade mark not B's, that alone leads to suspicion; but A., having caused the article to be manufactured, and admitting having casually heard of the party entitled to use such trade mark, must submit to a perpetual injunction, and pay costs. *Collins Co. v. Walker*, 7 W. R. 222.

7. An American company, incorporated, was established and located in the United States, for manufacturing edge tools of a superior description. The company used particular trade marks and labels on their manufactures, for which they obtained a great reputation. The company discovered that their manufactures were being imitated, and their marks and labels used, by manufacturers in England; and by the defendant, a manufacturer as Birmingham, and the company thereupon filed a bill against him, alleging that he had been for some time past in the habit of making and selling tools bearing a fraudulent imitation of their marks and labels. He, before putting in his answer, submitted to an injunction, and in his answer admitted the use of the trade marks complained of, but, by way of rebuttal of the charge of fraud, stated, that in so using the trade marks, he had only followed a custom prevalent at Birmingham for manufacturers of goods of the kind sold by the company, to affix on the goods ordered by merchants a particular trade mark, relying on the respectability of the merchant, when known to them, for the fact that those merchants had authority to act as agents of, or by way of licence from, the person entitled to the exclusive use of the trade marks; and that he had been informed that the company themselves had ordered goods to be manufactured at Birmingham, with their own trade mark upon them, for the purpose of sale in foreign countries. These statements were left uncontradicted by the company. On motion for a decree the Court ordered the injunction to be continued, the bill to be retained for a year, with liberty to the plaintiffs to proceed at law to establish their legal right to the marks and labels; but if no proceedings at law within that time should be taken, the bill to be dismissed with costs, otherwise further consideration of all matters reserved. *Collins Co. v. Reeves*, 4 Jur., N. S., 865; 38 L. J., Ch., 56; 6 W. R. 717.

8. Where a manufacturer has the exclusive right to use a particular trade mark, which he has been in the habit of procuring to be printed upon paper labels and wrappers, which he pasted on and wrapped round his manufactures, he may obtain an injunction, upon interlocutory motion, against a printer who has made and printed, and is in the habit of selling, imitations of the plaintiffs

labels to persons for the purpose of using them fraudulently, to pass off other goods as those of the plaintiff, although the printer himself makes no such use of them; so also, if the plaintiff alleges that persons bought the labels of the defendant for such a fraudulent purpose, and proves that the defendant was in the habit of selling them to any one who asked for them; and the defendant denies collusion with any one, and also denies the plaintiff's right to the exclusive use of the mark, and insists upon his own right to continue the printing and selling, the injunction will be granted, although the plaintiff does not allege or prove that the defendant sold them with a fraudulent purpose, and does not distinctly prove that any of the labels sold by defendant were in fact made use of to defraud the plaintiff. The ground of this equity is, that the defendant, by knowingly printing labels in imitation of the plaintiffs' trade mark, and selling them to any one who asked for them, was supplying the means of committing, and was thus a party to frauds, which courts of equity would interfere to stop at their source. *Farina v. Silverlock*, 1 Kay & J. 509; 24 L. J., Ch., 632. And see S. C. 1 Kay & J. 509, 660; 3 Eq. Rep. 883; 3 W. R. 532.

On appeal the Lord Chancellor dissolved the injunction on the ground that as the mark consisted of a label in a certain form, and it was shown that in very many instances labels the same as or similar to it might be sold for a legitimate purpose, the Court, in the absence of any proof of actual fraud, would not restrain the printing and sale of such labels until the manufacturer, who alleged that they were used for a fraudulent purpose, had established his case by an action at law. S. C. 6 De G. M. & G. 214; 2 Jur., N. S., 1008; 26 L. J., Ch., 11; 4 W. R. 731.

Other Cases.] 1. A. discovered a medicine to which he gave the name of chlorodyne, invented by himself as a fancy title, and not previously known in the medical profession. B. advertised for sale a medicine which he called chlorodyne, and sold as B.'s chlorodyne. A. filed a bill against B., but did not press it to a hearing, and obtained an order dismissing it with costs. B. subsequently advertised his medicine as original chlorodyne, asserting that he was the first inventor. Upon motion for an injunction in a second bill by A., to restrain B. from the use of the term original chlorodyne:—Held, that although A., by dismissing his former bill, has abandoned all right to the exclusive use of the term chlorodyne, he would have been entitled to restrain B. from selling his medicine as original chlorodyne, if he had adduced evidence that any one had been misled by the title into buying B.'s instead of A.'s medicine. *Browne v. Freeman*, 12 W. R. 305.

2. An *alien ami* manufactured, in his own country, goods which he distinguished by a peculiar trade mark. The goods obtained considerable reputation, both in his own country and in various other foreign countries, and also in some British colonies, but it was not shown that any of such goods had ever been even introduced or imported into England. The defendant was in the habit of manufacturing in, and selling in, this country goods similar in appearance and with an exact copy

of the plaintiffs' peculiar trade mark. Some of these imitative articles were sold and used abroad in countries where the *alien ami's* goods had obtained a reputation:—Held, that he was entitled to an injunction restraining the defendant from copying or imitating the trade mark. *Collins Co. v. Browne, Collins Co. v. Cohen*, 3 Kay & J. 423; 3 Jur., N. S., 929; 5 W. R. 676.

A man has no property in a trade mark, but he has a right to prevent anybody else from using it, so as to attract custom which otherwise would flow to himself. *Id.*

Semble, a person on whom an injury is fraudulently committed may have a remedy in the courts of any country where the fraud occurs, and even although he be at the time an *alien enemy*. *Id.*

3. J. sold, under a trade mark, a medicine known as J.'s ointment. O., without authority, sold an ointment as J.'s ointment, under an imitation of J.'s label. J. having threatened proceedings against O., an agreement was made, by which, after reciting that O. alleged that his invasion of the rights of J. was inadvertent, and that he had discontinued the same, and agreed not again to infringe on such rights, all claims in respect of the invasion, not only with respect to O., but to include all parties who may have purchased the ointment from him, shall be settled and discharged by the payment of 1,000*l.*, the receipt of which was acknowledged; this agreement also contained an undertaking to execute a formal release of all claims and demands in respect of the infringement. J. having commenced suits against persons who had purchased the ointment from O. previously to the agreement, but retailed it afterwards, O. filed a petition specifically to enforce the agreement, and to restrain J. from proceeding in the suits against the purchasers from O.:—Held, that the agreement did not authorize any sale, after the date of it, of ointment previously purchased from O. *Oldham v. James*, 14 Ir. Ch. R. 81. Affirming 13 Ir. Ch. R. 393.

Held, secondly, that, even if the terms of the agreement required the construction that J. was to permit ointment previously purchased from O. to be sold under the imitated mark, the Court would not specifically enforce such an agreement, as it would be a fraud on the public. *Id.*

4. A. being a thread manufacturer of repute, B. bought in the market thread, wound on spools, not made by A., of inferior quality, and cheaper than his, and not bearing his name, but marked with the name of a firm of winders of thread who were known to be accustomed to purchase of A. thread in the hank for the purpose of winding, and selling it when wound. B. sold the goods to a wholesale customer, with the assurance (given, as he said, without knowledge of any misrepresentation) that they were of A.'s make, and invoiced them to the customer under the description of certain numbers which A. had adopted and exclusively used in order to designate his particular manufacture. The customer attached A.'s name to the spools of thread, and retailed it to the public as of A.'s make:—Held, that there was not such a degree of wilful misrepresentation on the part of B. as would justify the Court in granting an injunction, and the bill was dismissed, but with-

out costs. *Ainsworth v. Walsley*, 1 L. R., Eq., 518; 12 Jur., N. S., 205; 35 L. J., Ch., 352; 14 W. R. 363; 14 L. T., N. S., 220.

1. A manufacturer using, to describe articles made by him, the name of another manufacturer, must justify the use thus made of a name not his own, by showing that such name is understood by the trade and the public to denote a patented or other article of a particular type, structure, or arrangement of parts, and not a mark or sign of a particular manufacturer. It makes no difference in this principle that such name does not appear upon the articles sold, but only in advertisements or price lists; nor that the articles bear the selling manufacturers' own trade mark and labels, stating them to be manufactured by him, and that statements to the same effect appear in the advertisements and price lists. *Singer Manufacturing Co. v. Wilson*, 47 L. J., Ch., 481; 3 L. R., App. Cas., 376; 26 W. R. 664; 38 L. T., N. S., 303. Reversing 2 L. R., Ch. D., 434; 24 W. R. 1023; 45 L. J., Ch., 490; 34 L. T., N. S., 858.

When the first producer of an article of manufacture has identified with it a particular name, whether his own name or a name which is a word descriptive of the article itself, such name becomes a trade mark, and cannot be adopted and employed by another person in advertising a similar article. *Id.*

Such adoption and employment will be restrained by injunction. *Id.*

Singer made a sewing machine, to which he gave his own name; it became known by that name. He afterwards took other persons into partnership with him for the sale of the machines known as the Singer sewing machines, and which were made in great variety, and with many modifications, but though not protected by patents, were established in public favour under that name. W. sold sewing machines, and advertised, among others, Singer sewing machines, but used his own trade mark on the machines; and expressly stated in his advertisements that the machines sold by him were manufactured by himself:—Held, that this, nevertheless, constituted a wrongful invasion of the property of Singer, and that W. might be restrained by injunction. *Id.*

Fraud is not necessary to be averred or proved in order to obtain protection for a trade mark. *Id.*

2. An article, the secret making of which was known only to one maker, had acquired a trade name. An injunction was granted, restraining the application of that name to a different article of the same class, so as to induce the belief that it was the plaintiff's article. *Siebert v. Findlater*, 7 L. R., Ch. D., 801; 47 L. J., Ch., 233; 38 L. T. 349; 26 W. R. 459.

3. A trader has a right to make and sell machines similar in form and construction to those made and sold by a rival trader, and in describing and advertising his own machines to refer to his rival's machines and his rival's name, provided he does this in such a way as to obviate any reasonable possibility of misunderstanding or deception. *Singer Manufacturing Co. v. Loog*, L. R., App. Cas., 15; 52 L. J., Ch., 481; 48 L. T. 3; 31 W. R. 325. Affirming 18 L. R., Ch. D., 395; 44 L. T. 888; 29 W. R. 699.

III. BY WHARFINGERS OR CARRIERS.

4. The plaintiffs, who were wharfingers, warehoused a quantity of wine branded in imitation of the trade mark of the Veuve Clicquot champagne. The dock warrants passed into the possession of the defendant, who had advanced money upon them. The plaintiffs were afterwards informed that the brand was counterfeit, and that an injunction was about to be applied for, to restrain them from parting with the wine. After the injunction had been granted, but before they had received notice of it, the defendant produced the warrants and demanded the wine on payment of the plaintiffs' charges. The plaintiffs refused to give it up. The defendant sued them at law, and the plaintiffs filed a bill to restrain him from prosecuting the action. Injunction granted. *Hunt v. Maniere*, 13 W. R. 312; 11 L. T., N. S., 469; 34 Beav. 157; 11 Jur., N. S., 28. On appeal, injunction continued. S. C. 34 L. J., Ch., 142; 11 L. T., N. S., 723.

5. A wine merchant brought an action against another wine merchant to restrain him from pirating his trade mark by branding it on the corks of his bottles. Some of the wine in bottles with the pirated trade mark was in the warehouse of certain wharfingers who were made defendants to the action. In their defence they disclaimed all interest in the matter in dispute, and submitted to act as the Court might direct upon having their charges and costs paid. At the trial they contended at the bar that the plaintiff, if his right was established, ought not to touch the bottles for the purpose of removing the branded corks without first paying their charges:—Held, that the wharfingers had done nothing to disentitle them to their costs of the action; and that if the plaintiff had any lien on the wine for his costs it must be postponed to the wharfingers' lien for their charges. *Moet v. Pickering*, 8 L. R., Ch. D., 372; 47 L. J., Ch., 527; 38 L. T. 799; 26 W. R. 637. Reversing 6 L. R., Ch. D., 770.

6. Wine marked with a counterfeit of the plaintiffs' brand had been imported into this country, and A. had made *bonâ fide* advances on the security of the dock warrants. An injunction having been granted to restrain the dock company from parting with it, the Court, on the application of A., ordered the wine to be delivered to him, on the counterfeit brand being removed, but made A. pay the costs of the application:—Held, that the priority of charges on the wine was, first, the expenses of the dock company; secondly, A.'s claim; and, thirdly, the plaintiffs' costs of suit. *Ponsardin v. Peto, Exp. Uselli*, 33 Beav. 642; 9 L. T., N. S., 567; 10 Jur., N. S., 66; 33 L. J., Ch., 371; 12 W. R. 198; 3 N. R. 237.

7. A firm of forwarding agents in London received from correspondents abroad several boxes of cigars bearing forged brands, which were to be delivered to several persons in England. On application by the makers whose brand had been forged, the agents gave information as to the consignors, and offered either to send back the cigars or to erase the brands:—Held, on a bill for injunction by the makers whose brands were forged, that the fact of the agents being merely carriers

was no defence to the suit; but that as they had given sufficient information, and offered to erase the brands, they were not to pay costs. *Upmann v. Elkan*, 7 L. R., Ch., 130; 41 L. J., Ch., 246; 25 L. T., N. S., 813.

1. An arrangement was made between W., R., and G., that W., a manufacturer, should consign cotton cloths to G. in Rangoon, paying him an inclusive commission. The goods were to be exported through R., who acted as shipping agent, and was to see to the goods being finished and packed, for which services he received a commission from G. A particular mark was by arrangement between the three parties adopted for the goods, of which some portions and the general arrangement were new, and other portions consisted of R.'s name and arms, and of a symbol which had formerly been used by G. After goods had been regularly exported for some years under this arrangement, W. ceased to send goods through R., and commenced exporting them to Rangoon through the agency of F., continuing to use the old mark, except that the name and arms of F. were substituted for those of R. At the same time R. commenced exporting other goods under the old mark. Cross actions were commenced for injunctions, in which R. set up an alleged custom in Manchester, giving the right to the trade marks to the shipping agent:—Held, upon the evidence, that no such custom existed. *Robinson v. Finlay, Ward v. Robinson*, 9 L. R., Ch. D., 487; 39 L. T. 398; 27 W. R. 294.

Held, also, that neither R. nor W. had any exclusive right to the use of the mark, and that both actions must be dismissed. *Id.*

IV. EVIDENCE OF DECEPTION.

2. Injunction granted restraining the sale of goods where imitation of trade mark was such as to deceive the public. *Semble*, the way in which the Court deals with cases of trade marks is not to see whether manufacturers themselves would distinguish them, but whether the public, who may be more easily misled, would probably be deceived. *Shrimpton v. Light*, 18 Beav. 164.

3. Where the Court is of opinion that the use of a particular mark is likely to deceive, it will not require evidence of actual deception. *Braham v. Bustard*, 11 W. R. 1061; 9 L. T., N. S., 199; 1 Hem. & M. 447; 2 N. R. 572.

4. Where a trader has innocently adopted a trade mark which is calculated to deceive by its similarity to another person's trade mark, his continuing to use it after complaint has been made is strong evidence of fraud. *Orr Ewing v. Johnston*, 13 L. R., Ch. D., 434; 41 L. T. 67; 28 W. R. 330. And see *S. C. sub. nom. Johnston v. Orr Ewing*, 7 L. R., App. Cas., 219; 51 L. J., Ch., 797; 46 L. T. 216; 30 W. R. 417.

If one trader appropriates a material and substantial part of a trade mark which belongs to another trader, he is bound to use such precautions as to avoid the reasonable probability of error and deception, and the onus is on him to show that purchasers of the goods will not be deceived. *Id.*

5. In suits to restrain the fraudulent use of

a trader's name, or of a trade mark, it is not necessary to give proof of actual deception; it is enough if the acts of the defendant are calculated to deceive. *Hookham v. Pottage*, 26 L. T., N. S., 755; 20 W. R. 720. Affirmed 21 W. R. 47; 8 L. R., Ch., 91; 27 L. T. 595.

6. It is not necessary, in order to give a right to an injunction, that a specific trade mark should be infringed; it is sufficient that the Court should be satisfied that there was on the whole a fraudulent intention of palming off the defendant's goods as those of the plaintiff; but in such a case it is essential that the imitation should be necessarily calculated to deceive; and where it did not appear that any one had been, in fact, deceived, and a material part of the plaintiff's peculiar marks had been omitted, the Court, notwithstanding strong circumstances of suspicion, refused to interfere. *Woolam v. Ratoliff*, 1 Hem. & M. 259.

7. The Court does not interfere to prevent the infringement of a trade mark, unless, in the first place, it has evidence that the public has been actually deceived, or is from inspection satisfied that there is either an intention to deceive, or a probability of deception. *Cope v. Evans*, 18 L. R., Eq., 138; 30 L. T. 292; 22 W. R. 450.

Evidence of skilled witnesses, that in their opinion the public is likely to be deceived by the similarity of two trade marks, is not of itself sufficient evidence of infringement. *Id.*

8. A tradesman may use a name, although he is aware that a neighbouring tradesman intends to use that name. A bootmaker having a shop running up Bedford Street, with the front and entrance in the Strand, wrote up over his shop the words "Civil Service Boot Supply." The Civil Service Supply Association were at that time building a large store at the other end of Bedford Street, in which when finished they opened a general shop, and they afterwards opened a boot and shoe shop in Tavistock Street, which was not far off. One of the customers of the association had gone to the shop of the bootmaker, mistaking it for that of the association. The association brought an action to restrain the bootmaker from using the words:—Held, that under the circumstances there was no intention on the part of the bootmaker to deceive, and that no rational person would have been deceived by the words so used; and action dismissed. *Civil Service Supply Association v. Dean*, 13 L. R., Ch. D., 512.

In a trade mark case, the fact that one person has been deceived is not conclusive as to the misrepresentation. *Id.*

V. COMPROMISE OF PROSECUTION FOR.

9. A prosecution instituted by the defendants against the plaintiff under the Merchandise Marks Act 1862 (25 & 26 Vict., c. 88), was by agreement compromised, and the plaintiff gave the defendants a written apology, requesting them not further to continue proceedings against him, and authorizing them to make such use of the apology as they might think necessary. Upon demurrer to a bill to restrain the excessive publication of this apology:—Held, that the Court had no juris-

diction to interfere. *Fisher v. Apollinaris Co.*, 44 L. J., Ch., 500; 23 W. R. 460; 32 L. T., N. S., 628; 10 L. R., Ch., 297.

VI. PROCEEDINGS IN RESPECT OF.

1. *Injunction. General Principles*, 6785.
2. *Breach of Injunction and Committal*, 6785.
3. *Delay and Acquiescence. Effect of*, 6786.
4. *Misrepresentation by Plaintiff. Effect of*, 6786.
5. *Parties*, 6787.
6. *Discovery*, 6787.
7. *Account of Profits*, 6787.
8. *Costs*, 6788.

1. Injunction. General Principles.

1. In granting injunctions to prevent the infringement of trade marks, the Court exercises its jurisdiction in aid of courts of law, *i.e.*, where an action could be maintained in a court of law. But it does not exercise an independent jurisdiction. The cases on this subject reviewed and considered. *Foot v. Lea*, 13 Ir. Eq. R. 484.

2. The ground on which a court of equity protects trade marks is, that it will not permit a party to sell his own goods as the goods of another; a party will not, therefore, be allowed to use names, marks, letters, or other indicia, by which he may pass off his own goods to purchasers as the manufacture of another person. *Perry v. Truefitt*, 6 Beav. 86.

If a plaintiff, coming for an injunction in such a case, appears to have been guilty of misrepresentations to the public, a court of equity will not interfere in the first instance. *Ib.*

3. The Court refused to interfere by injunction, on the application of the plaintiff, the owner of a manufactory, to restrain the occupiers of the original manufactory from using a particular mark, but gave him liberty to bring an action at law. *Mottley v. Downman*, 3 Myl. & C. 1; 6 L. J., N. S., Ch., 308.

In cases of claims to the exclusive right to particular marks on manufactures, the Court exercises a jurisdiction over a legal right, and therefore will not interfere by injunction in the first instance, except in strong cases, and it generally does so by putting the parties on the terms of asserting their legal right by action at law. *Ib.*

4. The Court will grant a perpetual injunction against the use, by one tradesman, of the trade marks of another, although such marks have been so used in ignorance of their being any person's property, and under the belief that they were merely technical terms. *Millington v. Fox*, 3 Myl. & C. 338.

5. An injunction to restrain a defendant from using the particular style or title adopted by the plaintiff will not be granted if the Court entertains the slightest doubt of the plaintiff's right to sustain his title at law. *Purser v. Brain*, 17 L. J., N. S., Ch., 141.

6. It is not necessary in order to maintain a prayer for injunction that the whole of a trade mark should have been imitated. *Braham v. Bustard*, 11 W. R. 1061; 9 L. T., N. S., 199.

7. In order to constitute a ground for interference by a court of equity to protect a

manufacturer against the use, by another person, of the particular name of his manufactured article, it is not necessary that there should be a *mala mens* towards the first purchaser of the article thus imitatively designated. The fault of the imitator is, that the first purchaser may be enabled, through this unwarranted designation, to retail a simulated article at a lower price than would be demanded for the original article, and so the original manufacturer may be injured. *Wotherpoon v. Currie*, 5 L. R., H. L., 508; 42 L. J., Ch., 180; 27 L. T. 393.

8. The principles explained on which interlocutory injunctions to restrain infringements of trade marks and names should be granted. *Read v. Richardson*, 45 L. T. 54.

9. The jurisdiction of the Court of Chancery in the protection given to trade marks rests upon property, and the Court interferes by injunction, because that is the only mode by which property of this description can be effectually protected. *Leather Cloth Co. v. American Leather Cloth Co.*, 33 L. J., Ch., 199; 9 L. T. 558; 12 W. R. 289; 10 Jur., N. S., 81; 3 N. R. 264; 4 De G. J. & S. 137; 2 N. R. 481; 3 N. R. 264. Affirmed 11 H. L. Ca. 523; 11 Jur., N. S., 513; 35 L. J., Ch., 53; 13 W. R. 873; 12 L. T., N. S., 742; 6 N. R. 209.

Where the owner of a trade mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not in his trade mark or in the business connected with it be himself guilty of any false or misleading representation. *Ib.*

It is not a rule, either of morality or equity, that a person is not answerable for a falsehood in his trade mark, because it may be so gross and palpable as that no one is likely to be deceived by it. *Ib.*

10. The jurisdiction of the Court of Chancery in the protection of trade marks rests upon property, and fraud in the defendant is not necessary for the exercise of that jurisdiction. *Hall v. Barrows*, 4 De G. J. & S. 160; 33 L. J., Ch., 204; 9 L. T., N. S., 651; 12 W. R. 322; 10 Jur., N. S., 55; 1 N. R. 543; 3 N. R. 259.

11. W.'s manager, without the personal knowledge of W., affixed tickets with T.'s name printed thereon to certain goods of inferior quality to T.'s and made by another manufacturer. On T.'s complaining of this, W. offered to give an undertaking that he would not use such tickets again, and to pay a certain sum, but declined to make a public admission that he had used the tickets in order to defraud T.:—Held, that, notwithstanding W.'s offer, T. was entitled to an injunction with costs, and also to an inquiry as to damages at his own risk. *Tonge v. Ward*, 21 L. T., N. S., 480.

2. Breach of Injunction and Committal.

12. In 1847 Joseph R. & Sons obtained an injunction to restrain N. and William R. from using the trade mark "J. R. & Sons." Soon afterwards W. R. entered into partnership with his father, John R., and with a brother, and the three used the trade mark "J. R. & Sons," with a colourable addition. Upon the

plaintiffs moving, in 1853, to commit W. R., and denying notice of the breach of the injunction before July 1852:—Held, that they were entitled to the order, and that acquiescence, to constitute a defence to such a motion, must amount to a licence to use the mark:—Held, also, that the plaintiffs might move to commit W. R. without bringing his partners before the Court. *Rodgers v. Norvill*, 3 De G. M. & G. 614; 17 Jur. 109, 171; 22 L. J., Ch., 404; 1 W. R. 122, 205, 216.

3. Delay and Acquiescence. Effect of.

1. A plaintiff laid by for two years before filing a bill for an injunction, having seen labels of the defendant exhibited publicly, which he now complained of as being colourable imitations of his labels:—Held, that such laches disentitled him to relief. *Beard v. Turner*, 13 L. T., N. S., 746.

2. The Court will not refuse to grant an injunction to restrain the infringement of a trade mark, on the mere ground that a great number of years has elapsed since it was first infringed by the defendant. But when many years have elapsed before the plaintiff takes steps to restrain the infringement, the Court will require clearer proof than it would otherwise have done that the trade mark was adopted by the defendant originally with fraudulent intent, and will require the plaintiff to prove that he has been actually injured by the infringement. *Rodgers v. Rodgers*, 31 L. T., N. S., 285; 22 W. R. 887.

3. The plaintiff, who was a manufacturer of an article used as a substitute for hops called "Estcourt's Hop Supplement," employed his son C., as his agent, who thereupon undertook not to disclose the secret of the compound, or at any time be connected with the sale of any article which could be used as a substitute for hops. During the time of his agency C. discovered the secret of the manufacture. He shortly afterwards terminated his agency, and began to sell a practically similar compound, which he called "Hop Essence." A bill was filed against him by the plaintiff to restrain him from continuing the sale, when he submitted and signed an agreement binding himself to observe the former agreement and do the plaintiff no injury in his trade. Subsequently, C. associated himself with Taylor, and circulars were issued advertising the sale of "Estcourt's Hop Essence, sole proprietor James Taylor." A company was formed for the purpose of selling the "Hop Essence" under the name of "Estcourt's Hop Essence." Although the plaintiff ascertained in January 1874 that a circular had been issued by Taylor, headed "Estcourt's Hop Essence Company," he did not apply to the Court until the following August:—Held, that the plaintiff was precluded by delay from any right to relief. *Estcourt v. Estcourt Hop Essence Co.*, 32 L. T., N. S., 80; 23 W. R. 313; 44 L. J., Ch., 223; 10 L. R., Ch., 276. Reversing 31 L. T., N. S., 567.

4. In a suit to restrain the user of names in trade in a fraudulent manner, the right to an interlocutory injunction is lost by a delay in filing the bill of nine or ten months since the discovery of the user. *Isaacson v. Thompson*, 41 L. J., Ch., 101.

5. In order to prove acquiescence by a firm in the piratical use of their trade mark, knowledge of such use must be proved; and that is not accomplished by the proof of publication of advertisements, which would have been an invasion of the rights of the firm if these advertisements have been issued not steadily or uniformly, but interchangeably with other advertisements in some respects similar, but not infringing the rights of the firm. *Kinahan v. Bolton*, 15 Ir. Ch. R. 75.

6. The plaintiffs were in August 1869, and had for some time previously been carrying on business under the style of The Guinea Coal Company, their offices being at No. 22, Pall Mall. In the early part of 1869, the defendant, who had formerly managed their business, established a business on his own account under the style of the Pall Mall Guinea Coal Company; his offices being first at Beaufort Buildings, whence, in August 1869, he removed to No. 46, Pall Mall. The defendant solicited orders principally by circular, sending circulars to many of plaintiffs' customers, and succeeded in obtaining orders, which the customers afterwards said they had intended for the plaintiffs:—Held, that they were entitled to restrain him from using the name "The Pall Mall Guinea Coal Company" in Pall Mall. *Lee v. Haley*, 39 L. J., Ch., 284; 5 L. R., Ch., 155; 18 W. R. 242; 22 L. T., N. S., 251.

The bill was filed on the 24th November 1869:—Held, that there was no laches, inasmuch as the plaintiffs must wait until sufficient proof of the injury they had received was collected. *Id.*

7. The life of a trade mark depends upon the promptitude with which it is vindicated. *Johnston v. Orr Ewing*, 7 L. R., App. Cas., 219; 51 L. J., Ch., 797; 46 L. T. 216; 30 W. R. 417.

4. Misrepresentation by Plaintiff. Effect of.

8. Where the plaintiff had used a considerable degree of misrepresentation in statements made to the public respecting the mode of procuring and making up a new description of tea, called "Howqua's mixture," an injunction to restrain the defendant from selling tea under the name employed by the plaintiff, and in a particular kind of package, which the plaintiff had introduced, was refused, until the plaintiff had established his title in a court of common law. *Pidding v. Hom*, 8 Sim. 477; 6 L. J., N. S., Ch., 345.

9. The test whether a fancy name adopted by a manufacturer as a trade mark for certain goods has become *publici juris* is the question whether the use of it by other persons in connection with the same goods is calculated to deceive the public, so as to induce them to believe that in purchasing the goods so named they are purchasing goods of the original manufacturer. Consequently, a trade mark may have become *publici juris* among a certain class, as between the wholesale and retail dealers who will not be deceived by it, and yet may not have become *publici juris* as between the retail dealers and their ordinary customers. The misrepresentation, such, for example, as falsely calling himself a patentee, which will disentitle a person to relief in equity in respect of an infringement of his trade mark, must be such a misrepresentation

as would prevent him from recovering nominal damages in an action brought to establish his right to the trade mark. *Ford v. Foster*, 7 L. R., Ch., 611; 41 L. J., Ch., 682; 27 L. T., N. S., 219; 20 W. R. 311, 818.

Since a misrepresentation, not forming a part of the trade mark itself, although used in connection with the trade mark, and with the article to which the trade mark applies, would be no answer to an action of a party to establish his title at law, neither will such a misrepresentation disentitle him to relief in equity. *Ib.*

1. If a plaintiff, coming for an injunction in a trade mark case, appears to have been guilty of misrepresentations to the public, a court of equity will not interfere in the first instance. *Perry v. Truefitt*, 6 Beav. 66.

2. The use of the word "patent," as part of the description in a label or trade mark of goods not protected by a patent, is not such a misrepresentation as to deprive the owner of his right to be protected against an infringement of his label where the goods have, from the usage of many years, acquired the designation, in the trade generally, of patent. *Marshall v. Ross*, 8 L. R., Eq., 651; 17 W. R. 1066; 21 L. T., N. S., 260; 39 L. J., Ch., 225.

3. Where the owner of a trade mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not in his trade mark or in the business connected with it be himself guilty of any false or misleading representation. *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De G. J. & S. 137; 9 L. T., N. S., 558; 10 Jur., N. S., 81; 33 L. J., Ch., 199; 12 W. R. 289; 2 N. R. 481; 3 N. R. 264. Affirmed 11 H. L. Ca. 523; 11 Jur., N. S., 513; 35 L. J., Ch., 53; 13 W. R. 873; 12 L. T., N. S., 742; 6 N. R. 209.

It is not a rule, either of morality or equity, that a person is not answerable for a falsehood in his trade mark, because it may be so gross and palpable as that no one is likely to be deceived by it. *Ib.*

4. The inventor of a sauce gave it the name of the Licensed Victuallers' Relish, and designed a trade mark for labels on the bottles containing it, and employed his son to sell it. He permitted his son to describe himself in his circulars and invoices as the sole proprietor of the sauce. The son became bankrupt, and his trustee sold his interest in the sauce and its trade mark to the plaintiff, who sought to restrain the inventor from infringing the trade mark. The plaintiff did not know the defendant's recipe, but made a sauce which the witnesses deposed to be undistinguishable from the defendant's:—Held, that a trade mark could not exist in gross, and that as the plaintiff did not know the recipe for the original article, he could not have a right to affix the trade mark to a sham article for the purpose of imposing on the public. *Cotton v. Gillard*, 44 L. J., Ch., 90.

5. Parties.

5. A plaintiff and another person, who carried on distinct trades at different places of business, had derived, from a common predecessor in their respective businesses, the

right to use the name of Dent as a trade mark. The defendant having infringed this right:—Held, that the plaintiff, without averring special damage, might sue alone for an injunction, and for the delivery up of the articles so marked to have the name erased. *Dent v. Turpin, Tucker v. Turpin*, 2 John. & H. 139; 7 Jur., N. S., 673; 30 L. J., Ch., 495.

Held, also, that he might sue alone for an account of profits made by the defendant out of articles so marked, and for payment to the plaintiff of such part of such profits as he should be entitled to. *Ib.*

6. Two persons, sons of their father, who had originated a manufacture of tobacco pipes, and designated them as "Southorn's Brosely pipes," on the death of their father, manufactured at Brosely, but at separate establishments, and for their separate benefit, pipes of a like character; one of the brothers instituted a suit to restrain the use of this trade mark, the other declining to join in such suit: Held, that the one brother might alone file a bill for an injunction and account. *Southorn v. Reynolds*, 12 L. T., N. S., 575.

6. Discovery.

7. An action will lie against shipowners who have shipped goods bearing counterfeits of the plaintiff's trade marks for discovery of the names of the consignor from whom the goods were received. *Orr v. Diaper*, 4 L. R., Ch. D., 92.

8. Where a decree has been made directing the defendant to account for all goods sold by him with a stamp thereon, he is compellable to disclose the names of all persons to whom he has sold any such goods; and if he be unable to give such information precisely, he may then (but not otherwise) be required to disclose the names of all persons to whom he has sold any goods which he will not swear positively were unstamped. *Leather Cloth Co. v. Hirschfeld*, 1 Hem. & M. 295; 11 W. R. 933; 1 N. R. 551.

9. In a suit to restrain the infringement of trade marks, the defendants refused to disclose the names of their customers, the places to which they had consigned their goods, and the prices which had been paid for them. They also, while producing their books, which confessedly showed orders for goods bearing some of the trade marks claimed by the plaintiffs, sealed up such portions of entries therein as they swore contained orders for the impression of devices other than those claimed by the plaintiffs:—Held, that the defendants need not disclose the names of their customers or the prices of the goods, as such disclosure could not be material to the plaintiffs and might injure the defendants in their business, but that they must make the rest of the disclosure which they objected to, and that where one of a line of trade marks had been disclosed in the order-book, the whole line must be disclosed. *Carter v. Pinto Leite*, 41 L. J., Ch., 92; 7 L. R., Ch., 90; 25 L. T. 722; 20 W. R. 134.

7. Account of Profits.

10. A defendant is liable, in equity, to account for the profits made by the user of a plaintiff's trade mark, though, at the time of

the user, he may have been ignorant of the rights and of the existence of the plaintiff, and, notwithstanding that, to entitle him to recover damages at law, it may be necessary to prove a *scienter*. *Cartier v. Carlile*, 31 Beav. 292.

1. If A. has acquired property in a trade mark, which is afterwards adopted and used by B., in ignorance of A.'s right, A. is entitled to an injunction, but not to an account of profits or to compensation, except in respect of any user by B. after he became aware of the prior ownership. *Edelston v. Edelston*, 9 Jur., N. S., 479; 11 W. R. 328; 7 L. T., N. S., 768; 1 De G. J. & S. 185.

Where a defendant is ordered to account for the profits made by him through a wrongful use of the plaintiff's trade mark, he cannot be charged with bad debts as profits; but on the other hand he cannot charge the plaintiff with the costs of manufacturing the goods in respect of which the bad debts were incurred. *S. C.* 10 L. T., N. S., 780; 12 W. R. 1026.

2. The plaintiffs had obtained a decree restraining the defendants from the use of a trade mark in sales of cloth, and directing an inquiry whether the plaintiffs had sustained any and what damage. The plaintiffs did not prove any direct damage, but, in the absence of evidence to what extent the defendants had used the trade marks, they claimed damages equal to the profits made by the defendants on all their sales of cloth:—Held, that they had failed to prove any damage. *Leather Cloth Co. v. Hirschfeld*, 14 W. R. 78; 13 L. T., N. S., 427. And see 11 W. R. 933; 1 Hem. & M. 295; 1 N. R. 551.

3. A person innocently selling goods bearing the spurious trade mark of another person is not, in equity, liable to account for the profits made thereby, but the owner of the trade mark is entitled to an injunction. *Moet v. Couston*, 33 Beav. 578; 10 Jur., N. S., 1012; 10 L. T., N. S., 395; 4 N. R. 86.

4. Injunction granted to restrain the use of the plaintiffs' trade mark by the defendant, though the *scienter* was not proved, but an account of profits refused on the ground of delay by the plaintiffs in commencing the suit. *Harrison v. Taylor*, 11 Jur., N. S., 408; 12 L. T., N. S., 339.

5. Ford, a shirt manufacturer, gave the name Eureka to a particular shape of shirt invented by him, and stamped all such shirts with the words "Ford's Eureka Shirts," and with a statement that such words were his trade mark. He advertised the shirts, falsely calling himself the patentee of them, and he falsely described himself on his bill heads, etc., as patentee of the shirts. Shirts of the particular shape came to be commonly known in the trade as Eureka. Certain wholesale shirt manufacturers made shirts of the same shape, and stamped them in the same part of the shirts as "Eureka Shirts":—Held, that Ford was entitled to an injunction to restrain the wholesale manufacturers from using the word "Eureka" as applied to shirts not of Ford's manufacture, except that they were to be at liberty to advertise their shirts as "Eureka" in their trade lists. But having regard to his misrepresentations, the account against them was confined to the time from the filing the bill. *Ford v. Foster*, 7 L. R., Ch., 611; 41 L. J., Ch., 682; 27 L. T. 219; 20 W. R. 311, 818.

8. Costs.

6. An offer by defendants after bill filed to discontinue the use of a trade mark, unless it be also accompanied by an offer to pay the costs and expenses up to that time, or to let the case be argued only upon the question of costs, will not relieve the defendants from the payment of the costs of the suit. *M'Andrew v. Bassett*, 10 Jur., N. S., 492; 10 L. T., N. S., 65.

7. An owner of a trade mark, having asked for an injunction, together with an account of profits, to which he was not entitled, was not allowed any costs of suit. *Moet v. Couston*, 10 Jur., N. S., 1012; 10 L. T., N. S., 395; 33 Beav. 578.

8. Where an order had been made for an interim injunction to restrain an alleged infringement of a trade mark, and the defendant, wishing to avoid further litigation, agreed to pay all costs, and to give an undertaking not to use the trade mark complained of:—Held, that the plaintiff, persisting in carrying on the suit to a hearing, was not entitled to his costs. *Hudson v. Bennett*, 12 Jur., N. S., 519; 14 W. R. 911; 14 L. T., N. S., 698.

9. An infant who had sold spurious articles, representing them to have been manufactured by the plaintiff, ordered to pay the costs of suit for an injunction. *Chubb v. Griffiths*, 35 Beav. 127.

10. A person having in his hands or under his control goods bearing a forged trade mark, is bound, upon the fact being brought to his knowledge, at once to submit to do whatever he might be compelled to do upon a bill filed; otherwise, however innocently the goods may have come to him, he will be liable for the costs of a suit instituted by the person whose right is infringed for the purpose of obtaining relief. *Upmann v. Elkan*, 12 L. R., Eq., 140; 19 W. R. 867; 24 L. T., N. S., 896; 40 L. J., Ch., 475.

The plaintiffs, in a suit to restrain infringement of their trade mark, are entitled to have a spurious imitation of their mark removed from goods, and to a lien on the goods for costs, provided that the owners of the goods, who were not before the Court, should not see fit to intervene. *Id.*

But on appeal, held that he was not bound to pay costs, being entirely innocent of the fraud. *S. C.* 20 W. R. 131.

11. The defendant, who was a china manufacturer, purchased abroad for his own private use a large number of cigars which were consigned to him at the docks here in cases bearing a spurious brand, purporting to be that of the plaintiffs, who were cigar manufacturers. The defendant was not aware that the brand was spurious, nor, except from seeing it on the invoice, that any such brand was in use. Immediately upon the plaintiffs issuing their writ and serving the defendant with notice of motion for an injunction to restrain him from selling the cigars, the defendant stated that he had no intention of selling the cigars, and offered all the relief asked for by the writ, and afterwards at the motion agreed to an undertaking in the terms of the writ, the question of costs being reserved:—Held, that the defendant must pay all the costs of the action. *Upmann v. Forester*, 24 L. R., Ch. D., 231; 52 L. J., Ch., 946; 49 L. T. 122; 32 W. R. 28.

1. If a trader imitates another person's label or trade mark, and sails so near the wind as just to avoid an injunction, though the Court does not grant the injunction, it will not willingly give him any costs of the proceedings. *Bass v. Dawber*, 19 L. T., N. S., 626.

2. The Court will give no costs on either side in a case where both plaintiff and defendant are engaged in the manufacture of an article intended to be used to deceive and mislead the public. *Estcourt v. Estcourt Hop Essence Co.*, 32 L. T., N. S., 80; 23 W. R. 313; 44 L. J., Ch., 223; 10 L. R., Ch., 276.

3. A defendant whom the Court held, on the chief point in issue, in a suit for infringement of a trade mark, to have been guilty of a fraudulent misrepresentation, was, though successful on another point, ordered to pay the whole costs. *Wheeler & Wilson Manufacturing Co. v. Shakespear*, 39 L. J., Ch., 36.

4. The defendant, in a trade mark suit, insisting on an adverse right, after being made aware that the plaintiff had been defrauded through his agency, ordered to pay the costs of all the proceedings, both at law and in equity. *Farina v. Silverlock*, 4 Kay & J. 650. And see *Tonge v. Ward*, 21 L. T., N. S., 480.

5. The defendant innocently used the plaintiff's trade marks, and on being served with the bill, he removed the labels, and gave an undertaking not to sell any more, but refused to pay the costs. No application was made to the defendant before suit, and he said he would have desisted if applied to. At the hearing, the account of profits, which were very trifling, was waived, but a perpetual injunction was granted:—Held, that the defendant must pay the whole costs of suit. *Burgess v. Hill*, 26 Beav. 244; 5 Jur., N. S., 283; 28 L. J., Ch., 356. S. P. *Burgess v. Hateley*, 26 Beav. 249.

6. An injunction was obtained to restrain wharfingers from parting with goods, on the ground that they had been imported with counterfeit trade marks. U., who was not a party to the suit, had *bonâ fide* advanced money before bill filed, on the security of the dock warrants. Upon motion by him *pro interesse suo*:—Held, that he had a priority, in respect of his advance, over the plaintiff's costs of the suit for the injunction, he undertaking to destroy the counterfeit marks, and paying the costs of the motion. *Ponsardin v. Peto, Exp. Uzielli*, 10 Jur., N. S., 6; 33 L. J., Ch., 371; 12 W. R. 198; 3 N. R. 237; 33 Beav. 642; 9 L. T., N. S., 567.

7. A wine merchant brought an action against another wine merchant to restrain him from pirating his trade mark by branding it on the corks of his bottles. Some of the wine in bottles with the pirated trade mark was in the warehouse of certain wharfingers who were made defendants to the action. In their defence they disclaimed all interest in the matter in dispute, and submitted to act as the Court might direct upon having their charges and costs paid. At the trial they contended at the bar that the plaintiff, if his right was established, ought not to touch the bottles for the purpose of removing the branded corks without first paying their charges:—Held, that the wharfingers had done nothing to disentitle them to their costs of the action; and that if the plaintiff had any lien on the wine

for his costs it must be postponed to the wharfingers' lien for their charges. *Moet v. Pickering*, 8 L. R., Ch. D., 372; 47 L. J., Ch., 527; 26 W. R. 637; 38 L. T., N. S., 799. Reversing 6 L. R., Ch. D., 770.

V. Registration under Trade Marks Act.

- I. *What may be Registered*, 6789.
- II. *Conditional*, 6792.
- III. *Rectification of Register*, 6792.
- IV. *Opposition to*, 6793.
- V. *Committee of Experts*, 6793.
- VI. *Proceedings by Party Aggrieved*, 6794.
- VII. *Costs*, 6794.
- VIII. *Other Matters*, 6795.

I. WHAT MAY BE REGISTERED.

- 1. *What Marks or Words*, 6789.
- 2. *Old Marks*, 6790.
- 3. *Similar or Identical Marks*, 6790.

1. What Marks or Words.

8. A single letter cannot be registered as a trade mark under the Trade Marks Registration Act 1875. *Re Mitchell*, 7 L. R., Ch. D., 36; 26 W. R. 326; 46 L. J., Ch., 876.

9. A word or distinctive combination of letters is not "a distinctive device, mark, or heading" within the meaning of the Trade Marks Registration Act 1875 (38 & 39 Vict., c. 91) s. 10, and cannot be registered as a trade mark under the Act. *Exp. Stephens*, 3 L. R., Ch. D., 659; 24 W. R. 963; 46 L. J., Ch., 46.

10. A person who had been using for upwards of a year a trade mark bearing the word "registered," it having been registered under the Copyright Act 1862 (25 & 26 Vict., c. 68), applied for its registration under the Trade Marks Registration Act 1875, but the registrar, acting on the instructions of the commissioners of patents, one of whom is the Lord Chancellor, who is empowered by the Act to make general rules as to registration, declined either to register the trade mark with the word "registered," or to allow the advertisements required by the Act before registration to be issued bearing the word "registered" as part of the trade mark. An application under s. 5, for an order directing the registrar to take the necessary steps for the registration of the trade mark in its entirety, was refused. *Re Meikle*, 46 L. J., Ch., 17.

11. A firm of watchmakers who for many years had been in the habit of using the name "Tod" in Arabic characters as a trade mark for watches sent to a particular firm in the East, applied to have it registered as a trade mark. The registrar, by the direction of the commissioners of patents, refused to register it:—Held, that the mark ought to be registered. *Re Rotherham's Trade Mark*, 14 L. R., Ch. D., 585; 49 L. J., Ch., 511; 43 L. T. 1. Affirming 11 L. R., Ch. D., 260; 27 W. R. 503; 40 L. T. 387.

A regulation issued by the commissioners of patents forbidding the registration as a trade mark of any word in foreign characters:—Held, to be *ultra vires* and void. S. C. 11 L. R., Ch. D., 250; 27 W. R. 503; 40 L. T. 387.

1. Where M. applied to register as a trade mark his signature in combination with the descriptive words "Filtre Rapide," he was allowed to register his signature with the above words added, under s. 10 of the Trade Marks Act 1875, but was compelled to pay the costs of the registrar, who was the only other person appearing on the motion. *Re Maignen's Application*, 28 W. R. 759.

2. Where a manufacturer places on his goods a series of combinations of letters as trade marks, each of which serves to indicate to purchasers (1) that the goods are made by the person using the mark, and (2) the quality of the goods as compared with the goods respectively bearing the other marks in the series, the marks being exclusively used by the manufacturer are valid trade marks and may be registered, notwithstanding that they are indicative of the quality of the goods to which they are applied. *Ransome v. Graham*, 51 L. J., Ch., 897; 47 L. T. 218.

3. When a mere word, not used as a trade mark before the Trade Marks Registration Act 1875, is put on the register, any dealer who has used the word in his trade in connection with or as descriptive of an article in which he deals is a person aggrieved by the registration within the meaning of sect. 5. *Re Trade Marks Registration Act 1875; Rose v. Evans*, 48 L. J., Ch., 618.

Semble, user before the Act, of a word as part of a trade mark, is not sufficient to render the word registrable as a mark. *Ib.*

4. *Semble*, that the name by which a patented article is generally known, and which is therefore descriptive of it, becomes *publici juris* at the expiration of the patent, and cannot properly be registered as a trade mark. *Re Ralph's Trade Mark*, 25 L. R., Ch. D., 194; 53 L. J., Ch., 188; 49 L. T. 504; 32 W. R. 168.

5. In the registration of cotton marks colouring and surrounding lines, edges, and borders will be disregarded. *Re Brook*, 26 W. R. 791.

2. Old Marks.

6. Old marks, whether cutlery's marks or not, may be registered up to the number of three by different persons in respect of the same goods even if identical; but this does not apply to new marks, and if the same old mark has been used in respect of the same goods by more than three different persons, it is a common mark. *Re Jelley, Son, & Jones's Application*, 51 L. J., Ch., 639. n.; 46 L. T. 381. n.

A new mark may be registered in respect of some of the goods in a class though a similar old mark is already registered for other goods in the same class, if the goods are distinct. *Ib.*

A mark which has been used before the coming into operation of the Trade Marks Registration Act 1875 is an old mark only in respect of the goods on which it has been used. In connection with other goods it is to be treated as a new mark, and will not be

granted registration if it clashes with another mark which is old in respect of those goods. *Ib.*

7. A single letter which has been used by a firm as a trade mark before the passing of the Trade Marks Registration Act 1875 is not a trade mark within the definition contained in sect. 10, and cannot be registered thereunder. *Re Mitchell*, 46 L. J., Ch., 876; 7 L. R., Ch. D., 36; 26 W. R. 326.

8. Whether the scientific name of a particular tree, *linetta*, is a distinctive word capable of registration as an old mark in respect of lime juice, a product of the tree, or preparations of lime juice, *quære*. *Re Trade Marks Registration Act 1875; Rose v. Evans*, 48 L. J., Ch., 618.

9. A new mark may be registered for some of the goods in a class, even though an old mark of a similar kind has been already registered for other goods in the same class, provided that the goods and the trades of the proprietors are sufficiently distinct for no confusion to take place. *Re Braby's Application, Re Shropshire Iron Company's Trade Marks*, 21 L. R., Ch. D., 223; 51 L. J., Ch., 637; 46 L. T. 380; 30 W. R. 675.

10. P. in 1876 registered "braided fixed stars" as a trade mark for matches, alleging that he had used it as a trade mark before the passing of the Act. He also at the same time registered a label enveloping the boxes in which his matches were sold, which contained the words "braided fixed stars" in two places so as to be conspicuous on each side of the boxes, but also contained a number of other words. It was shown that at the time when P. introduced the term "braided fixed stars" the term "fixed stars" was known in the trade as denoting a particular class of fuseses, and that he had just bought a patent for enveloping the stems of fuseses with wire by means of a braiding machine. This patent expired in August 1881. It appeared from the evidence that P. had not before the Act used "braided fixed stars" separately as a trade mark, or otherwise than as a part of the above mentioned label. In October 1881 an application was made by a rival trader to expunge the registration:—Held, that the registration must be expunged, for that to entitle P. to register these words as a trade mark he must before the Act have used them as such alone, and not merely in conjunction with other words:—Held, further, that if they had been so used alone they ought not to have been registered, for that they were only words properly descriptive of the patented article, and that P. had no exclusive right to their use after the patent had expired. *Re Palmer's Trade Mark*, 24 L. R., Ch. D., 504; 50 L. T. 30; 32 W. R. 306.

3. Similar or Identical Marks.

11. F. had long used and was the registered proprietor of three trade marks for eau-de-Cologne, consisting of (1) a label with his signature and a seal in the corner, and used for pasting on the side of the bottle; (2) a circular stamp on a strip of paper, used for pasting on the cork and down the neck of the bottle; (3) a label containing a picture of F.'s business

premises, "Gegenuber dem Julichs Platz," Cologne, with medals and letterpress, and used for pasting on boxes in which bottles were packed. B., also a manufacturer of eau-de-Cologne, applied for registration in his name of three marks similarly composed, and to be respectively used in the same manner. On motion by F., under s. 6 of Trade Marks Registration Act, for an injunction to restrain B. from proceeding with his application:—Held (1), that the marks were so nearly resembling F.'s marks as to be calculated to deceive, and that the fact that the picture of the house on B.'s label described as "Gegenuber dem Elogius Platz," Cologne, was said to be a correct view of the house in a street leading out of the Elogius Platz, did not prevent B.'s label being a colourable imitation of F.'s registered label, having regard to the similarity in the letterpress and the position of the medals; (2) that the allegation by B. that he had used his marks for several years without interference, did not, *prima facie*, entitle him to registration, since it was not proved that the original proprietor was aware of such user; and (3) that the injunction must go as to all three marks, notwithstanding that the German Court of Appeal, reversing the judgment of the Court of First Instance, had permitted registration of the label with the picture of B.'s business premises, the question being purely one of fact, as to which the foreign decisions were to be regarded merely as opposite verdicts by special juries. *Re Farina*, 27 W. R. 456.

1. A coat of arms in a medallion formed an important part of the trade mark of A. This medallion, with the same coat of arms, being proposed for registration by B. as his trade mark, A. sought to restrain the registration. The Court refused relief, on the ground that the simple medallion could not be mistaken for A.'s compound trade mark. *Re Farina*, 26 W. R. 261.

The question whether registration should be allowed or not ought to depend upon this: whether or not the party opposing registration would, independently of the Registration Acts, have been entitled to restrain the use by the applicant of the mark which he proposes to register. *Ib.*

2. The plaintiffs had, for fifteen years and upwards, manufactured and sold a medicine under the name of "Reinhardt's Celebrated Family Salve," and in the year 1876 they registered the words "Family Salve" as their trade mark in connection with such medicine, under the Trade Marks Registration Acts. The defendant in 1868 registered at Stationers' Hall a similar preparation under the title of "Spalding's Universal Family Salve," and he had since manufactured and sold the salve under that name. Both salves were sold in packets encased in wrappers bearing the above titles in full, but the wrappers were so folded that until the packets were opened the words "Family Salve" alone were visible. In an action by the plaintiffs for an injunction:—Held, that the words "Family Salve" were both a "distinctive heading," and also "special and distinctive words used before the passing of the Act," within s. 10 of the Trade Marks Registration Act 1875; that the plaintiffs having by the registration acquired a *prima facie* right to the exclusive use of the two

words "Family Salve," the onus lay on the defendant to displace that right; and that the defendant having failed to discharge that onus, an injunction must be granted. *Reinhardt v. Spalding*, 49 L. J., Ch., 57; 28 W. R. 300.

Semble, when a trade mark is claimed consisting of a device associated with certain words, those words may be regarded in estimating the distinctiveness of the mark. *Ib.*

3. The applicants, who were iron manufacturers, had for a long period before the passing of the Trade Marks Registration Act 1875 been in the habit of using as trade marks the letters B B H, which were the initials of the firm, and also the same marks coupled with symbols or words common to the trade, denoting the quality of the iron:—Held, that every mark, or combination of marks or words used as a trade mark before the passing of the Trade Marks Registration Act 1875, which would have entitled the proprietor to maintain a suit for infringement against any person imitating it, may be registered as a trade mark under the Act, and a trader is entitled to register a series of such marks which only differ from each other by combining in different modes a mark common to all of them and peculiar to the trader, with words merely indicative of the quality of the goods marked or symbols common to the trade, a note being in such a case entered in the register specifying the portions of the combination as to which no exclusive right is claimed. *Re Barrows*, 36 L. T., N. S., 29; 125 W. R. 407; 46 L. J., Ch., 450.

Held, on appeal, that the proper mode of registration was to register the trade mark B B H to be used either alone or with any device or words signifying the quality of the iron. S. C. 5 L. R., Ch. D., 353; 25 W. R. 564; 36 L. T., N. S., 780; 46 L. J., Ch., 725.

4. There being registered under the Trade Marks Registration Act 1875 four trade marks, including an anchor, in respect of goods in Class 42 of the first schedule to the rules made under the Act, the Court refused to give leave to register a new trade mark including an anchor in respect of goods in the same class, but different in character from those goods for which the four trade marks had been registered. *Re Hargreaves' Trade Mark*, 11 L. R., Ch. D., 669; 27 W. R. 450.

5. W. & Co. proposed to register as a trade mark for ale a triangle with a double outline, inscribing within the double outline the words "Beccles Brewery. Established 1830," the inner triangle having within it a conspicuous figure of a church. B. & Co., whose trade mark for pale ale was a plain triangle, which in use was coloured red, applied to prevent the registration of the proposed trade mark as being so similar to theirs as to be calculated to deceive:—Held, that as W. & Co. would be at liberty to print their trade mark in whatever colour they pleased, and if printed on a red ground it would be so similar to that of B. & Co. that a purchaser might be misled, the registration ought not to be allowed. *Re Worthington's Trade Mark*, 14 L. R., Ch. D., 8; 49 L. J., Ch., 646; 42 L. T. 563; 28 W. R. 747.

6. R. applied for registration of a cotton trade mark, which was coloured, being a gold mohur. It had been placed in the first class by the committee of experts, and had been

duly deposited for exhibition, and advertised in the official paper under the Trade Marks Registration Act and rules, and the additional rules with respect to cotton goods. D. was the proprietor of a cotton trade mark, which was a silver rupee, and he opposed the registration of R.'s mark:—Held, that R.'s mark was not calculated to deceive, for in such cases the mark which is protected is the registered mark, which has been deposited, and of which the representation can be seen at the places mentioned in the advertisement. *Re Robinson's Trade Mark*, 29 W. R. 81.

1. The rule of the Court is to permit registration, under s. 6 of the Trade Marks Registration Act 1875, of identical trade marks up to three, though, if more than three applications are made for the registration of similar trade marks, even though such trade marks are old, registration will be refused on the ground that such trade mark is common property. *Benbow v. Low*, 29 W. R. 837; 44 L. T. 876.

2. The Court will under r. 19 direct a trade mark to be registered, if satisfied of its dissimilarity to marks actually registered, without inquiring whether it be distinguishable from other marks the subject of pending applications to register. *Re Dugdale's Trade Mark*, 49 L. J., Ch., 303; 28 W. R. 436.

3. The proper mode of determining questions as to the similarity of trade marks is to compare them as actually used, e.g., impressed on metal goods. *Re Jelley, Son, & Jones's Application*, 5 L. J., Ch., 639. n.; 46 L. T., N. S., 381. n.

II. CONDITIONAL.

4. W. applied for the registration of an old trade mark for goods comprised in classes 11, 12, and 13, having used the mark in connection with the goods comprised in those classes in a particular manner. His application was opposed by a firm who had for many years used, and had obtained registration of, a similar mark, which they used in a different manner from that in which W. used his mark, but upon the same classes of goods:—Held, that registration should be granted to W. on his undertaking (to be noted on the register) not to use his mark in the manner in which the opposing firm used their mark, nor otherwise than in the manner in which he had previously used it. *Re Whiteley's Trade Mark*, 43 L. T. 627. n.; 29 W. R. 235. n.

5. Sykes & Company of Edgeley, a firm of calico bleachers, having applied for registration as cotton marks of two marks long used by them, the committee of experts placed the marks in the second class, as not being trade marks within the meaning of the Act. The marks consisted of (1) a shield in outline, containing the figure of a swan and the letters "S. & Co., E.;" it also contained three other letters, subject to variation, being indicative of the date of packing, and the hand employed to pack each particular parcel of calico; (2) a shield in outline, with the letters "R. S. E.," indicative of the former title of the firm, and varying letters as in the other mark. Bleachers' marks are used in a particular mode, being stamped within the fold of the calico before the parcel is stitched up. The committee considered the marks were not

trade marks within the Act, on the ground that the letters were not quality marks; swans are common marks in the trade, and borders must be disregarded. On application to the Court:—Held, that registration of both marks ought to be proceeded with, and that with the registration there should be entered upon the register a note of an undertaking by the applicants not to use the marks otherwise than in the limited mode in which they had formerly applied them. *Re Whiteley's Trade Mark* (29 W. R. 235. n.) followed. *Re Sykes' Trade Marks*, 43 L. T. 626; 29 W. R. 235.

III. RECTIFICATION OF REGISTER.

6. If a person registers a trade mark to which he was not entitled, although he does so with a *bonâ fide* belief that he is entitled to it, and after due advertisement in the *Trade Marks Journal*, and although no opposition is made to the registration, he may have to pay the costs of a motion to rectify the register by removing the mark. *Re Hyde*, 26 W. R. 625; 38 L. T., N. S., 777; 7 L. R., Ch. D., 724.

On an application under s. 5 of the Trade Marks Registration Act 1875 (38 & 39 Vict., c. 91), to remove from the register a trade mark of H. & Co., who had registered it as an old mark after advertisement in the *Trade Marks Journal*, claiming forty-one years' user, it appeared that for the greater part of that time the mark had been a common mark, and for about six years had been so to the knowledge of H. & Co., and that the applicants, who had long used the same trade mark, were not aware of the advertisement, and had not opposed the registration:—Held, that the trade mark must be ordered to be removed from the register; that there had been no laches on the part of the applicants, and that the respondent must pay the costs. *Ib.*

7. Certain trade marks belonging to a foreign firm trading with England had, owing to a mistake on the part of the managing members of the firm, been registered in the name of the senior member as sole proprietor. The senior member having died, and the whole goodwill of the business being the property of the firm:—Held, that the proper course to adopt was for the firm to take an assignment of the trade mark from the legal personal representative in England of the deceased. *Re Furina's Trade Marks*, 44 L. T. 99. n.; 29 W. R. 391.

8. A trade mark which was the property of a partnership firm was by mistake registered as the property of one of the partners trading under the style of the firm. Upon application to the Court by the firm it was ordered that the register be rectified by cancelling the name of the registered proprietor and registering the names of all the partners trading under the style of the firm. *Re Rust's Trade Mark*, 44 L. T., 98. n.; 29 W. R. 393. n.

9. The provisions of the Trade Marks Registration Act 1875, for the rectification of the register by the Court, apply only to cases of mistake or error in the original registration, and do not extend to cases where devolution of interest makes it desirable to alter the registration of the name of the proprietor of a trade mark. *Re Ward, Sturt, and Sharp's Trade*

Mark, 50 L. J., Ch., 347; 44 L. T. 97; 29 W. R. 395.

1. M. obtained the registration in his own name of a trade mark belonging to L. without the knowledge or consent of L. Upon application for relief by L.:—Held, that the register could not be rectified by transferring the registration into the name of L. *Exp. Lawrence, Re Marier's Trade Mark*, 44 L. T. 98. n.; 29 W. R. 392. n.

2. P. registered "braided fixed stars" as a trade mark for matches. After the expiration of five years another manufacturer applied to cancel the registration, on the ground that the words could not be registered as a trade mark, for that "fixed stars" was a name well known in the trade for a particular description of matches before P. used the alleged trade mark, and that the words "braided fixed stars" were only a proper description of a kind of matches made by P. under a patent which had recently expired, and which matches were at the time of the registration well known in the trade by that name, and differed from the "fixed stars" formerly known by having a braided stem, which was the subject of the patent:—Held, that even if the 3rd section of the Trade Marks Registration Act 1875 did not make the lapse of five years conclusive evidence that the alleged trade mark was a proper trade mark, which, *semble*, it did, it at all events excluded evidence to show that words which *prima facie* appeared to be fancy words and proper to constitute a trade mark were not capable of constituting one. His lordship therefore declined to hear evidence on the subject, and refused the application. But held, on appeal, that a mark which is not authorized to be registered as a trade mark does not acquire the character of a trade mark by being on the register for five years, and may be removed from the register though that period has elapsed, and that evidence ought therefore to have been admitted which went to show that at the time of the registration the words "braided fixed stars" were merely descriptive of a kind of matches well known in the trade. *Re Palmer's Application*, 21 L. R., Ch. D., 47; 51 L. J., Ch., 673; 46 L. T. 787.

Whether a person sued for using a name which has been five years on the register as a trade mark can defend himself on the ground that it is not a trade mark, *quære*. *Id*.

Where Refusal to register]. 3. An application to the Court by a person aggrieved by the refusal of the registrar to enter his name upon the register as the proprietor of a trade mark under 38 & 39 Vict., c. 91, s. 5, r. 43, may be by way of motion that the register may be rectified by entering his name as such proprietor, two clear days' notice of motion being given to the registrar. *Exp. Stephens*, 24 W. R. 819.

4. By the Trade Marks Registration Act 1875 the registrar acts under the direction of the commissioners of patents. By their direction the registrar refused to allow an advertisement in which the word "registered" was part of the proposed trade mark to appear in the official journal. The trade mark had in fact been registered under 25 & 26 Vict., c. 68. On a summons by the applicant:—Held, that the Court could not order his name to be inserted on the register, there not having

been the necessary advertisement; and that it could not interfere with the direction of the commissioners to the registrar. *Re Meikle*, 24 W. R. 1067.

IV. OPPOSITION TO.

5. Where an application is made for registration of a trade mark, and such application is opposed by the proprietors of a registered trade mark, and the case stands for the determination of the Court, under the Trade Marks Rules 1876, r. 16, the proper course is for the applicant to apply in chambers for directions as to the mode of trial, and not for the opponent to move to restrain the applicant from registering his mark. *Re Simpson's Trade Mark*, 15 L. R., Ch. D., 525; 42 L. T. 675; 28 W. R. 760.

6. The defendants in an action for infringement of trade mark having applied for the registration of the trade mark which they had been restrained by injunction from using, an order was made that the manner in which the matter should be brought before the Court should be by motion by the applicants to proceed with the registration, with liberty to either party to use the evidence in the action for infringement, and with further provisions as to evidence. *Re Johnston's Trade Mark*, 43 L. T. 672.

7. The plaintiffs had, for fifteen years and upwards, manufactured and sold a medicine under the name of "Reinhardt's Celebrated Family Salve," and in the year 1876 they registered the words "Family Salve" as their trade mark in connection with such medicine, under the Trade Marks Registration Acts. The defendant in 1868 registered at Stationers' Hall a similar preparation under the title of "Spalding's Universal Family Salve," and he had since manufactured and sold the salve under that name. Both salves were sold in packets encased in wrappers bearing the above titles in full, but the wrappers were so folded that until the packets were opened the words "Family Salve" alone were visible. In an action by the plaintiffs for an injunction:—Held, that the words "Family Salve" were both a "distinctive heading," and also "special and distinctive words used before the passing of the Act," within section 10 of the Trade Marks Registration Act 1875; that the plaintiffs having by the registration acquired a *prima facie* right to the exclusive use of the two words "family salve," the onus lay on the defendant to displace that right; and that the defendant having failed to discharge that onus, an injunction must be granted. *Reinhardt v. Spalding*, 49 L. J., Ch., 57; 28 W. R. 300.

V. COMMITTEE OF EXPERTS.

8. The decisions of the Manchester committee of experts, although entitled to weight on consideration, are not final, and must, if necessary, be reviewed by the Court. *Re Dugdale's Trade Marks*, 49 L. J., Ch., 303; 28 W. R. 436.

9. It is not the function of the committee of experts to decide questions of title between rival applicants for registration of identical or

substantially identical marks, but to consider whether a mark offered for registration contains the particulars necessary to constitute a registerable trade mark. *Exp. Ede*, 28 W. R. 436.

1. The committee of experts at Manchester, appointed under the Trade Marks Registration Acts, is not a judicial tribunal. It is appointed to consider and give an opinion on technical matters peculiarly within the knowledge of its members. Any person dissatisfied with the opinion of the committee may move the Chancery Division to consider it; and that Court is not bound to adopt the opinion as conclusive, even though the Court may have no reason to think that the committee has proceeded on a wrong principle, or has acted in an improper manner. Great weight is properly to be attributed to the opinion of the committee, but it proceeds *ex parte*, and the Court may direct a full consideration of the matter before the registrar himself. Observations on the manner in which the Court is to exercise this supervising authority. *Orr-Ewing v. Registrar of Trade Marks*, 4 L. R., App. Cas., 479; 48 L. J., Ch., 707; 41 L. T. 239; 28 W. R. 17. Reversing *S. C. sub nom. Re Orr-Ewing's Trade Mark*, 8 L. R., Ch. D., 794; 47 L. J., Ch., 807; 26 W. R. 777; 38 L. T., N. S., 695. Affirming 47 L. J., Ch., 180; 26 W. R. 259; 38 L. T., N. S., 313.

These principles apply when a label for cotton goods, which had been used as a trade mark before the passing of the Trade Marks Registration Act 1875, has been placed by the committee of experts in the second class, as not being a trade mark as defined by the Act. *Id.*

2. Messrs. B., being manufacturers of cotton sewing thread, applied for the registration of a considerable number of labels and devices used by them for various periods in their trade, and many of which were registered in foreign countries. The Manchester committee of experts divided the marks into two classes. The registrar refused registration to all the marks in the second class, while, of the marks in the first class, he admitted six to complete separate registration, but refused to register more than one of the remainder as representative of the marks in the first class not separately registered. He further offered a certificate of such representative registration. Upon motion for rectification of the register by registration of all the marks:—Held, that as to the marks placed in the second class, the case was governed by *Re Orr-Ewing's Trade Mark* (8 L. R., Ch. D., 794), and that the Court would not review the decision of the committee: and that, as to the marks in respect of which representative registration was offered, the case was governed by *Re Barrows* (25 W. R. 407, 564; 5 L. R., Ch. D., 353), and separate registration of each mark could not be granted. *Re Brook*, 26 W. R. 791.

In the registration of cotton marks, colouring and surrounding lines, edges, and borders, will be disregarded. *Id.*

VI. PROCEEDINGS BY PARTY AGGRIEVED.

3. When a mere word, not used as a trade mark before the Trade Marks Registration Act,

is put on the register, any dealer who has used the word in his trade in connection with or as descriptive of an article in which he deals, is a person aggrieved by the registration within the meaning of s. 5. *Re Trade Marks Registration Act 1875*; *Rose v. Erans*, 48 L. J., Ch., 618.

4. The assignee of a patent for a washing machine applied to it the name of "The Home Washer," and registered that name as his trade mark in respect of it. He did not manufacture the machines, or any other goods in the same class, but granted an exclusive right to a manufacturing firm who paid him royalties. They invented and patented various improvements in the machine, and after the expiration of the patent (six years from the registration of the trade mark) they continued to manufacture the improved machines, and to describe them by the old name, but paid no royalties, and the registered proprietors had not, after a year and nine months from the expiration, begun to manufacture, though he had been in negotiation with manufacturers to do so in conjunction with him:—Held, that the former licencees (against whom the registered proprietor was moving for an injunction) were "persons aggrieved" within Rule 33, and that the mark must be removed from the register on the ground that, notwithstanding the negotiations, the registered proprietor was not "engaged in any business concerned in the goods within the same class as the goods in respect to which the mark was registered." *Re Ralph's Trade Mark*, 25 L. R., Ch. D., 194; 53 L. J., Ch., 188; 49 L. T. 504; 32 W. R. 168.

Semble, that a patentee is "engaged in any business, etc.," so long as he receives royalties under his patent, even though he does not himself manufacture. *Id.*

5. R. & Co. registered a trade mark for brandy in England. M. & Co., who carried on business at Madras, but neither carried it on nor intended to carry it on in England, applied to rectify the register by striking out the name of R. & Co. and substituting that of M. & Co. as owners of the trade mark, alleging that they, M. & Co., were the owners of the trade mark, and had constructed R. & Co. to register it in the name of M. & Co., instead of which R. & Co. had registered it in their own name:—Held, that assuming M. & Co. to have no right to register the trade mark in England, it did not follow as a necessary consequence that they could not be aggrieved by its being registered here in the name of another person, and that the case must be dealt with on the merits. *Re Riviere's Trade Mark*, 26 L. R., Ch. D., 48; 53 L. J., Ch., 578; 50 L. T. 763; 32 W. R. 390. Reversing 53 L. J., Ch., 455; 49 L. T. 506.

VII. COSTS.

6. Where an application to register a trade mark is unsuccessful, the applicant may be ordered to pay the costs of persons opposing the application from the time when, under the Trade Marks Registration Rules, r. 16, the matter is deemed to stand for the determination of the Court, *i.e.*, since security for costs was given by the opponent under the Trade Marks Rules 1876, r. 16, but cannot be ordered

to pay any costs incurred before that time. *Re Brandreth*, 47 L. J., Ch., 816; 9 L. R., Ch. D., 618; 27 W. R. 281.

1. The Court of Appeal has no jurisdiction to give costs against the registrar when the latter is unsuccessful. *Re Rotherham's Trade Mark*, 14 L. R., Ch. D., 585; 49 L. J., Ch., 511; 43 L. T. 1.

2. Where the registrar is served with notice of an application to the Court for leave to be given him to proceed with a registration, and he appears, but does not oppose the application, he must be paid his costs of appearance. *Re Orr-Ewing's Trade Mark*, 8 L. R., Ch. D., 794; 47 L. J., Ch., 807; 26 W. R. 777; 38 L. T., N. S., 695. Reversing 47 L. J., Ch., 180; 26 W. R. 269; 38 L. T., N. S., 313. See also *Re Maignen's Application*, 28 W. R. 759.

3. If a person registers a trade mark to which he was not entitled, although he does so with a *bona fide* belief that he is entitled to it, and after due advertisement in the *Trade Marks Journal*, and although no opposition is made to the registration, he may have to pay the costs of a motion to rectify the register by removing the mark. *Re Hyde*, 7 L. R., Ch. D., 724; 38 L. T. 777; 26 W. R. 625.

On an application under s. 5 of the Trade Marks Registration Act 1875 (38 & 39 Vict., c. 91), to remove from the register a trade mark of H. & Co., who had registered it as an old mark after advertisement in the *Trade Marks Journal*, claiming forty-one years' user, it appeared that for the greater part of that time the mark had been a common mark, and for about six years had been so to the knowledge of H. & Co., and that the applicants, who had long used the same trade mark, were not aware of the advertisement, and had not opposed the registration:—Held, that the trade mark must be ordered to be removed from the register; that there had been no laches on the part of the applicants, and that the respondents must pay the costs. *Ib.*

VIII. OTHER MATTERS.

4. The books of the registrar of trade marks which show marks the registration of which has been refused, are not evidence that these marks are *publioi juris*. *Orr-Ewing v. Johnston*, 13 L. R., Ch. D., 434, 442.

5. Where, under the provisions of the Trade Marks Registration Acts, the registrar cannot proceed with the registration of certain marks without the leave of the Court, and the original order of the Court is varied by the House of Lords, it is necessary that the order of the House of Lords should be made an order of the Chancery Division of the High Court. *Re Orr-Ewing's Trade Marks*, 28 W. R. 412.

6. A Dutch company moved to restrain a commission agent from infringing its trade mark, and from shipping goods abroad with its trade mark stamped on them. The writ in the action was issued after the time for registration of trade marks limited by the Trade Marks Registration Amendment Act 1876 had expired, and before the Trade Marks Registration Extension Act 1877 had come into force. The company had not before the motion for injunction registered its trade mark:—Held, that registration was not a condition

precedent to the company's right to an injunction. *Twentsche Stoom Bleekery Goor and John Harper v. Ellinger*, 26 W. R. 70.

Applicant carrying on Business Abroad.]

7. Whether, in order to entitle a person to have a trade mark registered, he must be carrying on or intending to carry on business in England, *quære*. *Re Rivière's Trade Mark*, 26 L. R., Ch. D., 48; 53 L. J., Ch., 578; 50 L. T. 763; 32 W. R. 390. Reversing 53 L. J., Ch., 455; 49 L. T. 506.

TRADER AND TRADING.

- *Liability of Trader to Bankrupt Laws*. See BANKRUPTCY, VII.
- *Liability of Real Estate of Trader for Debts*. See EXECUTOR AND ADMINISTRATOR, XI.

TRADE UNION.

See TRADE, VI.

TRAMWAY.

- *Parliamentary Deposit by Tramway Company*. See PARLIAMENTARY DEPOSITS. See also RAILWAY.

Construction.] 8. Case in which the rule that 9 ft. 6 in. shall intervene between tramway-rail and nearest footpath was departed from by statutory authority. *Edinburgh Street Tramways Co. v. Black*, 2 L. R., App. Cas. (Sc.), 336.

Relying on certain preliminary agreements, the frontagers of a narrow thoroughfare abstained from opposing the Edinburgh Tramways Bill; but as it turned out that the Act, when passed, allowed the very thing which the frontagers had been most anxious to prevent, they asked and obtained from the Court of Session an interdict against its execution. But the House of Lords recalled the interdict, holding that the question was determined by the statute, which the tramways company was not only entitled to carry out, but bound to obey. *Ib.*

Held, also, that the same consequences would have arisen in the case of a provisional order from the Board of Trade, when confirmed by parliament. *Ib.*

When the Act directs compliance with deposited plans and sections, they are regarded as embodied in the statute. *Ib.*

Fares.] 9. By the Edinburgh Street Tramways Act 1871 (34 & 35 Vict., c. 89) the Edinburgh Street Tramways Company was authorized to construct a system of tramways as therein specified, and the Act fixed a maximum fare per mile, to be charged on such tramways. By the Edinburgh Street Tramways Act 1874, 37 & 38 Vict., c. 68, the company

was authorized to abandon some of the lines specified in the former Act, and to substitute omnibuses, and the Act authorized a higher rate of fares "on those routes, and any tramway routes worked in connexion therewith." The omnibuses were worked in connexion with the tramways:—Held, that the second Act did not authorize the company to demand the higher fare from passengers travelling by the tramways only. *Edinburgh Street Tramways Co. v. Torbain*, 37 L. T., N. S., 288; 3 L. R., App. Cas. (Sc.), 88.

Costs of Provisional Order.] 1. The costs of applications to the Board of Trade for provisional orders under the Tramways Act 1870 are to be taxed on the chancery and not on the parliamentary scale. *Re Morley*, 20 L. R., Eq., 17.

TRANSFER.

- *Of Proceedings.* See BANKRUPTCY—PRACTICE (TRANSFERS AND CONSOLIDATION).
- *Of Bills of Exchange and other Securities.* See BANK OF ENGLAND—BILLS OF EXCHANGE—COMPANY—EQUITABLE ASSIGNMENT—NEGOTIABLE INSTRUMENTS—STOCK.

TRANSFER OF LAND ACT.

See LAND REGISTRY.

TRAVERSE OF INQUEST.

See ESCHEAT AND FORFEITURE—LUNATIC, IV. 6.

TRAVERSING NOTE.

See PRACTICE (JUDGMENTS, DECREES, AND ORDERS).

TREES.

See WASTE AND TIMBER.

TRESPASS.

- *Waste by a Trespasser.* See WASTE AND TIMBER, VI.

- I. IN GENERAL, 6796.
- II. INJUNCTION AGAINST, 6797.

I. IN GENERAL.

2. In an ordinary estate of copyhold the property in the trees and minerals is in the

lord, the possession in the copyholder. If a stranger or the lord cuts trees or takes minerals, the copyholder can maintain trespass. *Eardley v. Granville*, 3 L. R., Ch. D., 826; 45 L. J., Ch., 669; 34 L. T. 609; 24 W. R. 528.

3. A lessor who, in the absence of express power in the lease, enters upon the demised premises to repair them on breach of the lessee's covenant to repair, even though under a superior lease the lessor is liable to forfeiture for non-repair, and though he enters by leave of weekly sub-tenants, commits a trespass which will be restrained by injunction. *Stocker v. Planet Building Society*, 27 W. R. 877.

4. One tenant in common cannot maintain trespass or trover against his co-tenant for cutting and carrying away the grass off their land unless there has been an ouster, or unless it is shown that the grass has been destroyed. *Jacobs v. Seward*, 5 L. R., H. L., 464; 41 L. J., C. P., 221; 27 L. T. 185. Affirming 22 L. T. 690; 18 W. R. 953.

A. and B., being tenants in common of land, B. entered the land, cut the grass, put a lock upon the gate, and carried away the grass. There was no evidence that he kept the gate locked, but there was evidence that he opened the gate for A.'s son to take away the hay of a former year:—Held, that these facts did not amount to an ouster, so as to enable A. to maintain an action of trespass against B., nor to a destruction of the common property so as to entitle him to maintain an action of trover. *Id.*

Held, also, that the Court was right in refusing to allow an amendment of the declaration by converting the action into an action for an account under 4 Anne, c. 16, s. 27. *Id.*

5. The lessee of a theatre held it under a lease in which he covenanted not to convert it to any other use than for acting or performing operas or theatrical entertainments. He demised certain boxes and stalls to a sub-lessee, reserving power of access for the purpose of repairing; the sub-lessee covenanted only to use the same for the purpose of viewing and hearing the operas and other entertainments. The underleases contained covenants for quiet enjoyment. The lessee demised the theatre for a term of three months for the purpose of holding religious meetings. To enable these meetings to be held, the stalls were covered with a flooring, the division between the boxes removed, and other temporary structural alterations made:—Held, that a trespass had been committed by the lessee and persons claiming under him in thus entering upon the sub-lessee's boxes and stalls without his licence, and the conversion of the theatre for other than theatrical purposes was a derogation from the grant and a breach of the covenant for quiet enjoyment. *Leader v. Moody*, 20 L. R., Eq., 146; 44 L. J., Ch., 711; 32 L. T. 422; 23 W. R. 606.

6. Title to property created merely by the act of reducing a thing into possession necessarily implies a reduction into possession effected by an act which is not in any way of a wrongful nature. Such an act, therefore, effected by one who is at the moment a trespasser, cannot create a title to property. *Blades v. Higgs*, 11 H. L. Ca. 621.

7. The owner of two contiguous houses in the city of London conveyed one of them to B.

by a deed which correctly marked out on a plan the ground site of the house conveyed. Over this site there projected on the first floor a room of the owner's house, which was supported by the other house:—Held, that the right to the vertical column of air over the projection was determined by the ground site, and hence belonged not to the owner, but to B. *Corbett v. Hill*, 22 L. T., N. S., 263; 9 L. R. Eq., 671; 39 L. J., Ch., 547.

II. INJUNCTION AGAINST.

1. Injunction granted in cases of trespass. *Field v. Beaumont*, 1 Swan. 208.

Whether, after a verdict at law, in an action of trespass, the Court will grant an injunction against future trespasses, in favour of parties who refused at the trial to produce documents necessary to a fair decision, *quære*. *Ib*.

2. Injunction in trespass, where the title was disputed. *Kinder v. Jones*, 17 Ves. 110.

3. A. demised certain lands to B., and for some years allowed B. and his under-tenants to cut turf out of a bog adjoining the lands demised; some acres of the bog having been reclaimed, B. set them, alleging that they formed part of the lands demised by A. In 1836 A. by notice demanded possession of the land reclaimed, and withdrew the permission to cut turf from the bog. An ejectment being brought for the recovery of the reclaimed lands, and B. still continuing to cut turf as before, pending the ejectment, A. filed a bill for an injunction to restrain him. The injunction was refused, as the case was not one of a sudden and irreparable injury, and therefore the Court would not interfere in a case of trespass. *Sandys v. Murray*, 1 Ir. Eq. R. 29.

4. The Court will not grant an injunction to restrain a person from committing a trespass, where it is temporary only; otherwise, where it has continued so long as to become a nuisance. *Coulson v. White*, 3 Atk. 21.

5. On bill stating intent of defendant to encroach on plaintiff's land, etc., by building, defendant, by answer, claiming title to land himself, motion for injunction was refused, not being sufficient to try title on. *Bateman v. Johnson*, Fitzg. 106.

6. Though the Court will not restrain an action of trespass against a company by a party, through whose estate a canal is cutting, for deviating from the line, because he has laid by and rested upon his legal rights, yet, if he files a bill to restrain their deviating, and then moves to commit them, the Court will not do so without a trial by jury in a disputed case, and directing an issue at law. *Agar v. Regent's Canal Co.*, Coop. 77.

7. On a bill to restrain the continuance of a trespass alleged to have been actually committed, the Court, in putting the plaintiff to his motion, will not require the defendant to admit any fact that enters into the question of trespass, at least unless such fact be clearly and unqualifiedly admitted in the answer. *Beaufort (Duke) v. Morris*, 2 Ph. 683; 12 Jur. 614.

8. Where a bill was filed praying for an injunction to restrain various acts of trespass committed against the plaintiff, and of annoy-

ance to his tenants, by a pauper defendant, the Court, on demurrer, granted the injunction, as recovering damages at law against a pauper did not constitute an adequate remedy. *Hodgson v. Duce*, 2 Jur., N. S., 1014.

9. The Court has no jurisdiction to restrain a trespass which does not amount to waste. *Turner v. Ringwood Highway Board*, 18 W. R. 424.

10. Where after the expiration of a tenancy for years the holder of a bill of sale of the furniture of the late tenant put and continued a man in possession of the furniture upon the premises under a power in his security:—Held, that the landlord was entitled to treat the bill of sale holder as a mere trespasser; and in an action against him by the landlord to restrain him from selling the goods on the premises or continuing in possession, an interlocutory injunction was granted in those terms. *Smith v. Brown*, 48 L. J., Ch., 694.

11. When the plaintiff's title is not disputed the Court will grant an injunction to restrain acts of trespass without requiring him first to bring an action. *Goodson v. Richardson*, 43 L. J., Ch., 790; 9 L. R., Ch., 221; 22 W. R. 337; 30 L. T., N. S., 142.

12. Where the legislature has pointed out a special tribunal for determining a question, as a general rule no other Court ought to restrain the proceedings before it; but where the question has come before another Court in independent proceedings in which it is necessary to decide the whole matter between the parties, the Court may in such case restrain the proceedings elsewhere by injunction in order to save expense. *Stannard v. St. Giles, Camberwell*, 20 L. R., Ch. D., 190; 51 L. J., Ch., 629; 46 L. T. 243; 30 W. R. 693.

A dispute having arisen between the defendants, who were a local authority, and the plaintiff about a drain which the plaintiff had interfered with, the defendants gave notice to the plaintiff that they would enter on his land and reinstate the drain; but they afterwards abandoned their intention, and instead took proceedings against him before the magistrate. The plaintiff then brought an action against the defendants, claiming an injunction to restrain them from trespassing on his land, and from proceeding against him before the magistrate. In the statement of claim the plaintiff did not in terms allege that the defendants threatened and intended to trespass on the land:—Held, that as no intention to commit a trespass was proved or alleged, the plaintiff had not made out his case for an injunction against the trespass; and that being so, the Court had no jurisdiction to restrain the proceedings before the magistrate. *Ib*.

Hedley v. Bates (13 L. R., Ch. D., 498) and *Great Western Railway Co. v. Waterford and Limerick Railway Co.* (17 L. R., Ch. D., 493) explained. *Ib*.

13. The guardians of the poor, wrongfully claiming a right of way to their relieving office over the plaintiffs' lands, invited paupers to come that way for relief; the trespass by the paupers causing serious injury to the plaintiffs, an injunction was granted to restrain the guardians, their servants, workmen, and agents, from trespassing. *Ardley v. St. Pancras (Guardians)*, 39 L. J., Ch., 871.

In considering the injury, the possible as

well as the actual use of the injured premises will be regarded. *Id.*

1. After a railway company had purchased a piece of land from A., who was mentioned in the book of reference to be the owner of it, B., a neighbouring landowner, part of whose land the company had also taken, claimed to be owner of the piece of land, and filed a bill for an injunction to restrain the company from continuing in possession of it, and from committing waste on it. But the affidavits as to title on both sides being inconclusive, the Court refused the injunction. *Webster v. South Eastern Railway Co.*, 1 Sim., N. S., 272; 6 Rail. Ca. 698; 20 L. J., N. S., Ch., 124; 15 Jur. 73.

2. The Court will, by mandatory injunction, restrain a trespass the continuance of which will inflict irreparable damage upon persons in possession. Damage which it is impossible to measure will be deemed irreparable. *London & North Western Railway Co. v. Lancashire & Yorkshire Railway Co.*, 36 L. J., Ch. 479; 4 L. R., Eq., 174; 17 L. T., N. S., 43; 15 W. R. 810.

A bill was filed to restrain a railway company from placing an obstruction, partly on a public footway and partly on land belonging to the plaintiffs, and a rival railway company, so as to block up the access to a station of the plaintiffs, and alleged that the injury to the traffic by allowing the obstruction to remain would be irreparable, and that the Act was done without any colour of title by the defendants:—Held, that this was one of the exceptional cases in which the Court would interfere to restrain a trespass by a stranger. *Id.*

TRIAL.

See PRACTICE (TRIAL ON HEARING).

TROVER.

3. A purchaser under the Court, not being able to obtain an account book delivered over to him, to which he was entitled under his contract, brought an action of trover against some parties to the cause. He was restrained by injunction. *Stubbs v. Sargon*, 4 Beav. 90.

4. Trover will not lie by one tenant in common against his co-tenant for cutting and carrying away the grass of their land unless there has been an ouster on the grass destroyed. *Jacobs v. Seward*, 5 L. R., H. L., 464; 41 L. J., C. P., 221; 27 L. T. 185. Affirming 22 L. T. 690; 18 W. R. 953.

5. The plaintiffs, who were linen manufacturers at Belfast, received an order for goods, signed "A. Blenkarn & Co.," 37, Wood Street, London, the word "Blenkarn" being so written as to resemble "Blenkiron." The goods were afterwards forwarded and addressed to "A. Blenkiron & Co.," 37, Wood Street, the plaintiffs being under the belief that they were in correspondence with the well-known firm of

"Blenkiron & Sons," who carried on business at 123, Wood Street. The goods were ordered and received by Alfred Blenkarn, who had an office at 37, Wood Street, and the plaintiffs were induced by his fraud to send the goods to him. The plaintiffs on discovering the fraud prosecuted Blenkarn for obtaining goods by false pretences, and he was found guilty. Before his conviction he had sold part of the goods to the defendants, who had no knowledge of the fraud, and they had re-sold them to other persons:—Held, that there was no valid contract for the sale of the goods by the plaintiffs, and that they were entitled to recover them from the defendants in an action of trover. *Oundy v. Lindsay*, 26 W. R. 406; 47 L. J., Q. B., 481; 38 L. T., N. S., 573; 14 Cox C. C. 93; 3 L. R., App. Cas., 459. Affirming 25 W. R. 417; 2 L. R., Q. B. D., 96; 46 L. J., Q. B., 233; 13 Cox C. C. 583; 36 L. T., N. S., 345. Reversing 1 L. R., Q. B. D., 348; 45 L. J., Q. B., 381; 13 Cox C. C. 162; 34 L. T., N. S., 314; 24 W. R. 730.

6. In an ordinary estate of copyhold the property in the trees and minerals is in the lord, the possession in the copyholder. If a stranger or the copyholder cuts trees or takes minerals, the lord can bring trover. *Eardley v. Granville*, 3 L. R., Ch. D., 826; 45 L. J., Ch., 669; 34 L. T. 609; 24 W. R. 528.

7. G. purchased through his broker Russian and Hungarian scrip; the undertaking in the scrip was to give to the bearer a bond for the money advanced payable with interest in the way there stated. G. left the scrip (to be exchanged for bonds or sold, as he should direct) in the hands of his broker, who fraudulently deposited it with a banker as security for a loan to himself:—Held, that the scrip was a negotiable instrument, transferable by mere delivery; and that the banker, being a *bond fide* holder for value, was not liable to G., either in trover for the scrip itself, or in assumpsit for the value received upon it. *Goodwin v. Roberts*, 1 L. R., App. Cas., 476; 45 L. J., Exch., 748; 35 L. T. 179; 24 W. R. 987.

TRUSTEE ACTS.

See also BANKRUPTCY, XIV. iv.—CHARITY, II.—III.—IV.—VII.—PARTITION, XI.

I. VESTING ORDERS, CONVEYANCES, AND TRANSFERS UNDER THE TRUSTEE ACTS PRIOR TO 1850.

1. Under the 7 Ann., c. 19.

1. Infant Heir or Trustee.

- (a) Who is, 6800.
- (b) Property Abroad, 6801.
- (c) Order to Convey, 6801.
- (d) Conveyance. Form and Contents, 6801.
- (e) Costs, 6801.

2. Infant Mortgagees, 6801.

II. Under the 4 Geo. 2, c. 10, 6802.

III. *Transfer of Stock under the 36 Geo. 3, c. 90, and Succeeding Statutes.*

1. *Under the 36 Geo. 3, c. 90*, 6802.
2. *Under the 6 Geo. 4, c. 74*, 6803.
3. *Under the 11 Geo. 4, and 1 Will. 4, c. 60*, 6803.

IV. *Under the 6 Geo. 4, c. 74*, 6804.

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 - (f) *Lunatic Mortgagee. See 4 infra.*
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5. *Other Persons*, 6808.
6. *Order to Convey*, 6808.
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VI. *Leases under the 11 Geo. 4, and 1 Will. 4, c. 65. See INFANT, III. III. 1 and 2.*

VII. *Conveyances under the 11 Geo. 4, and 1 Will. 4, c. 47, and the 2 of 3 Vict., c. 60. See EXECUTOR AND ADMINISTRATOR, XI. VI.*

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- I. *Jurisdiction where Property Abroad*, 6810.
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V. REMOVAL OF TRUSTEES. See TRUSTS, XV. III. 1.

I. **Vesting Orders, Conveyances, and Transfers under the Trustee Acts Prior to 1850.**

- I. *Under the 7 Ann., c. 19*, 6800.
- II. *Under the 4 Geo. 2, c. 10*, 6802.
- III. *Transfer of Stock under the 36 Geo. 3, c. 90, and Succeeding Statutes*, 6802.
- IV. *Under the 6 Geo. 4, c. 74*, 6804.

V. *Under the 11 Geo. 4, and 1 Will. 4, c. 60 and Amending Acts*, 6804.VI. *Leases under the 11 Geo. 4, and 1 Will. 4 c. 65*. See INFANT, III. III. 1 and 2.VII. *Conveyances under the 11 Geo. 4, and 1 Will. 4, c. 47, and the 2 & 3 Vict., c. 60*. See EXECUTOR AND ADMINISTRATOR, XI. VI.

I. UNDER THE 7 ANN., c. 19.

1. *Infant Heir or Trustee*, 6800.
2. *Infant Mortgagee*, 6801.

1. **Infant Heir or Trustee.**

- (a) *Who is*, 6800.
- (b) *Property Abroad*, 6801.
- (c) *Order to Convey*, 6801.
- (d) *Conveyance. Form and Contents*, 6801.
- (e) *Costs*, 6801.

(a) *Who is*.

1. The stat. 7 Ann., c. 19, enabling infant trustees to convey, extends only to plain and express trusts, not to such as are implied, or constructive only. *Goodwyn v. Lister*, 3 P. W. 387.

2. Infant devisee of land, charged with payment of money, is a trustee in equity, but not within the stat. 7 Ann., c. 19. *Anon.*, 2 Eq. Abr. 521.

3. An infant, the surviving life in a bishop's lease, not beneficially interested, held to be an infant trustee within the statute of 7 Ann. *Exp. Hodges*, Dick. 737.

4. Where trust to be executed vests in infant, he is not trustee within 7 Ann., c. 19. But must be decreed to convey on suit for that purpose. *Riggs v. Sykes*, Dick. 400.

5. Infant trustee for sale is not within the stat. 7 Ann., c. 19, though the persons entitled to the produce of the sale are adult, and join in the petition, *semble*. *Exp. Chastaney*, Jac. 56.

6. Infant trustee within the stat. 7 Ann., c. 19, notwithstanding an interest as co-executor and co-residuary legatee, entitled to the mortgage money; the receipt and discharge of the other executor leaving the infant a mere trustee. — *v. Handcock*, 17 Ves. 383.

Infant trustee within the stat. 7 Ann., c. 19, must be a dry trustee. *Id.* 384.

7. An infant directed to convey charity estates to new trustees, under the Act of 7 Ann., c. 19, he having nothing to do but to make such conveyance; but where infant has any duty to perform as such trustee, beyond the mere conveyance, the case is not within the statute. *Att.-Gen. v. Pomfret*, 2 Cox 221.

8. Infant heir of messenger to whom in bankruptcy provisional assignment had been made, and who died before choice of assignees: — Held, to be a trustee within 7 Ann., c. 19. *Exp. Carter*, 5 Madd. 81.

9. A decree having been made for sale of an estate, and that a trustee should join in the conveyance; that trustee dying, his infant heir bound to execute a conveyance under the

stat. 7 Ann, c. 19. Such a decree against the ancestor would obviate any doubt as to whether his infant heir were or were not a trustee within the Act. *Hankins v. Obeen*, 2 Ves. 559.

1. Tenant in tail, with remainder over, by bargain and sale conveyed to B. for the purpose of making him tenant to the *præcipe* in a recovery. By mistake recovery was suffered before bargain and sale was executed. Tenant in tail died:—Held, infant heir of B. was not a trustee with 7 Ann, c. 19. *Exp. Boehm*, 5 Madd. 124.

2. Court refused to direct an infant customary heir to surrender copyhold premises to a purchaser, which had been sold and conveyed to him by deceased ancestor of infant for valuable consideration, and for which ancestor had received purchase money in his lifetime, on a motion made to confirm report which found those facts, and that the infant was a trustee within 7 Ann on the ground that it was an *ex parte* proceeding; and *non constat*, that ancestor was competent to sell; and therefore Court would not declare infant a trustee within the statute. *Re Janaway*, 7 Price 679.

3. Infant heir of nominal vendee in trust, being reported to be within the statute, may be ordered to convey to the devisee of the real vendee, as being the *cestui que trust*. *Exp. Vernon*, 7 Price 685. n.

The Court will not, on motion or petition, order an infant trustee to convey, unless the trust appear in writing; but in such case will leave the *cestui que trust* to get a decree by bill. S. C. 2 P. W. 549.

(b) Property Abroad.

4. Infant trustee directed to convey under the stat. 7 Ann, c. 19, though the trust estate abroad. *Exp. Prosser*, 2 Bro. C. C. 325.

5. An infant trustee ordered to convey an estate in Calcutta under the stat 7 Ann, c. 19. *Exp. Anderson*, 5 Ves. 240.

(c) Order to Convey.

6. Infant trustee within 7 Ann, c. 19; purchaser to enjoy, and infant to convey at full age. *Chandler v. Beard*, Dick. 392. S. P. *Exp. Benton*, Dick. 394.

7. Bill to execute articles for the sale of lands against the devise for life and the infant heir of the vendor:—Decreed to be executed, and that plaintiff should be let into possession and hold against the infant, who should convey when of age, unless cause shown within six months after. *Sikes v. Lister*, 5 Vin. Abr. 541, pl. 28.

8. Infant trustee refusing, ordered to convey by a given day, and if he still refused, plaintiff to move that he stand committed, unless cause, etc. *Re Beech*, 4 Madd. 128.

9. Order upon petition, under the stat. 7 Ann, c. 19, for an infant trustee to convey to the persons absolutely entitled, or as they shall appoint, but not to convey to a new trustee, upon trusts to be executed without a bill. *Exp. Anderson*, 5 Ves. 240.

10. The vendor dying intestate, and leaving an infant heir, the purchase money being paid

in a suit for a specific performance instituted after his death, will be retained till the heir attains twenty-one, and conveys. *Bullock v. Bullock*, 1 Jac. & Walk. 603.

(d) Conveyance. Form and Contents.

11. Assuree dies before assurance, heir unknown. Assurer, on bill of interpleader, ordered to assure to two six clerks, they to re-assure heir, when discovered. *Anon.*, Cary 29.

12. The manner in which infant trustees are to convey the estates devolved on them, pursuant to the Act of Parliament. *Anon.*, Pre. Ch. 284.

13. In a marriage settlement, husband made tenant for ninety-nine years if he so long lived, remainder to trustees during the life of the husband, etc., remainder to the first, etc., son by the marriage in tail male, remainder to the first, etc., son of any other wife, remainder over. A son is born, and of age, the wife dead, and there are no other sons by the second marriage; the trust for preserving contingent remainders descends to an infant; if for the benefit of the family, equity will decree the infant trustee to join in a recovery. *Winnington v. Foley*, 1 P. W. 536.

14. An infant trustee may levy a fine; but Lord Hardwicke doubted whether he could suffer a recovery without a privy seal. *Exp. Bowers*, 3 Atk. 164. And see *Exp. Johnson*, 3 Atk. 559. *Exp. Smith*, Ambl. 624.

15. Court will, if necessary, order an infant feme covert, being heir or trustee, to levy a fine. *Anon.*, 2 Com. 615.

16. An infant mortgagee or trustee, who is a feme covert, may convey by fine under 7 Ann, c. 19. *Exp. Mairs*, 3 Atk. 479.

17. Conveyance by infant trustee voidable, as not within the statute; if he would be bound to convey when adult, he would in equity be restrained from setting it aside. — *v. Handcock*, 17 Ves. 383.

(e) Costs.

18. An infant trustee, ordered to convey under the statute of Ann, is entitled to his necessary costs. The Lord Chancellor said, that in taxing them, the Master would not allow anything that was not necessary; as, for instance, a brief to counsel to consent for an infant, to which no attention could be paid. *Exp. Cant*, 10 Ves. 554.

2. Infant Mortgagee.

19. The Lord Chancellor and the Master of the Rolls inclined to think the legal estate in mortgaged premises passed by a general residuary devise by the mortgagee to A., who was also executor, his heirs, executors, administrators, and assigns for ever, on the side of his mother. A. being nineteen, the Lord Chancellor would not order him to join in conveyance, under the stat. 7 Ann, c. 19, but ordered the money to be put into the bank, *ex parte* the infant, and said, when he should

come of age, it would be very reasonable that he should join. *Exp. Sergison*, 4 Ves. 147.

1. An infant mortgagee is within the statute notwithstanding he may be beneficially interested in the mortgage money. *Exp. Bellamy*, 2 Cox 422.

2. A mortgagee in fee, devised to A., B., and C., and the "survivor, and the heirs of such survivor." The infant heir of the testator was directed to join in re-conveying to the mortgagor, as having the fee in him during the joint lives of the devisees. *Re Harrison*, 3 Anstr. 836.

3. Mortgagee within the statutes 7 Ann, c. 19, as to infants, and 4 Geo. 2, c. 10, as to lunatics, though entitled as co-executor and residuary legatee to the mortgage money, the discharge of the other executor leaving a naked trust. *Exp. Tutin*, 3 Ves. & B. 151.

4. Estate in Ireland ordered to be conveyed by an infant mortgagee, under the stat. 7 Ann. The order under the statute for the reference to the Master, as well as that for the infant to convey, must be on petition, not on motion. *Evelyn v. Forster*, 8 Ves. 96.

II. UNDER THE 4 GEO. 2, c. 10.

Lunatic Trustee.] 5. A trustee found a lunatic, by the Master's report, could not be ordered to convey under the stat. 4 Geo. 2, c. 10, unless a commission of lunacy has issued. *Exp. Gillam*, 2 Ves. J. 586.

6. Lunatic trustee within 4 Geo. 2, c. 10, must be without interest or duty; therefore, having an interest as creditor, trust being to sell for payment of debts, he is not within the Act. *Exp. Tutin*, 3 Ves. & B. 149.

7. The heir of one who had covenanted to surrender copyholds to the uses of a settlement on his daughter's marriage being a lunatic, a surrender cannot be made under the stat. 4 Geo. 2, c. 10. *Exp. Currie*, 1 Jac. & Walk. 642.

Lunatic Mortgages.] 8. One found *non compos* before the senate of Hamburg a mortgagee within stat. 4 Geo. 2, c. 10, and will be directed to convey. *Exp. Otto Lewis*, 1 Ves. 298.

—9. Mortgagee is within the statutes 7 Ann, c. 19, as to infants, and 4 Geo. 2, c. 10, as to lunatics, though entitled as co-executor and residuary legatee to the mortgage money, the discharge of the other executor leaving a naked trust. *Exp. Tutin*, 3 Ves. & B. 151.

Costs.] 10. The costs of a committee of a lunatic mortgagee requisite to enable him to re-convey to the mortgagor under the stat. 4 Geo. 2, c. 10, including the costs of the reference, are to be paid out of the lunatic's estate, whether the application be made by the mortgagor, or by the committee, which is the usual course. *Exp. Richards*, 1 Jac. & Walk. 264.

If the mortgagor be ready to pay the committee of a lunatic, mortgagee should apply for a reference under the statute, and it seems he would not be allowed to bring an action. *Ib.*

11. Costs of the committee of a lunatic trustee conveying within the statute must be

paid out of the lunatic's estate. *Exp. Brydges*, Coop. 290.

12. The costs of the committee of a lunatic trustee, conveying under the statute, must be paid by the *cestuis que trustent*. The estates being vested in the lunatic upon trusts for securing an annuity, and subject thereto upon trust for the grantor of the annuity, were ordered to defray equally the committee's costs of an application by them for a re-conveyance of the estate. *Exp. & Re Pearce*, T. & R. 325.

III. TRANSFER OF STOCK UNDER THE 36 GEO. 3, c. 90, AND SUCCEEDING STATUTES

1. Under the 36 Geo. 3, c. 90, 6802.

2. Under the 6 Geo. 4, c. 74, 6803.

3. Under the 11 Geo. 4 and 1 Will. 4, c. 60, 6803.

1. Under the 36 Geo. 3, c. 90.

13. Stock ordered to be transferred, under the stat. 36 Geo. 3, c. 90, the trustee being of unsound mind, though no commission had issued, and having actually refused to transfer, the refusal proceeding from mere weakness of mind. *Simms v. Naylor*, 4 Ves. 360.

14. Trustees under a foreign will dead, and no personal representation taken out in this country, is a case for relief, by directing a transfer of stock, within the stat. 36 Geo. 3, c. 90. *Lee v. England (Bank of)*, 8 Ves. 44.

15. A lunatic abroad, under a judicial proceeding in nature of a commission of lunacy, is not within the stat. 36 Geo. 3, c. 90, s. 3. *Sylva v. Da Costa*, 8 Ves. 316.

16. Order for a transfer of stock within the stat. 36 Geo. 3, c. 90, as upon a refusal by a party appearing by counsel, and admitting that she had disobeyed an order to transfer. *Rider v. Kidder*, 15 Ves. 123.

17. Under 36 Geo. 3, c. 90, on proof that one trustee had become bankrupt, and absconded, and was abroad, and not likely to return, order was made that remaining trustee should transfer stock into name of himself and another as co-trustees. *Williams v. Bird*, 1 Ves. & B. 3.

18. Where bill is filed under the 36 Geo. 3, c. 90, merely to obtain transfer of stock standing in name of trustee, who is out of jurisdiction of Court, order must be made at hearing of cause, and cannot be obtained on petition. *Burr v. Mason*, 2 Sim. & S. 11.

19. A trustee, who is in a state of mind which renders him incompetent to the management of business, may refuse to transfer within the meaning of the 36 Geo. 3, c. 90, s. 1. *West v. Ayles*, T. & R. 330.

20. Construction of the Act 36 Geo. 3, c. 90, s. 3, directing the transfer in certain cases of stock standing in the name of a lunatic or his committee, not to extend to stock standing in the name of another to which the lunatic is entitled as administrator. *Exp. Adams*, 2 Meriv. 112.

21. Trustee of fund absconding, dividends of fund ordered to be paid to the *cestui quo vie*. *Wharton v. Massey*, Dick 429.

2. Under the 6 Geo. 4, c. 74.

1. A. and B., the residuary legatees of a deceased person, obtained administration of and had part of the assets transferred to their names. The letters of administration were afterwards re-called, and administration granted to B., the sole next of kin of the deceased, who was declared to have died intestate. A. was abroad, and B. a prisoner for contempt, for not obeying an order of the Court to transfer to the credit of the cause certain stock, which they had admitted, by their answer, to belong to the deceased. A petition was presented, under the 6 Geo. 4, c. 74, to have the stock transferred; but the Court held, that the Act extended only to express trusts, and refused to make the order. *Dem v. Clarke*, 4 Russ. 511.

2. The executor of a surviving trustee appointed three executors, who in an adverse litigation procured probate of his will to be decreed to them, but afterwards refused to take out probate. They are legal personal representatives of the surviving trustee, within the meaning of 6 Geo. 4, c. 74, and an order will be made under that Act for the transfer of stock standing in the trustee's name. An affidavit that they refuse to take out probate of the testator's will is not sufficient to ground an order under the Act; it should state that they refuse to take the steps necessary for enabling them to transfer. *Exp. Winter*, 5 Russ. 284.

3. Under the 11 Geo. 4 and 1 Will. 4, c. 60.

3. Construction of 11 Geo. 4 and 1 Will. 4, c. 60, s. 10. *Anon.*, 2 Jur. 886.

4. Construction of 11 Geo. 4 and 1 Will. 4, c. 60, ss. 10, 11. There must be a clear case of trust to justify the Court in transferring. *Crouch v. Crouch*, 2 Jur. 773.

5. The request in writing mentioned in the stat. 11 Geo. 4 and 1 Will. 4, c. 60, s. 10, as to the transfer of stock, means a private request by the party requiring the transfer, and service of an order of Court directing such transfer is not sufficient. *Madge v. Riley*, 3 Y. & Coll. 425.

6. Bengal government notes are land within the meaning of the Act 11 Geo. 4 and 1 Will. 4, c. 60. *Re Dyce Sombre*, 1 Macn. & G. 101; 13 Jur. 218.

7. A decree declared a defendant, against whom the bill had been taken *pro confesso*, to be a trustee of stock for the plaintiffs; but the Court declined to refer it to the Master to appoint a person to transfer the stock, in the place of the defendant, except upon a petition presented under 11 Geo. 4 and 1 Will. 4, c. 60. *Fellows v. Till*, 5 Sim. 319.

8. But where the widow and administratrix of an intestate, who had also left a child, of her own accord had transferred money in the funds into the names of herself and the infant child, it was ordered, under the 11 Geo. 4 and 1 Will. 4, c. 60, that the child should join in transferring the third to which the widow was entitled. *Kidd v. Kidd*, 1 Beav. 225. n.

9. A testatrix directed funds to be transferred in the bank books into the names of A. B. and wife, and their children, who were infants, for the benefit of A. B. and wife for

life, with remainder to their children. This was done, and a suit being instituted for the performance of the trusts:—Held, that the Court had no jurisdiction, under 11 Geo. 4 and 1 Will. 4, c. 60, to order the infants to transfer the fund into court. *Watts v. Scrivens*, 1 Beav. 223.

10. The executor of a surviving trustee declined stating whether he would or would not prove the will, and neglected for thirty-one days after notice to transfer trust-stock standing in the name of the testator:—Held, that he was a trustee within the 11 Geo. 4 and 1 Will. 4, c. 60, and a transfer was ordered to new trustees. *Cockell v. Pugh*, 6 Beav. 293.

11. Petition, under the 11 Geo. 4 and 1 Will. 4, c. 60, s. 10, for the appointment of a person to transfer stock in the place of a trustee refusing. *Re Crowther*, 3 Jur. 21.

12. A. and B. claimed adversely a sum of stock standing in the names of A. and two other persons as trustees. A. filed an amicable bill to have the rights and interests of himself and B. declared; A. was beyond sea, commanding a merchant vessel on a voyage to India. B. presented a petition, under 11 Geo. 4 and 1 Will. 4, c. 60, praying that the stock might be transferred into court in the cause. Petition refused, the case not being within the Act. *Hutchinson v. Stephens*, 5 Sim. 498; 3 L. J., N. S., Ch., 239.

13. Testator gave an annuity to his widow, and the residue of his estate to his children. The executors paid the testator's debts and legacies, and purchased stock in their names to answer the annuity, and paid the dividends to the widow. One of the executors went to reside abroad, and the other died:—Held, that they were trustees of the stock, within 11 Geo. 4 and 1 Will. 4. *Exp. Dover*, 5 Sim. 500.

14. One of two executors appearing, from the proceedings in the cause, to be a trustee, within the meaning of the 11 Geo. 4 and 1 Will. 4, c. 60, of a fund standing in the testator's name, and it being proved by affidavit that he was living out of the jurisdiction, the Court, without a reference to the Master, made an order under this Act for the transfer of the fund by his co-executor. *Parker v. Burney*, 1 Beav. 492; 8 L. J., N. S., Ch., 107.

15. Stock was vested in trustees in trust to pay the dividends to persons successively entitled for life. One of the trustees had acted, by joining in a power of attorney to receive the dividends, but, a new power of attorney being necessary, he refused to join in giving it, or in receiving the dividends. There was a power to appoint new trustees vested in the acting trustee of the deed. A petition was presented by the person entitled to the first life interest to have a trustee appointed to receive and pay over the dividends:—Held, not a case within the 10th section of 11 Geo. 4 and 1 Will. 4, c. 60. *Re Byrne*, 1 J. & L. 535; 6 Ir. Eq. R. 563.

16. The survivor of four trustees of a sum of stock died intestate, and his sole next of kin refused to administer to him:—Held, that the case was not within the 10th section of 11 Geo. 4 and 1 Will. 4, c. 60, and therefore the Court could not appoint a person to transfer the stock. *Re Lunn's Charity*, 15 Sim. 464. S. C. on appeal, 11 Jur. 256.

1. Stock was invested in the names of two persons upon trust, as was alleged, for the petitioners. The only evidence of the trust was the statements in the petition and verifying affidavits of a letter written by the donor for the purposes of the application. One of the alleged trustees being resident in some place unknown, out of the jurisdiction, a petition was presented praying that the stock might be transferred to the petitioners; but the Court refused to make the order in his absence, though it was stated that he declined to act, and the other trustee submitted to act as the Court should direct. *Re Dunbar*, 2 J. & L. 120; 8 Ir. Eq. R. 71.

2. Upon an application, under the 11 Geo. 4 and 1 Will. 4, c. 60, for a transfer of stock standing in the name of a lunatic trustee, the Lord Chancellor will not adopt the facts as found in the proceedings in a suit in the Court of Exchequer, but will require them to be ascertained by the usual reference. *Re Prideaux*, 2 Myl. & C. 640; 7 L. J., N. S., Ch., 82.

3. Where stock is standing in the names of trustees, one of whom becomes a lunatic, and new trustees are appointed in his place, the Court will not order a transfer of the stock to be made to the *cestui que trust*, but it must be transferred to the old and new trustees. *Re Smith*, 17 L. J., N. S., Ch., 415.

IV. UNDER THE 6 GEO. 4, c. 74.

Infant Heir or Trustee.] 4. A copyholder covenants to surrender to trustees in trust to sell, and dies before surrender, leaving an infant heir; the covenantees agree to sell the estate, and afterwards file a bill for a specific performance:—Held, that the heir is not an infant trustee within 6 Geo. 4, c. 74, and therefore cannot be ordered to surrender immediately; and the bill was dismissed with costs. *King v. Turner*, 2 Sim. 549. But see 1 Myl. & K. 456; *Coop. temp. Brough*, 64.

5. A. contracted to sell a freehold estate to B., and by will gave the purchase money to trustees for certain purposes; and if the contract should not be completed, he devised the estate to the trustees for the same purpose. A. died, leaving a son, who died leaving an only daughter, an infant:—Held, that she was not a trustee within the stat. 6 Geo. 4, c. 74. *Re Moody*, Taml. 4.

6. Court has no jurisdiction in bankruptcy to declare an infant heir of assignee a trustee of bankrupt's estate; the petition must be entitled under 6 Geo. 4, c. 74. *Exp. Kirk*, Buck 478. S. P. *Exp. Beddam*, 1 Rose 310.

V. UNDER THE 11 GEO. 4 AND 1 WILL. 4, c. 60, AND AMENDING ACTS.

1. *General Principles*, 6804.
2. *Infant Heir, Devisee, or Trustee. In General*, 6804.
3. *Mortgages*, 6806.
4. *Lunatic Mortgagee, Devisee, or Trustee*, 6807.
5. *Other Persons*, 6808.
6. *Order to Convey*, 6808.
7. *Execution of Conveyance*, 6808.
8. *Praetice*, 6809.
9. *Costs*, 6809.

1. General Principles.

7. The 11 Geo. 4 and 1 Will. 4, c. 60, s. 8, applies to cases where conveyances are to be made, and not where sales are to be effected. *Re Down*, 2 Jur. 886.

8. The 8th section of the stat. 11 Geo. 4 and 1 Will. 4, c. 60, relates to trusts only, and not to mortgages, and to positive or naked trustees, and not to constructive trustees, or trustees by operation of law. *Re Dearden*, 3 Myl. & K. 508; 4 L. J., N. S., Ch., 186.

9. The stat. 11 Geo. 4 and 1 Will. 4, c. 60, intitled "an Act for amending the laws respecting conveyances, and transfers of estates, and funds vested in trustees and mortgagees," applies only to *cestuis que trustent* who are named in the instruments upon which their title depends, or to persons who claim directly under such *cestuis que trustent*, as real or personal representatives, or as assignees. *Re Merry*, 1 Myl. & K. 677.

10. The Act (11 Geo. 4 and 1 Will. 4, c. 60) does not apply to lands out of the Queen's dominions; nor is a party having the legal interest in a debt (which he has been decreed to assign) a trustee of such debt within the Act. *Price v. Denhurst*, 8 Sim. 616. See S. C. *id.* 279; 8 L. J., N. S., Ch., 267.

11. An exchange of lands, or an exchange of lands where a sum of money forms part of the consideration by way of equality of exchange, is not within the stat. 11 Geo. 4 and 1 Will. 4, c. 60. *Turner v. Edgell*, 1 Keen 502; 6 L. J., N. S., Ch., 201.

12. The statute 1 Will. 4, c. 60, does not apply to cases of partition. *Re Neashell*, 14 L. J., N. S., Ch., 121.

2. Infant Heir, Devisee, or Trustee. In General.

13. Estates were conveyed to A. and B. and the heirs of A. A. died, having devised the estates to C. in tail. C. alone, in B.'s lifetime, conveyed the estates to D., to make him tenant to the *praetice*; and a recovery was suffered to the use of C. in fee. D. died, leaving an infant heir:—Held, that the heir was not a trustee, for though the recovery did not bar the estate tail, it drew out from D. the whole estate that was vested in him, under the recovery deed. *Re Debary*, 5 Sim. 283.

14. A testatrix directed funds to be transferred in the bank books into the names of A. B. and wife, and their children, who were infants, for the benefit of A. B. and wife for life, with remainder to their children. This was done, and a suit being instituted for the performance of the trusts:—Held, that the Court had no jurisdiction, under the 11 Geo. 4 and 1 Will. 4, c. 60, to order the infants to transfer the fund into court. *Watts v. Scrivens*, 1 Beav. 223.

15. Where the widow and administratrix of an intestate transferred money into the names of herself and infant child, it was ordered, under the 11 Geo. 4 and 1 Will. 4, c. 60, that the child should join in transferring the third to which the widow was entitled. *Kidd v. Kidd*, 1 Beav. 225. n.

16. Four co-partners purchased an estate out of the partnership assets, and took a convey-

ance to themselves as tenants in common in fee. One of them died intestate as to his real estate, leaving an infant heir. The survivors settled with his executors for the value of one-fourth of the estate, and then petitioned, under the 11 Geo. 4 and 1 Will. 4, c. 60, that the infant might be declared a trustee of one-fourth of the estate, and might join in conveying the estate to a purchaser. The Court refused to make the order, and said that a bill must be filed. *Exp. Williams*, 11 Sim. 54.

1. In a decree for raising legacies against an infant heir of a devisee, whose estate was charged with the legacies, a sale may be directed, but the infant will not then be declared a trustee, so as to enable the Court to order a conveyance under the 6th and 18th sections of the 11 Geo. 4 and 1 Will. 4, c. 60. *Walters v. Jackson*, 12 Sim. 278; 10 L. J., N. S., Ch., 388.

2. A trader, who had freehold, copyhold, and personal estate, died in September 1832, leaving an infant heir. His estate was insufficient to pay his debts and charges. His partners, however, by deed took upon themselves to pay all the debts, and secured the principal part of his property for his family. A suit was instituted for carrying the deed into execution, and the Master found that it would be for the benefit of the infant heir that the real estate should be sold and applied in the manner mentioned in the deed. A decree was made for sale, and the infant was declared a trustee within the 11 Geo. 4 and 1 Will. 4, c. 60:—Held, that a sale under the decree could not be enforced; that the Court had no jurisdiction to order the sale; that the infant was not a trustee within the Act; that the purchaser was not bound to wait until the error was corrected; and the Court, therefore, discharged him with his costs, charges, and expenses. *Calvert v. Godfrey*, 6 Beav. 97; 12 L. J., N. S., Ch., 306.

3. Upon a direction for the sale of testator's real estate to pay debts, infant devisees refusing to convey, were declared by the Court to be trustees within 11 Geo. 4 and 1 Will. 4, c. 60. *Warburton v. Vaughan*, 4 Y. & Coll. 247.

4. The infant tenant in tail of lands decreed to be sold for an equitable charge is a trustee under the 8th and 18th sections of the 11 Geo. 4 and 1 Will. 4, c. 60; and if he refuse to execute, the Master will be directed to do so in his name, under 11 Geo. 4 and 1 Will. 4, c. 60. *Semble*, the 4 & 5 Will. 4, c. 78, s. 8, does not apply to infants. *Peyton v. McDermott*, 6 Ir. Eq. R. 220.

5. Where an order was obtained on petition against a minor, not a party to the cause, to execute the conveyance, and the minor refused to obey the order, it is necessary, to present a further petition to obtain an order that an attachment should issue against the minor, that a person appointed by the Court should execute in his name. *Semble*, the 4 & 5 Will. 4, c. 78 (Irish Statutes), does not apply to minors. *Moore v. Grogan*, 9 Ir. Eq. R. 472.

6. Where the Master finds that in a certain construction of a devise the infant therein named is a trustee within the Act 11 Geo. 4 and 1 Will. 4, c. 60, but that on a different

construction another person would be such trustee, the Court may declare the infant to be the trustee, and make the order for conveyance, without sending the case back to the Master. *Langford v. Auger*, 4 Hare 313.

7. A testator agreed to let land on a building lease, but died before the execution of the lease, having devised the land:—Held, on a bill for specific performance by the intended lessee, that the devisees, including an infant, were trustees for the plaintiff, under the stat. 11 Geo. 4 and 1 Will. 4, c. 60, for the purpose of executing the lease. *Cullum v. Upton*, 19 L. J., N. S., Ch., 276; 14 Jur. 187.

8. Bill filed to have a sale of lands, the legal and beneficial estate in which was vested in the plaintiff, an infant. Order for sale made:—Held, that this order was tantamount to declaring that the infant was a trustee for the purchaser within the Act 11 Geo. 4 and 1 Will. 4, c. 60, s. 18; and upon the petition of the purchaser, the Court ordered an immediate conveyance by the infant, without a previous reference to the Master to inquire whether he was a trustee within the meaning of the Act. *Re Blackwell*, 7 Jur. 9.

9. Where a freehold estate was vested in an infant trustee on a plain trust, an order for a conveyance was made on a petition presented under the 11 Geo. 4 and 1 Will. 4, c. 60, without a reference to the Master. *Re Trapp*, 13 L. J., N. S., Ch., 168; 8 Jur. 437.

10. A petition under the 11 Geo. 4 and 1 Will. 4, c. 60, stated, that in 1823 the testator devised real estate to a trustee to pay debts, and after payment thereof in trust for the petitioner; that he died in 1824, and thereupon the petitioner entered; that many years ago petitioner and the trustee sold part of the estate, and paid all the debts; that the trustee had died, and that his heir was a minor; and it prayed a conveyance of the real estate. The Court directed inquiries whether the minor was a trustee for the petitioner alone, discharged of debts and the trusts of the will. *Re Barry*, 2 J. & L. 1.

11. An infant devisee had been ordered to convey real estate sold for payment of testator's debts; and having made default, and not being within reach of process, a person was appointed by the Court, under 1 & 2 Will. 4, c. 60, s. 8, to convey. *Thomas v. Gwynne*, 9 Beav. 275.

12. The stat. 11 Geo. 4 and 1 Will. 4, c. 60, does not apply to cases of partition, and an infant will not be directed under the provisions of that Act to execute a conveyance upon a partition, unless the rights of the parties have been previously established by a decree. *Re Neachell*, 14 L. J., N. S., Ch., 121.

13. After decree in a suit for specific performance against the infant heir of the vendor, a petition must be presented under 11 Geo. 4 and 1 Will. 4, c. 60, for an order that the infant may convey to the purchaser. The costs of the suit were ordered to be paid out of the purchase money. *Prythoroh v. Harvard*, 6 Sim. 9.

Of Mortgages.] See 3 (b) *infra*.

Of Mortgagees.] See 3 (d) *infra*.

3. Mortgages.

- (a) *Mortgages. In General*, 6806.
- (b) *Infant Heir of Mortgagee*, 6806.
- (c) *Mortgagee out of Jurisdiction or not to be Found*, 6806.
- (d) *Mortgagors and Infant Heir of Mortgagor*, 6807.
- (e) *Assignment of Mortgage Debt*, 6807.
- (f) *Lunatic Mortgagee*. See 4 *infra*.

(a) *Mortgages. In General.*

1. The devisee of a mortgage is not a trustee for the executors of the testator within 11 Geo. 4 and 1 Will. 4, c. 60. *Exp. Payne*, 6 Sim. 644; 5 L. J., N. S., Ch., 259.

2. The 8th section of the 11 Geo. 4 and 1 Will. 4, c. 60 relates to trusts only, and not to mortgages, and to positive or naked trustees, and not to constructive trustees, or trustees by operation of law. *Re Dearden*, 3 Myl. & K. 508; 4 L. J., N. S., Ch., 186.

3. Appointment of person to convey for the heir of a mortgagee under the 11 Geo. 4 and 1 Will. 4, c. 60, s. 8, 4 & 5 Will. 4, c. 23, and 1 & 2 Vict., c. 69. *Re Wilson*, 2 Jur. 987.

4. Mortgagees and the heirs of mortgagees are within the 8th section of the 11 Geo. 4 and 1 Will. 4, c. 60, explained by the 4 & 5 Will. 4, c. 23, s. 2. *Exp. Whitton*, 1 Keen 278.

5. An order of reference to inquire whether the heir of the mortgagee was a trustee within the Acts 11 Geo. 4 and 1 Will. 4, c. 60, and 1 & 2 Vict., c. 69, was made upon the petition of the executors of the mortgagee; and the mortgage debt being paid off pending the reference, the Master found that the heir was not a trustee for the petitioners, but for the mortgagee, whereupon the Court allowed the petition to be amended and made the petition of the mortgagor, and then directed the re-conveyance. *Re Manifold*, 4 Hare 308.

(b) *Infant Heir of Mortgagee.*

6. The infant heir of a mortgagee, who had obtained a decree for a sale, being out of the jurisdiction:—Held, a trustee within the 8th and 18th sections of 11 Geo. 4 and 1 Will. 4, c. 60. *Prendergast v. Eyre*, Ld. & G. temp. Sugd. 11.

7. The executors of a mortgagee in fee who had died intestate, leaving an infant heir, having in exercise of a power in the mortgage deed agreed to sell the estate, the heir was ordered, on a petition presented by the executors under the 11 Geo. 4 and 1 Will. 4, c. 60, s. 6, to convey the estate to the purchaser. *Re Kent*, 9 Sim. 501; 8 L. J., N. S., Ch., 169.

8. Form of order upon an application for an infant mortgagee to convey, under the stat. 11 Geo. 4 and 1 Will. 4, c. 60, s. 6. *Re Halliday*, Dr. 3.

9. The Act 1 & 2 Vict., c. 69 does not repeal any part of 1 Geo. 4 and 1 Will. 4, c. 60, nor of the 4 & 5 Will. 4, c. 23, and therefore, since the passing of the 1 & 2 Vict., according to previous decisions upon the meaning of the 4 & 5 Will. 4, an order will be made for the re-conveyance

of the legal estate when the heir of a mortgagee is either an infant or cannot be found. *Re Wilson's Estate*, *Re Gathorne*, 8 Sim. 392; 8 L. J., N. S., Ch., 45; and *id.* 46.

(c) *Mortgagee out of Jurisdiction or not to be Found.*

10. A mortgagee in fee died intestate as to his real estate, and his heir was not known. The Court had no authority, under the 11 Geo. 4 and 1 Will. 4, c. 60, s. 8, to appoint a person to re-convey the estate to the party entitled to the equity of redemption on his payment of the mortgage money to the executor of the mortgagee. *Re Goddard*, 1 Myl. & K. 25; 2 L. J., N. S., Ch., 16.

11. A mortgagee in fee died intestate as to the mortgaged premises, but having bequeathed her personal estate to B. The mortgage money remaining unpaid, B. presented a petition, under 11 Geo. 4 and 1 Will. 4, c. 60, praying that some person might be appointed in the place of the mortgagee's heir (who could not be found) to convey the premises to him; but the Court refused to make any order. *Re Stanley*, 5 Sim. 320; 3 L. J., N. S., Ch., 240.

On a further application to the Court:—Held, that his heir was to be regarded as a trustee within the meaning of the 11 Geo. 4 and 1 Will. 4, c. 60, s. 8, as explained by 4 & 5 Will. 4, c. 23, s. 2, and the Court made the order. *S. C.* 6 L. J., N. S., Ch., 361; 7 Sim. 170.

12. A mortgagee was resident out of the jurisdiction:—Held, that the case was not within the 11 Geo. 4 and 1 Will. 4, c. 60, the 4 & 5 Will. 4, c. 23, or the 1 & 2 Vict., c. 69. *Green v. Holden*, 1 Beav. 207.

13. The Act 1 & 2 Vict., c. 69 does not repeal any part of 11 Geo. 4 and 1 Will. 4, c. 60, nor of the 4 & 5 Will. 4, c. 23, and therefore, since the passing of the 1 & 2 Vict., according to previous decisions upon the meaning of the 4 & 5 Will. 4, an order will be made for the re-conveyance of the legal estate when the heir of a mortgagee is either an infant or cannot be found. *Re Wilson's Estate*, *Re Gathorne*, 8 Sim. 392; 8 L. J., N. S., Ch., 45; and *id.* 46.

14. The case of a mortgagee leaving an heir, though such heir be unknown, is within the stat. 11 Geo. 4 and 1 Will. 4, c. 60, s. 8, as expounded by the stat. 4 & 5 Will. 4, s. 23. *Re Williams*, *Exp. Bird*, 9 Sim. 642. Reversing *id.* 426; 9 L. J., N. S., Ch., 353; 4 Jur. 912.

15. The 8th section of 11 Geo. 4 and 1 Will. 4, as expounded by the 2nd section of 4 & 5 Will. 4, c. 23, applies to the case of the heir of a mortgagee being out of jurisdiction of the Court. *Re Thompson*, 12 Sim. 392.

16. The heir-at-law of a mortgagee, who had never been in possession, was out of the jurisdiction, and the produce of the sale of the mortgaged lands under a decree was sufficient to pay off the mortgage by reason of prior incumbrances:—Held, that the Court had no jurisdiction to make an order for the conveyance of the legal estate to the purchaser either under the 11 Geo. 4 and 1 Will. 4, c. 60, s. 8, or 1 Vict., c. 69, s. 1. The decisions under these statutes reviewed. *Re Thompson* (12 Sim. 392) disapproved of. *Spunner v. Walsh*, 10 Ir. Eq. R. 214.

(d) *Mortgagors and Infant Heir of Mortgagor.*

1. In a suit by an equitable mortgagee of leaseholds to enforce his security, a decree was made for sale in default of payment, and the premises were sold under the decree; the mortgagor, then out of the jurisdiction, was held not to be a trustee, within the Act 11 Geo. 4 and 1 Will. 4, c. 60, for the purchaser, but he was held to be a trustee within that Act for the plaintiff, and a person was appointed to execute the assignment in the place of such trustee. *King v. Leach*, 2 Hare 57.

2. In a creditors' suit for the administration of a testator's estate, a decree was made that the devisees of real estates subject to a mortgage, two of whom were married women, should execute a conveyance of the equity of redemption to the mortgagee, if the latter were willing to release the testator's estate from the mortgage debt. The devisees refused to execute a deed of conveyance, prepared in pursuance of the decree by the mortgagee, and approved of by the Master:—Held, upon petition by the mortgagee, that he was entitled, under stat. 11 Geo. 4 and 1 Will. 4, c. 60, to an order for the appointment of a person to execute the conveyance in the place of the devisees. *Hood v. Hall*, 19 L. J., N. S., Ch., 312; 14 Jur. 127.

[*Infant Heir of Mortgagor.*] 3. In a suit by an equitable mortgagee against infant heir of mortgagor, the estate having been directed to be sold as most beneficial to the infant, the latter was, under the 11th section of the stat. 11 Geo. 4 and 1 Will. 4, c. 60, directed to convey to the purchaser. *Scholefield v. Heafeld*, 8 Sim. 470; 7 L. J., N. S., Ch., 4.

4. Where lands are decreed to be sold in a mortgage suit, the infant heir-at-law of the mortgagor is not a trustee within the 8th or 18th section of the 11 Geo. 4 and 1 Will. 4, c. 60. *Goddard v. Macaulay*, 6 Ir. Eq. R. 221.

Semble, the Court has jurisdiction, under 11 Geo. 4 and 1 Will. 4, c. 47, s. 11, to make an order directing such infant heir to execute a conveyance. *Id.*

He is not within the provisions of the 28 Geo. 3, c. 25. Nor is he a necessary party to the conveyance to the purchaser. *Id.*

(e) *Assignment of Mortgage Debt.*

5. The 11 Geo. 4 and 1 Will. 4, c. 60, being intended only to provide means for conveying the legal interest:—Held, that an assignment of a mortgage debt was not within the Act; nor was it intended to apply to land out of the King's dominions. *Price v. Demhurst*, 8 Sim. 617; 8 L. J., N. S., Ch., 267; 8 Sim. 279.

4. *Lunatic Mortgagee, Devisee, or Trustee.*

6. The statute 11 Geo. 4 and 1 Will. 4, c. 60, applies only to the case of a trustee who, by reason of mental incapacity, is incompetent to the execution of a trust. *Re Jones*, 6 Jur. 545.

7. The summary jurisdiction given to the Lord Chancellor by the 11 Geo. 4 and 1 Will.

4, c. 60, s. 5, for the conveyance of property vested in trustees or mortgagees who are lunatic, but not found so by inquisition, does not apply to cases in which the fact of lunacy is contested. *Re Walker*, Cr. & Ph. 147; 10 L. J., N. S., Ch., 355; 5 Jur. 571.

8. Where the evidence adduced of unsoundness of mind of a lunatic trustee, but not found such by inquisition, is very strong, the Court will make the order for a conveyance of the trust property in the first instance, without directing a reference to the Master. *Re Daniel*, 11 L. J., N. S., Ch., 123.

9. Land having been sold under a decree for payment of charges which were prior to the estate of one of the defendants, who was a lunatic, the Court referred it to the Master to appoint a person in his place to convey them to the purchaser. When the sale is under a decree of the Court, the granting parties do not fill the character of vendors within the exception in the 11 Geo. 4 and 1 Will. 4, c. 60, s. 18. *Re Blake*, 3 J. & L. 265.

10. Where a lunatic, who had no issue, was seized of an estate tail in possession, with the immediate reversion to himself in fee, and the land had been sold under the 1 Will. 4, c. 65 for payment of his debts, an order was made on the committee to suffer a recovery on behalf of the lunatic, in order to complete the title to a purchaser. *Re Brand*, 1 Myl. & K. 150; 2 L. J., N. S., Ch., 12.

11. Property, of which a lunatic (not so found) was mortgagee in fee for 1,300*l.*, was sold for 900*l.* His beneficial interest in the mortgage money having been by means of an equitable charge reduced below 700*l.*:—Held, that this case fell within the 5th section of the Act 11 Geo. 4 and 1 Will. 4, c. 60. *Re Sandford*, 1 Macn. & G. 538; 2 H. & Tw. 137.

12. R. B. was entitled to a rent-charge for life, and legal estate for life in remainder in lands, decreed to be sold for paramount incumbrances; after decree, he became lunatic, but no commission issued. A conveyance by him to purchase was ordered under s. 5 of the Trustee Act, 11 Geo. 4 and 1 Will. 4. *Blake v. Blake*, 9 Ir. Eq. R. 592.

13. A petition praying that the committee of a lunatic may be ordered to transfer property vested in the lunatic as a trustee ought to be entitled in the lunacy, and need not be entitled in the matter of the Act which authorises the Lord Chancellor to make the order. *Re Fowler*, 2 Russ. 449.

14. *Ad interim* committee incapable of conveying under the Act 1 Will. 4, c. 60, s. 3. *Re Poulton*, 1 Macn. & G. 100; 1 H. & Tw. 476.

15. A., after making an equitable mortgage of freeholds, became lunatic. The mortgaged estate was sold under a decree in a foreclosure suit. The lunatic was held to be a trustee within the 11 Geo. 4 and 1 Will. 4, c. 60, and a conveyance was ordered to be made by the plaintiff's solicitors in the name of the lunatic, without a reference. *Re Rogers*, 13 L. J., N. S., Ch., 262; 8 Jur. 229.

16. After a decree in a creditors' suit for the sale of the real estate of the testator, and the application of the proceeds in payment of the debt, and after a sale under that decree, the devisees of the estate, being lunatic or out of the jurisdiction, are trustees of the estate within the statute 11 Geo. 4 and 1 Will. 4, c. 60,

for the plaintiff in the cause, *semble*. *Jackson v. Milfield*, 5 Hare 254, 538.

5. Other Persons.

1. A woman who was sole trustee for sale of real property married a man who absconded, and had not been heard of up to the hearing of the cause. The Court decreed a sale, and that the husband should be declared a trustee within the 11 Geo. 4 and 1 Will. 4, c. 60, s. 19, but declined to appoint a person to convey in his room, under the 8th section, on the ground that he was not the trustee "last known to have been seised," there being a joint seisin in him and his wife. *Moore v. Vinten*, 12 Sim. 161; 10 L. J., N. S., Ch., 345.

2. Real estate having been applied for a century and a half upon the trusts specified by will, the Court assumed that the will created a trust, and that the heir of the testator became a trustee, and, the present heir not being known, the case was held to be within 11 Geo. 4 and 1 Will. 4, c. 60, s. 23. *Re Gore's Charities*, 2 Con. & L. 411; 4 Dr. & War. 270.

3. Devise in 1677 to the use of the poor of the parish of A. The Master was unable to ascertain in whom the estate was vested:—Held, that the case was not within the Trustee Acts. So also where charity money had in 1745 been laid out by a parish in the purchase of an estate for the poor of the parish, and it could not be ascertained in whom it was vested. *Att.-Gen. v. Randles*, 8 Beav. 185.

4. Tenant for life of estates decreed in a creditors' suit to be sold for payment of debt, is a trustee for the purchaser within the meaning of 1 Will. 4, c. 60, s. 18. *Re Milfield*, 2 Ph. 254; and see 5 Hare 538.

5. An estate was devised to A., subject to a charge of 5,000*l.*, payable to the executors in a suit to which A. was a party; the estate was sold, and all proper parties were ordered to join in the conveyance. A. refusing to execute the deed, was declared a trustee for the purchaser under the stat. 11 Geo. 4 and 1 Will. 4, c. 60, and another person was directed to convey in his stead. The petition for the above purposes was presented by a defendant in his character of purchaser; the Court refused to give costs. *Robinson v. Wood*, 5 Beav. 246.

6. Where the heiress-at-law, a feme covert, declined acknowledging the conveyance upon the sale of an intestate's estate under a decree, *semble*, that the heir was a trustee within 11 Geo. 4 and 1 Will. 4, c. 60. *Billing v. Webb*, 1 De G. & Sm. 717; 12 W. R. 427.

7. The heir of a trustee of the lessee's interest in a lease for lives renewable for ever having been applied to to accept a renewal to him, refused to execute the conveyance:—Held, that the 8th section of the Trustees' Act, 11 Geo. 4 and 1 Will. 4, c. 60, did not extend to such a case. *Fitzgibbon v. Lewis*, 6 Ir. Eq. R. 560.

8. A vendor who dies before the completion of the contract is a trustee within the meaning of the 4 & 5 Will. 4, c. 23, though expressly excepted out of the 1 Will. 4, c. 60. *Re Lowe's Estate*, 2 Ph. 690; 17 L. J., N. S., Ch., 430; 12 Jur. 638.

9. The executor of the survivor of three

trustees declined to prove his will:—Held, that the case was within the 11 Geo. 4 & 1 Will. 4, c. 60. *Exp. Hagger*, 8 Beav. 98.

6. Order to Convey.

10. An application, under the 11 Geo. 4 and 1 Will. 4, c. 60, to appoint a person to convey in the place of an absent trustee, who has been discharged by a decree of the Court, ought to be by motion in the cause in which the decree was pronounced, a petition for that purpose being unnecessary. *Callaghan v. Egan*, 1 Dr. & Wal. 187.

11. Where an order that the Master or any other person appointed by the Court should convey in the name of a defendant, under the 11 Geo. 4 and 1 Will. 4, c. 60, s. 8, cannot be made contemporaneously with the decree at the hearing of the cause, in consequence of the party to whom the conveyance is to be made not being then ascertained (*e.g.*, where lands are by the decree directed to be sold), an application, under the 11 Geo. 4 and 1 Will. 4, c. 60, that the Master should execute a conveyance in the name of such defendant, must be made by petition. *Newman v. Fitzgerald*, 13 Ir. Eq. R. 65.

12. Under the 11 Geo. 4 and 1 Will. 4, c. 60, the Master has no power to appoint a person to convey. It is for the Master to "approve," and for the Court to "appoint." *Fowler v. Ward*, 8 Beav. 488.

13. One of two executors appearing, from the proceedings in the cause, to be a trustee within the meaning of the 11 Geo. 4 and 1 Will. 4, c. 60, of a fund standing in the testator's name, and it being proved by affidavit that he was living out of the jurisdiction, the Court, without a reference to the Master, made an order, under this Act, for the transfer of the fund by his co-executor. *Parker v. Burney*, 1 Beav. 492; 8 L. J., N. S., Ch., 107.

14. Where the Court, in any proceeding in a cause, declares a party to be a trustee, within 11 Geo. 4 and 1 Will. 4, c. 60, it may, by the same order, direct a conveyance to be made. *Walton v. Merry*, 6 Sim. 328.

15. Where the Court, by its decree, declares that an infant heir is a trustee, and the right of party entitled to a conveyance is established by that decree, the Court will at the same time direct a conveyance from the infant heir, a petition for that purpose being unnecessary. *Broom v. Broom*, 3 Myl. & K. 443.

16. Where an infant heir is declared, by the decree of the Court, to be a trustee for a purchaser, the Court will direct a conveyance to the purchaser by the same decree, a petition for that purpose being unnecessary. *Miller v. Knight*, 1 Keen 129; 5 L. J., N. S., Ch., 168.

7. Execution of Conveyance.

17. Where a person has been ordered, under the 11 Geo. 4 and 1 Will. 4, c. 60, to execute a deed in place of a refusing trustee, it is sufficient that he should execute the same deed that has been tendered to the refusing trustee, it being expressed, in the attestation clause, that he has executed it in place of the trustee, and in pursuance of the order. *Exp. Foley*, 8 Sim. 395; 8 L. J., N. S., Ch., 56; 2 Jur. 1012.

8. Practice.

1. For the proper form of the reference under the stat. 11 Geo. 4 and 1 Will. 4, c. 60, see *Re Pigott*, 2 Russ. & M. 683.

2. Where one of two executors, defendants in an administration suit, was stated by affidavit to be out of the jurisdiction, an order was made for the transfer of a fund, under the 11 Geo. 4 and 1 Will. 4, c. 60, without a reference, it appearing from the proceedings in the cause, as was stated in the order, that he was a trustee within the meaning of the Act. *Parker v. Burney*, 3 Beav. 492; 8 L. J., N. S., Ch., 107.

3. Reference directed under 11 Geo. 4 and 1 Will. 4, c. 60, in a case where the *cestui que trust*, making the application, claimed in respect of interests devised in remainder after the determination of prior estates tail which had failed. *Re De Clifford Estates*, 2 Myl. & K. 624.

4. In proceedings under the 11 Geo. 4 and 1 Will. 4, c. 60, all the circumstances giving the Court jurisdiction should be stated in the petition, as a supplemental affidavit cannot be read. *Re Hartford*, 1 Con. & L. 394; 2 Dr. & War. 292.

5. Proof of search for a trustee under the 11 Geo. 4, s. 24, and 1 Will. 4, c. 60, s. 24, may be given at the hearing of the cause, by affidavit. *Moore v. Vinten*, 12 Sim. 161; 10 L. J., N. S., Ch., 345.

6. The title of a petition presented, under an Act of Parliament, as the Trustee Act (11 Geo. 4 and 1 Will. 4, c. 60), should contain a reference to that Act, as well as to the matter of the petition. *Re Lam*, 4 Beav. 509; 11 L. J., N. S., Ch., 118; 6 Jur. 615.

9. Costs.

- (a) *Heir or Devisee of Mortgagee*, 6809.
- (b) *Lunatic Mortgagee or Trustee*, 6809.
- (c) *Other Cases*, 6809.

(a) *Heir or Devisee of Mortgagee.*

7. The infant heir of a mortgagee is entitled to the costs incurred on the reference, under 11 Geo. 4 and 1 Will. 4, c. 60. *Milton (Earl) v. Trimleston (Lord)*, Fl. & K. 338.

8. The infant heir of a mortgagee in fee having been found by the Master to be a trustee of the mortgaged estate for the executor of the mortgagee, the executor petitioned that the infant might be ordered to re-convey the estate to the mortgagor on payment of the principal and interest due on the mortgage and costs:—Held, that the costs of the proceeding before the Master must be paid by the mortgagor. *Exp. Ommaney*, 10 Sim. 228; 10 L. J., N. S., Ch., 315; 5 Jur. 647.

9. The costs of the petition and order, under the stat. 11 Geo. 4 and 1 Will. 4, c. 60, for the re-conveyance of a mortgaged estate to the mortgagor or his representatives, upon payment of the mortgage money, are to be borne by the mortgagor or his estate, although such proceedings were rendered necessary by the circumstance that the mortgagee had devised the legal estate in the mortgaged

premises to three trustees, one of whom could not be found. *King v. Smith*, 6 Hare 473; 18 L. J., N. S., Ch., 43; 12 Jur. 1083.

(b) *Lunatic Mortgagee or Trustee.*

10. Costs of the committee of a lunatic trustee, conveying within the statute, must be paid out of the lunatic's estate. *Exp. Brydges*, Coop. 290.

11. *Semble*, the expenses of proceedings, under the 11 Geo. 4 and 1 Will. 4, c. 60, s. 5, for the purpose of obtaining a re-conveyance of a mortgaged estate from a mortgagee of unsound mind, but not found such by inquisition, are to be borne by the mortgagor. *Re Marrow*, Cr. & Ph. 142; 10 L. J., N. S., Ch., 340.

12. Where it clearly appeared that the lunatic was a trustee of mortgaged premises, and the mortgage deed contained a declaration to that effect:—Held, that the costs of proceedings, under the Act 11 Geo. 4 and 1 Will. 4, c. 60, to obtain a re-conveyance, must be borne by the mortgagor. *Re Lewis*, 1 Macn. & G. 23; 1 H. & Tw. 123; 18 L. J., N. S., Ch., 153; 13 Jur. 548.

13. The costs of proceedings of a re-conveyance by the committee of a lunatic of premises mortgaged to the lunatic will be ordered to be paid out of the lunatic's estate, where the lunatic is beneficially interested in the mortgage money, and the petition is presented by the committee. *Re Wheeler*, 1 De G. M. & G. 434.

This rule, however, will not be acted on if the mortgagor presents the petition, unless in cases where the committee has declined to take that step. *Id.*

14. Application of the rule as to the costs of proceedings under 11 Geo. 4 and 1 Will. 4, c. 60, for the purpose of obtaining a re-conveyance of mortgaged premises, to the case of a lunatic mortgagee who was a trustee, and where the existence of the trust did not appear on the mortgage deed. *Re Townsend*, 1 Macn. & G. 686; 2 H. & Tw. 185; 2 Ph. 348; 16 L. J., N. S., Ch., 456.

(c) *Other Cases.*

15. If a motion is made to enforce an order under the 11 Geo. 4 and 1 Will. 4, c. 60, and the order appears to be an improper one, the Court has jurisdiction to give the party resisting it the costs of the motion. *Re King*, 10 Sim. 605; 9 L. J., N. S., Ch., 257.

16. If a petition is presented under the 10 Geo. 4, c. 56, or under the 11 Geo. 4 and 1 Will. 4, c. 60, to have a person appointed to convey property in the place of a recusant trustee, the latter ought not to be served with the petition; and if he is served, he will be entitled to costs. *Re Third Burnt Tree Building Society*, 16 Sim. 296; 12 Jur. 595. And see S. C. 1 Macn. & G. 607; 2 H. & Tw. 44.

17. Upon an order, under the 11 Geo. 4 and 1 Will. 4, c. 60, for the infant heir of a trustee under a settlement to convey to parties who claimed under the will of a party who claimed under the limitation in the settlement to the

right heirs of the settlor:—Held, that such heir need not be served with the order of reference to the Master, or other orders in the matter of the reference; and the petition of such infant, that he might be directed to convey upon the trusts of the settlement, instead of the trusts of the subsequent will, and that he might be served with such orders as aforesaid, being wrong, the petitioner could not have his costs of opposing the *cestui que trust*. *Re Bradburne*, 12 L. J., N. S., Ch., 353.

II. Vesting Orders, Conveyances, and Transfers under the Trustee Acts 1850 and 1852.

- I. *Jurisdiction where Property Abroad*, 6810.
- II. *Copyholds*, 6810.
- III. *Decrees for Sale*, 6811.
- IV. *Leaseholds*, 6812.
- V. *Lunacy*, 6813.
- VI. *Mortgages*, 6815.
- VII. *Stock and Choses in Action*, 6817.
See also XIII. infra.
- VIII. *Trusts out of Jurisdiction or not to be Found*, 6819.
- IX. *Vendor, Heir or Devisee of*, 6820.
- X. *Vesting Orders. When made in Other Cases*, 6820.
- XI. *Form and Effect of Vesting Order*, 6821.
- XII. *Order to Convey or Transfer instead of Vesting Order*, 6823.
- XIII. *Orders when Binding on Bank of England*, 6823.
- XIV. *Disobedience to Orders. Attachment*, 6824.
- XV. *Practice*, 6824.
- XVI. *Costs*, 6825.

I. JURISDICTION WHERE PROPERTY ABROAD.

1. Where land held in trust is situated in Ireland, the *cestui que trust* being in England, and a surviving trustee in Ireland, the Court has jurisdiction under the 54th section of the Trustee Act of 1850 (13 & 14 Vict., c. 60) to appoint new trustees and make a vesting order. *Re Hewitt's Estate*, 6 W. R. 537.

2. A vesting order in the owner of lands in Canada may be made under the 13 & 14 Vict., c. 60, s. 54. *Re Groom*, 11 L. T., N. S., 326.

A. purchased an estate in Canada, and his conveyance was duly registered there. A mortgage thereon, made in 1837, had also been registered. The conveyance to A. was confirmed by the personal representative of the mortgagee, the mortgage having been satisfied in his lifetime. It subsequently turned out that the mortgage was a mortgage in fee, and the legal estate was outstanding in a grandchild of the mortgagee, an infant. On proof of these facts the Court made an order vesting the estate in A. *Id.*

[*Lunacy*.] 3. The Trustee Act 1850 does not give to the Lord Chancellor of Great

Britain sitting in lunacy jurisdiction over lands in Ireland. *Re Davies*, 3 Macn. & G. 278.

4. Where the surviving trustee of property, consisting partly of real estate in Ireland, becomes lunatic, the Court has jurisdiction to make an order, upon a petition presented both in lunacy and in the Chancery Division, appointing new trustees, and vesting the real estate in Ireland in them. *Re Lamotte*, 36 L. T., N. S., 231; 4 L. R., Ch. D., 325; 25 W. R. 149.

5. One of the trustees of an estate which was being administered by the Court having become of unsound mind, an order was made under the Trustee Act 1850, s. 5, appointing a person to concur with the other trustee in transferring into court certain Irish railway stock standing in the names of the trustees. It being discovered before the order was drawn up that, owing to s. 56 of the Act, such an order could not be made as to Irish stock, an order was made appointing a person new trustee of the Irish stock in the place of the person of unsound mind, and directing him to concur with the other trustee in transferring the stock into court. *Re Hodgson (Lord)*, *Kenlis v. Hodgson*, 11 L. R., Ch. D., 888.

II. COPYHOLDS.

6. It is not necessary for the lord of a manor to appear in court to consent to a vesting order under the Trustee Act. *Ayles v. Cox*, 17 Beav. 584.

After a decree for the sale of an intestate's copyhold estate in lots, but before the sale, the infant heir of the intestate was admitted:—Held, that a petition for a vesting order was properly presented by the purchaser, whose money was in court, and that the costs of the order were to be borne by the vendors, and to be paid out of the purchase money of the particular lot, and not out of the fund in court generally. *Id.*

7. Where the party entitled to the legal estate in copyholds has been admitted, and the legal estate descends on his death to his customary heirs, who disclaim, the consent of the lord will be necessary to a vesting order. *Re Howard*, 3 Eq. Rep. 846; 3 W. R. 605.

8. The Court will, on a petition to appoint a new trustee under the Trustee Act, direct copyholds to vest in the trustees appointed by the Court without requiring the parties to get the consent of the lord. *Re Flitcroft*, 1 Jur., N. S., 418. And see *Re Boyce*, 4 De G. J. & S. 210.

9. Where copyholds of inheritance had been sold by order of the Court in a suit by an equitable mortgagee against the infant customary heir, who had not been admitted, and the personal representative of the deceased mortgagor, the consent of the lord of the manor evidenced either by his appearing and consenting, or by a verified certificate of his consent:—Held, to be a necessary preliminary to the drawing up of a vesting order under the 13 & 14 Vict., c. 60, made upon the petition of the purchaser, the infant heir, and the personal representative of the mortgagor. *Cooper v. Jones*, 2 Jur., N. S., 59; 25 L. J., Ch., 240.

10. Where a person to whom a trust estate

in copyholds is devised disclaims, a vesting order, vesting in a new trustee the estate and interest in the copyholds, which would have vested in the disclaiming trustee if he had accepted the devise, is regular. *Puterson v. Puterson*, 35 L. J., Ch., 518; 14 W. R. 601; 14 L. T., N. S., 320; 2 L. R., Eq., 41. And see *S. C. sub. nom. Briston v. Booth*, 5 L. R., C. P., 86.

The consent of the lord is not necessary to a vesting order of copyholds, but his right to his fine is not prejudiced by such an order if made without his consent. *Ib.*

If the order is to be made without the consent of the lord, he ought not to be served with the petition. *Ib.*

A., being tenant on the rolls of copyholds held in trust, devised them to B., who disclaimed. The Court having made an order, under the Trustee Act, in the absence of the lord of the manor, vesting the copyholds in a new trustee:—Held, that the order was regular in form, and that it did not prejudice the right of the lord. *S. C.* 35 Beav. 506; 2 L. R., Eq., 31.

1. A copyhold was vested in a married woman. It was sold under a decree, which ordered all proper parties to join. She stated in writing that she never would surrender:—Held, that the case came within the Trustee Act, and a vesting order was made. *Rowley v. Adams*, 14 Beav. 130; 20 L. J., N. S., Ch., 436; 15 Jur. 1002.

Whether, where a purchaser has paid his purchase money into court, the petition under the Trustee Act should be presented by the plaintiff or the purchaser, *quære*. But held, that the objection might be removed by making them co-petitioners. *Ib.*

The tender of a notice requiring a trustee to surrender a copyhold is not sufficient, within the 17th section of the Trustee Act 1850, but the tender of a deed appointing an attorney to surrender may possibly be sufficient. *Ib.*

Where an estate is sold in lots under a decree, one petition under the Trustee Act, as to the several lots, is not multifarious. *Ib.*

2. Form of order appointing a new trustee of a copyhold estate, and appointing a person to complete the assurance of the estate to such new trustee. *Re Hey's Will*, 9 Hare 221.

3. Covenant by A. to surrender copyholds to the use of B., and in the meantime, and until such surrender should be made, that A. would stand seised of the copyholds "upon trust for, and to surrender the same unto B." A. went out of the jurisdiction without making any surrender. Order made, under the Trustee Act 1850, for the appointment of a person to surrender the copyholds to B. *Re Collingwood's Trusts*, 6 W. R. 536.

4. A vendor covenanted in the usual way to surrender copyholds to the purchaser, and the purchase money was paid. The vendor died before surrender. His customary heir was of unsound mind. The covenant contained no declaration that the vendor and his heirs would until surrender hold the premises in trust for the purchaser:—Held, that a person might be appointed under the Trustee Act 1850, to convey to the purchaser, without a suit being instituted to have the heir declared a trustee. *Re Cuming*, 5 L. R., Ch., 72; 21 L. T., N. S., 739; 18 W. R. 157.

5. Copyhold lands were devised to an infant for life, with remainder to his first and other sons in tail. By a decree made in a cause these copyholds were directed to be sold for the payment of the testator's debts, and an order was made under the Act 1 Will. 4, c. 47, directing the guardian of the infant to surrender the lands to the purchaser. The purchaser objected to the surrender of the copyholds in question without a petition presented in the Trustee Act 1850, on the ground that there were contingent rights and interests subsequent to the infant's life estate, which the surrender as proposed would not defeat:—Held, that the purchaser was entitled to an order under the 29th section of the Trustee Act 1850, discharging the contingent rights of the unborn issue of the tenant for life, but that such an order might be made in the suit without a petition entitled in the Trustee Act. *Wood v. Beeston*, 1 Kay & J. 213; 3 Eq. Rep. 238.

6. A mortgagor of copyholds having refused for twenty-eight days to make a surrender in accordance with his covenant, an order was made vesting the legal estate in the mortgagee, subject to the proviso for redemption. *Re Crome*, 41 L. J., Ch., 32; 13 L. R., Eq., 26.

7. Copyhold premises were surrendered in 1829 by a debtor to the use of his creditor, his heirs and assigns, upon trust that he, his heirs, executors, administrators, or assigns, should sell the same, and, out of the proceeds, should pay to himself, his executors or administrators, 200*l.* then due, and interest. The creditor died in 1831. In 1851 his personal representative contracted to sell the copyhold premises for 100*l.* The customary heir of the creditor was an infant. On the petition of the personal representative of the creditor, it appeared that the debtor had died intestate, that there was no personal representative, and that proof of the title of the customary heir would be very expensive. The Court made an order vesting the legal estate in the copyhold premises in the purchaser, without any service either on the customary heir or on the personal representative of the debtor. *Re Wise*, 5 De G. & Sm. 415.

III. DECREES FOR SALE.

8. A decree had been made in a creditor's suit for sale in lots of a testator's real estates, which had been devised to several persons (many of whom were infants and married women) for various interests. Upon the application of the plaintiff in the suit, an order was made appointing the plaintiff's solicitor to convey these lands to the respective purchasers, to save the inconvenience which might arise from a simple vesting order. *Hancock v. Spittle*, 3 Sm. & G. 478.

9. A testator devised his freehold estates to his granddaughter for life, with remainder to all her children as tenants in common in fee, on their attaining twenty-one. In a suit for the administration of the testator's real and personal estate, certain parts of the real estate had been contracted to be sold by order of the Court, to provide a fund for payment of costs. The only two infant children of the granddaughter were parties to the suit. On their

petition in the cause, and under the Trustee Act 1850, praying a declaration that the petitioners and the unborn children of the granddaughter would, on attaining twenty-one, be trustees of the estate devised to children of the granddaughter for the purpose of the decree, and that their respective rights might be vested in the respective purchasers, or that some person might be ordered to convey for them:—Held, that the 29th and 30th sections of the Trustee Act 1850 did not apply, and that the infants were not constructive trustees; and the Court refused to make any order. *Weston v. Filer*, 5 De G. & Sm. 608; 16 Jur. 1010.

1. Where a sale has been ordered, by decree, of property in which infants and possible unborn children are interested, though such decree was made before the passing of the Trustee Act 1852, and though the purpose of the sale is not confined to the payment of debts, the Court has authority, under both the Trustee Acts of 1850 and 1852, taken together, to make a vesting order. *Wake v. Wake*, 17 Jur. 545.

2. Where copyholds devised to an infant for life, remainder to his first and other sons in tail, were decreed to be paid to pay the debts of the testator, and an order was made in the cause, and pursuant to the 1 Will. 4, c. 47, that the guardian of the infant should surrender them to the purchaser:—Held, that the purchaser was entitled to require that an order should be made discharging the contingent rights of the unborn issue of the infant, under s. 29 of the Trustee Act 1850. *Wood v. Beettlestone*, 1 Kay & J. 213; 3 Eq. Rep. 238.

3. A devisee of real estate, subject to payment of debts, became of unsound mind, and was so found by inquisition. A committee was appointed, and an action for the administration of the testator's real and personal estate was commenced, with the sanction of the Master in Lunacy, in the Chancery Division, by the lunatic and his committee, and, the testator's personal estate proving to be insufficient for payment of his debts, an order was made for sale of all the testator's real estate upon payment of the purchase money into court. Under this order the real estate was sold, and the purchaser paid the purchase money into court. He, however, raised an objection to the title of the vendors, on the ground that they could not convey without an order in lunacy:—Held, that, the administration action in which the order for sale was made having been properly commenced with the sanction of the master in lunacy, the lunatic plaintiff was entitled to carry on the action, and was, therefore, also bound by the order for sale made in it; that the lunatic was, therefore, a trustee within the Trustee Extension Act 1852, s. 1, of the real estate, and that his committee should be appointed to convey. *Re Stamper, Stamper v. Stamper*, 46 L. T. 372.

IV. LEASEHOLDS.

4. A lessee who mortgages his term with the reservation of a day, and covenants to stand possessed of the reversion for the mortgagee and his assigns, is not a trustee within

the 13 & 14 Vict., c. 60. *Re Roberts's Estate*, 1 W. R. 237.

5. Order vesting leaseholds in continuing and new trustees as joint tenants. *Re Fisher's Will*, 1 W. R. 505.

6. The surviving trustee of leaseholds died intestate, and no administration had been taken out. The Court appointed a new trustee, and made a vesting order in the absence of the owner of the fee. *Re Matthew's Settlement*, 2 W. R. 85.

7. New trustees had been appointed, under a power, of trust property, comprising freehold, copyhold, and leasehold estates, but the property remained vested in the representatives of a former trustee, who had died abroad. A petition was presented for a vesting order under s. 15 of the 13 & 14 Vict., c. 60; but the Court made an order, under s. 32, re-appointing the trustee who had been already appointed under the power, and ordered that the trust estates should vest in such trustees under s. 34. *Re Mundel*, 6 Jur., N. S., 880; 8 W. R. 683.

8. *Semble*, the Court has no jurisdiction to make a vesting order, as to leaseholds, where the surviving trustee, who had died intestate, had not proved the will, or acted in the trusts, and no administration had been taken out to his estate. *Re Robinson*, 9 Jur., N. S., 885; 11 W. R. 1035; 9 L. T., N. S., 12; 2 N. R. 504.

9. Upon an appointment of A. as a trustee under a settlement jointly with B., certain leaseholds were assigned to a provisional trustee, upon trust to re-assign the same to A. and B. No re-assignment was executed. The provisional trustee died intestate, and no legal representative could be found. Under s. 32 of the Trustee Act 1850, A. was re-appointed a trustee of the settlement; and, under s. 34, the leaseholds were vested in A. and B. jointly. *Re Morris's Settlement*, 4 N. R. 480.

10. When a trustee of leaseholds has died intestate and has no legal personal representative, and a new trustee has been duly appointed in his place, the Court will not re-appoint him trustee under the Trustee Act 1850, s. 32, merely for the sake of making a vesting order under s. 34. *Re Driver*, 19 L. R., Eq., 352; 23 W. R. 587.

The Court will, however, appoint an additional trustee under s. 32, and will thereupon make a vesting order under s. 34. *Id.*

11. When the proving executors of the last surviving trustee and executor of a will were dead, the Court, having appointed new trustees of the will, made an order vesting in the new trustees the leaseholds of the original testator for all the estate therein of the last surviving trustee and executor. *Re Rathbone*, 2 L. R., Ch. D., 483; 45 L. J., Ch., 531; 24 W. R. 566.

12. When a sole or surviving trustee of leaseholds has died intestate, and has no legal personal representative, and a new trustee has been duly appointed in his place, the Court has power, under s. 34 of the Trustee Act 1850 (13 & 14 Vict., c. 60), to make a vesting order; and the Court will, under s. 32, re-appoint the trustee who has already been duly appointed, for the sake of making a vesting order under s. 34. *Re Dalgleish*, 35 L. T., N. S., 829; 4

L. R., Ch. D., 143. Reversing 1 L. R., Ch. D., 46; 45 L. J., Ch., 68; 25 W. R. 122; 24 W. R. 53.

V. LUNACY.

1. *Jurisdiction. Chancery or Lunacy, where Vesting Order only*, 6813.
2. *Jurisdiction. Chancery or Lunacy, where Appointment of New Trustees with or without Vesting Order*, 6813.
3. *Stook Vested in Lunatic*, 6814.
4. *Property of Lunatic Abroad*. See 1. *supra*.

1. Jurisdiction. Chancery or Lunacy, where Vesting Order only.

1. Whether the Lords Justices acting in lunacy under the royal sign-manual have jurisdiction to make an order vesting a trust estate, of which a person of unsound mind, who was heir-at-law of a deceased trustee, was seised, the words of the Trustee Act 1850 (13 & 14 Vict., c. 60) being "the Lord Chancellor intrusted by virtue of the Queen's sign-manual," *quere*. *Re Pattinson*, 21 L. J., Ch., 280.

2. *Semble*, that the Lords Justices intrusted by warrant under the sign-manual to make orders in lunacy have jurisdiction to make a vesting order under the Trustee Act, where the heir of the survivor's trustee is of unsound mind; but for the greater certainty, the Lord Chancellor made the order. *Re Waugh's Trust*, 2 De G. M. & G. 279.

3. Where a trustee is an infant as well as lunatic, the Court of Chancery has jurisdiction to make an order for conveying his estate under the Trustee Act; and recourse need not be had to the jurisdiction in lunacy. *Re Arrowsmith's Trusts*, *Re Thompson*, 6 W. R. 642; 4 Jur., N. S., 1123; 27 L. J., Ch., 704.

4. The case of an imbecile trustee is not within the jurisdiction of this Court, and an application to the Lords Justices or Lord Chancellor is necessary. *Re Good Intent Benefit Society*, 2 W. R. 671.

5. When a decree in a partition suit had declared a lunatic a trustee of an allotted portion of land for the plaintiff:—Held, that the Court of Chancery could make a vesting order under the Trustee Act 1850. *Re Molyneaux, Ex p. Spencer*, 4 De G. F. & J. 365.

6. One of the two trustees of a will became lunatic, and a new trustee was appointed under a power in the will. A petition was then presented entitled in lunacy, only asking for a vesting order:—Held, that the petition must be entitled in Chancery as well as in lunacy, and must ask for the re-appointment of the new trustee by the Court, as, if the order were made in lunacy only, it would have the effect of severing the joint tenancy. *Re Chell*, 49 L. T. 196; 31 W. R. 898.

7. The meaning of s. 28 of the Charitable Trusts Act 1853 is to confer on the Master of the Rolls and Vice-Chancellors at chambers the same jurisdiction as before the passing of the Act they could have exercised in a suit regularly instituted, or upon petition. Con-

sequently, where a Vice-Chancellor had in chambers appointed new trustees of a charity, and the surviving trustee was a lunatic:—Held, that he might also in chambers make an order under the Trustee Acts vesting the charity property in the new trustees. *Re Davenport's Charity*, 4 De G. M. & G. 839.

8. When the legal estate in land sold under the order of the Court is vested in a person of unsound mind, but not found lunatic, an order may be made by the Lord Chancellor on a petition in Chancery, under the Trustee Acts, appointing a person to convey the legal estate so vested. *Herring v. Clark*, 4 L. R., Ch., 167.

2. Jurisdiction. Chancery or Lunacy, where Appointment of New Trustees with or without Vesting Order.

9. The Court made an order, upon one petition, for the appointment of new trustees in the place of retiring trustees and a lunatic trustee, and that the trust estates should vest in the new trustees; but directed that the order should be intitled both in lunacy and in Chancery, and be entered in the registrar's book. *Re Davidson*, 20 L. J., N. S., Ch., 644.

10. An appointment under the Trustee Act 1850, of a new trustee in the place of one of unsound mind not so found by inquisition, belongs to the jurisdiction in Lunacy, and not to that of the Court of Chancery. It cannot therefore be exercised by the Court of Chancery of Lancaster. *Re Ormerod*, 3 De G. & J. 249; 28 L. J., Ch., 55; 4 Jur. 1289.

11. A summary petition under the Acts of 1850 and 1852, for the appointment of a new trustee in the place of one who has become imbecile, though not so found by inquisition, can only be disposed of by the Lord Chancellor sitting in lunacy. *Re Burton*, 7 L. R., Eq., 270.

12. When a petition is presented under the Trustee Acts 1850 and 1852, for the appointment of new trustees in the place of trustees some of whom are dead and the survivor a person of unsound mind, not so found by inquisition, the petition may be presented in lunacy only, and not in Chancery. *Re Owen*, 4 L. R., Ch., 782; 17 W. R. 1035.

13. When a trustee of a trust deed registered under the Bankruptcy Act 1861 had become of unsound mind, and there was no power in the deed to appoint new trustees, the Court of Chancery appointed a new trustee under the Trustee Acts. *Re Donisthorpe*, *Re Thompson*, 23 W. R. 100; 31 L. T., N. S., 369; 44 L. J., Ch., 536.

14. A testator devised real estate to trustees, their heirs and assigns, upon certain trusts. The surviving trustee devised all estates vested in him as a trustee to three persons, one of whom, after proving his testator's will, became of unsound mind. A petition was presented for the appointment of new trustees, and for the appointment of a person to convey on behalf of the devisees of the surviving trustee:—Held, that the petition was properly presented in lunacy as well as in Chancery. *Re Mason*, 10 L. R., Ch., 273; 23 W. R. 737; 44 L. J., Ch., 678.

15. A petition under the Trustee Acts 1850

and 1852, for the appointment of new trustees in the place of trustees, two of whom were dead, and one of the surviving two was a person of unsound mind, but not so found by inquisition (not asking for a vesting order), may be presented in Chancery and not in lunacy. *Re Vickers*, 3 L. R., Ch. D., 112; 24 W. R. 755; 46 L. J., Ch., 16.

1. A petition for the appointment of new trustees and for a vesting order, where the existing sole trustee is of unsound mind and out of the jurisdiction, need not be presented in lunacy as well as in Chancery. *Re Gardner's Trust*, 10 L. R., Ch., 29; 27 W. R. 164; 40 L. T. 52.

2. The surviving trustee of property, consisting partly of land in Ireland, having become lunatic, an order was made, upon a petition instituted both in lunacy and in the Chancery division, appointing new trustees and vesting the Irish land in them. *Re Lamotte*, 4 L. R., Ch. D., 325; 25 W. R. 149; 36 L. T., N. S., 231.

3. Where a new trustee of a settlement had been appointed in the place of a trustee who had become of unsound mind, a petition for an order appointing the new trustee by the Court and vesting the real estate, and the right to call for a transfer of the personal property in the new trustee, together with the continuing trustee, was directed by the Court to be entitled in Chancery as well as in lunacy, otherwise the vesting order will sever the joint tenancy. *Re Pearson*, 46 L. J., Ch., 670; 37 L. T., N. S., 299; 5 L. R., Ch. D., 982; 25 W. R. 853.

See also 3 (a) *infra*.

Where Trustees have a more Power and no Legal Estate. 4. A testator gave all his real and personal estate to his wife, and after her death he desired the same to be sold by his executors, the proceeds to be divided amongst legatees as directed by his will. He appointed his wife and S. F., his daughter, executors. After the death of the wife S. F. became lunatic, but was not found so by inquisition. Upon a petition being presented by the legatees praying for the appointment of new trustees under the Trustee Acts:—Held, that S. F., as surviving executor, had no power to convey or assign, the interest having descended to the heir subject to her power; and therefore the Court could not make a vesting order under the 3rd section of the Trustee Act 1850. *Re Porter's Will, Exp. Franklin*, 3 W. R. 583; 3 Eq. Rep. 719.

5. A husband appointed his wife executrix, and A. executor and trustee of his will. He devised his real estate to his wife during her life or widowhood, but in case she should marry again he gave her, by way of legal limitation, an annuity out of his realty, with powers of entry, distress, and sale; and directed his trustee to invest and accumulate the surplus of the rents and profits of his real estate, and on the death of his wife to sell the real estate, with power to execute such instruments and assurances as might be requisite for effecting the sale. The will contained a power to appoint new trustees in the place of any trustee dying, or becoming unwilling or unable to act. The donee of this power having died, and the original trustee having become

of unsound mind, although not so found by inquisition:—Held, that the order for the appointment of the new trustees and the vesting order should be drawn up in Chancery, as well as in lunacy. *Re Boyce*, 4 De G. J. & S., 205; 3 N. R. 396; 33 L. J., Ch., 390; 10 Jur., N. S., 138; 12 W. R. 359; 9 L. T., N. S., 670.

Semble, there is no power under the Trustee Act 1850 to appoint, in lunacy, a new trustee in the room of a lunatic trustee, except where some property is vested in him. *Ib*.

3. Stock Vested in Lunatic.

(a) *Transfer of and Vesting in New Trustees*, 6814.

(b) *Transfer into Court*, 6815.

(a) *Transfer of and Vesting in New Trustees*.

6. The wife of a lunatic was sole surviving trustee of stock. An order was made appointing new trustees in the place of the married woman and the deceased trustees, and vesting in the new trustees the right to transfer the stock. *Re Wood*, 3 De G. F. & J. 125.

7. Stock was standing in the name of a person of unsound mind, part of the stock being his own beneficially, and part of it being vested in him as trustee. The Court had made an order appointing new trustees, and vesting in them the right to call for a transfer of the trust stock, and to receive the arrears of dividends. It was found that an order in this form could not be acted on as to the arrears of dividend, since the bank could not pay arrears on part of a sum. The Court, therefore, varied the order, so as to enable the new trustees to receive the past dividends on the whole stock, and to retain, for the purposes of the trust, that portion which had accrued due in respect of the trust stock. *Re Stewart*, 8 W. R. 425; 2 De G. F. & J. 1; 8 W. R. 297. *S. P. Skynner v. Pelkhot*, 9 W. R. 191.

8. Out of the four trustees of a settlement, one was a lunatic, so found by inquisition, and another was, through ill health, unfit to act. The Court appointed two new trustees in their room, and made an order that the real estates, subject to the settlement, should vest in the new trustees jointly with the two continuing old ones, and that the right to call for a transfer of some stock, also subject to the settlement, should vest in the same persons. *Re Chauncey*, 14 W. R. 849.

9. The sole surviving trustee of a sum of stock under a settlement having become of unsound mind, the persons beneficially entitled presented a petition in lunacy for an order vesting in them the right to transfer the stock and receive the dividends:—Held, that such an order ought not to be made, as it would be administering the trust in lunacy; but, on the petition being amended and intitled in the Chancery Division as well as in lunacy, an order was made appointing the petitioners trustees of the settlement, and vesting in them, as such, the right to transfer the stock and receive the dividends. *Re Currie*, 10 L. R., Ch. D., 93; 27 W. R. 369; 40 L. T. 110.

10. Where one of three trustees was dead,

one an absconding bankrupt, and one a lunatic, on a petition being presented intituled both in lunacy and in the Chancery Division, the Court under the Trustee Act 1850, ss. 5, 32, and 35, appointed three new trustees, and vested the right to transfer stock in them. *Re Druce's Trusts* or *Re Duce's Trusts*, 46 L. T. 669; 30 W. R. 759.

1. Where one of three executors of the surviving executor of a testator was of unsound mind, an order was made under the 5th section of the Trustee Act 1850, giving the right to transfer a sum of stock belonging to the estate of the original testator, although the stock still remained standing in the name of the original testator. *Re Wacker*, 22 L. R., Ch. D., 535; 48 L. T. 552.

2. One of the executors of the surviving trustee of a settlement was a lunatic. The other two executors refused to transfer some shares included in the settlement to the person absolutely entitled to them:—Held, that a vesting order could not be made under the Trustee Act 1850, s. 25, but that a petition in lunacy must be presented. *Re Nicholl*, 18 W. R. 443; 22 L. T., N. S., 323.

3. When one of several trustees of stock becomes lunatic or of unsound mind, the Court, although it may have jurisdiction under s. 5 of the Trustee Act 1850 to make an order vesting the right to transfer the stock solely in the co-trustees, will not do so, but a new trustee in the place of the lunatic must be appointed before a vesting order will be made. *Re Nash*, 16 L. R., Ch. D., 503; 44 L. T. 40; 29 W. R. 294.

4. One of three trustees of a sum of stock had been found lunatic. The fund having become divisible, a petition, intituled both in lunacy and in Chancery, was presented for the appointment of a new trustee and a vesting order:—Held, that the appointment of a new trustee was unnecessary, and that the petition ought to be intituled in lunacy only. Order made vesting the right to call for a transfer of and to transfer the stock in the two trustees who were not under disability. *Re Nash* (16 L. R., Ch. D., 503) not followed. *Re Watson*, 19 L. R., Ch. D., 384; 45 L. T. 513; 30 W. R. 554.

5. Where one of four trustees of stock became lunatic, and there was no difficulty in finding a new trustee to be appointed in his place, the Court, though having discretion under s. 5 of the Trustee Act 1850 to do so, refused to make an order vesting the right to transfer the stock in the three remaining trustees, and ordered a new trustee to be appointed in the place of the lunatic trustee. *Re Nash* (16 L. R., Ch. D., 503) and *Re Watson* (19 L. R., Ch. D., 384) considered. *Re Ray*, 47 L. T. 500.

See also 1. *supra*.

(b) *Transfer into Court.*

6. Where stock is standing in the name of a trustee, who is of unsound mind, but not found so by inquisition, and it is desired to bring such stock into court to the credit of a cause, the proper course is for the cause to be heard by the judge to whose Court the cause

is attached, and then to present a petition in lunacy, to be heard before the Lords Justices. *Re Dawson, Barber v. Dawson*, 6 N. R. 346.

7. Where stock is standing in the names of two trustees, in whom alone a power of appointing new ones is vested, and one of the existing trustees is found lunatic by inquisition, the proper course, in order to obtain a transfer of the fund into court, is by petition in lunacy. *Jeffries v. Drysdale, Re Drysdale*, 7 Jur., N. S., 667; 30 L. J., Ch., 612; 9 W. R. 428; 4 L. T., N. S., 454.

VI. MORTGAGES.

1. *Mortgagor out of Jurisdiction*, 6815.
2. *Mortgagor. Infant Heir or Devisee of*, 6815.
3. *Mortgagee. Heir of, out of Jurisdiction or Uncertain*, 6816.
4. *Mortgagee. Infant Heir of*, 6816.
5. *Joint Mortgagees*, 6817.

1. Mortgagor out of Jurisdiction.

8. After a decree for foreclosure, the absconding mortgagor was declared a trustee and an order was made, under 13 & 14 Vict. c. 60, ss. 9, 43, vesting the mortgaged premises in the plaintiff, on non-payment of the principal, interest, and costs. *Lechmere v. Clapp*, 30 L. J., Ch., 651; 9 W. R. 860; 31 Beav. 578.

9. On making an order of foreclosure absolute, the Court refused to add a declaration under the Trustee Act 1850, that the mortgagor, being out of the jurisdiction, is a trustee, in order to found upon it a subsequent application for a vesting order. Such a declaration can be obtained only on a separate application. *Smith v. Boucher*, 1 Sm. & G. 72; 16 Jur. 1154; 1 W. R. 51.

10. Leases were granted to A. B. for certain terms of years. He sub-demised to C. D. for the terms, less ten days. C. D. mortgaged to E. F. & Co., for securing money, and sub-demised for the last-mentioned terms, less one day, with a power of sale, and covenanted to assign the last day of each term to a purchaser. The mortgagees (E. F. & Co.) sold to G. H., and assigned the mortgage terms. G. H. then bought of A. B. the improved ground rents, and took an assignment of the leases granted to him. C. D., the mortgagor, being abroad, G. H. petitioned under the Trustee Act (13 & 14 Vict., c. 60), that the Court would declare the last day of each of the terms, created by the underlease to him, vested in the petitioner; but the Court, concurring in the opinion of one of the Vice-Chancellors, dismissed the petition. *Re Property's Purchase*, 22 L. J., Ch., 948.

2. Mortgagor. Infant Heir or Devisee of.

11. On a claim for foreclosure against the devisees of the mortgagor, one of whom was an infant, the infant did not appear, and the plaintiff obtained an order appointing the solicitor to the fee fund his guardian:—Held, on the hearing, that the plaintiff had a right to have the common decree of foreclosure,

with a day for the infant to show cause, there being nothing in the Trustee Act to alter the rights of the infant. *Newbury v. Marten*, 15 Jur. 166.

In this case, and under the circumstances, the costs of the solicitor to the fee fund were ordered to be taxed and paid by the plaintiff, and added to the debt, as the solicitor only appeared for the convenience of the plaintiff. *Id.*

1. Vesting order under the 7th section of the Trustee Act 1850, as to the equity of redemption in an infant, against whom, in a foreclosure suit, a decree for sale had been made, refused on the ground that a mortgagee had the legal estate, and that all equities were bound by the order for sale. *Re William's Estate*, 5 De G. & Sm. 515; 21 L. J., Ch., 437.

2. In a foreclosure action, where the estate of the mortgagor was devised in trust for sale, and had become vested in an infant, who was one of the persons beneficially interested:—Held, that the decree should contain a direction that, in case the mortgagees were not redeemed within six months, the infant should be a trustee for them within the meaning of the Trustee Act, and the executrix of the mortgagor be ordered to convey the estate to the mortgagees on his behalf. *Foster v. Parker*, 8 L. R., Ch. D., 147.

3. Mortgagee. Heir of, out of Jurisdiction or Uncertain.

3. The 19th section of the Trustee Act 1850 does not enable the Court, on the petition of the administrator of a mortgagee in fee, who has died intestate, and whose heir is unknown, to vest the mortgaged estate in such administrator, subject to the equity of redemption, the mortgage debt remaining unpaid. *Re Meyrick's Estate*, 9 Hare 116; 20 L. J., N. S., Ch., 336; 15 Jur. 506.

4. Under the 19th section of the Trustee Relief Act (13 & 14 Vict., c. 60) the Court has jurisdiction, upon the petition of the personal representative of a mortgagee in fee, who has died intestate as to the mortgaged premises, and whose heir cannot be found or is unknown, to vest the mortgaged estate in such representative, subject to the equity of redemption, the mortgage debt remaining unpaid. *Re Boden's Trust*, 1 De G. Macn. & G. 57; 21 L. J., N. S., Ch., 316; 16 Jur. 279; 9 Hare 820.

5. Where a mortgagee, with power of sale, and a trust to pay the residue to the mortgagor, took possession and so remained until his death, giving his estate generally to trustees, but left no heir-at-law, the Court would not make a vesting order under ss. 9 or 10 of the 13 & 14 Vict., c. 60, but under s. 15. *Re Keeler*, 11 W. R. 62; 9 Jur., N. S., 95; 32 L. J., Ch., 101; 1 N. R. 44.

6. Vesting order made in the executors of a deceased mortgagee in fee, whose heir-at-law was residing out of the jurisdiction. *Re Lea's Trust*, 6 W. R. 482.

7. When the personal representative of a mortgagee assigns the mortgage, the heir of the mortgagee being out of the jurisdiction, the assignee may, under s. 19 of 14 & 15

Vict., c. 60, obtain an order vesting the legal estate. The relief given by that section is not confined to the case of re-conveyance to the mortgagor. *Re Quinlan*, 9 Ir. Ch. R. 306.

8. In consideration of money lent, real estate was conveyed to the lender, his heirs and assigns, upon trust, in case the principal money and interest should be re-paid by a given day for the borrower, his heirs or assigns; but in case default should be made, then upon trusts for sale, and the trusts of the purchase money were declared to be for payment of the principal money, interest, and costs, and subject thereto for the borrower, "his executors, administrators, or assigns." Default having been made:—Held, that the trust of the surplus being for the borrower, "his executors, administrators, or assigns," and not for him, "his heirs, or assigns," the deed operated to convert the property as between his real and personal representatives. It was therefore more than merely a security for money; more, that is, than a "mortgage," as defined by the 2nd section of the 13 & 14 Vict., c. 60; it was a deed of "trust" within the meaning of the 15th section; and the lender having died intestate, and it being impossible to find his heir, the Court had power to make a vesting order under that section. *Re Underwood*, 3 Kay & J. 745; 5 W. R. 866.

9. The Court may, under the 9th section of the Trustee Act, make an order vesting in the executors of a deceased mortgagee in fee, who has died intestate as to trust estate, the legal estate outstanding in the heir-at-law out of the jurisdiction of the Court, though the mortgagee had before her death been in the receipt of the rents and profits of the mortgaged property. *Re Skitter's Mortgage Trust*, 4 W. R. 791.

10. M., a mortgagee in fee, after directing payment of debts, etc., devised all her real and personal estate to B. upon certain trusts. M. was illegitimate, and had died without issue. The Court made an order vesting the legal estate in the mortgaged premises in a purchaser, the money having been paid off. *Re Minchin's Estate*, 2 W. R. 179.

4. Mortgagee. Infant Heir of.

11. A mortgagee in fee of lands of gavelkind tenure gave and devised all the residue of his estate, personal and real property, moneys, and securities, and all other effects, which should remain after paying his just debts, funeral and testamentary expenses, to his wife, for her own use and benefit:—Held, that in consequence of the devise by the will, no estate in the mortgage premises remained vested in the infant co-heirs in gavelkind of the mortgagee; and an order was therefore refused, upon a petition presented under the Trustee Act 1850, praying an order vesting in the infant's estate in the petitioner. *Re Field's Mortgage*, 9 Hare 414; 21 L. J., N. S., Ch., 175; 15 Jur. 1004.

12. Where the legal estate was outstanding in the infant heir of a deceased mortgagee, and the equity of redemption had been devised by the mortgagor to his three daughters

charged with a pecuniary legacy, ordered, upon petition under the Trustee Act 1850, that the legal estate should be vested in the daughters subject to the legacy. *Re Ellerthorpe*, 18 Jur. 669; 2 Eq. Rep. 1146.

1. One of the executors of a deceased mortgagee was a married woman, and the legal estate, as to which there was an intestacy, had descended to the infant heir-at-law of the mortgagee. To save the necessity of an acknowledgment under the Fines and Recoveries Act by the executrix upon a reconveyance to the mortgagor, order made upon petition under the Trustee Act 1850, vesting the legal estate in the executors, their heirs and assigns, to such uses, etc., as they should appoint; and in default of and until appointment, to the use of the executors in fee, subject to the equity of redemption therein. *Re Powell*, 6 W. R. 136.

5. Joint Mortgagees.

2. A legal estate vested in a mortgagee having descended on two co-parceners, one of whom was out of the jurisdiction, an order was made vesting it in the other alone. *Re Templor's Trusts*, 4 N. R. 494.

3. The Court has no jurisdiction under the Trustee Act 1850 to appoint a person to convey lands in mortgage for the estate therein of a joint mortgagee out of the jurisdiction of the Court. *Re Osborn*, 40 L. J., Ch., 706; 12 L. R., Eq., 392; 25 L. T., N. S., 151.

4. One of three joint mortgagees, who were trustees, went abroad, and in his absence the mortgage was paid off, and by a deed, to which he, with the other trustees, was named a party, but which he never executed, the debt and security, except the legal estate outstanding in him, were vested in the transferee of the mortgage. Afterwards a new trustee was by deed appointed a trustee in his place:—Held, that the neglect or refusal of the old trustee to convey the outstanding legal estate brought the case within the Trustee Acts, and that the Court had jurisdiction under those Acts to vest in the transferee the outstanding legal estate. *Re Walker*, 3 L. R., Ch. D., 209.

VII. STOCK AND CHOSES IN ACTION.

See also XIII. *infra*.

1. *Refusal to Transfer or Pay Dividends*, 6817.
2. *Where no Legal Personal Representative of Surviving Trustee*, 6818.
3. *When Trustee out of Jurisdiction or Uncoerced*, 6818.
4. *Infant Trustee*, 6819.
5. *Vesting Right to Stock in Beneficiaries*, 6819.
6. *Lunatic Trustee*. See v. 3 *supra*.

1. Refusal to Transfer or Pay Dividends.

5. The surviving trustee of a sum of stock neglected, for twenty-eight days after a request in writing had been made to him by persons who had been duly appointed new

trustees, to transfer the stock to them. The Court held, that they were persons absolutely entitled to the stock, within the meaning of the Trustee Act 1850, and ordered the stock to be transferred to them. *Exp. Russell*, 1 Sim., N. S., 404; 20 L. J., N. S., Ch., 196; 15 Jur. 100.

6. The person entitled for life to the dividends of stock held in trust requested, in writing, two executors of a sole deceased trustee, in whose name the stock was standing in the bank-book, to receive the dividends, and they made default for twenty-eight days in doing so. Upon the petition of the person entitled for life to the dividends, the Court declared that the right to receive the dividends which accrued due prior to such request was vested in the petitioner; but held, that it had no authority to make any order as to any dividends accrued, or to accrue, subsequent to the date of the request. *Re Hartnall, Exp. Hodges*, 5 De G. & Sm. 111; 21 L. J., N. S., Ch., 384; 16 Jur. 33.

7. Stock was standing in the names of A. and B. upon trust for C. for life, with remainders over. By an order made in a cause instituted by C. against A. and B., with respect to the stock, it was ordered that A. and B. should transfer the stock to the credit of the cause. A. refused to make the transfer. A petition was presented by C. under the Trustee Act 1850, and in that cause, praying that the right to transfer the stock might be vested in B. alone:—Held, that the Court had not jurisdiction to make the order. *MacKenzie v. MacKenzie*, 21 L. J., N. S., Ch., 385; 16 Jur. 723; 5 De G. & Sm. 338.

8. The 13 & 14 Vict., c. 60, gives power to the Court to make a vesting order in cases where a sole trustee, or one of two or more trustees of stock, shall refuse to transfer the same according to the direction of the person absolutely entitled. Where there were two trustees, and both refused to transfer:—Held, that the Act did not apply. *Re Spanforth*, 12 W. R. 978; 10 L. T., N. S., 641.

9. On the neglect of old trustees to transfer stock to new trustees appointed by the Court, the Court will, upon motion, vest the right to transfer stock in the new trustees, and that whether the order upon the old trustees was made in a cause or upon petition. *Re Holbrook*, 29 L. J., Ch., 200; 8 W. R. 3.

10. On the refusal of a trustee to comply with an order directing the assignment of trust property, the Court, after a lapse of twenty-eight days, and on an *ex parte* application, made an order vesting the property in the person entitled to it. *Knight v. Knight*, 14 L. T., N. S., 161.

11. One of the three executors of a surviving trustee of canal shares was of unsound mind, and the other two, when applied to by the persons absolutely entitled to the shares, declined to do anything:—Held, that an order could be made vesting the right to transfer the shares in the persons beneficially entitled. *Re White*, 5 L. R., Ch., 698.

12. One of the executors of the surviving trustee of a settlement was a lunatic. The other two executors refused to transfer some shares included in the settlement to the person absolutely entitled to them:—Held, that a vesting order could not be made under

the Trustee Act 1850, s. 24, but that a petition in lunacy must be presented. *Re Nicholl*, 18 W. R. 443; 22 L. T., N. S., 323.

1. The Court has jurisdiction, under the 23rd section of the Trustee Act 1850, and having reference to the interpretation clause (s. 2) of the Act, to make an order vesting trust property in new trustees, where two or more present trustees improperly refused to transfer it. *Re Hyatt's Trusts*, 21 L. R., Ch. D., 846; 51 L. J., Ch., 742.

2. A trustee having refused to convey certain shares to new trustees duly appointed, a notice was served upon him under the 24th section of the Trustee Act 1850, and on a petition being afterwards presented which was not served on the recusant trustee, the Court made a vesting order. *Re Baxter's Will*, 2 Sm. & G. (App.) v.

2. Where no Legal Personal Representative of Surviving Trustee.

3. Stock was vested in the names of three trustees, in trust for the benefit of a lunatic for life, and, after her decease, for her children; the last surviving trustee having died, his widow and executrix refused to prove his will. The Court, upon petition, appointed new trustees, and directed that they should obtain a limited administration to the last surviving trustee for the purpose of procuring a transfer of the stock to themselves. *Re Needham*, 1 J. & L. 34; 6 Ir. Eq. R. 557.

4. The 13 & 14 Vict., c. 60, held to apply to a case in which the executor of a surviving trustee had not proved the will, and had neglected to transfer stock on the requisitions of new trustees appointed out of Court. *Re Ellis*, 24 Beav. 426.

The Court directed the circumstances, bringing a case within the Trustee Act, to be inserted in an order vesting the right to transfer stock. *Id.*

5. Where all the trustees of stock had died, and there was no personal representative of the survivor, and new trustees had been appointed under a power in the settlement, the Court, under s. 32 of the Trustee Act 1850 (13 & 14 Vict., c. 60), re-appointed the same persons trustees, and under s. 35 made an order vesting in them the right to call for the transfer of the stock the subject of the trusts. *Re McCarthy*, 1 L. R., Ir., 16.

6. When the surviving trustee of a fund, standing in the names of trustees in the books of the Bank of England, died leaving no personal representative, the Court, upon a petition by the person beneficially entitled, appointed him trustee of the fund, and ordered it to be transferred into his name. *Re Dickson or Dixon*, 27 L. T., N. S., 671; 21 W. R. 220.

7. When the legal personal representative of the last surviving trustee of a settlement was dead, the Court made an order vesting stock standing in the name of the last surviving trustee in the persons entitled thereto. *Re Hilliard's Settlement Trust*, 42 L. T. 79.

8. The survivor of two trustees of stock under a will having died leaving no legal personal representative, the *cestuis que trust-*

out and two new trustees, who had been appointed under a power in the will, presented a petition asking that the right to transfer the stock—which was then standing in the names of the deceased trustees—might vest in the new trustees, under s. 25 of the Trustee Act 1850. The Court made the order—considering itself bound by *Dalglish's Settlement* (4 L. R., Ch. D., 143)—but without re-appointing the new trustees. *Re Cromie's Trusts*, 14 L. R., Ch. D., 304. Corrected, *Id.* 610; 42 L. T. 822; 23 W. R. 885.

3. Where Trustee Out of Jurisdiction or Uncertain.

9. Husband of executrix out of the jurisdiction held to be a trustee within the Trustee Act 1850, s. 22. *Exp. Bradshaw*, 2 De G. M. & G. 900; 22 L. J., Ch., 180.

10. The 13 & 14 Vict., c. 60, s. 22, authorises an order vesting the right to receive future dividends. *Re Peyton*, 2 De G. & J. 290; 4 Jur., N. S., 469; 1 L. T., N. S., 127; 6 W. R. 429.

One of four trustees of stock being out of the jurisdiction, an order was made under the 13 & 14 Vict., c. 60, s. 22, vesting the right to receive the dividends in the other three (4 Jur., N. S., 370; 27 L. J., Ch., 476; 6 W. R. 429; 1 L. T., N. S., 94; 25 Beav. 317); but was, on appeal by the bank, varied by restricting it to the dividends to accrue due during the joint lives of the three. *Id.*

11. A, the owner of shares in a certain bank, wrote a letter from Calcutta to the manager in England, requesting him to deliver over the shares to the manager of another bank to which A. was indebted, and to pay all dividends on the shares to, and to sell them at, the order of this last-mentioned bank. A. being still in India, the shares were sold under the authority of this letter, and the purchaser applied for an order under the Trustee Act 1850, to vest the shares and dividends in B., for the purpose of enabling the purchaser to obtain a transfer of the said shares and dividends from B. under the authority of the Act. On proof of the signature of A. to the letter, of the sale, and that the debt had ever since existed and was still due, the order was made. *Re Angelo*, 16 Jur. 831; 5 De G. & Sm. 278.

12. Where a trustee is out of the jurisdiction, and it is uncertain whether he is living or dead, no order can be made under the latter part of the 22nd section of the Trustee Act 1850, in the absence of evidence proving him to be a sole trustee. *Re Randall's Trust*, 1 W. R. 174. S. C. *nom. Re Randall's Will*, 1 Drew. 401.

There being three trustees of stock, two die and one is out of the jurisdiction, and it is uncertain whether he is living or dead. Upon the question whether the case was within the 22nd section under the words "sole trustee":—Held, that the case was not within the Act, and the case was ordered to stand over to present a petition under the 32nd section. S. C. 1 W. R. 207.

13. Stock was standing in the names of G. and H., trustees for a lunatic. G. died in 1864, and E. was his executor, H. having died long previously, but no such proof of his death as the bank would act upon could be fur

nished. An order was made under s. 22 of the Trustee Act 1850, appointing the officer of the bank to concur with E. in transferring the stock into court:—Held, that such order could not be made on the petition of the committee alone. *Re Bourne*, 2 De G. J. & S. 426.

1. Husband of executrix out of jurisdiction held to be a trustee within the Trustee Act 1850, s. 22. *Re Denison, Exp. Bradshaw*, 2 De G. M. & G. 900.

4. Infant Trustee.

2. Before the passing of the Trustee Act Extension (15 & 16 Vict., c. 55) the Court had no authority to make a vesting order with regard to stock held by an infant sole trustee who was out of the jurisdiction of the Court. *Cramer v. Cramer*, 5 De G. & Sm. 312; 16 Jur. 831.

An infant trustee of stock in the jurisdiction not being, within the Trustee Act 1850, s. 22, an infant and sole trustee out of the jurisdiction, is not a sole trustee of stock out of the jurisdiction within the meaning of the 22nd section. *Ib.*

3. The sole trustee of money for A. and B. invested it in stock in the joint names of himself and B. (an infant); after the death of the trustee and A., the infant was held to be a trustee within the 13 & 14 Vict., c. 60, and 15 & 16 Vict., 55, s. 3, and a vesting order was made. *Sanders v. Homer*, 25 Beav. 467; 6 W. R. 476.

4. An infant declared a trustee of stock standing in his own name, and to which he was absolutely entitled, in order to obtain payment of the dividends to his guardians. *Re Westwood*, 6 N. R. 61.

5. Where an investment in consols has been made by executors, by mistake, in the names of infants, for the purposes of re-investment, the infants must be considered as trustees for the executors, and a declaration will be made by the Court to that effect. *Rives v. Rives*, 14 L. T., N. S., 351.

6. Money payable under a will to an infant at twenty-one, with maintenance and education, out of the income in the meantime, was invested in stock in the joint names of the executors and the infant. The executors having died:—Held, that the infant was a trustee of the stock within the meaning of the Trustee Acts. *Gardner v. Comles*, 24 W. R. 920; 3 L. R., Ch. D., 304.

7. Where stock to which an infant was beneficially entitled had been invested in the joint names of himself and another person:—Held, that the Court had jurisdiction under the 3rd section of the Trustee Extension Act 1852 to make an order vesting in such other person the stock to transfer such stock. *Re Harwood*, 20 L. R., Ch. D., 536; 51 L. J., Ch., 578; 30 W. R. 595.

8. A trustee of property, held in trust for A. B. absolutely, having become lunatic, A. B. presented a petition asking that the property might be vested in himself:—Held, that such an order ought not to be made, but that a new trustee ought to be appointed and the property vested in him. *Re Holland, Re Howarth's Trusts*, 16 L. R., Ch. D., 672; 50 L. J., Ch., 271; 44 L. T. 561; 29 W. R. 449.

5. Vesting Right to Stock in Beneficiaries.

9. Where a chose in action is vested in two trustees within the jurisdiction, the Court will not make an order vesting it in the *cestuis que trustent* only. *Semble*, the same rule applies to the case of an order directing the transfer of shares in a bank. *Re Brass's Trusts*, 4 W. R. 764.

10. A sum of 500*l.* stood settled on the trusts of a marriage settlement. The trustees were dead; there were no children; the wife was fifty-eight years old, and had assigned all her interest to her husband, who was one of the *cestuis que trustent*. On the petition of husband and wife, the Court ordered that the right to transfer might vest in the husband, and that he might transfer to himself. *Re Ryan*, 9 W. R. 137.

11. Husband of executrix out of the jurisdiction held to be a trustee within the Trustee Act 1850, s. 22. *Exp. Bradshaw*, 2 De G. M. & G. 900; 22 L. J., Ch., 180.

12. A surviving trustee of stock died leaving no personal representative. The person beneficially entitled was appointed trustee of the fund, which was ordered to be transferred into his name. *Re Dickson or Dixon*, 21 W. R. 220; 27 L. T., N. S., 671.

VIII. TRUSTEE OUT OF JURISDICTION OR NOT TO BE FOUND.

1. *In General*, 6819.

2. *Absent Trustee* (*Trustee Act* 1850, s. 49), 6820.

1. In General.

13. There being a direction in a will to sell real estate without naming the person to sell, and no devise of the real estate, and it not being clear that there was a sufficient legal power of sale (implied) in the executor, or a sufficient charge of debts to enable him to convey the legal estate to a purchaser, the Court, at the hearing, directed a sale, declaring the heir-at-law, who was out of the jurisdiction, a trustee within the meaning of the 13 & 14 Vict., c. 60, and made a vesting order under s. 9. *Hooper v. Strutton*, 12 W. R. 367.

14. When two persons, of whom both were legally entitled as co-parceners to copyholds, but one only had any beneficial interest therein, were admitted as tenants in common, and the lord afterwards enfranchised to both, their heirs and assigns, the other was held to be "solely seised upon trust" within the meaning of s. 9 of the Trustee Act 1850. *Murray v. Spicer*, 16 W. R. 332; 5 L. R., Eq. 527; 37 L. J., Ch., 505.

15. After a bankruptcy, and the appointment of assignees, the proceedings were suspended under the Bankruptcy Act 1861, s. 110, reserving the rights and jurisdiction of the assignees; and the Court held, that one of the assignees who had gone abroad was a trustee within the meaning of the Trustee Act 1850. *Re Joyce*, 2 L. R., Eq., 576.

16. Vesting order made under the Trustee Act 1850, where purchaser entitled to estate of a dower trustee who was in Australia.

Collard v. Roe, 6 W. R. 348; 27 L. J., Ch., 295; 4 Jur., N. S., 431; 4 De G. & J. 525.

Where one Trustee Abroad and New Trustees Appointed.] See IV. III. 4. *post*.

In other Special Cases.] See other Subdivisions.

2. Absent Trustee (Trustee Act 1850, s. 49).

1. The Court directed a cause to be certified as fit for hearing, although one of the defendants, a trustee, who could not be found, had not entered an appearance. *Westhead v. Sale*, 6 W. R. 52; 3 Jur., N. S., 1209.

2. The Court ordered a cause to be set down for hearing, notwithstanding one of the defendants, who was a trustee, had not entered an appearance. *Burrell v. Maxwell*, 25 L. T., N. S., 655.

IX. VENDOR. HEIR OR DEVISEE OF.

3. Two partners in a brewery, part of the property of which consisted of freehold and copyhold estates, covenanted that the survivor should have the option of purchasing the share of the deceased partner in the property of the partnership at a valuation; and the survivor accordingly exercised such option, and paid to the executors of the deceased partner the amount at which his share was valued. The share of the deceased partner and his legal estate, in part of the freehold and copyhold estates of the partnership, descended or became vested in his infant heir; but the Court refused, upon petition or motion under the Trustee Act 1850, without suit, to declare the infant heir a trustee for the surviving partner. *Re Burt*, 9 Hare 289; 22 L. J., N. S., Ch., 153.

4. The infant heir of an intestate who had died after contracting to sell his real estate is not a trustee within the meaning of the Trustee Act 1850, s. 29 (Trustee Act Extension, s. 1) until the constructive trust shall have been declared by a decree of the Court. *Re Carpenter*, 1 Kay 418.

5. Where a testator had, in his lifetime, agreed to give an option to his lessee to purchase the fee, and the lessee did not declare for the option until after the testator's decease, an infant tenant in tail of the legal estate under the will is not a trustee for the lessee desirous of purchasing within the meaning of the Trustee Act 1850; but a claim for specific performance was directed to be filed. *Re Weeding*, 4 Jur., N. S., 707.

6. The Court has no jurisdiction on a petition presented under the Trustee Acts to decide on a disputed question of title. *Re Draper*, 9 W. R. 805.

7. Where a vendor, after conveying the equitable estate, became seised of the legal estate, and died intestate, and without an heir:—Held, that he was a trustee within the 13 & 14 Vict., c. 60. *Re Wilkinson*, 10 Jur., N. S., 716; 12 W. R. 522; 10 L. T., N. S., 89.

8. Where a person seised in fee of land, which a railway company was empowered to take compulsorily, entered into a voluntary agreement for sale with the company, and after the purchase money had been paid,

and the company had taken possession, and had accepted the title, the vendor died intestate, leaving an infant heir at law:—Held, that the heir at law was a trustee within the Trustee Act 1850, and that an order might be made for a conveyance of the legal estate without a bill filed. *Re Russell*, 35 L. J., Ch., 461; 12 Jur., N. S., 224.

In such a case service of the petition on the infant is necessary. *Ib*.

9. A., without devising lands to his executors, L. and G., directs them to sell the lands and to apply the money. A., after date of his will, contracts to sell the land to X., who objects to the title of the executors, and requires the heirs of A. to join in the conveyance. The Court made an order vesting the estate which was in A.'s heirs in the executors of his will. *Semble*, where two executors are appointed and only one proves, the Court will not make a vesting order in favour of the one who proves, unless the other disclaims. *Re Badcock's Trusts*, 2 W. R. 386.

10. When the owner of lands agrees to sell to a railway company land which it has power to take for the purposes of its undertaking, and afterwards dies, having devised his real estate to an infant, the infant devisee is a trustee within the meaning of the Trustee Act 1850, and a vesting order may be made on a petition under that Act. *Re Lowry*, 15 L. R., Eq., 78; 21 W. R. 428; 42 L. J., Ch., 509.

In Case of Copyholds.] See II. *supra*.

X. VESTING ORDERS. WHEN MADE IN OTHER CASES.

11. The Court has authority to make a vesting order under the Trustee Act 1850 in cases where there is nothing to prevent a conveyance of the trust property to the trustees appointed by the Court. *Re Manning's Trusts*, 1 Kay (App.) xxviii.

A vesting order made on the appointment of new trustees, two of whom were possessed of the legal estate in the trust property under a previous attempted appointment of them as new trustees, the will creating the trust containing no power to appoint new trustees. S. C. 2 W. R. 289; 2 Eq. Rep. 221.

12. The Court has jurisdiction to make a vesting order of the legal estate in mortgaged lands, where a transfer of the mortgaged debt had been ordered by the Court, and it is doubtful whether the trustees of the debt have power to convey the legal estate. *Re Hughes*, 2 Hem. & M. 695.

13. A testator having devised to two trustees upon trust to sell, and one of the trustees named being an infant, the Court declined to make an order vesting the whole estate in the other trustee, being adult, but appointed a person to be trustee in the room of the infant, and vested the whole estate in such new trustee with the original adult trustee jointly. *Re Porter*, 2 Jur., N. S., 349; 25 L. J., Ch., 688; 4 W. R. 217.

14. A married woman who was the legal representative of a testator, in exercise of a power reserved to her by her marriage settlement, made her will, and appointed her

husband executor. The husband proved the will, and also obtained letters of administration to all other his wife's personal estate. He also applied for supplemental letters of administration, to enable him to continue the chain of representation to the testator; but they were refused by the Court of Probate. The Court made an order, appointing the husband trustee of the trust funds which were standing in the testator's name, and vesting in him the right to transfer them. *Re Herbert*, 8 W. R. 272.

1. Lands bought by a father in the name of his son held, under the circumstances of the case, not to amount to an advancement; but the Lord Chancellor declined to make an order to that effect on the petition of the father, though the petition was founded on the certificate of the Master under s. 38 of the Trustee Act 1850. *Collinson v. Collinson*, 3 De G. M. & G. 409.

2. Upon the sale of an estate which stood limited to the ordinary uses to bar dower, but over which the tenant for life was not entitled to a power, the objection was taken by the purchaser that the dower trustee, who was then in Australia, was a necessary party to the conveyance:—Held, on a bill for specific performance, filed by the vendor, that the purchaser was entitled to such estate as was then vested in the dower trustee. Specific performance was decreed, and a vesting order made under the Trustee Act 1850. *Collard v. Roe*, 6 W. R. 348; 27 L. J., Ch. 295; 4 Jur., N. S., 431; 1 L. T., N. S., 148; 4 De G. & J. 525.

3. The Court will make a vesting order under 15 & 16 Vict., c. 55, s. 2, to defeat an attempt at extortion on the part of a trustee. *Re O'Donnell*, 19 W. R. 522.

4. A married woman living separate from her husband invested, in the names of her son and daughter, moneys arising from savings of her separate estate. The mother appointed her daughter her executrix. The son having become lunatic, a transfer to the daughter as executrix was ordered on petition without bill. *Re De Visne*, 2 De G. J. & S. 17; 12 W. R. 140; 9 L. T., N. S., 668; 33 L. J., Ch., 332.

5. When a trustee and executor has proved the will only, and done no other act, and taken no notice of applications, nor appeared on a petition served upon him, the Court will appoint another trustee in his room, and make a vesting order under the Trustee Act 1850. *Re Byrne*, 18 L. T., N. S., 631.

Where Trustees have a mere Power and no Legal Estate. 6. The Court of Chancery has not authority, under the Trustee Acts of 1850 and 1852, to make a vesting order of real estate in proposed trustees, where the testator by his will directed his "executors" to sell the estate after the death of one of them, who was also tenant for life; the surviving executor being also a person of unsound mind, not found so by inquisition. *Re Porter's Will, Exp. Franklin*, 3 W. R. 583; 3 Eq. Rep. 719.

7. The power of appointing new trustees conferred by the 13 & 14 Vict., c. 60, s. 32, applies to the simple office of trustee, and it is not necessary to the exercise thereof that any estate or property should be vested in the trustee. *Re Boyce*, 10 Jur., N. S., 138; 33

L. J., Ch., 390; 12 W. R. 359; 9 L. T., N. S., 670; 4 De G. & S. 205.

A testator appointed A. B. to be trustee of his will; and after devising all his real estate to his wife for life, he directed his trustee, on the death of his wife, to sell his real estate, with power to sell the same by public auction or private contract, etc., and with power to execute all such instruments and assurances as might be necessary to carry out the sale:—Held, that, whether or not A. B. took any estate in the realty by implication, he was a trustee within the Trustee Act 1850. S. C. 3 N. R. 396.

XI. FORM AND EFFECT OF VESTING ORDER.

1. *Form and Contents*, 6821.
2. *Limitations in*, 6822.
3. *Effect of*, 6822.
4. *Other Matters*, 6822.

1. Form and Contents.

8. Vesting order prefaced with a statement that A. B. was a trustee within the meaning of the Trustee Act 1850, and died without an heir. *Hughes v. Wells*, 2 W. R. 575.

9. A vesting order should contain some description of the property intended to be comprised in it. *Re Ord's Trust*, 3 W. R. 386.

10. A petition was presented under the Trustee Act 1850 for an order to vest the legal estate, which was outstanding, in the infant heir of an intestate mortgagee. The owner of the equity of redemption had devised it to his three daughters, charged with a legacy of 200*l*. The three daughters applied that the estate might be vested in them, subject to the legacy, and the Court made the order. *Re Ellerthorpe*, 18 Jur. 669; 2 Eq. Rep. 1146.

11. If the Bank of England is required to act upon an order made in pursuance of the 13 & 14 Vict., c. 60, and 15 & 16 Vict., c. 55, the circumstances bringing the case within the Acts must appear upon the order of Court. *Re Mainwaring*, 26 Beav. 172; 5 Jur., N. S., 52; 28 L. J., Ch., 97; 2 L. T., N. S., 154.

12. Where an order is made under the Trustee Acts, subject to the production of evidence to the registrar, the order will bear date on or after the day of the production of such evidence. *Re Havelock*, 11 Jur., N. S., 906; 14 W. R. 174.

13. The Court directed the circumstances bringing a case within the Trustee Act 1850 to be inserted in an order vesting the right to transfer stock. *Re Ellis*, 24 Beav. 426.

14. Form of order on appointment of new trustees where the trust funds are invested on unauthorised securities and it is desired not to transfer them into the names of new trustees, but to sell them and re-invest the funds in accordance with the trusts of the settlement. *Re Peacock*, 14 L. R., Ch. D. 212; 49 L. J., Ch., 228; 43 L. T. 99; 28 W. R. 801.

See also *infra*.

2. Limitations in.

1. A mortgagee in fee of real estate having died intestate as to the mortgaged premises, which descended on his death to his infant heir, the Court, upon petition by his executors, one of whom was a married woman, made an order under the 13 & 14 Vict., c. 60, vesting the legal estate in the petitioners to such uses as they should appoint, and in default to the use of petitioners in fee, subject to the equity of redemption, in order to enable them to reconvey to the mortgagor without the necessity of having the deed acknowledged by the married woman under the 3 & 4 Will. 4, c. 74. *Re Powell*, 4 Kay & J. 338.

2. Upon a petition presented under the Trustee Act 1850, s. 7, the Court declined, without further consideration, to make an order to vest the legal estate in a purchaser to uses in bar of dower. Such an order was subsequently made by V.-Ch. Kindersley. *Re Howard's Estate*, 5 De G. & Sm. 435; 21 L. J., Ch., 437.

3. As to limitations in an order under the Trustee Act 1850, vesting the legal estate in a purchaser to uses in bar of dower. See *Re Lush*, *Exp. Grice*, 5 De G. & Sm. 436. n.

4. Upon petition presented under the Trustee Act 1850, an order made vesting the legal estate in a purchaser to uses to bar dower. *Davey v. Miller*, 1 W. R. 465; 1 Eq. Rep. 236; 1 Sm. & G. (App.) xix.; 17 Jur. 908; 22 L. J., Ch., 1054.

See also Next Subdivision.

3. Effect of.

5. A vesting order, under the Trustee Act 1850, will, if consented to by the protector of the settlement, bar all estates in remainder, and not pass a base fee only under the 3 & 4 Will. 4, c. 74. *Powell v. Matthews*, 1 Jur., N. S., 973.

6. When, by order under the Trustee Act 1850, the estate of a trustee tenant in tail who is of unsound mind is vested in any person, the order should only direct the land to be vested in such person for all the estate which the trustee could convey, if sane, and need not refer to the execution of a disentailing deed, or to the Fines and Recoveries Act. *Mason v. Mason*, *Re Mason*, 7 L. R., Ch. D., 707; 26 W. R. 565.

Section 3 of the Trustee Act 1850 will then free the land from the estate tail. *Id.*

7. Where copyholds devised to an infant for life, remainder to his first and other sons in tail, were decreed to be sold to pay the debts of the testator, and an order was made in the cause, and pursuant to the 1 Will. 4, c. 47, that the guardian of the infant should surrender them to the purchaser:—Held, that the purchaser was entitled to require that an order should be made discharging the contingent rights of the unborn issue of the infant, under s. 29 of the Trustee Act 1850. *Wood v. Beeston*, 1 Kay & J. 213; 3 Eq. Rep. 238.

8. Contracts for sale of different parts of an estate held under the same title had been entered into with different purchasers by a

father and son, who had a joint power of appointment under a settlement. The son died before the conveyances were executed. The legal estate under the settlement thereupon became vested in the father for life, with remainder in tail to an infant. A bill was filed by one of the purchasers, on behalf of himself and all other purchasers, etc., for the purpose of having the several contracts carried into effect. The cause coming on to be heard before Turner, V.-Ch., he declined to make a decree against the infants in a suit of that form, but suggested his willingness to do so if the bill were amended by making the several purchasers parties as co-plaintiffs, and the defendants undertook not to raise the objection of multifariousness. The bill having been amended accordingly, the decree was now made, and directions given for the completion of the several purchases against the infants and unborn persons claiming under the settlement. *Hargreaves v. Wright*, 1 W. R. 408.

9. The Court will, upon petition under the Trustee Acts, discharge the contingent rights of unborn children in favour of purchasers under a decree, and make an order vesting in such purchasers the estates of infants and the contingent estates of unborn infants. *Wake v. Wake*, 1 W. R. 283; 17 Jur. 545.

10. Vesting order as to the equity of redemption in an infant, against whom in a foreclosure suit a decree for sale had been made, refused, on the ground that the mortgagee had the legal estate, and that all equities were bound by the order for sale. *Re Williams*, 5 De G. & Sm. 515.

11. Foreclosure made absolute, and it appearing that the mortgagor could not be found, he was declared a trustee, and a vesting order was made vesting the property in the mortgagees. *Lechmere v. Clamp*, 31 Beav. 578.

12. After a sale under a decree for partition in a suit under the Partition Act 1868, it appeared that one-sixth of the estate was vested in B. (one of the parties to the suit), a bachelor, for life, with remainders to his issue in tail, with ultimate remainders to the right heirs of the plaintiff:—Held, that the power (to make declarations as to the interests of unborn persons, and that such persons on coming into existence would be trustees) given by the Trustee Act 1850, s. 30, which is incorporated in the Partition Act 1868, enabled the Court to make an order to appoint a person to convey the legal estate in the one-sixth limited to the right heirs of the plaintiff. *Basnett v. Mozon*, 44 L. J., Ch., 556; 20 L. R., Eq., 20; 23 W. R. 544. And see *Lees v. Coulton*, 20 L. R., Eq., 20; 44 L. J., Ch., 556; 23 W. R. 544.

4. Other Matters.

13. An order was made on a petition under the Trustee Act 1850, appointing three new trustees, and vesting property in them jointly with a fourth surviving trustee, but subject to the production of certain evidence. Before this evidence could be obtained the fourth trustee died. Upon motion that the order might be dated on the day it was pronounced:—Held, that the proper course was to make

a supplemental order on the petition. *Re Havelock*, 14 W. R. 26; 13 L. T., N. S., 272; 11 Jur., N. S., 906; 14 W. R. 174.

1. By an order made under the 13 & 14 Vict., c. 60, real estate was inadvertently vested in an alien. The Court declined varying the order, by inserting the name of a natural-born subject, without the consent of the Crown; but the order was made upon a re-hearing. *Re Giraud*, 32 Beav. 385; 9 Jur., N. S., 862; 11 W. R. 607; 2 N. R. 9.

2. In cases where new trustees are appointed under the Trustee Act 1850, the real estates subject to the trust ought to be conveyed to them by deed, and the vesting order ought only to be resorted to when it is inconvenient to obtain a conveyance. *Langhorn v. Langhorn*, 21 L. J., Ch., 860.

XII. ORDER TO CONVEY OR TRANSFER INSTEAD OF VESTING ORDER.

3. Real estates devised to married women and infants having been sold under a decree in a creditor's suit, in several lots, upon petition under the Trustee Acts, the Court appointed the plaintiff's solicitor to convey their shares to the several purchasers; form of the order. *Hancox v. Spittle*, 3 Sm. & G. 478.

4. A testator devised real estates to trustees, upon trust to sell and pay debts, and apply the surplus as therein mentioned. The trustees disclaimed the trusts by deed; the heir-at-law of the testator could not be found:—Held, in a suit for the sale of the estates and administration, that the case fell within the meaning of s. 9 of the 13 & 14 Vict., c. 60; and that an order appointing a party to convey to a purchaser was correct. *Wilks v. Groom*, 6 De G. M. & G. 205; 2 Jur., N. S., 1077.

The Court has jurisdiction to appoint a person to convey to purchasers under a decree where the trustee of the will had disclaimed, and need not under the Trustee Act 1850, s. 33, appoint trustees in the place of those who have disclaimed. S. C. 4. W. R. 828.

5. Upon a partition, the shares of the parties were very minute and complicated. The Court, to save expense, and instead of directing a conveyance of the several shares, declared each of the parties trustees as to the shares allotted to them, and then vested the whole trust estate in a single new trustee, under the Trustee Acts, with directions to convey to the several parties their allotted shares. *Shepherd v. Churchill*, 25 Beav. 21.

6. When the surviving trustee of a fund, standing in the names of trustees in the books of the Bank of England, died, leaving no personal representative, the Court, upon a petition by the person beneficially entitled, appointed him trustee of the fund and ordered it to be transferred into his name. *Re Dickson or Dixon*, 27 L. T., N. S., 671; 21 W. R. 220.

7. A gave all his real and personal estate and effects, of what nature or kind soever, to B., upon trust to pay to his wife for life the rents of this real estate, and the interest on all sums due to him on mortgages, bond, note, or other security, and after her death to get in all debts owing to him on any security, and pay the same over to other persons. B. died intestate, leaving C., his eldest son and

heir-at-law, a person of unsound mind and an infant:—Held, that the legal estate in the mortgaged property passed to B., and that he was a trustee; and persons were appointed to convey the property comprised in the mortgages to the purchasers thereof, under ss. 3 and 20 of the Trustee Act 1850. *Re Arrow-smith*, 4 Jur., N. S., 1123; 27 L. J., Ch., 704; 6 W. R. 642.

8. A donee of a power of jointuring under a settlement was ordered, in a specific performance suit instituted by his wife, to execute the power by a deed to be approved of by the Master, whereby 1,000*l.* per annum was to be appointed as the plaintiffs jointure. On his refusal to obey the decree:—Held, that under the Trustee Acts 1850 and 1852 he might be declared a trustee of all the rights, interests, estates, and property acquired by him under the settlement; and the Court appointed a person to execute the requisite deed in his place, under the Trustee Act 1850. *Exp. Mornington (Countess)*, 4 De G. M. & G. 537. S. C. *nom. Wellesley v. Wellesley*, 22 L. J., Ch., 966. S. C. *nom. Mornington v. Mornington*, 1 W. R. 248; 1 Eq. Rep. 368.

XIII. ORDERS WHEN BINDING ON BANK OF ENGLAND.

9. An order discharged, on the objection of the bank as being unauthorised by the Trustee Act 1850; and another order substituted under the 1 Will. 4, c. 65, s. 32. It is the duty of the Bank of England to bring an erroneous order, under which it is asked to act under the notice of the Court. *Re Westwood*, 6 N. R. 316.

10. If the Bank of England is required to act upon an order made in pursuance of the 13 & 14 Vict., c. 60, and 15 & 16 Vict., c. 55, the circumstances bringing the case within the Acts must appear upon the order of Court. *Re Mainwaring*, 26 Beav. 172; 5 Jur., N. S., 52; 28 L. J., Ch., 97; 32 L. T. 154.

11. It is of great importance to have the books of the Bank of England clear; and, upon the construction of an Act directing a transfer of stock, if there is room for argument, the strict interpretation of the Act must be followed. Therefore, under the Trustee Act 1850, which authorises the Court to vest in new trustees the right to call for a transfer of stock, forming part of the trust estate:—Held, before the Trustee Extension Act, s. 6, passed, that the order ought to be in that form, and should not purport to vest in the new trustees the right to the stock; and that the bank was not bound to permit the new trustees to make a transfer into their names. *Re Smyth's Settlement*, 4 De G. & Sm. 499; 15 Jur. 644; 20 L. J., Ch., 255.

12. Stock was standing in the name of a person of unsound mind, part of the stock being his own beneficially, and part of it being vested in him as trustee. The Court had made an order appointing new trustees, and vesting in them the right to call for a transfer of the trust stock, and to receive the arrears of dividends. It was found that an order in this form could not be acted on as to the arrears of dividend, since the bank could not pay arrears on part of a sum. The Court therefore varied

the order, so as to enable the new trustees to receive the past dividends on the whole stock, and to retain, for the purposes of the trust, that portion which had accrued due in respect of the trust stock. *Re Stenart*, 2 De G. F. & J. 1; 8 W. R. 425.

1. In an action commenced by writ for the administration of a testator's estate, an order for accounts was made in chambers under Order XV. (Judicature Act). Subsequently an order was made in chambers directing the plaintiff and defendant to transfer a sum of stock into court. The defendant could not be found, and an order was made in chambers vesting the right to transfer the stock in the plaintiff, and directing him to transfer it into court. The bank objecting to act on this order, on the ground of its having been made in chambers, a motion was made by arrangement for an order directing the bank to act upon it:—Held, by Jessel, M.R., that the judge had jurisdiction to make the order on summons in chambers, and that the bank ought to be ordered to act upon it. *Frodsham v. Frodsham*, 15 L. R., Ch. D., 317; 43 L. T. 558; 29 W. R. 165; 50 L. J., Ch., 233.

Held, by the Court of Appeal, that, having regard to the 18 & 19 Vict., c. 134, s. 16, Cons. Ord. XXXV., Rule 1, and the course of practice, there was so much doubt as to the jurisdiction as to render it unsafe to make such a vesting order in chambers, and that the order directing the bank to act upon it ought to be discharged. *Ib.*

XIV. DISOBEDIENCE TO ORDERS. ATTACHMENT.

2. The case of a trustee refusing to obey the order of the Court is not a case provided for by the Trustee Act 1850, but it is a case within the 1 Will. 4, c. 36, s. 15, the 15th subdivision; and any proceeding to obtain the transfer should be taken under that Act. *Mackenzie v. Mackenzie*, 5 De G. & Sm. 338; 16 Jur., 723; 21 L. J., Ch., 385, 386.

By an order expressed to be made in a cause and in the matter of the Trustee Act 1850, a defendant was directed to transfer stock. Upon an affidavit of service of this order, which was intitled in the cause only, a writ of attachment for disobedience was issued, on which the defendant was in custody. The writ was discharged for irregularity on account of a variance, but the Court declined to give the defendant costs. *Ib.*

3. When a trustee is ordered to transfer a fund of consols admitted to be due from him and subsequently default is made, a writ of attachment will issue. *Digby v. Turner*, 21 W. R. 471; 28 L. T., N. S., 296.

4. When a person has been directed to execute a lease, but refuses to do so, the Court can only enforce such execution by attachment, the Trustee Act 1850 having omitted to provide for such a case. *Grace v. Baynton*, 25 W. R. 506.

XV. PRACTICE.

1. *In General*, 6824.

2. *Parties and Service*, 6825.

1. In General.

5. An order under the Trustee Act 1850 may be made in a cause without a petition presented in the Act. *Wood v. Beetonstone*, 1 Kay & J. 213; 3 Eq. Rep. 238.

6. Upon a petition for the re-conveyance of mortgaged premises, the equity of redemption of which was in trustees, upon the question whether some of several *cestuis que trustent* sufficiently represented the parties beneficially interested under the Trustee Act 1850:—Held, that irrespective of that Act, the Court has power to adjudicate upon such a petition, under the 15 & 16 Vict., c. 86. *Re Sharpley's Trust*, 1 W. R. 271; 1 Eq. Rep. 40.

7. The Court will make an order under the 4th section of the 15 & 16 Vict., c. 55, upon motion made in a matter as well as in a cause. *Re Holbrook*, 5 Jur., N. S., 1333; 1 L. T., N. S., 18.

8. Order made vesting property in a mortgagee in a foreclosure suit without requiring a petition to be presented under the Trustee Act 1850. *Harrison v. Smith*, 17 W. R. 646.

9. A debtor resident in India pledged shares, held by him in a joint-stock banking company in England, with a creditor in England, with an authority by letter to sell, which was communicated to and recognised by the banking company. The creditor, in exercise of the authority, sold the shares to a purchaser. Upon the petition of the purchaser:—Held, that the shares were "stock," and that the debtor in India, being constructively a trustee, was a trustee for the purchaser within the the Trustee Act 1850; and the Court made an order directing a specified person to transfer the shares to the petitioner. *Re Angelo*, 5 De G. & Sm. 278; 16 Jur. 831.

Under the 1 Will. 4, c. 60, the Court was prohibited from making any order upon such a petition until the rights of the petitioner had been ascertained by suit; but the Trustee Act 1850 contains no such prohibition. *Ib.*

10. When a purchaser presented a petition for a vesting order intitled in the cause only, the petition was ordered to be amended by intitling it under the Trustee Act 1850 (13 & 14 Vict., c. 60, s. 43). *Gough v. Bage*, 25 L. T., N. S., 738.

11. In an action commenced by writ for the administration of a testator's estate, an order for accounts was made in chambers under Order XV. (Judicature Act). Subsequently an order was made in chambers directing the plaintiff and defendant to transfer a sum of stock into court. The defendant could not be found, and an order was made in chambers vesting the right to transfer the stock in the plaintiff, and directing him to transfer it into court. The bank objecting to act on this order, on the ground of its having been made in chambers, a motion was made by arrangement for an order directing the bank to act upon it:—Held, by Jessel, M.R., that the judge had jurisdiction to make the order on summons in chambers, and that the bank ought to be ordered to act upon it. *Frodsham v. Frodsham*, 15 L. R., Ch. D., 317; 43 L. T. 558; 29 W. R. 165; 50 L. J., Ch., 233.

Held, by the Court of Appeal, that, having regard to the 18 & 19 Vict., c. 134, s. 16, Consolidated Order XXXV., Rule 1, and the course of practice, there was so much doubt as to the jurisdiction as to render it unsafe to

make such a vesting order in chambers, and that the order directing the bank to act upon it ought to be discharged. *Ib.*

Appeal.] 1. Notice of appeals from orders made under the Trustee Relief Act must, according to the true construction of Order LVIII, Rules 9, 15 (Judicature Act), be given within twenty-one days from the perfecting of the order, or, in the case of the refusal of an application, from the date of such refusal. *Re Baillie*, 25 W. R. 310; 4 L. R., Ch. D., 785; 46 L. J., Ch., 330; 35 L. T., N. S., 917.

2. Parties and Service.

2. Shares in an assurance office were vested in trustees, one of whom refused to assign them to new trustees who had been duly appointed. A notice having been served on the old trustee under s. 24 of the Trustee Act 1850, and a petition having been presented but not served on the old trustee, order made vesting the shares in the new trustees. *Re Baxter*, 2 Sm. & G. (App.) v.

3. Where a person seised in fee of land, which a railway company was empowered to take compulsorily, entered into a voluntary agreement for sale with the company, and after the purchase money had been paid, and the company had taken possession, and had accepted the title, the vendor died intestate, leaving an infant heir-at-law:—Held, that the heir-at-law was a trustee within the Trustee Act 1850. *Re Russell*, 35 L. J., Ch., 151; 12 Jur., N. S., 224.

In such a case service of the petition on the infant is necessary. *Ib.*

4. It is not necessary to serve a petition for a preliminary order, under the Trustee Extension Act 1852, s. 4, upon the trustee. *Re Mount*, 24 L. T., N. S., 290.

5. The Court has authority to order service upon minors residing out of the jurisdiction of a petition under the Trustee Acts 1850 and 1852 (13 & 14 Vict., c. 59, and 15 & 16 Vict., c. 56); and also a petition under the Trustee Relief Act (11 & 12 Vict., c. 68). *Re Wycherley*, *Re Drunne*, 1 L. R., Ir., 12.

6. A petition under the 13 & 14 Vict., c. 60, for the appointment of a person to convey, in the place of an infant heir of a deceased mortgagee, need not be served upon the infant. *Re Willan*, 9 W. R. 689.

7. A petition for vesting a legal estate outstanding in the infant heir of a deceased mortgagee must be served upon the infant. *Re Jones*, 22 W. R. 837.

8. A mortgagor devised his real estate to a trustee on trust for sale, the proceeds to be divided amongst certain persons named in the will. The original mortgagee having died, and her heir not being found, a petition was presented by the trustee and one of the *cestuis que trustent* for a vesting order under s. 19 of the Trustee Act 1850:—Held, that the trustee sufficiently represented the other *cestuis que trustent*, whose appearance was, therefore, dispensed with. *Re Blanchard's Estate*, 2 N. R. 386.

9. Real estate was devised by C. D. to trustees upon trust, after paying debts and legacies, and, subject to a certain annuity

charged thereon, to convey the same to use of A. A. in fee:—Held, upon petition by the devisee of A. B. for a conveyance by the trustee of C. D.'s will, all the debts and legacies having been satisfied, that the concurrence of the annuitant to this petition was not necessary. *Re Winteringham's Trusts*, 3 W. R. 578.

10. A petition for an order vesting the trust estate in continuing trustees, and new trustee having been presented:—Held, that service on trustee of unsound mind was not necessary. The power was well exercised. *Re East*, *Re Bellwood's Trusts*, 8 L. R., Ch., 735; 42 L. J., Ch., 480.

XVI. COSTS.

1. *Lunatic Mortgagee*, 6825.
2. *Vendor and Purchaser*, 6826.
3. *Other Cases*, 6826.

1. Lunatic Mortgagee.

- (a) *Liability of Mortgagee*, 6825.
- (b) *Liability of Mortgagor*, 6826.

(a) *Liability of Mortgagee.*

11. Where, through the unsoundness of mind of a mortgagee (not found lunatic by inquisition), proceedings under the Trustee Act (13 & 14 Vict., c. 60), are rendered necessary to obtain the re-conveyance of the estate, the costs must be borne by the mortgagee. *Exp. Sargeant*, 25 L. J., Ch., 656.

12. A mortgage debt having been paid off, the committees of the estate of the mortgagee, who had become lunatic, presented a petition, which they served upon the mortgagor, for an order enabling them to re-convey the mortgaged property. The costs of the mortgagor's appearance were directed to be paid by the petitioners, and allowed to them out of the estate, with an intimation that for the future petitions of the kind ought not to be served upon mortgagors. *Re Rowley*, 1 De G. J. & Sm. 417; 32 L. J., Ch., 158; 11 W. R. 297; 7 L. T., N. S., 702.

13. The costs of the proceedings for obtaining from the committee of a lunatic a re-conveyance of premises mortgaged to the lunatic, will be ordered to be paid out of the lunatic's estate where the lunatic is beneficially interested in the mortgage money, and the petition is presented by the committee. *Re Wheeler*, 1 De G. M. & G. 434; 21 L. J., Ch., 759.

This rule will not, however, be acted on if the mortgagor presents the petition, unless in cases where the committee has declined to take that step. *Ib.*

14. In the case of a lunatic mortgagee, the costs of an order vesting the estate in the mortgagor must be paid by the mortgagee, but the mortgagee may have an order for the committee to convey at the expense of the lunatic's estate. *Re Thomas*, 1 W. R. 155.

Upon the petition of the committee of a lunatic mortgagee, an order was made vesting the estate in the mortgagor, the costs of the order to be paid out of the lunatic's estate, with the exception of the stamp, which was

the order, so as to enable the new trustees to receive the past dividends on the whole stock, and to retain, for the purposes of the trust, that portion which had accrued due in respect of the trust stock. *Re Stenart*, 2 De G. F. & J. 1; 8 W. R. 425.

1. In an action commenced by writ for the administration of a testator's estate, an order for accounts was made in chambers under Order XV. (Judicature Act). Subsequently an order was made in chambers directing the plaintiff and defendant to transfer a sum of stock into court. The defendant could not be found, and an order was made in chambers vesting the right to transfer the stock in the plaintiff, and directing him to transfer it into court. The bank objecting to act on this order, on the ground of its having been made in chambers, a motion was made by arrangement for an order directing the bank to act upon it:—Held, by Jessel, M.R., that the judge had jurisdiction to make the order on summons in chambers, and that the bank ought to be ordered to act upon it. *Frodsham v. Frodsham*, 15 L. R., Ch. D., 317; 43 L. T. 558; 29 W. R. 165; 50 L. J., Ch., 233.

Held, by the Court of Appeal, that, having regard to the 18 & 19 Vict., c. 134, s. 16, Cons. Ord. XXXV., Rule 1, and the course of practice, there was so much doubt as to the jurisdiction as to render it unsafe to make such a vesting order in chambers, and that the order directing the bank to act upon it ought to be discharged. *Id.*

XIV. DISOBEDIENCE TO ORDERS. ATTACHMENT.

2. The case of a trustee refusing to obey the order of the Court is not a case provided for by the Trustee Act 1850, but it is a case within the 1 Will. 4, c. 36, s. 15, the 15th subdivision; and any proceeding to obtain the transfer should be taken under that Act. *Mackenzie v. Mackenzie*, 5 De G. & Sm. 338; 16 Jur., 723; 21 L. J., Ch., 385, 386.

By an order expressed to be made in a cause and in the matter of the Trustee Act 1850, a defendant was directed to transfer stock. Upon an affidavit of service of this order, which was intitled in the cause only, a writ of attachment for disobedience was issued, on which the defendant was in custody. The writ was discharged for irregularity on account of a variance, but the Court declined to give the defendant costs. *Id.*

3. When a trustee is ordered to transfer a fund of consols admitted to be due from him and subsequently default is made, a writ of attachment will issue. *Digby v. Turner*, 21 W. R. 471; 28 L. T., N. S., 296.

4. When a person has been directed to execute a lease, but refuses to do so, the Court can only enforce such execution by attachment, the Trustee Act 1850 having omitted to provide for such a case. *Grace v. Baynton*, 25 W. R. 506.

XV. PRACTICE.

1. *In General*, 6824.

2. *Parties and Service*, 6825.

1. In General.

5. An order under the Trustee Act 1850 may be made in a cause without a petition presented in the Act. *Wood v. Beetonstone*, 1 Kay & J. 213; 3 Eq. Rep. 238.

6. Upon a petition for the re-conveyance of mortgaged premises, the equity of redemption of which was in trustees, upon the question whether some of several *cestuis que trustent* sufficiently represented the parties beneficially interested under the Trustee Act 1850:—Held, that irrespective of that Act, the Court has power to adjudicate upon such a petition, under the 15 & 16 Vict., c. 86. *Re Sharpley's Trust*, 1 W. R. 271; 1 Eq. Rep. 40.

7. The Court will make an order under the 4th section of the 15 & 16 Vict., c. 55, upon motion made in a matter as well as in a cause. *Re Holbrook*, 5 Jur., N. S., 1333; 1 L. T., N. S., 18.

8. Order made vesting property in a mortgagee in a foreclosure suit without requiring a petition to be presented under the Trustee Act 1850. *Harrison v. Smith*, 17 W. R. 646.

9. A debtor resident in India pledged shares, held by him in a joint-stock banking company in England, with a creditor in England, with an authority by letter to sell, which was communicated to and recognised by the banking company. The creditor, in exercise of the authority, sold the shares to a purchaser. Upon the petition of the purchaser:—Held, that the shares were "stock," and that the debtor in India, being constructively a trustee, was a trustee for the purchaser within the Trustee Act 1850; and the Court made an order directing a specified person to transfer the shares to the petitioner. *Re Angelo*, 5 De G. & Sm. 278; 16 Jur. 831.

Under the 1 Will. 4, c. 60, the Court was prohibited from making any order upon such a petition until the rights of the petitioner had been ascertained by suit; but the Trustee Act 1850 contains no such prohibition. *Id.*

10. When a purchaser presented a petition for a vesting order intitled in the cause only, the petition was ordered to be amended by intitling it under the Trustee Act 1850 (13 & 14 Vict., c. 60, s. 43). *Gough v. Bage*, 25 L. T., N. S., 738.

11. In an action commenced by writ for the administration of a testator's estate, an order for accounts was made in chambers under Order XV. (Judicature Act). Subsequently an order was made in chambers directing the plaintiff and defendant to transfer a sum of stock into court. The defendant could not be found, and an order was made in chambers vesting the right to transfer the stock in the plaintiff, and directing him to transfer it into court. The bank objecting to act on this order, on the ground of its having been made in chambers, a motion was made by arrangement for an order directing the bank to act upon it:—Held, by Jessel, M.R., that the judge had jurisdiction to make the order on summons in chambers, and that the bank ought to be ordered to act upon it. *Frodsham v. Frodsham*, 15 L. R., Ch. D., 317; 43 L. T. 558; 29 W. R. 165; 50 L. J., Ch., 233.

Held, by the Court of Appeal, that, having regard to the 18 & 19 Vict., c. 134, s. 16, Consolidated Order XXXV., Rule 1, and the course of practice, there was so much doubt as to the jurisdiction as to render it unsafe to

make such a vesting order in chambers, and that the order directing the bank to act upon it ought to be discharged. *Ib.*

Appeal.] 1. Notice of appeals from orders made under the Trustee Relief Act must, according to the true construction of Order LVIII, Rules 9, 15 (Judicature Act), be given within twenty-one days from the perfecting of the order, or, in the case of the refusal of an application, from the date of such refusal. *Re Baillie*, 25 W. R. 310; 4 L. R., Ch. D., 785; 46 L. J., Ch., 330; 35 L. T., N. S., 917.

2. Parties and Service.

2. Shares in an assurance office were vested in trustees, one of whom refused to assign them to new trustees who had been duly appointed. A notice having been served on the old trustee under s. 24 of the Trustee Act 1850, and a petition having been presented but not served on the old trustee, order made vesting the shares in the new trustees. *Re Baxter*, 2 Sm. & G. (App.) v.

3. Where a person seised in fee of land, which a railway company was empowered to take compulsorily, entered into a voluntary agreement for sale with the company, and after the purchase money had been paid, and the company had taken possession, and had accepted the title, the vendor died intestate, leaving an infant heir-at-law:—Held, that the heir-at-law was a trustee within the Trustee Act 1850. *Re Russell*, 35 L. J., Ch., 151; 12 Jur., N. S., 224.

In such a case service of the petition on the infant is necessary. *Ib.*

4. It is not necessary to serve a petition for a preliminary order, under the Trustee Extension Act 1852, s. 4, upon the trustee. *Re Mount*, 24 L. T., N. S., 290.

5. The Court has authority to order service upon minors residing out of the jurisdiction of a petition under the Trustee Acts 1850 and 1852 (13 & 14 Vict., c. 59, and 15 & 16 Vict., c. 55); and also a petition under the Trustee Relief Act (11 & 12 Vict., c. 68). *Re Wycherley*, *Re Dunne*, 1 L. R., Ir., 12.

6. A petition under the 13 & 14 Vict., c. 60, for the appointment of a person to convey, in the place of an infant heir of a deceased mortgagee, need not to be served upon the infant. *Re Willan*, 9 W. R. 689.

7. A petition for vesting a legal estate outstanding in the infant heir of a deceased mortgagee must be served upon the infant. *Re Jones*, 22 W. R. 837.

8. A mortgagor devised his real estate to a trustee on trust for sale, the proceeds to be divided amongst certain persons named in the will. The original mortgagee having died, and her heir not being found, a petition was presented by the trustee and one of the *cestuis que trustent* for a vesting order under s. 19 of the Trustee Act 1850:—Held, that the trustee sufficiently represented the other *cestuis que trustent*, whose appearance was, therefore, dispensed with. *Re Blanchard's Estate*, 2 N. R. 386.

9. Real estate was devised by C. D. to trustees upon trust, after paying debts and legacies, and, subject to a certain annuity

charged thereon, to convey the same to use of A. A. in fee:—Held, upon petition by the devisee of A. B. for a conveyance by the trustee of C. D.'s will, all the debts and legacies having been satisfied, that the concurrence of the annuitant to this petition was not necessary. *Re Winteringham's Trusts*, 3 W. R. 578.

10. A petition for an order vesting the trust estate in continuing trustees, and new trustee having been presented:—Held, that service on trustee of unsound mind was not necessary. The power was well exercised. *Re East*, *Re Bellwood's Trusts*, 8 L. R., Ch., 735; 42 L. J., Ch., 480.

XVI. COSTS.

1. *Lunatic Mortgagee*, 6825.
2. *Vendor and Purchaser*, 6826.
3. *Other Cases*, 6826.

1. Lunatic Mortgagee.

- (a) *Liability of Mortgagee*, 6825.
- (b) *Liability of Mortgagor*, 6826.

(a) *Liability of Mortgagee.*

11. Where, through the unsoundness of mind of a mortgagee (not found lunatic by inquisition), proceedings under the Trustee Act (13 & 14 Vict., c. 60), are rendered necessary to obtain the re-conveyance of the estate, the costs must be borne by the mortgagee. *Exp. Sargeant*, 25 L. J., Ch., 656.

12. A mortgage debt having been paid off, the committee of the estate of the mortgagee, who had become lunatic, presented a petition, which they served upon the mortgagor, for an order enabling them to re-convey the mortgaged property. The costs of the mortgagor's appearance were directed to be paid by the petitioners, and allowed to them out of the estate, with an intimation that for the future petitions of the kind ought not to be served upon mortgagors. *Re Rowley*, 1 De G. J. & Sm. 417; 32 L. J., Ch., 158; 11 W. R. 297; 7 L. T., N. S., 702.

13. The costs of the proceedings for obtaining from the committee of a lunatic a re-conveyance of premises mortgaged to the lunatic, will be ordered to be paid out of the lunatic's estate where the lunatic is beneficially interested in the mortgage money, and the petition is presented by the committee. *Re Wheeler*, 1 De G. M. & G. 434; 21 L. J., Ch., 759.

This rule will not, however, be acted on if the mortgagor presents the petition, unless in cases where the committee has declined to take that step. *Ib.*

14. In the case of a lunatic mortgagee, the costs of an order vesting the estate in the mortgagor must be paid by the mortgagee, but the mortgagee may have an order for the committee to convey at the expense of the lunatic's estate. *Re Thomas*, 1 W. R. 155.

Upon the petition of the committee of a lunatic mortgagee, an order was made vesting the estate in the mortgagor, the costs of the order to be paid out of the lunatic's estate, with the exception of the stamp, which was

to be paid by the mortgagor. *S. C. 22 L. J., Ch., 858.*

1. Where through the lunacy of a mortgagee not found lunatic by inquisition, a petition under the Trustee Act (13 & 14 Vict., c. 60), is rendered necessary, in order to enable the mortgagor to pay off the mortgage debt, the costs must be paid out of the mortgage debt. There being no committee, but only a receiver of the mortgagee's estate, under the 8 & 9 Vict., c. 100, the costs of the appearance of the heir-at-law and next-of-kin were allowed. *Re Biddle, 23 L. J., Ch., 23; 2 W. R. 50; 2 Eq. Rep. 71.*

2. A plaintiff in a suit for the administration of a mortgagor's estate, and the purchasers under a decree in the suit, presented a petition under the Trustee Act, seeking an order to vest in the purchasers the legal estate in the purchased property, which was vested in a lunatic mortgagee not found so by inquisition:—Held, that a portion of the costs ought to be paid out of the mortgage money. *Re Viall, 8 De G. M. & G. 439.*

The rule that a lunatic mortgagee bears the costs of proceedings, under the 13 & 14 Vict., c. 60, occasioned by his lunacy, to obtain a re-conveyance of the estate, applies equally to a person of unsound mind not so found by inquisition; and whether the proceedings are taken in a redemption suit, or in the course of the administration of the mortgagor's estate. *S. C. nom. Hamkins v. Perry, Re Viall, 4 W. R. 686.*

3. When the committee of a lunatic mortgagee presents a petition under the Trustee Act for a re-conveyance of the mortgaged estate to the mortgagor, the mortgagor is not entitled to his costs out of the lunatic's estate, even though served with the petition. *Re Phillips, 4 L. R., Ch., 629; 17 W. R. 904.*

4. When a mortgagee becomes of unsound mind, not so found, and the mortgagor applies for a vesting order on payment into court of the mortgage debt, making the mortgagee a respondent to the petition, the Court has no jurisdiction to make an order for the costs to be paid out of the mortgage debt, but each party must bear his own costs. *Re Sparks, 6 L. R., Ch., 361; 25 W. R. 869.*

5. A trustee having advanced money on mortgage became lunatic. Upon redemption of the estate and a petition to appoint a person to re-convey, it appearing that the mortgagor had no knowledge that the money was trust money, the costs of the application were ordered to be paid out of the trust estate. *Re Jones, 1 L. R., Ch. D., 70; 45 L. J., Ch., 688; 34 L. T. 470; 24 W. R. 377.*

(b) Liability of Mortgagor.

6. Where a mortgage in fee had been paid off to the mortgagee's executor, and a petition was presented under the Trustee Act 1850 by the mortgagor for a re-conveyance from the mortgagee's heir, who was a lunatic, or for a vesting order:—Held, that the mortgagor must pay the costs of the proceeding. *Re Stuart, Exp. Marshall, 4 De G. & J. 317; 8 W. R. 297; 3 L. T., N. S., 495.*

7. A mortgagee died intestate as to estates, whereof he was mortgagee, leaving an heir-at-law, who was a lunatic. The costs of obtain-

ing a vesting order, and of all proceedings necessary to effect a re-conveyance, were directed to be borne by the mortgagor. *Re Jones, 30 L. J., Ch., 112; 9 W. R. 175; 2 De G. F. & J. 554; 7 Jur., N. S., 115. Affirming 8 W. R. 297; 3 L. T., N. S., 495.*

2. Vendor and Purchaser.

8. A vendor agreed to surrender, or procure some person to surrender, and the costs of the surrender were to be paid by the purchaser. It was necessary to procure a surrender under the Trustee Act 1850:—Held, that the costs of the proceedings ought to be paid by the vendor. *Bradley v. Munton, 16 Beav. 294.*

9. After a decree for the sale of an intestate's copyhold estate, in lots, but before the sale, the infant heir of the intestate was admitted:—Held, that a petition for a vesting order was properly presented by the purchaser, whose money was in court, and that the costs of the order were to be borne by the vendors, and to be paid out of the purchase money of the particular lot, and not out of the fund in court generally. *Ayles v. Cox, 17 Beav. 584.*

10. Where a vendor dies intestate, leaving an infant heir, and a bill is filed to make him a trustee to convey under the Trustee Act 1850, each party must pay his own costs. *Scott v. Scott, 11 W. R. 766; 8 L. T., N. S., 450.*

3. Other Cases.

11. See, as to vesting order and costs, *Re Fulham, 15 Jur. 69.*

12. Where a widow, a sole surviving trustee of a will, married, and her husband was afterwards duly found lunatic, such husband was held a trustee within the 13 & 14 Vict., c. 60, and the costs of his committee, who appeared, were allowed out of the corpus of the trust fund. *Re Wood, 7 Jur., N. S., 323; 30 L. J., Ch., 453; 4 L. T., N. S., 104.*

13. The costs of applications to the Court, in respect of trust property, necessitated by the lunacy of a bare trustee, will not be ordered to be paid either by or to the lunatic's estate. *Re Garden, 34 L. J., Ch., 466.*

Where a trustee becomes a lunatic, and consequently an application to the Court in Lunacy becomes necessary for the purpose of obtaining a transfer of the trust funds, no order as to costs will be made. *S. C. 6 N. R. 347.*

14. Under the Trustee Acts the Court has not jurisdiction to give the costs to a *cestui que trust*, compelled, in consequence of the assignees of a bankrupt trustee refusing to sign a disclaimer, to apply to the Court to procure a transfer of the trust funds. *Exp. Primrose, 3 Jur., N. S., 899; 26 L. J., Ch., 666. But see Re Woodburn, 3 Jur., N. S., 799; 26 L. J., Ch., 522.*

15. An equitable mortgagee filed a bill against an infant heir of the mortgagor (upon whom a vesting order had been made under the Trustee Act 1850), for a sale of the property. The proceeds being insufficient to satisfy the mortgage debt and costs:—Held, that the infant heir was not entitled to his costs of the suit, but he was allowed the costs of the vesting order. *Wade v. Ward, 29 L. J., Ch., 42; 4 Drew. 482.*

III. Appointment of New Trustees Under the Trustee Acts Prior to 1850.

- I. *Grounds for Application to the Court*, 6827.
- II. *Reference to the Master*, 6829.
- III. *Parties and Service*, 6831.
- IV. *Number, Persons Appointed, and Powers and Liabilities of New Trustees*. See TRUSTS, XVI. 1.
- V. *Charity Trustees*. See CHARITY, II.—III.—IV.—VII.
- VI. *On Bankruptcy of Trustees*. See BANKRUPTCY, XIV. iv.

I. GROUNDS FOR APPLICATION TO THE COURT.

1. *In General*, 6827.
2. *Death*, 6827.
3. *Disclaimer or Refusal to Act*, 6827.
4. *Lunacy*, 6828.
5. *Trustee Out of Jurisdiction or Absconding*, 6828.
6. *Where Power in the Settlement*, 6829.

1. In General.

1. Construction of 11 Geo. 4 and 1 Will. 4, c. 60, s. 22. *Re Fairbairn*, 2 Jur. 987.
2. A trustee and executor is not within the 11 Geo. 4 and 1 Will. 4, c. 60, s. 22. *Clarke v. Wilson*, Hay. & J. 424.
3. The Court will not appoint new trustees under the 11 Geo. 4 and 1 Will. 4, c. 60, s. 22, except in a plain case, or where there has been a recent creation of trust, and the Court has jurisdiction by reason of disability, or the like. The insecure nature of the property is no ground for the interference of the Court. *Whitley v. Fishbourne*, Ll. & G. temp. Sugd. 23.
4. The Court has no power to appoint new trustees under the 11 Geo. 4 and 1 Will. 4, c. 60, unless a case of disability in the present trustees is established. *Re Pennesfather*, 2 Dr. & War. 292. *Harte v. French (Lord)*, id. 292.
5. The Court will not appoint a new trustee under the 22nd section of the 11 Geo. 4 and 1 Will. 4, c. 60, where no bill has been filed, and there is no power to do so in the instrument creating the trust, unless a disability exist such as is pointed out by the previous sections of the Act, viz., infancy, lunacy, etc. *Exp. Fitzgerald*, Ll. & G. temp. Sugd. 20.

Before the Court has jurisdiction under the 22nd section, there must be a case where the party might apply by petition, under the former sections of the Act. *Id.* 21.

2. Death.

6. Leasehold, as well as freehold, charity estates are within the 23rd section of 11 Geo. 4 and 1 Will. 4, c. 60, where all the trustees are dead; and a direction will be made under that section for the appointment of new trustees; and that a proper person be appointed to convey and assign the estates accordingly. *Re St. Antholin Trust Estates*, 7 L. J., N. S., Ch., 269.

7. The Court made the usual order of reference to the Master to appoint new trustees of the will, under the 11 Geo. 4 and 1 Will. 4, c. 60, s. 22, the devise to the trustees being to them and the survivors of them, and the heirs and assigns of such survivor; and it appearing that the trustees named were both dead, that they had never acted, but had never declined, nor were ever called upon to act, and the heir-at-law of the survivor was resident in Canada. *Re Legg*, 1 Ir. Eq. R. 374.

8. The Court refused to appoint new trustees, under the 11 Geo. 4 and 1 Will. 4, c. 60, in the room of trustees who had died, where the trust property consisted both of stock and real estate, no administration having been taken out to the survivor of the said trustees (who died intestate), and his heir-at-law being out of the jurisdiction. *Re Anderson*, Ll. & G. temp. Sugd. 27.

It was not intended by the 9th and 10th sections to supply the want of a personal representative of a trustee of a chattel interest, or stock. *Id.* 28.

9. Where the sole trustee in a will, to whom a term was demised, died in the testator's lifetime, the Court referred it to the Master to appoint a new trustee, and to approve of a like demise. *Devey v. Peace*, Taml. 78.

3. Disclaimer or Refusal to Act.

10. The mere refusal of the trustee to act in the trusts will not bring the case within the 11 Geo. 4 and 1 Will. 4, c. 60. *Re Hartford*, 1 Con. & L. 394; 2 Dr. & War. 292.

11. This Court will not appoint a new trustee, under the 11 Geo. 4 and 1 Will. 4, c. 60, s. 22, instead of a person who appears never to have accepted the trust, and refuses to act. *Mitchell v. Nixon*, 1 Ir. Eq. R. 155.

12. The Court will not appoint a new trustee, under the 11 Geo. 4 and 1 Will. 4, c. 60, s. 22, where the old trustee had acted and was within the jurisdiction, but refused to act any longer. *Re Hossford*, 1 Jones 550.

13. The Court will not appoint a new trustee, under the 11 Geo. 4 and 1 Will. 4, c. 60, s. 22, in the place of a person, who though named as trustee, has never accepted the trust. *Re Quinlan*, 1 Jones 549.

14. Application, under the 11 Geo. 4 and 1 Will. 4, c. 60, s. 22, for the appointment of a new trustee, refused, it not appearing that the party named as trustee in the conveyance had accepted the trusts. *Re Clerk*, 1 Jur. 737.

15. A trustee of chattels real and of stock, having acted in the trusts, died, and appointed executors resident within the jurisdiction, who proved his will, but never acted and refused to act in the trusts, which were still continuing:—Held, that the Court had jurisdiction to appoint new trustees under the 11 Geo. 4 and 1 Will. 4, c. 60, s. 22. *Muley v. Smiths*, 3 Ir. Eq. R. 497; L. & T. 241.

The original trustee having committed a breach of trust, the Court appointed new trustees, the executors of the old trustee undertaking to replace the trust fund. *Id.*

16. Where the executor of the survivor of three trustees declined to prove his will:—Held, that the case was within the stat. 11

Geo. 4 and 1 Will. 4, c. 60; and, upon the usual reference, new trustees were appointed. *Exp. Haggart*, 1 Beav. 98.

1. An estate was devised to A., subject to a charge of 5,000*l.*, payable to the executors in a suit to which A. was a party; the estate was sold, and all proper parties were ordered to join in the conveyance. A., refusing to execute the deed, was declared a trustee for the purchaser, under the 11 Geo. 4 and 1 Will. 4, c. 60, and another person was directed to convey in his stead. *Robinson v. Wood*, 5 Beav. 246.

2. One of three trustees under a will had disclaimed, and another had become lunatic:—Held, upon the petition of the sole acting trustee and the *cestui que trust*, in the matter of the lunacy, that the Court had no jurisdiction to appoint a new trustee in the place of the disclaiming trustee; but the Court appointed two persons trustees in the place of the lunatic. *Re Smith*, 17 L. J., N. S., Ch., 415.

3. A person was named as a trustee in a marriage settlement of the year 1821, but did not execute or act in the trusts of it. After the death of his co-trustee, he, in 1844, refused to act in the trusts. The Court, upon the petition of the tenant for life, under the 11 Geo. 4 and 1 Will. 4, c. 60, s. 22, refused to appoint a new trustee in his place. After such a lapse of time, it must, in a petition matter, be presumed that the trustee accepted the trust. *Re Uniacke*, 1 J. & L. 1.

4. The stat. 11 Geo. 4 and 1 Will. 4, c. 60, was not intended to sanction a trustee resigning his trust rather than do an act which he deems improper. A trustee in marriage settlement refused to join in lending the trust moneys, because he disapproved of the security. The wife pursuant to a power for the purpose removed him, and appointed a new trustee in his place; and the husband and wife then presented a petition under the Act to compel the old trustee to transfer the funds to the new trustee. The Court refused the application. *Pepper v. Tuckey*, 2 J. & L. 95; 7 Ir. Eq. R. 572.

5. By marriage settlement a judgment was vested in trustees; and it was declared, that if the wife should, with the consent of her husband, think it advisable to call in the sum secured thereby, the trustees were to permit her to use her discretion as to the re-investment of same. One trustee died; the other was out of the jurisdiction. The wife, with the consent of her husband, called in the money, and she and her husband assigned the judgment to a third person, who advanced the money; but the surviving trustee refused to execute the assignment, and desired to be discharged from the trusts. The Court, thinking that the real object of the parties was not to continue the money in settlement, but, under colour of the power, to get it out of settlement, refused to appoint new trustees. *Re Malony*, 2 J. & L. 391.

6. Where a trustee, who did not labour under any disability, declined to act, application by petition for a new trustee granted, although some of the *cestui que trustent* were minors, the funds being small. *Plunket v. Smith*, 8 Ir. Eq. R. 523.

7. The Court will appoint new trustees

under 11 Geo. 4 and 1 Will. 4, c. 60, s. 22, where the trustees are out of the jurisdiction, and decline to act, although the deed creating the trusts contains no power to appoint new trustees. In every case in which a petition for a conveyance can be presented under a previous section, the Court has power under the 22nd section to appoint new trustees. *Re Mayo (Earl)*, 1 L. & G. temp. Plunk. 118, 126.

4. Lunacy.

8. The Vice-Chancellor has no authority to make an order of reference, under the 11 Geo. 4 and 1 Will. 4, c. 60, with respect to a lunatic trustee. *Re Shorrocks*, 1 Myl. & C. 31.

9. The Vice-Chancellor has no jurisdiction, under 11 Geo. 4 and 1 Will. 4, c. 60, in cases of lunatic trustees or mortgagees, beyond directing the reference to the Master in the first instance. *Anon.*, 5 Sim. 332; 3 L. J., N. S., Ch., 240.

10. Where a trustee is of unsound mind, but not found a lunatic, a reference, under 11 Geo. 4 and 1 Will. 4, c. 60, to appoint a new trustee, can be made only by the Lord Chancellor. *Re Mount*, 12 L. J., N. S., Ch., 95.

11. On a petition under the Act 11 Geo. 4 and 1 Will. 4, c. 60, the Court never interferes in the administration of the trusts, but merely substitutes a trustee in the place of the lunatic. *Re Ward*, 2 Macn. & G. 73.

12. New trustees appointed on petition, under the Act 11 Geo. 4 and 1 Will. 4, c. 60, in the stead of a lunatic, not found such by inquisition, to whom, together with two other persons since deceased, a sum of money charged by will upon real estates in the West Indies, and another sum secured by a bond, had been assigned by a deed, dated 1802, upon certain trusts. A person at the same time appointed to assign the sums of money to the new trustees. *Re Welch*, 3 Myl. & C. 292; 7 L. J., N. S., Ch., 169.

13. When it did not appear that the old trustee, though incapable of managing his affairs, was a lunatic, the Court would not appoint a new trustee, under the 22nd section of the 11 Geo. 4 and 1 Will. 4, c. 60. *Re Wakeford*, 1 J. & L. 2.

14. Upon a reference made on a petition for the appointment of a new trustee in the place of an original trustee, who had left this country, the Master found that another of the original trustees had become lunatic. An order was afterwards made for the transfer of the trust funds by the committee, without a second reference in the matter of the lunatic under the 11 Geo. 4 and 1 Will. 4, c. 60. *Re Buckle*, 15 L. J., N. S., Ch., 289.

15. One of the trustees under a will had disclaimed and another had become lunatic:—Held, upon the petition of the sole acting trustee and the *cestui que trustent* in the matter of the lunacy, that the Court had no jurisdiction to appoint a new trustee in the place of the disclaiming trustee; but the Court appointed two persons trustees in the place of the lunatic. *Re Smith*, 17 L. J., N. S., Ch., 415.

5. Trustee out of Jurisdiction or Absconding.

16. The Court will appoint new trustees under the 11 Geo. 4 and 1 Will. 4, c. 60, s. 22, where the

trustees are out of the jurisdiction and decline to act, although the deed creating the trusts contains no power to appoint new trustees. In every case in which a petition for a conveyance can be presented under a previous section, the Court has power, under the 22nd section, to appoint new trustees. *Re Mayo (Earl)*, L. & G. temp. Plunk. 118, 126.

1. Three trustees, two of whom were creditors of A., joined in making promissory notes for securing to the other creditors of A. a composition on the respective debts, and took a conveyance and assignment of the real and personal estate of A. upon trust, after paying the costs and charges, to indemnify the three trustees in respect of the promissory notes, and then to pay the two trustees, who were creditors, a like composition on their respective debts, and to pay the surplus to A. After two of the trustees had received part of the personal estate of A., and had paid the promissory notes to a larger amount than they had received, the other trustee (who was one of the creditors) went out of the jurisdiction of the Court. There was no power in the deed to appoint new trustees:—Held, on the petition of the two trustees, that the trustee out of the jurisdiction was a trustee within the Act 11 Geo. 4 and 1 Will. 4, c. 60, for the petitioners and himself, and the Court, without directing a bill to be filed, appointed another trustee in his stead. *Re Ryley*, 3 Hare 614.

2. Where a rent-charge was, by indenture of 1634, granted to trustees for charitable uses, the last survivor being unknown, the Court, under 11 Geo. 4 and 1 Will. 4, c. 60, s. 23, on the petition of parties who had administered the rent-charge until it ceased to be paid, appointed new trustees, and a party to convey the rent-charge to them. *Re Nightingale's Charity*, 3 Hare 336; 8 Jur. 1005.

3. The Court will not direct the appointment of a trustee to convey, in the room of a trustee who is abroad, without a reference to the Master, although there be affidavits of the absence of the trustee. Inquiry also directed whether the absent party was a trustee, although appointed such by the Duchy Court of Lancaster. *Fazekerty v. Gillebrand*, 7 Jur. 1123.

4. One of two trustees absconded: the other ordered to transfer fund into his own name, and that of another appointed. *Re Friendly Society*, 1 Sim. & S. 82.

5. *Semble*, that neither bankruptcy nor occasional residence abroad disqualifies a testamentary trustee to whom the testator has unconditionally confided a large personal discretion in the administration of the trusts, together with power to appoint a receiver of the rents of the trust estates. *Archbold v. Commissioners of Charitable Bequests*, 2 H. L. Ca. 440. Reversing *S. C. nom. Commissioners of Charitable Bequests v. Archbold*, 11 Ir. Eq. R. 187.

6. Form of the order for the appointment of a new trustee, under 11 Geo. 4 and 1 Will. 4, c. 60, in the room of a trustee resident out of the jurisdiction, where the trust fund consisted merely of government stock in the Bank of Ireland. *Re Chambers*, 3 Dr. & War. 496.

7. A testator who gave a legacy for charitable purposes to be executed in a foreign country, named as one of the trustees of the charity an officer created by Act of Parliament,

describing him by his office, and not by his name. The Act of Parliament having been repealed, and the office abolished, the Court referred it to the Master to approve of a proper person to be a trustee in his stead. *Att.-Gen. v. Stephens*, 3 Myl. & K. 347.

8. One of the three trustees, dismissed under an Act of Parliament, being gone abroad, and having released, there being no provision for the change of trustees, upon a bill, it was referred to the Master to appoint a new trustee. *Buchanan v. Hamilton*, 5 Ves. 722.

9. The residence of a party interested in trust funds being out of the jurisdiction does not authorise the Court to appoint new trustees without notice being given to such party. *Exp. Hardman, Re Molyneux*, 3 M. D. & De G. 559.

6. Where Power in the Settlement.

10. Testator directed a new trustee to be appointed, if either should die or become incapable of acting; one absconded, charged with forgery; but was not outlawed: referred to the Master to appoint a new trustee. *Mil-lard v. Eyre*, 2 Ves. J. 94.

11. Where a deed declaring trusts contained a power to appoint new trustees in case of death, desire to be discharged, or refusal to act of the trustees, and the trustee went to America, and his residence could not be discovered:—Held, that a new trustee might be appointed, under the 22nd section of 11 Geo. 4 and 1 Will. 4, c. 60, on petition. *Re Ledwich*, 6 Ir. Eq. R. 561.

12. Although taking up his permanent residence abroad, in a case where there is a power to appoint a new trustee in place of one going to reside abroad, does not *ipso facto* deprive a trustee of his office, yet it is such a disqualification as entitles the *cestui que trust* to have a new trustee appointed in his place. *O'Reilly v. Alderson*, 8 Hare 101.

13. The Act 11 Geo. 4 and 1 Will. 4, c. 60, does not apply to a case where the event upon which the appointment of new trustees is sought has been provided for by the settlement. *Re Laffan*, 1 Con. & L. 395. And see *id.* 396. n.

14. The Court may appoint new trustees under 11 Geo. 4 and 1 Will. 4, c. 60, s. 22, although the instrument creating the trust contains a power to appoint new trustees. *Re Fountleroy*, 10 Sim. 252; 8 L. J., N. S., Ch., 367; 3 Jur. 673.

15. The Court may appoint a new trustee on petition, under 11 Geo. 4 and 1 Will. 4, c. 60, s. 22, although the instrument creating the trust contains a power to appoint new trustees. *Re Foxhall*, 2 Ph. 281; 16 L. J., N. S., Ch., 498.

II. REFERENCE TO THE MASTER.

1. *When Dispensed with*, 6829.

2. *Exceptions to Report and Confirmation*, 6830.

1. When Dispensed with.

16. Court will not change a mere trustee for wife under marriage settlement, without

sending it first to Master to see if a proper person is proposed. *O'Keeffe v. Calthorpe*, 1 Atk. 18.

1. When trustees have a power to appoint new trustees, the Court will not, on their application, direct an appointment without a reference. — *v. Roberts*, 1 Jac. & Walk. 251.

2. A new trustee appointed under 11 Geo. 4 and 1 Will. 4, c. 60, without a reference to the Master, the petitioner being the only person interested in the trust property. *Exp. Shick*, 5 Sim. 281.

3. Upon an application, under the 11 Geo. 4 and 1 Will. 4, c. 60, for the transfer of a sum of stock standing in the name of a lunatic trustee, the Lord Chancellor refused to adopt the facts as found in a suit in the Exchequer, and directed the usual reference. *Re Pri-deaux*, 2 Myl. & C. 640; 7 L. J., N. S., Ch., 82.

4. The Court never appoints a new trustee without a reference to the Master. *Re Roche*, 2 Dr. & War. 287; 1 Con. & L. 306.

5. A new trustee will be appointed by the Court without a reference, on proof of his fitness, and on his consent. *Re Robinson's Trust*, 15 Jur. 187.

6. The Court, if perfectly satisfied, will make an order to transfer, under the Trustee Act, 11 Geo. 4 and 1 Will. 4, c. 60, without a reference. *Cockell v. Pugh*, 6 Beav. 293.

7. The Court will, to save expense, appoint a new trustee without a reference, but it will require strict proof of title. *Re Procter*, 16 Jur. 233.

8. The Court of Chancery will not take upon itself to inquire into the fact whether a lunatic is a trustee within the meaning of the Trustee Act 1850; there must be a reference to the Master to make that inquiry, according to the former practice. *Re Ramshay*, 15 Jur. 96.

9. Where a suit was instituted for the administration of the trusts of a will, for an account of the funds, and for the removal of the surviving trustee, and, at the hearing of all parties, waived all the prayer, except the appointment of new trustees, and stated that all parties interested were before the Court, a petition was directed to be presented, supported by a proper affidavit of the fitness of the intended new trustees, and an order to be made for the appointment of the same number as were appointed by the will, without a reference. *Buckley v. Buckley*, 14 Jur. 189.

10. The Court will not direct the appointment of a trustee to convey, in the room of a trustee who is abroad, without a reference to the Master, although there be affidavits of the absence of the trustee. Inquiry also directed whether the absent party was a trustee, although appointed such by the Duchy Court of Lancaster. *Fazakerly v. Gillebrand*, 7 Jur. 1123.

11. Where legacy is given for permanent charitable purposes to trustees, not having corporate character, Court will not transfer fund to them, without reference. *Wellbeloved v. Jones*, 1 Sim. & S. 40; 1 L. J., Ch., 11.

12. Trustees of a charity are never appointed by the Court without a reference, though the amount of the fund be extremely small. *Att.-Gen. v. Arran (Earl)*, 1 Jac. & Walk. 229.

13. The Court will not make an order for

the appointment of particular persons as trustees of a charity without a reference to the Master. *Re Shrewsbury School*, 1 Macn. & G. 85; 13 Jur. 201.

2. Exceptions to Report and Confirmation.

14. A trustee, by his answer, declined to act, and on the hearing it was referred to the Master to appoint new trustees; the original trustee afterwards agreed to act, and on application to the Court, that the trustee might be at liberty to amend his answer in this respect, so as to enable the Court on a re-hearing to vary that part of the decree, the Court refused to do this; but thought the Master was at liberty, on statement of these circumstances, to decline the appointment of new trustees. *Miles v. Neave*, Cox 159.

15. Exceptions cannot be taken to Master's report approving new trustee; nor will the Court interfere with report where there is no complaint that persons approved of are unfit. *Att.-Gen. v. Dyson*, 2 Sim. & S. 528; 4 L. J., Ch., 164.

16. Where a reference has been made to the Master to appoint trustees of a charity, it is the rule of the Court to adopt the Master's appointments, unless the persons appointed can be shown to be objectionable, and the Court will not enter into the question of the fitness of other persons whom the Master has refused to appoint. *Re Norwich Charities*, 2 Myl. & C. 275.

17. A person's name had been submitted to the Master as a new trustee, and he had been approved by the Master, but without any affidavit of his respectability. Such an affidavit was afterwards produced to the Lord Chancellor, and no objection to his respectability was made:—Held, that there was no ground for referring the question of his appointment back to the Master. *Re Ludlow Charities*, 3 Myl. & C. 262.

18. Where a deed gives a power of appointing new trustees to a particular person, the Court is bound to adopt his nominee, unless he refuses to nominate any but a person wholly unfit; therefore, when the power of appointing trustees was given to H. K. and J. K., and the survivor of them, and J. K. died, and H. K. nominated new trustees, but, in consequence of the interference of R. K., who had become entitled to J. K.'s interest under the deed, it was necessary to file a bill to procure a conveyance of the legal estate; and the Master, under the reference made at the hearing, entered into a general inquiry as to the relative fitness of the nominees of H. K. and R. K., and selected the nominee of the latter:—Held, he was wrong in so doing, although the reference had been made in general terms to select a proper person as trustee. *Kennedy v. Turnley*, 6 Ir. Eq. R. 399.

Rules of the Court as to controlling the appointment of trustees in such cases. *Ib.*

19. Where a bill is filed for the appointment of new trustees, the amount of the property being small, the Court will make an order for the Master to appoint the trustees at once under the reference, without the necessity of coming back to the Court. *Clinton v. Watkins*, 7 Ir. Eq. R. 489.

1. In a suit for the appointment of new trustees, occasioned by the refusal of the surviving trustees to exercise a power of appointment, reference was made to the Master to approve of proper persons. Exceptions to his report on the ground that he had not regarded the right of nomination given to the surviving trustee by the instrument creating the power, but not raising any objections to the fitness of the persons nominated by the Master, were overruled. *Middleton v. Reay*, 18 L. J., N. S., Ch., 153; 13 Jur. 116.

On a reference to appoint new trustees, where the power is in a party to the cause, the Master need not approve of persons named by him, in preference to others he may consider more eligible. If the party's right of nomination is to be preserved, there should be special directions to the Master, *semble*. S. C. 7 Hare 106.

2. An order of reference, under the 4 & 5 Will 4, c. 29, as to whether it would be for the benefit of the parties beneficially interested in a settled fund to lend it on the security of freehold estates in Ireland, may be made *ex parte*; but the Court will not confirm the Master's report, finding that such a loan would be for the benefit of such parties, unless they all, as well those entitled in remainder as those entitled for life, have either been served with the petition, or appeared before the Master. *Re Kirkpatrick's Trust*, 15 Jur. 941.

3. In this case a reference had been made, under Turner's Act, for the Master to approve of a new trustee. The Master made his certificate accordingly, and a petition was presented, praying that the Master's report might be confirmed. The Vice-Chancellor stated that he had communicated with the other judges, and it was settled that these applications must be made by motion, and not by petition. *Re Farmer*, 16 Jur. 634.

III. PARTIES AND SERVICE.

4. A party beneficially entitled to part of the dividends of a sum in the funds held to have a sufficient interest to support a petition, under 11 Geo. 4 and 1 Will. 4, c. 60, for appointment of a new trustee; and by s. 10 the Court may appoint one of the bank officers to receive the dividends and pay them over to the new trustee; and although an order has been made under Act, but irregularly, the Court has jurisdiction to give costs. *Re King*, 10 Sim. 605; 9 L. J., N. S., Ch., 257.

5. Mode in which a petition presented under an Act of Parliament, by which the Court derives its jurisdiction, ought to be intitled. *Re Law*, 4 Beav. 509; 11 L. J., N. S., Ch., 118; 6 Jur. 615.

A petition under the 11 Geo. 4 and 1 Will. 4, c. 60, to obtain a transfer of trust stock from the names of the surviving trustees into the joint names of such trustees and of a new trustee duly appointed, is properly presented by such new trustee. *Id.*

6. Upon a petition by a mortgagee for the appointment of a new trustee in the room of the infant heir of a trustee for sale under a mortgage deed, the Court, in the absence of the mortgagor, refused the application. *Re Green*, 2 Colly. 91; 9 Jur. 74.

7. On petition, a trustee of lands with a power of sale sufficiently represents the *cestui que trustent*. *Re Blanchard*, 8 L. T., N. S., 603.

8. After a reference to the Master, and a report thereupon, on a petition to confirm the report, under the provisions of the stat. 11 Geo. 4 and 1 Will. 4, c. 60, and to transfer funds to new trustees:—Held, that all parties interested in the fund, whether in reversion or otherwise, should be served with notice of the petition. *Exp. Yates*, 16 L. J., N. S., Ch., 72; 11 Jur. 33.

IV. Appointment of New Trustees under the Trustee Acts 1850 and 1852.

I. *What Matters within Jurisdiction on Petition to Appoint*, 6831.

II. *Effect of Conveyancing Act 1881, s. 31*, 6831.

III. *Grounds for Application to the Court*, 6832.

IV. *Over Part of Property and Severance of Trusteeship*, 6835.

V. *Practices and Parties*, 6836.

VI. *Costs*, 6837.

VII. *Number, Persons Appointed, and Powers and Liabilities of New Trustees*. See TRUSTS, XVI. I.

VIII. *Charity Trustees*. See CHARITY, II.—III.—IV.—VII.

IX. *On Bankruptcy of Trustees*. See BANKRUPTCY, XIV. iv.

I. WHAT MATTERS WITHIN JURISDICTION ON PETITION TO APPOINT.

9. Upon a separation between the husband and wife, a deed was executed, in which a trustee covenanted that, in the event of the husband allowing the wife to live separate, and have the custody of their children, the trustee would indemnify the husband against the debts of the wife, upon the decease of the trustees:—Held, as the deed contained no power to appoint new trustees, that the Court, under the 13 & 14 Vict., c. 60, and 15 & 16 Vict., c. 55, had jurisdiction to appoint new trustee of the property, but declined to inquire into the validity of the provisions of the separation deed. *Re Matthews*, 5 Jur., N. S., 184; 28 L. J., Ch., 295; 7 W. R. 224; 32 L. T. 289; 26 Beav. 463.

II. EFFECT OF CONVEYANCING ACT 1881, s. 31.

10. Sect. 31 of the Conveyancing Act 1881, having given a power to appoint new trustees in every case where a trust is subsisting, it is now improper to apply to the Court for the appointment of new trustees under the Trustee Act 1850, s. 32, unless there is some reason making it "difficult, inexpedient, or impracticable to appoint them without the assistance of the Court" other than the mere absence of a power to do so in the instrument creating the trust. *Re Gibbon's Trusts*, 45 L. T. 766; 30 W. R. 287.

III. GROUNDS FOR APPLICATION TO THE COURT.

1. *Death*, 6832.
2. *Disclaimer or Refusal to Act*, 6832.
3. *Infancy*, 6832.
4. *Trustee out of Jurisdiction or Absconding, and Vesting Order*, 6833.
5. *Where no Original or Existing Trustee*, 6833.
6. *Where Power in the Settlement Insufficient*, 6834.
7. *Where Donee of Power Incapacitated*, 6834.
8. *Other Grounds*, 6835.
9. *Lunacy and Vesting Orders*. See II. v. ante.

1. Death.

1. Where a surviving trustee has been dead for many years, and no administration has been taken out to him, and there is therefore no existing trustee, the Court will appoint a new trustee, upon petition, under s. 32 of the Trustee Act 1850, and s. 9 of the Trustee Extension Act 1852. In such a case it is expedient to appoint a new trustee, but it cannot be done without the aid of the Court. *Davis v. Chanter*, 6 W. R. 416; 4 Jur., N. S. 272; 27 L. J., Ch., 577; 1 L. T., N. S., 70.

2. Where the trustees of a will are dead, and there is a question as to the party in whom the legal estate is vested, the Court will appoint new trustees, notwithstanding that a receiver has been appointed in the suit, and continue the receiver. *Reeves v. Neville*, 10 W. R. 335.

3. When the proceedings in a bankruptcy have been suspended by a resolution of the creditors, passed under the Bankruptcy Act 1861, s. 110, and the trustee appointed by the creditors to wind up the estate and effects of the bankrupt has died, the Court of Chancery has jurisdiction, under the Trustee Acts, to appoint new trustees. *Re Raphael*, 9 L. R., Eq., 233; 39 L. J., Ch., 200; 18 W. R. 247.

4. Pending the proceedings for carrying out a sale directed by an order made under the Settled Estates Act, one of the trustees, who were the conveying parties, died. The Court directed a petition to be presented for the appointment of a new trustee in the place of the deceased trustee. *Scott v. Heisch*, 24 W. R. 108; 33 L. T., N. S., 498.

5. Upon a petition to appoint new trustees of a separation deed, on the death of the sole trustee, it was objected that the deed was void, in consequence of the father's thereby abandoning his right to the custody of his children. The Court declined deciding as to its validity, but appointed new trustees to protect the property. *Re Matthews*, 28 Beav. 463; 5 Jur., N. S., 184; 28 L. J., Ch., 295; 7 W. R. 244; 2 L. T., N. S., 289.

2. Disclaimer or Refusal to Act.

6. Two trustees of real estates named in a will disclaimed. On a petition by a person entitled to a pecuniary legacy charged on the estates, to appoint two persons named in the petition as trustees in their place, it was suggested that s. 32 of Trustee Act, 1850

authorised the Court to appoint trustees in substitution for or in addition to existing trustees only, and that the heir of the testator had become the existing trustee:—Held, that the distinction was too narrow; and the Court, upon affidavits of the fitness of the proposed trustees, appointed them in substitution for the trustees who had disclaimed. *Re Tyler's Trust*, 5 De G. & Sm. 56; 15 Jur. 1120; 21 L. J., Ch., 16.

7. Upon a petition for the appointment of new trustees by the Court, it is not necessary that a disclaiming trustee who has never acted should disclaim by deed, but a disclaimer by his counsel at the bar is sufficient. *Forster v. Dawber*, 1 Dr. & Sm. 171; 8 W. R. 646.

8. M. and C. being trustees and executors under a will, C. simply renounces, and M. then dies, having left devisees in trust. A petition is presented to appoint new trustees, and for a direction that such devisees might convey. C., by affidavit on the petition, disclaimed; and on the doubt whether the devisees in trust of M. had the legal estate:—Held, that a vesting order would obviate the difficulty. *Re Skinner's Trusts*, 2 W. R. 130.

9. *Semble*, disclaimer in court on petition not sufficient to divest an estate; disclaimer should be by deed or of record. *Re Ellison*, 2 Jur., N. S., 62.

And *semble* disclaimer by petition is no more than a parol disclaimer, and not like a disclaimer by bill, as a bill is entered of record. *Id.*

10. Where estates were given to trustees, upon trust (after a trust for one for life, with remainder for his children) to convey to a person in the event of the death of the tenant for life without issue, the Court, under the 13 & 14 Vict., c. 60, appointed trustees in the place of original trustees who refused to act. *Re Sheppard*, 32 L. J., Ch., 23; 11 W. R. 60; 7 L. T., N. S., 377.

11. Where three executors and trustees of the will of a naturalised British subject renounced probate, and declined to act, the Court, on the petition of the administrator, and of the persons who would, but for the fact of their being aliens, be co-heirs at law, made an order, the Crown not opposing, for the appointment of new trustees, and vesting the real estate in such new trustees. *Re Martinez*, 22 L. T., N. S., 403.

12. A settlor made a voluntary settlement of real estate, but did not communicate the fact of the settlement to the sole trustee during his lifetime. After the settlor's death the trustee refused to undertake the trusts of the settlement. The settlement contained a covenant for further assurance, and a power to appoint new trustees:—Held, that this was a case in which the Court would appoint new trustees. *Jones v. Jones*, 31 L. T., N. S., 535.

3. Infancy.

13. Devise to an adult and infant trustee upon trust to sell. New trustee appointed in place of the infant under s. 32 of the Trustee Act 1850, and vesting order granted in favour of the old and new trustees. *Re Porter*, 4 W. R. 417; 25 L. J., Ch., 482; 2 Jur., N. S., 349.

1. The Court will on petition appoint a new trustee in the room of an infant appointed trustee by the testator together with two other persons, and who has himself a beneficial interest. *Re Gartside's Estate*, 1 W. R. 196.

2. Where the Court, with a view to carrying out the trusts of a testator's will, appoints a new trustee in the room of an infant trustee nominated by the testator himself, the appointment should be without prejudice to any application by the infant to be restored to the trusteeship on his coming of age. *Re Shelmerdine*, 33 L. J., Ch., 474; 11 L. T., N. S., 106.

4. Trustee out of Jurisdiction or Absconding, and Vesting Order.

3. Where one of two trustees was residing out of the jurisdiction of the Court, the Court refused to appoint another trustee in his stead under ss. 22 and 32 of the 13 & 14 Vict., c. 60. *Re Mais*, 21 L. J., N. S., Ch., 875; 16 Jur. 608.

4. A surviving trustee of a settlement of stock having died, his widow took out administration with the will annexed in Ireland. There was no representative in England. A petition was presented for the appointment of new trustees, and for a vesting order, under the stat. 13 & 14 Vict., c. 60, but the order was refused. *Re Frost's Settlement*, 20 L. J., N. S., Ch., 112; 15 Jur. 644.

5. Order appointing trustees of a settlement, one of the trustees named in it residing permanently abroad, and the other having been wrongly described in the settlement. *Re Irvin's Trust*, 9 L. R., Ir., 19.

6. The Court has power, under the Trustee Act 1850, s. 32, to appoint a new trustee in place of a trustee who is permanently residing abroad, without his consent. *Re Bignold*, 7 L. R., Ch., 223; 41 L. J., Ch., 235; 20 W. R. 345; 26 L. T., N. S., 176.

Semble, that a power in a settlement to appoint a new trustee in the place of a trustee incapable to act applies to personal incapacity, and not to simple residence abroad. *Ib.*

7. A new trustee appointed in the place of a trustee who had become bankrupt, had never surrendered, and had not been heard of for several years. *Re Renshaw*, 4 L. R., Ch., 783; 17 W. R. 1035.

8. Appointment under one petition in lunacy and Chancery of new trustees, in the place of a person of unsound mind, not so found by inquisition, and of a deceased trustee and a trustee resident abroad. *Re Stewart*, 8 W. R. 297.

Vesting Order where one Trustee Abroad.

9. Where there are several trustees, one of whom is out of the jurisdiction, and a new trustee is appointed by the Court in his place under the Trustee Act 1850, an order vesting the trust estate in the new and continuing trustees will, under the 10th section of that Act, have the effect of severing the joint tenancy, *semble*. *Re Watt's Settlement*, 9 Hare 106; 20 L. J., N. S., Ch., 337; 15 Jur. 459.

10. Where one of several trustees of real estates is out of the jurisdiction, and it is sought to get another trustee appointed in his

place, and to vest the trust property in the new trustee and the continuing trustees, the proper course is, not to apply for a vesting order for that purpose, but for an order appointing a proper person to concur with the continuing trustees in conveying the property, so as to vest it in themselves and the new trustee. *Re Plyer's Trust*, 9 Hare 220; 20 L. J., N. S., Ch., 529; 15 Jur. 766.

Form of order appointing a trustee in the place of a trustee out of the jurisdiction, where there is another and continuing trustee, and the vesting order is not made. *Ib.*

11. Where one of several trustees is out of the jurisdiction, and a new trustee is appointed in his place, the Court will make an order vesting the estate in the continuing trustees and the new trustee. *Re Watt's Settlement* (9 Hare 106) overruled. *Smith v. Smith*, 18 Jur. 1047; 3 Drew. 72; 3 W. R. 95; 24 L. J., Ch., 229; 3 Eq. Rep. 126.

12. Under the 10th section of the 13 & 14 Vict., c. 60, the Court will make an order vesting lands in a new trustee, jointly with continuing trustees, notwithstanding the doubts suggested in *Re Watt's Settlement* (9 Hare 106) and *Re Plyer's Trust* (9 Hare 220). *Re Bute (Marquis)*, 1 Johns. 15; 5 Jur., N. S., 487; 33 L. T. 178.

5. Where no Original or Existing Trustees.

13. The Court has no jurisdiction, under the Trustee Act 1850, to appoint a new trustee of a term of which there is no subsisting trustee. *Re Hazeldine*, 16 Jur. 853.

14. The Court has inherent jurisdiction in a cause to appoint trustees of a will in a case where no trustees were originally appointed by the testator. *Dodkin v. Brunt*, 6 L. R., Eq., 580.

15. When a testatrix devised real estate on trust for sale, but there had never been a trustee of the will, in consequence of the death in the testatrix's lifetime of the sole trustee named in the will, and it was not known who was the heir of the testatrix:—Held, that the Court had no jurisdiction under the Trustee Act 1850, in the absence of the heir, to appoint a trustee and to make an order vesting in him the real estate descended. *Gunsen v. Simpson*, 5 L. R., Eq., 332; 16 W. R. 782; 18 L. T., N. S., 78.

16. Executors of a will, which contained no appointment of trustees, set apart a sum of money to answer a legacy; the fund was standing in the name of the surviving executor:—Held, that he was a constructive trustee within the Trustee Acts, and new trustees were appointed on petition. *Re Davis*, 40 L. J., Ch., 566; 12 L. R., Eq., 214; 19 W. R. 944.

17. The Court will appoint trustees of a will by which property is limited in such a manner as contemplates the intervention of trustees, although none may have been appointed by the testator. *Re Gillett*, 25 W. R. 23.

18. Where a testator had, by his will, left all his property to his wife for life, and appointed her his sole executrix, and had also left legacies of considerable amount to be paid after her death, but had not constituted any persons trustees thereof:—Held, upon petition intitled in an administration action

commenced for the purpose and in the Trustee Act 1850, that upon the retirement of the widow the Court had jurisdiction, under the Trustee Act 1850, to appoint in her place a trustee or trustees to perform the duties incident to the office of an executor. *Re Moore, McAlpine v. Moore*, 21 L. R., Ch. D., 778; 30 W. R. 839.

1. The Court, sitting in lunacy, has power, under the 9th section of the Trustee Extension Act 1852, to appoint new trustees of the will of a deceased lunatic, where the trustees appointed by the lunatic have died in his lifetime, for the purpose of getting rid of the funds standing in court to the credit of the lunacy. *Re Orde*, 24 L. R., Ch. D., 271; 52 L. J., Ch., 832; 49 L. T. 430; 31 W. R. 801.

2. When all the trustees of real estate named in a will have predeceased the testator, new trustees may be appointed if the heir of the testator is before the Court. *Re Smirthwaite*, 40 L. J., Ch., 176; 11 L. R., Eq., 251; 19 W. R. 381; 23 L. T., N. S., 726.

6. Where Power in the Settlement Insufficient.

3. Where a trustee, a bankrupt, had not surrendered, and was proclaimed, the Court refused to appoint a new trustee in his place under a power, in which were the words, "refuse or become incapable to act." *Turner v. Maule*, 15 Jur. 761.

4. New trustee appointed by the Court where the power to appoint new trustees only contained the words, "die, or decline, or become incapable to act," and where a trustee who had acted was anxious to retire. *Re Armstrong's Settlement*, 5 W. R. 448.

5. New trustee appointed by the Court where the power to appoint new trustees only contained the words, "shall die, or become incapable, or be unwilling to act," and where two trustees who had acted desired to be discharged from the trusts. *Re Woodgate's Settlement*, 5 W. R. 448.

6. The words "unable to act" do not apply to the case of a trustee going out of the jurisdiction. *Re Harrison's Trusts*, 1 W. R. 58; 22 L. J., Ch., 69.

7. By residence for twenty years in America, and establishing in trade there, a trustee held to "become incapable" of acting in respect of leasehold property in England. *Mesnard v. Welford*, 1 W. R. 443; 1 Eq. Rep. 237.

In 1824 A. was appointed a trustee of leaseholds, situate in Middlesex; and the deed by which he was appointed contained a power for B. to appoint a trustee in the place of A., if A. "should die, or decline, or become incapable to act in the execution of the trusts aforesaid." In 1832 A. went to the United States of America, and had never since returned to this country, and was now settled in trade at New York. B. had appointed a trustee in the place of A. without A.'s consent:—Held, that A. was "incapable to act" as a trustee of the leaseholds in question, and the new trustee was declared to have been properly appointed. An order was made vesting the leaseholds in the new trustee. *Id.*

8. A settlement contained a power to appoint a new trustee in case any trustee should become incapable of acting. A trustee became of

unsound mind. Upon petition, under the Trustee Act, 13 & 14 Vict., c. 60, the Court made an order for appointing a new trustee, and empowering the continuing trustee to transfer the trust fund. *Re Cooper*, 25 L. J., Ch., 685; 4 W. R. 729.

7. Where Donee of Power Incapacitated.

9. The Court has power, notwithstanding s. 137, 16 & 17 Vict., c. 70, to make an order for the appointment of new trustees, where the power of appointment was vested in a tenant for life, a lunatic, but it declined to do so in the absence of the committee of the lunatic. *Re Parke*, 9 Jur., N. S., 998; 11 W. R. 655; 8 L. T., N. S., 378. *S. C. nom. Re Parker's Trust*, 32 Beav. 580.

10. A power for the appointment of new trustees contained in a settlement became vested in a person who had been found lunatic by inquisition. The committee of the person and estate petitioned, under the 16 & 17 Vict., c. 70, for leave to exercise the power for him, and the same was ordered. *Re Bowmer*, 5 Jur., N. S., 348; 28 L. J., Ch., 618; 3 De G. & J. 658.

11. When the person having power to appoint a new trustee is a lunatic, found so by inquisition, an order appointing a new trustee may be made in Chancery under the Trustee Act 1850, s. 32. *Re Sparrow*, 5 L. R., Ch., 662; 18 W. R. 1185.

12. Order made under the Trustee Act 1850, appointing a new trustee, and vesting the trust premises in him jointly with the continuing trustees, in a case where one of three trustees was lunatic, and though the will contained a power to appoint new trustees. *Re Davis*, 3 Macn. & G. 278.

13. Property was left by will to trustees in trust for a person for her life, with remainder as therein mentioned. In the clause providing for the appointment of the trustees the power of appointment was vested solely in the tenant for life during her life. The tenant for life having become lunatic, and one of the trustees of the will having died, the Court, on the petition of the surviving trustee for the time being and the committee of the lunatic's estate, appointed a new trustee in the stead of the trustee who had died. *Re Heapfy*, 18 W. R. 1070.

14. Application for the direction of the Court as to the appointment of a third trustee in the room of a disclaiming trustee. The parties in whom the power of appointment was vested were in India; they, supposing that only two trustees had disclaimed, appointed two. It appeared that the third had also disclaimed. The petition was ordered to be amended by intitling it in the Trustee Act 1850, and by introducing the above facts; the Court would then appoint under the power in the Trustee Act. *Re Humphry's Estate*, 1 Jur., N. S., 921.

15. The Court has jurisdiction, under s. 32 of the Trustee Act 1850, to appoint a new trustee in the place of a trustee who has become incapable, as, for instance, through age and infirmity, of acting in the trusts. A will contained a power for the trustees, or the survivors of them, to appoint a new trustee in the place of any trustee who should be "in-

capable to act." One of the surviving trustees, the testator's widow, having become, through age and infirmity, incapable of acting in the trusts, or of concurring in the appointment of a new trustee, or in a transfer of the trust estate, the Court appointed a new trustee in her place, and made a vesting order. *Re Lemann's Trusts*, 22 L. R., Ch. D., 633; 52 L. J., Ch., 560; 48 L. T. 389; 31 W. R. 520.

8. Other Grounds.

1. The Court refused to appoint a new trustee on petition, where the object of the parties was to convey an estate to a purchaser, pursuant to a contract for sale, to which the old trustee ought to have been but was not a party. *Re Lloyd*, 3 J. & L. 255.

2. Held, that this Court has no power, under the Trustee Act 1850, to appoint trustees, where there are trustees *de facto* acting as such. *Exp. Hadley*, 5 De G. & Sm. 67; 16 Jur. 98; 21 L. J., Ch., 109.

3. A contingent interest in remainder in trust property gives a right to apply, under the Trustee Act 1850, ss. 32, 33, for the appointment of new trustees. *Re Sheppard*, 1 N. R. 76; 4 De G. F. & J. 423; 9 Jur., N. S., 59.

Though no case of present danger to such contingent right be shown, it is sufficient ground for an appointment of new trustees that the person who holds the office of trustee might have an interest in neglecting it. *Ib.*

4. The Court has not jurisdiction, under the Trustee Act 1850, to take away the power of appointing new trustees from the donee of the power, where the donee is capable of exercising, and willing to exercise, the power, although such donee may have disclosed an intention or desire to exercise his power corruptly. *Re Hodson's Settlement*, 9 Hare 118; 20 L. J., N. S., Ch., 551; 15 Jur. 552.

5. Where a trustee, from ill health, was unequal to the exertion of signing the necessary papers for effecting a transfer into Court of a sum of stock, the Court appointed new trustees of such sum of stock, they undertaking, within a given time, to transfer such sum of stock into the name, and with the privy, of the accountant-general of this court, pursuant to the provisions of the Trustee Relief Act. *Re Dawson's Trust, Re Broome*, 3 N. R. 397.

6. On petition for vesting order, the Court will also appoint a new trustee, notwithstanding the instrument creating the trust contains a power to appoint new trustees, which might without difficulty have been exercised. *Re Cooper's Settlement*, 4 W. R. 729; 25 L. J., Ch., 685.

7. The Court has jurisdiction, under s. 32 of the Trustee Act 1850, to appoint a new trustee in the place of a trustee who has become incapable, as, for instance, through age and infirmity, of acting in the trusts. A will contained a power for the trustees, or the survivors of them, to appoint a new trustee in the place of any trustee who should be "incapable to act." One of the surviving trustees, the testator's widow, having become, through age and infirmity, incapable of acting in the trusts, or of concurring in the appointment of a new trustee, or in a transfer of the trust estate, the Court appointed a new trustee

in her place, and made a vesting order. *Re Lemann's Trusts*, 22 L. R., Ch. D., 633; 52 L. J., Ch., 560; 48 L. T. 389; 31 W. R. 520.

8. A suit having been instituted for the purpose of obtaining an order for the transfer, with the consent of all parties, of a fund standing in the books of the Bank of England in the name of an incorporate body, which had ceased to exist, the Court, having ordered the decree to be intitled in the matter of the Trustee Act 1850, appointed two trustees, and empowered and directed them to transfer the fund. *Hanoer (King of) v. England (Bank of)*, 8 L. R., Eq., 350; 21 L. T., N. S., 106.

IV. OVER PART OF PROPERTY AND SEVERANCE OF TRUSTEESHIP.

9. Where part of the trust property had been lost, the Court in appointing new trustees refused to confine the trust to the remaining property, but directed it to be made of the whole comprised in the settlement, and referred it to the Master, whether it would be proper to take proceedings for the recovery of the part lost. *Bonnett v. Burgis*, 5 Hare 295; 15 L. J., N. S., Ch., 231; 10 Jur. 153.

10. Where by the same will different estates have been vested in the same trustees upon different trusts, and there is only a single power of appointment of new trustees in the usual form, and all the trustees have died, the Court may, with the consent of the representatives of the surviving trustee, appoint new trustees to execute the trusts of one estate, without dealing with the other estates. *Re Dennis*, 12 W. R. 675; 10 L. T., N. S., 688.

Hereditaments were devised to certain persons upon trust to secure a rent-charge, to be held on certain trusts, and subject thereto the hereditaments were devised in strict settlement, the same persons being trustees to support the contingent remainders. Various other trusts relating to other property were reposed in the same trustees, and the will contained a single power of appointing new trustees in the ordinary form. The estates limited to the trustees having devolved on the co-heiresses of the last surviving trustee, who refused to act in the trusts:—Held, that the Court could not, under the Trustee Act 1850, appoint new trustees of the rent-charge only, and vest the rent-charge in them, without the consent of the co-heiresses. S. C. 3 N. R. 636.

11. A father gave six separate sums in trust for six daughters respectively for life, with remainder for the benefit of their children, respectively at twenty-one or marriage, with ultimate gifts over for the benefit of all his children in certain contingencies. He gave a general power of appointment of new trustees. One of the six daughters married a Canadian; her children were Canadians, and had attained twenty-one or married, and the investments of the sum of money for her benefit were mostly Canadian. One of the trustees of the will retiring as far as regarded that sum, the Court appointed a Canadian trustee of the same jointly with the other trustee of the will. *Re Cunard*, 27 W. R. 52; 43 L. J., Ch., 192.

1. A testator gave different parts of his property, consisting of freeholds and leaseholds, on substantially similar trusts for different families, with cross-remainders in each case. Many of the *cestuis que trustent* were not *sui juris*:—Held, the present trustees of the will and all the *cestuis que trustent* who were *sui juris* consenting, that separate sets of trustees might be appointed for the different divisions of the property. *Re Grange, Cooper v. Todd*, 44 L. T. 469; 29 W. R. 502.

V. PRACTICE AND PARTIES.

1. *Who may Petition*, 6836.
2. *Parties to Concur or be Served*, 6836.
3. *Affidavit of Fitness*, 6837.
4. *Other Evidence*, 6837.
5. *Consent of New Trustees*, 6837.

1. Who may Petition.

2. A petition to change the trustees in a settlement ought to be presented by the *cestui que trust*, and not by the proposed trustees. *Re O'Dell, Hayes* 257.

3. A person who has a contingent interest in a trust fund has a *locus standi* to present a petition for the appointment of new trustees under the Trustee Act 1850. *Re Sheppard*, 4 De G. F. & J. 423; 1 N. R. 76; 9 Jur., N. S., 59.

4. Creditors who have obtained a decree for the administration of the estate of their deceased debtor, under which a contract for sale of his real estate has been entered into, and the purchase money paid into court, are persons "beneficially interested" in the lands comprised in the contract within the scope of the 13 & 14 Vict., c. 60, s. 37, and entitled to apply thereunder. *Re Wragg*, 1 De G. J. & Sm. 356; 2 N. R. 49.

2. Parties to Concur or be Served.

5. The Master directed to appoint a new trustee, although some of the *cestuis que trustent* were infants, and another was out of the jurisdiction. *Hunter v. Gibson*, 16 Sim. 159.

6. On a petition, under the Trustee Act 1850, for the appointment of new trustees of a settlement, the beneficial interests under which had been made the subjects of marriage settlements:—Held, that the original *cestuis que trustent*, their husbands and wives, and the trustees of their settlements, sufficiently represented all the parties beneficially interested. *Re Smyth's Settlement*, 2 De G. & Sm. 781.

7. Certain persons interested, being desirous of having new trustees appointed of certain articles of settlement, exhibited a statement before the Master, under the 13 & 14 Vict., c. 60, s. 38, and the Master gave a certificate approving of certain persons as new trustees, all parties interested having appeared before him and consented. On a motion that the certificate might be confirmed, and that an order might be made appointing the persons approved of by the Master trustees of the articles of settlement, the other parties in-

terested did not appear, and the question was, whether it was necessary for them to do so, as they had already consented before the Master. Lord Cranworth thought they must appear and consent, and made the order on the production of consent brief from the other parties. *Re Thomas's Trust*, 15 Jur. 187.

8. On a petition to appoint new trustees, under the Trustee Act 1850, in place of two who were advanced in years and anxious to retire:—Held, that the two old trustees and all the *cestuis que trustent* should appear. *Re Sloper*, 18 Beav. 596.

9. When a chapel was conveyed to trustees upon trust among other things to allow such person to preach as the Wesleyan Conference should appoint:—Held, that the persons representing the Conference might join in a petition for the appointment of new trustees. *Re Harden Wesleyan Chapel*, 1 W. R. 212.

10. All the *cestuis que trustent* ought ordinarily to be parties to a petition for the appointment of new trustees, infants by their next friends, as well as adults. *Re Fellows*, 2 Jur., N. S., 62.

Costs "incidental to and consequent on" inquiry; the words "incidental to and consequent on" ordered to be struck out. *Id.*

11. Persons entitled to six-seventh parts of a trust fund applied to have a new trustee of the fund appointed:—Held, that, *prima facie*, all the persons beneficially interested must be before the Court, and that though circumstances might render such an application impossible, yet no such impossibility being suggested, these persons were not entitled to apply, and the Court declined to make the order asked, without service on the person entitled to the remaining one-seventh part. *Re Richard's Trust*, 5 De G. & Sm. 636.

12. Demise of lands to trustees for 1,000 years on certain trusts. Petition for the appointment of new trustees:—Held, that the reversioner ought to be served with the petition. *Re Farrant's Trust*, 20 L. J., N. S., Ch., 532.

13. Petition by tenant for life for a vesting order, to vest property in a new trustee appointed in the place of a trustee out of the jurisdiction, must be served on the remainderman. It must be proved by affidavit, *inter alia*, that the power has been properly exercised, and that the proposed trustee is a fit and proper person. *Re Maynard's Settlement*, 16 Jur. 1084; 1 W. R. 15.

14. A new trustee was appointed under a power in a settlement in the place of a trustee who was a lunatic. An order was made, under the 13 & 14 Vict., c. 60, for vesting the estate in the new trustee, but the committee of the lunatic's estate had not been served. The registrar declined to draw up the order without service, which the Court directed to be made. *Re Saumarez*, 25 L. J., Ch., 575; 8 De G. M. & G. 390; 4 W. R. 658.

15. A tenant for life of trust property, with a power of appointing new trustees, was duly found lunatic; but no committee was appointed. On a petition being presented, under 16 & 17 Vict., c. 70, s. 137, for the appointment of new trustees of the property, the Court declined to make an order in the absence of a committee. *Re Parke*, 9 Jur., N. S., 998; 11 W. R. 655; 8 L. T., N. S., 378; 32 Beav. 580.

16. When a petition is presented for the appointment of a new trustee under the

Trustee Act 1850, in place of a trustee of unsound mind not so found, service on the trustee of unsound mind is not necessary. *Re Green, Re Murton*, 10 L. R., Ch., 272; 23 W. R. 804; 32 L. T., N. S., 446.

1. In petition cases, under the Trustee Act 1850, arising from trustees being out of the jurisdiction, it should be sworn where the trustee is, as service will be required when the absence is only in England. *Exp. Hughes*, 6 Ir. Eq. R. 559; 1 J. & L. 32.

2. An appointment of a new trustee in place of one permanently residing out of the jurisdiction will be made without service of the petition on the trustee so residing out of the jurisdiction. *Re Martin Pye's Trusts*, 42 L. T. 247.

3. The service of a petition for vesting in newly-appointed trustees lands which had descended to the infant heir of the former sole trustee upon the guardian of the infant is not necessary. *Re Little*, 7 L. R., Eq., 323.

3. Affidavit of Fitness.

4. Two trustees of real estate were appointed by the Court in the place of one on petition under the Trustee Act 1850; and, the property being small, without a reference, on an affidavit of the fitness of the two persons proposed as trustees. *Exp. Tunstall*, 4 De G. & Sm. 421; 15 Jur. 645, 981.

5. On a petition for the appointment of new trustees under the Trustee Act 1850, it was asked that the parties named in the petition might be appointed trustees without a reference to the Master, upon an affidavit of their fitness. Order made on the written consent of the parties proposed to be appointed trustees. *Re Battersby's Trust*, 16 Jur. 900.

6. The Court will not, as a general rule, receive the evidence of the solicitor in the matter, as to the fitness of persons proposed to be appointed new trustees. *Grundy v. Bucheridge*, 17 Jur. 731; 22 L. J., Ch., 1007.

7. It is not sufficient to describe a person making an affidavit of the fitness of a new trustee merely as a "gentleman." *Re Orde*, 24 L. R., Ch. D., 271; 52 L. J., Ch., 832; 40 L. T. 430; 31 W. R. 801.

Reference to Master.] See III. II. *ante*.

4. Other Evidence.

8. On a petition for appointing new trustees of a will containing gifts to classes, an affidavit of the solicitor was received as sufficient evidence of the persons constituting the classes without the production of baptismal and other certificates. *Re Hoskins*, 4 De G. & J. 436.

9. On a petition by the *cestuis que trustent* under a will of real estate for the appointment of new trustees, the will not having been proved:—Held, that the production of the affidavit of one of the attesting witnesses, proving the due execution of the will, would be sufficient evidence. *Re Wickens's Trusts*, 27 W. R. 880.

10. Affidavits made in a cause allowed to be used as evidence in a petition under the Trustee Act 1850. *Re Pickance*, 10 Hare (App.) xxxv.

5. Consent of New Trustees.

11. An affidavit by a third party is not sufficient evidence that the proposed trustees will consent to act. *Semble*, that such consent may be sufficiently shown by the instruction of counsel or by letter. *Re Park's Trust*, 1 W. R. 477.

12. An intended trustee should not appear to consent by counsel, but should merely signify his assent to the petitioner. *Re Draper's Settlement*, 2 W. R. 440.

13. Where a trustee declines to act, and it is necessary to appoint a new one in his place, his consent to the new appointment must be obtained. *Re Garty*, 10 L. T., N. S., 331; 3 N. R. 636.

14. Order for appointment of new trustees or written consent of parties proposed to be appointed. *Re Battersby's Trusts*, 16 Jur. 900.

VI. COSTS.

15. A court of equity has no jurisdiction to award costs adversely against third parties cited to appear as respondents upon a petition to appoint new trustees under the 13 & 14 Vict., c. 60. *Re Primrose*, 23 Beav. 590; 3 Jur., N. S., 899; 5 W. R. 508. But see *Re Woodburn*, 1 De G. & J. 333; 3 Jur., N. S., 799; 26 L. J., Ch., 522.

16. Where an order had been made for the appointment of new trustees under the Trustee Act 1850, and for the payment of the costs out of the trust estate, and it was subsequently shown that the trust estate consisted entirely of realty, the order was amended by the insertion of words authorising the trustees to raise the costs out of the realty by way of mortgage, the mortgage deed to be approved by the judge at chambers. *Re Crabtree*, 14 W. R. 497.

17. When a legacy had been bequeathed to a sole trustee for a tenant for life, and then for reversioners absolutely, the costs of a petition by the reversioners for the appointment of an additional trustee were ordered to be paid by the petitioners, and not out of the corpus of the legacy. *Re Brackenbury*, 10 L. R., Eq., 45; 39 L. J., Ch., 635; 22 L. T., N. S., 469.

18. On petition for the appointment of new trustees under the Trustee Act 1850, the Court has no jurisdiction to order payment into court of the trust funds. The costs of a petition for the appointment of new trustees where the petitioner was the tenant for life directed to be paid out of the corpus of the fund, and as regards persons having legal interest in the funds as between solicitor and client. *Re Parby's Settlement Trusts*, 29 L. T. 72.

19. Under a power in a settlement of real estate, a new trustee was duly appointed in the place of a sole trustee, deceased. The heir of the deceased trustee could not be found, and, on petition, an order was made to vest the estate in the new trustee, and that upon consent he might pay the costs of the proceedings, and that such costs, with interest at 4l. per cent., might form a charge on the inheritance. *Exp. Davies*, 16 Jur. 882.

20. A bankrupt trustee is entitled to his costs of appearing on a petition for the ap-

pointment of new trustees. *Turner v. Mul-linex*, 9 W. R. 252.

1. On a petition for appointment of new trustees of two trust funds, the costs ordered to be paid out of the two funds ratably. *Re Grant*, 2 John. & H. 764.

2. Where a petition by a married woman by her next friend, for the appointment of new trustees, contained allegations against the husband of misconduct, and his affidavit denied those allegations, and contained other allegations of misconduct on the part of the parties therein referred to, the Court ordered the next friend to pay the respondent his costs of answering the charges made against him, and the costs incurred in making those charges, and in reference thereto; the respondent to pay the costs incurred by the charges which he first introduced, and the trust property to bear the ordinary costs of a petition for the appointment of new trustees. *Re Wills*, 9 Jur., N. S. 1225.

3. A trustee who makes an improper opposition to a petition for the appointment of new trustees will have to bear his own costs of the opposition, and will have the costs occasioned to the other parties by his opposition deducted from the costs properly payable to him. *Re Wiseman*, 18 W. R. 574.

4. Two petitions were presented on the same day for the appointment of new trustees, the Court will order the costs of the more perfect petition only to be paid out of the fund, and notwithstanding that the less perfect petition was presented first. *Re Pring*, 42 L. J., Ch., 473; 28 L. T., N. S., 467.

TRUSTEE RELIEF ACTS.

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- *Payment into Court under Legacy Duty Act.* See PRACTICE (PAYMENT INTO COURT).
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- IX. *When Justifiable and Costs.* See III. *post*.

I. WHO MAY PAY IN.

1. A. B. purchased an estate subject to a pecuniary charge:—Held, that he was not entitled to pay the amount of the charge into Court under the Trustee Relief Act. *Re Buckley's Trust*, 17 Beav. 110; 17 Jur. 478; 22 L. J., Ch., 934; 1 Eq. Rep. 18.

A testator directed legacies to be laid out upon real estate, and the interest thereof paid to C. D. for life, and after her death the principal sum divided amongst certain persons. The testator devised the real estate charged with the payment of the said legacies. A portion of the real estate was conveyed to purchasers, and the same was, by arrangement, made subject to the payment of legacies. C. D. having died, the legacies became divisible, but the purchaser of the estate charged with them, not being satisfied that the same were divisible among the parties who claimed, paid the money into court, with an arrear of interest, under the Trustee Relief Act, 10 & 11 Vict., c. 96:—Held, that the case was not within the statute. *Ib.*

2. A stakeholder may pay money into court under the Trustee Relief Act. *Re United Kingdom Life Assurance Co.*, 11 Jur., N. S., 424; 34 L. J., Ch., 554; 13 W. R. 645; 12 L. T., N. S., 441; 6 N. R. 59.

3. Testatrix, by her will, declared, that every person thereby made tenant for life should have such and the like powers of leasing, selling, and exchanging any part of the devised estate as were by her father's will given to the tenants for life and in tail mentioned in his will, or to the trustees thereof. It appeared that the father's will did not give a tenant for life or in tail any power of the leasing, selling, or exchanging, but gave trustees full power to sell and exchange the hereditaments therein comprised, and to give receipts for the purchase money:—Held, that tenant for life in possession of the estate devised by the testatrix had the same powers of selling and exchanging that estate as were by the father's will given to the trustees, but that such powers did not extend to giving receipts; and *semble*, that the difficulties which might be met with in exercising such power of sale, in the absence of a power to give receipts, might be removed by paying the money into Court under the Trustee Relief Act, stat. 10 & 11 Vict., c. 96, and that upon such payment the purchaser might safely complete. *Cox v. Cox*, 1 Kay & J. 251.

4. Bonds of a foreign company were deposited by their agent at a bank in London, together with 5,000*l.* to be divided amongst the bondholders on non-payment of interest. The 5,000*l.* having become forfeited by non-payment of interest, one of the bondholders brought an action against the bankers for his share. Injunction granted to restrain this action, the bankers being trustees for an unascertained class, and therefore entitled to protection against a succession of actions, and not bound at their own risk and expense to ascertain the amount of bonds negotiated at the date of the forfeiture. *Semble*, that the 5,000*l.* might have been paid into court under the Trustee Relief Act. *Hankey v. Morley*, 4 Jur., N. S., 234.

5. A banking company having received notice in writing of conflicting claims to moneys placed with them on deposit, paid such moneys into court under the Trustee Relief Act, after first deducting therefrom their costs of payment in. Upon petition by one of the claimants for payment out:—Held, that the proviso in s. 25, sub-s. 6 of the Judicature Act only applied to debts of which there had been an absolute assignment in writing; and that the banking company, not being trustees within the Trustee Relief Act, were not entitled to pay the deposit moneys in court thereunder:—But held, that the petitioner must be taken to have submitted to the jurisdiction under the Trustee Relief Act, by petitioning the Court, and upon the principle of *Re Haycock's Policy* (1 L. R., Ch. D., 611), the bank were entitled to their taxed costs of payment in and of the petition, and such costs were directed to be taxed accordingly. *Re Sutton's Trusts*, 12 L. R., Ch. D., 175; 48 L. J., Ch., 350; 27 W. R. 529.

6. The surety in the Probate Court of an administrator who has got money assets of the intestate in his hands may lodge it in court under the Trustee Relief Act. *Re Monahan*, 8 Ir. R., Eq., 353.

See also INSURANCE, II. VIII. 2.

II. BY SURVIVING TRUSTEE OR MAJORITY OF TRUSTEES.

7. Stock standing in the joint names of surviving and deceased trustees may be transferred by the survivors to the accountant-general, under the Trustee Relief Act (10 & 11 Vict., c. 96). *Re Parry*, 6 Hare 306; 12 Jur. 721.

8. Three trustees were possessed of a fund which it was desirable to pay into court. One of the trustees being invalidated, the other two petitioned, under the Trustee Further Relief Act (12 & 13 Vict., c. 74), for leave to pay in the fund. The order was made. *Re Broadwood*, 8 L. T., N. S., 632.

III. WHAT SECURITIES MAY BE PAID IN.

9. As to transfer into court of foreign bonds under the Trustee Relief Act. See *Re Lloyd*, 2 W. R. 371.

10. Railway stock may now be transferred into court under the Trustee Relief Act 1847. *Re Ross's Trusts*, 28 W. R. 418.

IV. AFFIDAVIT.

11. In an affidavit made upon payment of money into court under the Trustee Relief Act, the sum to be paid in must be expressed in words, and not in figures. *Re Watts*, 24 W. R. 701; 34 L. T., N. S., 647.

12. If a trustee about to pay money into court under the Trustee Relief Act becomes aware of the existence of a claim after he has filed his affidavit, he must file a supplemental affidavit stating the claim, and in default of so doing, he will be personally responsible for the costs of any application by the claimant necessitated by his neglect. *Re Allen's Trusts*, 27 W. R. 529; 40 L. T. 466.

By a Sole Trustee.] 1. Order made under the circumstances for the accountant-general to receive a fund under the Trustee Relief Act on the affidavit of one only of two trustees. *Anon.*, 1 Jur., N. S., 974.

V. NOTICE AND SERVICE.

2. When a legacy had been paid into court by trustees, and the persons entitled to it were resident in Canada:—Held, that notice sent through post by registered letter was sufficient notice. *Re Merryweather*, 22 L. T., N. S., 603.

3. Where the person mentioned in an affidavit on payment into court under the Trustee Relief Act as being the person interested in the fund could not be found, an opinion was intimated as to what would probably be held sufficient notice of the payment in, but the Court declined to give any directions. *Re Hardley's Trusts*, 10 L. R., Ch. D., 664; 48 L. J., Ch., 335; 27 W. R. 587; 40 L. T. 409.

When Dispensed With.] 4. Where the only person entitled to a trust fund paid into court under the Trustee Relief Act had gone to America, and had not been heard of since 1868, service of the notice of the payment into court required to be given by the trustees was dispensed with. *Re Walters*, 22 L. T., N. S., 120.

5. Where property was given by will to a person, but should he not return to England within seven years of the testatrix's death then over to other persons, and the executor, the seven years having elapsed, and the legatee having been last heard of four years and a half ago in Australia, paid the money into court under the Trustee Relief Act, the money was allowed to be paid to the persons entitled in default of the legatee's return in seven years, and service upon him of notice of the payment into court was dispensed with. *Re Whitaker's Trust*, 47 L. T. 507; 31 W. R. 114.

6. On payment into court by trustees of a reversionary fund, which had fallen into possession since the death of a married woman entitled thereto:—Held, that upon production of a full affidavit as to unsuccessful inquiries for the husband, who had gone to Australia in 1850, and had not since been heard of, the Court would dispense with notice to the husband. *Re Hansford*, 7 W. R. 199.

VI. TITLE OF ACCOUNT.

7. Executors paid money into court under the Trustee Relief Act to an account headed "In the matter of the trusts of the will of S. J." The Court held that the account was too general to enable it to act under this statute. *Re Joseph's Will*, 11 Beav. 625.

Observations as to the effect of and the proper mode of proceeding under this Act. *Id.*

8. In order to indemnify a trustee or executor who lodges funds in court under the Trustee Relief Act (11 & 12 Vict., c. 68), the funds must be lodged in the credit of a particular trust. The Court will not make an order where the funds have been properly lodged.

The practice under the said and corresponding English Act stated. *Re Godfrey's Trust*, 2 Ir. Ch. R. 105.

9. To enable the Court to distribute a fund under the Act 10 & 11 Vict., c. 96, it must stand to an account which separates it from the other assets, and disconnects it from all the other trusts of the will. *Re Everett*, 12 Beav. 485.

10. A fund bequeathed in aliquot parts, on distinct trusts, ought not to be paid by the trustees to the joint account of the several trusts, but ought to be carried to separate accounts. *Re Tillstone's Trust*, 9 Hare (App.) lix.

11. Application to have some money paid out of court which had been paid in to an account intitled "The Trusts of the will of J. Robinson, deceased," the application being by the nine children of the testator, all of whom were adult and *sui juris*, and claimed as residuary legatees. The Court, however, declined to pay out to residuary legatees a sum which had been paid in on so general a trust. After consideration of the will, however, the fund was directed to be carried over to an account intitled "The Account Residue" subject to the particular legacies; and then the residuary legatees claiming would be in their right. *Re Robinson's Trust*, 1 Jur., N. S., 750.

12. Where a fund is paid into court under the Trustee Relief Act to a general account of a will, the Court will order it to be carried to the separate account of the person (an infant) named in the trustee's affidavit, as the only person entitled to such fund, and it is not necessary previously to change the title of the account. *Re Coulson*, 4 Jur., N. S., 6.

13. Where under the Trustee Relief Act money is paid into court "upon the trusts of a will," it involves the general administration of the estate, and the Court will not order it to be transferred to a particular account, except at the request and on the responsibility of the trustee. *Re Wright's Trusts*, 15 Beav. 367.

14. Form of order where cash and stock not admitting of division below 1*l.* are paid and transferred into court to separate accounts. *Re Perry*, 24 W. R. 433.

15. The surety in the Probate Court of an administrator who has got money assets of the intestate in his hands may lodge it in court under the Trustee Relief Act. *Re Monahan*, 8 Ir. R., Eq., 353.

The balance of the assets of an intestate, after they have been fully administered, should be lodged to a credit intitled, "In the matter of the 11 & 12 Vict., c. 68, and separate credit of the next-of-kin" of the intestate. *Id.*

16. A fund paid in under the Trustee Relief Act to an account intitled, "In the matter of the estate of a deceased person," will not be paid out without the presence of his legal personal representative and an admission of assets by him. *Re Edwards' Estate*, 4 W. R. 801.

VII. EFFECT ON POWERS OF TRUSTEES.

17. There being a question whether a fund should be paid to *cestuis que trustent*, infants

being interested, the trustee pays it into court under the Trustee Relief Act, and the *cestui que trust* appoint new trustees:—Held, that they could do so, as the payment into court specified a “desire to be discharged,” and therefore it was competent for them to appoint other trustees under their power in that case to nominate and appoint any other persons, etc. *Re Bailey's Trust*, 3 W. R. 31.

1. A testator gave all his property to trustees, upon trust to pay the income to his widow, and after her death “to make a weekly allowance to the testator's son S., or his children, for his and their maintenance and support, such allowance to be in the discretion of my trustees.” He then gave his trustees a power of advancement, at their discretion, to S. or his children, and concluded, “it being my intention that S., if living, shall have the whole benefit of such moneys, if he shall conduct himself steadily and to the satisfaction of my executors.” S., after the death of the widow, assigned the fund absolutely to A. The trustees, in consequence of doubts raised on the construction of the will as to the nature of S.'s interest, and without any observations favourable or otherwise to the conduct of S., paid the fund into court:—Held, that S. took an absolute interest in the whole fund, which passed to his particular assignee. *Re Coe*, 4 Kay & J. 199; 4 Jur., N. S., 158.

2. Where under a will the income of a fund was payable for the maintenance of T. G.:—Held, that the trustee by paying the fund into court under the Trustee Relief Act relinquished his discretionary power. *Re Tegg's Trusts*, 15 W. R. 52.

3. A trustee who had paid money into court under the Trustee Relief Act (10 & 11 Vict., c. 96):—Held, to have retired from his trust. *Re William's Settlement*, 4 Kay & J. 87.

4. Trustees who have paid a fund into court under the 10 & 11 Vict., c. 96, cannot prevent its being paid out to a *cestui que trust* absolutely entitled to it, on the ground that he is about to file a bill against them to take accounts of the trust. *Re Wright*, 3 Kay & J. 419.

5. A testator bequeathed to his executors a sum of 450*l.*, which he directed should be held by them in trust for his brother James's family, and should be by his said executors expended for the benefit of the said family, in such a manner as to them should seem most expedient. The executors having paid the 450*l.* into court under the Trustee Relief Act:—Held, that the payment into court terminated the discretionary power of applying the funds. *Re Mulqueen Trusts*, *Exp. Mulqueen*, 7 L. R., Ir., 127.

6. A trustee having a discretionary power as to the application of a trust fund, does not necessarily abandon it by paying the trust fund into court. *Re Landon*, 40 L. J., Ch., 370.

7. The 10 & 11 Vict., c. 96, by enabling a trustee to pay a trust fund into court, does not deprive him of the right to file a bill to be relieved from the trusteeship, and he will, in a proper case, be allowed his costs of such bill as between solicitor and client. *Barker v. Piele*, 2 Dr. & Sm. 340; 11 Jur., N. S., 436; 34 L. J., Ch., 497; 13 W. R. 573; 12 L. T., N. S., 50.

See also TRUSTS, VIII. II. 5 (b)—IX. IV.

VIII. OTHER MATTERS.

8. Before the General Orders of June 1848, money might be paid in to the name of the Accountant-General, under the 10 & 11 Vict., c. 96, without any order of the Court. *Re Biggs*, 11 Beav. 27; 11 Jur. 958.

II. Payment out and Administration of the Trust Fund.

I. *What Questions are within the Jurisdiction of the Court, and Direction of Actions by the Court*, 6841.

II. *To whom Payment will be made*, 6843.

III. *Funds of Lunatics*, 6843.

IV. *Practice*, 6845.

v. *Order for Payment*, 6847.

I. WHAT QUESTIONS ARE WITHIN THE JURISDICTION OF THE COURT, AND DIRECTION OF ACTIONS BY THE COURT.

9. *Quære*, whether the Court has jurisdiction to decide a question of election on a petition under the Trustee Relief Act. *Exp. Bernard*, *Re Leigh's Trust*, 6 Ir. Ch. R. 133.

10. Where a petition was presented under the Trustee Relief Act, and a question as to sanity of one of the parties arose:—Held, that the Court had jurisdiction to decide the matter as if it were a suit, and if necessary the Court could direct an issue. *Semble*, also, that where there are creditors or unascertained claims a suit is the proper course. *Re Allen's Will*, Kay (App.) li.

11. The Court has no jurisdiction on a petition presented under the Trustee Relief Acts to decide on a disputed question of title. *Re Draper*, 9 W. R. 805.

12. In a case upon the construction of a marriage settlement and the interest of the children of the marriage under it:—Held, that the question raised was a matter which it was competent for the Court to deal with, on petition, under the Trustee Relief Act. *Re Dalton*, 1 De G. M. & G. 265; 21 L. J., N. S., Ch., 681; 16 Jur. 253.

13. Under the Trustee Relief Act (10 & 11 Vict., c. 96), it is entirely a matter for the discretion of the Court to direct a bill to be filed, if such a mode of proceeding shall appear to be necessary; but the Lord Chancellor has the same jurisdiction upon petition as upon a bill. *Lewis v. Hillman*, 3 H. L. Ca. 607. And see S. C. in court below *sub. nom.* *Re Bloye's Trust*, 1 Macn. & G. 488; 2 H. & Tw. 140; 19 L. J., N. S., Ch., 89; 14 Jur. 49.

On a petition presented under that Act praying for the payment out of court of money then in court, and on cross-petition in opposition thereto, the Court has full power to declare validity or invalidity of any deed on which the claim to that money is vested. *Ib.* *Quære*, whether this may not properly be done upon petition alone, without any necessity for filing a cross-petition. *Ib.*

Such necessity, if it exists, may be dispensed with by consent. *Ib.*

A. was entitled to a reversionary interest in

one-fifth share of certain real and personal estate then held by a devisee for life. A. granted to B. an annuity upon it; the annuity deed, which was registered, contained a power of sale; the annuity fell into arrear, and B. determined to exercise the power of sale. The sale was effected for a sum of 900*l.*; but the purchaser discovered an objection in the memorial registered, which rendered the annuity deed invalid, and he refused to complete the purchase, and obtained a return of his deposit money. The solicitors of B. (acting at the time, as they stated, from motives of kindness to A.) obtained from A., who had not the benefit of any solicitor's advice, an assignment of the reversionary interest to L. for the sum of 900*l.*, and after the reversion fell in by the death of the tenant for life, claimed the property as the purchaser's, alleging that the purchase had been made by L. as their agent and on their behalf. The executors declined to pay them the value of the property, which it was then found amounted to 1,770*l.*, but paid it into court, under the 10 & 11 Vict., c. 96 (the Trustee Relief Act). The solicitors presented a petition to have the money paid out to them as purchasers of the reversionary interest under the deed of assignment to L. A. opposed the payment on affidavits, which set up a case of deception and fraud practised on him. The parties on both sides agreed that the case should be heard on petition and affidavits as if a petition and cross-petition had been filed. The Vice-Chancellor ordered the money to be paid out of court to the solicitors as purchasers. The Lord Chancellor, on appeal, reversed this order, declared the assignment to be invalid, and ordered the money to be paid back into court, reserved the costs, and gave either of the parties liberty to make any further application to the Court:—Held, that the Lord Chancellor's order was correct; that the purchase by the solicitors, who were at the time the solicitors of the vendor, was contrary to the rules of equity, and void; that without any consent the Court had jurisdiction, on petition or cross-petition, under the statute, to declare the deed of assignment invalid, as well as to order repayment of the money; that the consent here given waived any possible necessity for a cross-petition; and that the order was not bad for not directing a return to the solicitors of the money they had paid as purchase money; for that the leave reserved to either party to make any further application to the Court enabled them to obtain a return of this money. *1b*.

1. The validity of a deed cannot be impeached on a petition under the Trustee Relief Act. *Re Way*, 10 Jur., N. S., 1166; 34 L. J., Ch., 49; 11 L. T., N. S., 495.

2. A fund in court which has, contrary to the intention of the parties, clearly proved, been included in a settlement, will only be paid out to the parties entitled under that settlement until it has been reformed; and the Court has no jurisdiction upon petition to reform an instrument. *Re Malet*, 30 Beav. 407. But see *Re Hoare*, 4 Giff. 254, and *Re De la Touche*, 10 L. R., Eq., 603.

3. The testator directed his debts and funeral and testamentary expenses to be paid out of his personal estate. He then devised

his freeholds to trustees to be sold, and the proceeds, after deducting costs, to be deemed part of the residue of his personal estate, and to be subject to the dispositions thereafter made of the same. The testator then gave a legacy of 1,000*l.* upon certain trusts, and finally directed all the rest and residue of his personal estate to go to his wife for life, remainder over. The pure personal estate being insufficient to pay all the debts and legacies:—Held, that the legacy of 1,000*l.* ought to be paid out of the moneys arising from the sale of the real estate. There was only one petition presented in the present case, and the petitioner being held not to be entitled, another petition ought to have been presented by the party whose claim was preferred. But in order to save expense, the Court, having under the Trustee Relief Act the same jurisdiction on such a petition as on a bill, made an order for distribution and investment, according to the rights of the parties. *Re Woollard's Trust*, 18 Jur. 1012.

4. A trustee paying into court a sum of money under the Trustee Relief Act (10 & 11 Vict., c. 96), although such sum may be less than the amount of the trust fund in his hands, is discharged as to the money so paid in, and after such payment the parties beneficially interested can proceed only under the Act to recover the money so paid in, and the ordinary jurisdiction of the Court as against the trustee is confined to the balance which may remain due from the trustee in respect of the trust fund after such payment. *Goode v. West*, 9 Hare 378; 21 L. J., N. S., Ch., 127; 15 Jur. 1025.

5. The Trustee Relief Act takes away the jurisdiction of the Court by bill against the trustee in respect of the money which he has paid into court. *Thorp v. Thorp*, 1 Kay & J. 438.

6. A testator devised a freehold to trustees for the benefit of E. for life and for her separate use, and after her death upon trusts for such of the children of E. as, being sons, should attain twenty-one, or, being daughters, should attain that age or marry. E. died after the testator, leaving an infant daughter who did not marry before attaining twenty-one:—Held, that the legal estate was in the trustees, and the daughter of E. took the property on attaining twenty-one, but the interim rents went to the residuary devisee. *Re Eddels*, 40 L. J., Ch., 316; 11 L. R., Eq., 559; 24 L. T., N. S., 223; 19 W. R. 815.

On a petition for payment out of the interim rents which had been paid in under the Trustee Relief Acts, the Court decided that the legal estate was in the trustees. *1b*.

7. Application by person claiming to be entitled to some money which had been paid into court under the Trustee Relief Act 1847, asking for leave to make out his title to it on a bill rather than on a petition, stating that the only point to be decided was, whether a legacy "to the eldest son of my dear sister J." lapsed or not by the decease, in the lifetime of the testator, of the child who was eldest son at the date of the will, refused. *Re Harris's Trust*, 18 Jur. 721; 2 Eq. Rep 1110; 2 W. R. 442.

8. Where a fund is brought into court under the Trustee Relief Act, and the title

one of the claimants is adverse to that of the trustees who brought in the fund, the Court will not decide the case on petition under the Act, but will direct a bill to be filed. *Re Fozard's Trusts*, 3 W. R. 219; 1 Kay & J. 233, 341; 3 Eq. Rep. 759; 24 L. J., Ch., 441.

1. The surviving trustee under two wills, having gone abroad temporarily, pays the trust fund into court, and a petition is presented by the *cestui que trustent* to appoint new trustees; and upon the question whether the fund should not remain in court:—Held, that such was not the object of the Trustee Relief Act, but the parties interested must be satisfied with the trustees appointed. *Re Lloyd's Trust*, 2 W. R. 371.

2. Where trustees pay a fund into court, under the 10 & 11 Vict., c. 96, as the portion of A., the Court will not, upon petition by A. for payment out to him of the fund, entertain any question by third parties as to whether it is the right sum. *Re Jenkins*, 10 Jur., N. S., 332; 10 L. T., N. S., 58; 3 N. R. 408.

II. TO WHOM PAYMENT WILL BE MADE.

3. A claimant allowed to proceed *in forma pauperis* under the Act 11 & 12 Vict., c. 96. *Re Money*, 13 Beav. 109; 20 L. J., N. S., Ch., 274; 15 Jur. 51.

4. A sum of money was paid into court by an executor, in the belief that it was the clear residue. Debts were afterwards discovered to be due from his estate; and on a petition, consented to by the parties beneficially interested, an order was made for payment out to the executor of money to the requisite amount, he undertaking to apply it according to the trusts of the will. *Exp. Tournay*, 19 L. J., N. S., Ch., 257; 14 Jur. 263; 3 De G. & Sm. 677.

5. A trustee who has paid a sum of money into court under the 10 & 11 Vict., c. 96, may afterwards apply by petition, that the fund may be dealt with as in an administration suit. *Re Trower*, 1 L. T., N. S., 54.

6. A trust fund paid into the court under the Trustee Relief Act, after the death of the *cestui que trust*, ordered to be paid to the administrator of the *cestui que trust*, under a grant of letters of administration by the Archdeaconry Court, obtained after the fund was in the Court of Chancery. *Re Spencer*, 9 Hare 410; 1 De G. Macn. & G. 311; 21 L. J., N. S., Ch., 314; 16 Jur. 233.

7. The sole surviving trustee of stock was an infant, and was also absolutely entitled beneficially to the fund. The Court ordered the fund to be brought into court under the Trustee Relief Act, and part of the capital to be sold out and applied for the infant's benefit. *Re Pitt*, 1 Jur., N. S., 1155.

8. Where stock paid into court under 10 & 11 Vict., c. 96, was settled in default of issue of the marriage on the husband absolutely, and he, by his will, there being no children, bequeathed it to his wife, the Court refused to order it, on petition, to be transferred to her until the fact on which her title depended had been found by the Master. *Re Woods*, 15 Sim. 469.

9. Trustees who have paid a fund into court under the 10 & 11 Vict., c. 96, cannot prevent

its being paid out to a *cestui que trust* absolutely entitled to it on the ground that he is about to file a bill against them to take the accounts of the trust. *Re Wright*, 3 Kay & J. 419.

10. Stock paid into court under the Trustee Relief Act, and forming the subject of a settlement according to the law of Prussia, under which the husband took no interest, ordered, after the death of the wife, to be paid out to him in his capacity of guardian of the infant child of the marriage, who was entitled to the fund upon the death of her mother. *Re Brown*, 13 W. R. 677.

11. A wife who has been deserted by her husband for more than twenty years, and has heard nothing of him for more than five years, is entitled to receive a sum of money, paid into court, as though a *feme sole*. *Re Pope*, 21 W. R. 646.

12. Funds lodged under the Trustee Relief Act to the separate credit of minors, natives of and domiciled in Scotland, ordered to be transferred to the minors and their curator. *Re Ferguson*, 8 Ir. R., Eq., 563.

13. When there are conflicting claims to a trust fund, and the trustees have paid it into court to the account of one of the claimants, without giving, at the same time, notice to the Court of the adverse claims, payment of the fund to the person in whose name it stands ordered by the Court, but without prejudice to any question as between the trustees and the adverse claimants. *Re Jenkins*, 3 N. R. 408; 10 Jur., N. S., 332; 10 L. T., N. S., 58.

14. A person not mentioned in the trustee's affidavit may apply by petition for the payment out of court of moneys paid in under the Trustee Relief Act. *Re Puttrel*, 7 L. R., Ch. D., 647; 47 L. J., Ch., 11; 37 L. T., N. S., 374.

See also Preceding Subdivision.

III. FUNDS OF LUNATICS.

15. Certain stock belonging to a lunatic, though not found so by inquisition, had been paid into court under the Trustee Relief Act. The expenses of the maintenance of the lunatic out of the parish fund had exceeded the value of the fund in court. The stock in court was ordered to be sold, and the produce to be paid to the clerk of the guardians of the poor of the parish. *Re Parker*, 2 W. R. 139.

16. Order made, on a petition presented by guardians of the poor under the Trustee Relief Act, 10 & 11 Vict., c. 96, for payment to them, out of a fund paid in by trustees in which a lunatic was interested, of sums expended by the guardians in support of the lunatic, the Lord Chancellor holding that, by the Act, the Court was placed in the position of the trustees, and that the trustees might have made the payment under the 7 & 8 Vict., c. 101, s. 27. *Re Upfull's Trust*, 3 Macn. & G. 281; 21 L. J., N. S., Ch., 119.

17. Expenses incurred by the overseers for the maintenance of a lunatic paid to them upon petition out of his share in a sum of stock paid into court under the Trustee Relief Act. *Re Ward*, 2 W. R. 406.

18. When a fund belonging to an Englishman

residing abroad and found lunatic there under a foreign inquisition is paid into court under the Trustee Relief Act, the Court has a discretion to refuse to transfer the corpus to the foreign provisional committee of the estate of the lunatic, though such committee is duly constituted according to the laws of the country where the inquisition was held, and has power to sue and give valid receipts for the fund. *Re Garnier*, 41 L. J., Ch., 419; 13 L. R., Eq., 532; 20 W. R. 288; 25 L. T., N. S., 928.

1. A., being entitled to property under an English settlement, and being resident in Jersey, was found of unsound mind by a formal proceeding there, and his brother E. appointed his curator. The trustee of the settlement having paid the fund into court under the Trustee Relief Act, the curator petitioned to have the dividends paid to him, he undertaking to apply them for the benefit of A. Order made on production of official and verified copy of the proceedings in Jersey. *Re Albo*, 11 W. R. 80; 7 L. T., N. S., 778.

2. Where a person of unsound mind had been maintained in a lunatic asylum by his parish, a portion of the capital of a fund belonging to him, which had been paid in under the Trustee Relief Act, ordered to be applied in defraying the past charges of the parish. *Re Buckley*, 1 Johns. 700.

The Court has a discretion to order such repayment or not, as it may think most for the benefit of the lunatic. *Id.*

3. The Court of Chancery, in its ordinary jurisdiction, can entertain applications relating to the property under its control of persons of unsound mind not found lunatic by inquisition. *Re Maofarlane*, 8 Jur., N. S., 208; 31 L. J., Ch., 335; 10 W. R. 369; 6 L. T., N. S., 154; 2 John. & H. 673.

Stock transferred into court under the Trustee Relief Act, and constituting the entire fortune of a person of unsound mind not found lunatic by inquisition, ordered, with the dividends thereon, to be paid to his father in part discharge of moneys expended for past maintenance, the father undertaking to continue the maintenance in future. *Id.*

4. The Court ordered a fund of 379*l.* stock and 5*l.* cash paid into court under the Trustee Relief Act, and constituting nearly the entire fortune of a lunatic not found such by inquisition, to be paid to his father in part discharge of moneys expended for past maintenance. *Re Lam*, 7 Jur., N. S., 410; 30 L. J., Ch., 512.

5. Investment of a fund belonging to a lunatic in an annuity for his life. *Re Dods-worth's Trust*, 10 Hare 16.

6. Order made by the Master of the Rolls directing the dividends of a sum paid into court under the 10 & 11 Vict., c. 96, belonging to a person of unsound mind, though not so found by inquisition, to be paid to her father for her maintenance. *Re Berry*, 13 Beav. 455.

7. S., a person alleged to be lunatic, but not so found by inquisition, was entitled absolutely to 720*l.*, which had been paid into court under the Trustee Relief Act. The father of S. presented a petition in his own right, and as next friend, praying that the income of the fund might be paid to him during the life of S., or until further order, he undertaking to

apply it towards the maintenance of S. The evidence showed that S. was quite imbecile, and was not entitled to any property other than the 720*l.*, and that the father was not of ability to maintain her. The Court made the order, but directed an application to be made once a year in chambers, showing the state of mind of S., and of what her property then consisted. *Re Sturge*, 5 Jur., N. S., 423; 7 W. R. 395.

8. When a person of unsound mind, not found lunatic by inquisition, had been maintained in a lunatic asylum by his parish, the whole of the capital of a fund belonging to him, which had been paid into court under the Trustee Relief Act, was ordered to be applied, so far as it would extend, in discharge of the past charges of the parish for maintenance. *Re Phelps*, 28 L. T., N. S., 350.

9. A pauper lunatic in an asylum at Bethnal Green, but not found lunatic by inquisition, became entitled to a small fund in court. An order was made in 1856 on petition under the Trustee Relief Act by his next friend directing that he should continue at the asylum until further order, and, the guardians of the poor of his parish undertaking to maintain him there, that 31*l.* a year should be raised out of the fund and paid to the guardians in repayment of the sums to be expended in his maintenance. In 1859 he was removed to the new asylum for his county by order of the justices, but without any order of the Court of Chancery. From this time no payments were applied for by the guardians. He remained in the county asylum till his death in 1875. His legal personal representative petitioned for transfer of the funds in court to him. The guardians appeared and claimed maintenance for the past time:—Held, that the guardians could not claim maintenance under the order, which ceased to be operative on the lunatic's removal to a fresh asylum. *Re Marman*, 8 L. R., Ch. D., 256; 38 L. T., N. S., 797; 26 W. R. 621.

Held, also, that any claim for maintenance independently of the order was merely a debt of the lunatic, payable by his personal representative in due course of administration, and that the Court had no jurisdiction in the matter to order payment of it, but that the whole fund must go to the personal representative. *Id.*

10. Where a person who has been found a lunatic is entitled to a fund which has been paid into court under the Trustee Relief Act, a petition may be presented in chancery under the Trustee Relief Act and in lunacy, and the Court has jurisdiction to make an immediate order for the transfer of the fund to the account of the lunatic. *Re Tate*, 29 L. R., Ch. D., 135; 47 L. T. 2.

11. A testator bequeathed one-third of the capital in a fund to A., a married woman. In 1835 (long after the death of the testator) A.'s husband took the benefit of the Insolvent Debtors Act, and assigned all his property, present and future, to his assignee. In 1851 A. died, and the husband took out administration to her estate. In 1852 the husband became an inmate of a county lunatic asylum. In 1854 the annuitant died, and the fund became divisible:—Held, as between the assignee in insolvency of the husband and the overseers of the parish to which his mainte-

nance was chargeable (who have, as to lunatics, a preferential claim to all others), that the assignee in insolvency was entitled to the share of the deceased wife *jure mariti*. *Re Tyler*, 2 Jur., N. S., 927.

The fund having been paid into court under the Trustee Relief Act, the assignee in insolvency had presented his petition claiming the fund, which he had served on the overseers; and the latter appeared and argued their claim:—Held, that they were not entitled to costs. *Id.*

IV. PRACTICE.

1. *Petition or Summons*, 6845.
2. *Form and Contents of Petition*, 6845.
3. *Service*, 6845.
- See also* III. II. *post*.
4. *Other Cases*, 6847.

1. Petition or Summons.

1. Applications under the 10 & 11 Vict., c. 96, and the 12 & 13 Vict., c. 74, must be by petition, and not by motion. *Re Masselin's Will*, 21 L. J., N. S., Ch., 53; 15 Jur. 1073. *See also Re Maganley's Trust*, 5 De G. & Sm. 1; 15 Jur. 1005.

2. A judge in chambers is not empowered, under the 26th section of the Act (15 & 16 Vict., c. 80), to entertain applications with reference to funds paid into court under the Acts for the relief of trustees (10 & 11 Vict., c. 96, and 12 & 13 Vict., c. 74); such applications must originate in and be founded upon a petition presented to the Court, and applications cannot be made to a judge in chambers under the Act unless subsequently to such petition being presented. *Re Hodges*, 3 W. R. 151; 4 De G. M. & G. 491; 1 Jur. N. S., 73; 3 Eq. Rep. 123.

3. *Semble*, that money paid into court under the Trustee Relief Act cannot be included in an order on further directions without a petition. *Otte v. Castle*, 1 W. R. 64.

4. The Court has not jurisdiction on motion, without a petition, to pay out funds lodged in court under the Trustee Relief Act. *Earp. Stock*, 5 Ir. Ch. R. 341.

5. Applications for payment out of court of a fund paid in under the Trustee Relief Act must be made by petition, and not by action; and a person not named in the trustees' affidavit may petition for payment out of court. But where an action has been brought the Court may make a declaration of right, leaving the payment to be obtained on petition. *Pelling v. Goddard*, 9 L. R., Ch. D., 185; 47 L. J., Ch., 646; 26 W. R. 476; 38 L. T., N. S., 811.

6. A trust fund having been paid into court under the Trustee Relief Act by the trustee of a will, a petition was presented by parties interested for an inquiry as to the persons entitled and for payment out to the persons found entitled under that inquiry. Upon the petition coming on for hearing an order was made directing the inquiry, and adjourning the further hearing of the petition in chambers:—Held, that the proceedings having been properly commenced by petition under s. 2 of the Trustee Relief Act, the Court had jurisdiction, under s. 27 of the Masters' Abolition Act 1852 (15 & 16 Vict., c. 80), to adjourn the petition

into chambers. *Frodsham v. Frodsham* (15 L. R., Ch. D., 317) distinguished. *Re Moate's Trust*, 22 L. R., Ch. D., 635; 31 W. R. 497.

7. When a fund has been paid into court under the Trustee Relief Act, a person not mentioned in the trustee's affidavit can apply by petition to the Court for the distribution of the fund, and need not bring an action. *Re Puttrell*, 37 L. T., N. S., 374; 7 L. R., Ch. D., 647; 47 L. J., Ch., 11.

8. As to filing cross-petitions. *See Lewis v. Hillman*, 3 H. L. Ca. 607.

2. Form and Contents of Petition.

9. A petition under the Trustee Relief Act, 10 & 11 Vict., c. 96, ought not to be set out of the whole of the affidavit of the trustee made at the time of paying the trust fund into court. *Re Curtois*, 17 Jur. 852; 22 L. J., Ch., 1045.

Observations upon the statements and contents of such petition and affidavits. *Id.*

Petitions for the payment out of court of money which has been paid in under the Trustee Relief Act must set out enough of the affidavit on which the payment was made to show the difficulty which occasioned the payment into court, and who are the parties that claim or are interested in the fund, but not necessarily all the details contained in that affidavit. 8 C. 10 Hare (App.) lxiv.

10. Petitions for the payment out of court of money which had been paid in under the Trustee Relief Act must state the affidavit upon which the payment into court was made. *Re Flack's Will*, 10 Hare (App.) xxx.

11. On a petition presented under the Trustee Relief Act for payment of trust funds out of the Court, the statements in the affidavits made on payment of the trust money into court should be set out in the petition, as these statements form the only declaration of trust under which the Court can act. *Re Levett's Trust*, 5 De G. & S. 619; 16 Jur. 1063.

12. The prayer of a petition, and notice thereof under the Trustee Relief Act, should specify the exact order which is sought for and the precise portions of the fund which are to be transferred to the several parties entitled to it. *Earp. Bernard, Re Leigh's Trust*, 6 Ir. Ch. R. 133.

13. Money had been paid into court under the Trustee Relief Act, and an affidavit of the trustees was intitled, "In the matter of the trusts of the settlement bearing date the 12th July 1812, and made on the marriage of." A petition was presented for payment out of court of part of the money so paid in, and an affidavit in support was intitled, "In the matter of the trusts of an indenture of settlement bearing date the 12th July 1812, and made on the marriage of":—Held, that the variation was not material, and that the affidavit might be received. *Re Harris*, 8 Jur., N. S., 166.

3. Service.

See also III. II. *post*.

- (a) *On Trustees*, 6846.
- (b) *On Other Persons*, 6846.
- (c) *Out of Jurisdiction or Substituted*, 6846.

(a) On Trustees.

1. Where the trustee who has paid the trust fund into court under this Act cannot be found, service on him of the petition for payment out of the fund, at the address given by him in his affidavit on the occasion of his paying in the money, will be deemed good service. *Exp. Baugham*, 16 Jur. 325.

2. Where a trustee pays money into court, and, in his affidavit, appoints a place for service on him of any legal proceedings, and he is not there to receive service, the Court will not deem such service good unless he cannot be found elsewhere on search made. *Re Lawrence*, 14 W. R. 93.

3. An administrator paid into court under the Trustee Relief Act, to the separate account of an infant, a sum representing his share of the intestate's estate, as one of his next of kin. The administrator, in an affidavit, stated, that, to the best of his knowledge and belief, the infant was entitled to the fund. The infant having attained his majority, petitioned for a transfer of the fund:—Held, unnecessary to serve the administrator with the petition. *Re Beauclerk*, 11 W. R. 203.

4. Where the Court has decided a question under a will upon a fund being paid into court under the 10 & 11 Vict., c. 96, and a petition is presented for payment out of court of such fund, the Court will dispense with service upon the trustee. *Re Thomas*, 11 W. R. 276.

5. A fund having been paid into court by the trustees under the Trustee Relief Act, one-third was carried to the separate account of one of the *cestuis que trustent*, who was a lunatic. Afterwards a petition was presented in lunacy for a transfer of the one-third belonging to the lunatic:—Held, that the trustees need not be served with notice of the petition. *Re Young*, 5 W. R. 400.

6. When the house named by trustees on payment into court as their address for service had been pulled down, and the trustees had not been heard of for ten years, service of the petition for payment out of court dispensed with, and an inquiry directed to ascertain who were entitled to the fund. *Re Bolton*, 18 W. R. 56; 21 L. T., N. S., 413.

7. *Semble*, that where the title of the tenant for life is clear, the trustees ought not to appear upon a petition simply affecting their income. *Re Evans*, 7 L. R., Ch., 609; 41 L. J., Ch., 512; 20 W. R. 695; 26 L. T. 816.

(b) On Other Persons.

8. A person claiming a particular share of an aggregate fund brought into court under the Trustee Relief Act, presenting a petition to get that share out of court, ought to serve with the petition all the other persons whom the trustees have stated to be in their belief interested in the fund. *Re Manning's Trusts*, 3 W. R. 379.

9. Upon an application for payment out of court of a fund paid in under the Trustee Relief Act, one of the persons in consequence of whose claim it was paid into court was found to be out of the jurisdiction, and had not been served:—Held, that no service could be

ordered in such a case, and the petition was directed to be proceeded with as if all parties were before the Court. *Re Naylor*, 28 L. T., N. S., 18.

10. Where money has been paid into court under the Trustee Relief Act, and the Court, in an action brought for the fund, has declared the rights of the person interested, on an application made by the trustee and the person so interested for payment out, it is unnecessary to serve notice of the application on persons who, although stated in the trustee's affidavit as being interested in the fund, have not been declared to be so by the Court. *Re Fosbury's Trusts*, 39 L. T. 422.

11. Upon petition by tenant for life of a fund paid into court under the 10 & 11 Vict., c. 96, for payment of income to him, the costs of the trustees and remainderman were ordered to be paid out of the corpus. *Re Whiting*, 7 Jur., N. S., 754; 30 L. J., Ch., 862. S. C. *nom. Re Whiting*, 4 L. T., N. S., 739.

In such cases it will, as a general rule, be unnecessary to serve the remainderman with the petition. *Id.*

12. Whether the parties beneficially interested in a fund which had been paid into court under the Trustee Relief Act should be served with petition for payment of an annuity out of the dividends thereof when the petition prays costs out of the corpus of the fund. *Re Greenland's Trusts*, 1 W. R. 46.

13. On a petition under the Trustee Relief Act for payment out of court of a fund to which numerous parties were entitled, most of whom were not before the Court, a former order having been made directing class inquiries, and the chief clerk having made his certificate, it was ordered that the petitioner be at liberty to serve a copy of the petition, the former order, and the chief clerk's certificate, together with the present order, upon the several persons named in the certificate, and that the petition stand over till such persons had been served. *Re Battersby's Trusts*, 10 L. R., Ch. D., 228.

14. Where the trustees had paid the fund into court, under the 10 & 11 Vict., c. 96, it was ordered to be transferred to a purchaser from the *cestui que trust* on the petition being served only on the trustees, and notice given to the assignees of the husband of *cestui que trust*. *Exp. Stuteley*, 1 De G. & Sm. 703.

15. As to service on some of a class only under the Trustee Relief Act. See *Re Colson*, 2 W. R. 11.

(c) Out of Jurisdiction or Substituted.

16. *Semble*, the Court has not jurisdiction under the Trustee Relief Act to order service of the notice of the petition on parties residing out of the jurisdiction. *Exp. Bernard, Re Leigh's Trust*, 6 Ir. Ch. R. 133.

17. Upon a petition under the Trustee Relief Act the Court has jurisdiction to order service on a respondent out of the jurisdiction, and also substituted service. *Re Bonelli's Electric Telegraph Co., Cook's claim*, 43 L. J., Ch., 720; 18 L. R., Eq., 655; 22 W. R. 856; 31 L. T., N. S., 83.

18. The Court has jurisdiction to order service of a petition under the Trustee Relief

Act, 10 & 11 Vict., c. 96, on a party out of the jurisdiction. *Re Haney*, 10 L. R., Ch., 275; 44 L. J., Ch., 272. Affirming 31 L. T., N. S., 645; 44 L. J., Ch., 207.

4. Other Cases.

1. Where a petition, under the Trustee Relief Act, stands over for amendment by adding a next friend on behalf of the petitioner, it is not necessary to re-answer the petition. *Re Medow*, 10 Jur., N. S., 536.

2. Where money belonging to an infant has been paid into court under the Trustee Relief Act, 10 & 11 Vict., c. 96, a petition must, notwithstanding the Act 15 & 16 Vict., c. 80, be presented in order to enable the Court to make an order for the infant's maintenance. *Re Rye's Trust*, 3 W. R. 198; 1 Jur., N. S., 222; 3 Eq. Rep. 368.

3. A petitioner under the Trustee Relief Act died pending the results of some inquiries:—Held, that an order of revivor might be made in favour of his executor. *Re Staggoll*, 15 W. R. 974.

V. ORDER FOR PAYMENT.

4. Some portion of a trust fund, payable by instalments, was paid by the trustee into court, under the Trustee Relief Act. Upon a petition seeking payment of the fund so paid in, the trustee was ordered to pay the future instalments from time to time as he should receive them to the *cestui que trust*, whose title was clear. *Re Wright's Settlement*, 1 Sm. & G. (App.) v.

5. When a fund which has been paid into court is settled on two successive tenants for life, an order may be made for payment of the dividends to the first tenant for life, and on proof of his death, to the second, without any further petition. *Re Brent*, 8 W. R. 270.

6. When, under the Trustee Relief Act, a petition is presented for the payment of the share in an undivided fund of one of several children who has become entitled, the Court will, if the amount is small, reserve liberty to each of the remaining children to apply at chambers in respect of their several shares as they successively become due. *Re Tracey*, 6 Ir. R., Eq., 271.

Drawing up the Order. 7. Upon a written and reasonable application from claimants residing abroad, the Court will postpone the drawing up of an order for payment out of court of money paid in under the Trustee Relief Act. *Re Hodson's Will*, 17 Jur. 826; 22 L. J., Ch., 1055.

Appeal and Review. 8. An order under the Trustee Relief Act stands on the same footing as a decree as respects leave to file a bill of review. *Re Smyth and Arnold's Estate*, 2 N. R. 381.

Trustees of a fund to which a lady was entitled for life, with remainder to her children, on her death paid the fund into court under the Trustee Relief Act, and under orders of the Court three-fourths were paid out. One child then claimed the fund as the only legiti-

mate child, and presented a petition for leave to file a bill of review:—Held, that orders under the Trustee Relief Act stood, *pro hac*, on the same footing as a decree in a suit, and a probable case being put forward, founded on facts discovered since the date of the orders, leave was given. S. C. *nom.* *Re Smyth*, 32 L. J., Ch., 779; 11 W. R. 850; 8 L. T., N. S., 599.

9. Notice of appeals from orders made under the Trustee Relief Act must, according to the true construction of the Judicature Act, Order LVIII., Rules 9, 15, be given within twenty-one days from the perfecting of the order, or, in the case of the refusal of an application, from the date of such refusal. *Re Baillie*, 25 W. R. 310; 4 L. R., Ch. D., 785; 46 L. J., Ch., 330; 35 L. T., N. S., 917.

III. Costs.

- I. *Out of what Funds payable*, 6847.
- II. *Of Claimants or Parties served*, 6849.
- III. *Of Two Petitions*, 6850.
- IV. *Payment in when justified and Costs of Trustees*, 6350.

I. OUT OF WHAT FUNDS PAYABLE.

1. *Whether out of Income or Corpus (Tenant for Life)*, 6847.
2. *Other Cases*, 6849.

1. Whether out of Income or Corpus (Tenant for Life).

10. The costs of an application for payment to the tenant for life of the dividends of a fund paid into court under the Trustee Relief Acts ordered to be paid out of the corpus of the fund. *Re Butler's Trust*, 16 Jur. 325.

11. Trust money had been paid into court under the Trustee Relief Act, and the tenant for life thereby presented a petition for payment of the dividends:—Held, that the costs of the petition ought to be paid out of the corpus, and not out of the income, of the fund, though the parties entitled in remainder opposed such payment. *Re Field's Trust*, 16 Jur. 770; 16 Beav. 146.

12. A fund was paid into court under the Trustee Relief Act. The tenant for life petitioned for payment of the dividends. There being no general estate applicable:—Held, that the costs of the petition ought to be paid out of the income, and not out of the corpus. *Re Lorimer*, 12 Beav. 521; 19 L. J., N. S., Ch., 524; 14 Jur. 1126.

13. Where a trust fund has been paid into court under the Trustee Relief Act, the costs of an application by the tenant for life for payment of the dividends to her ought not to come out of the corpus of the fund. *Re Bangley's Trust*, 21 L. J., N. S., Ch., 875; 16 Jur. 682.

14. A testator bequeathed a fund to A. B. for life, with remainders over. The fund was paid into court under the Trustee Relief Act.

On a petition by A. B. for payment of the dividends, which was not served on persons claiming in remainder, costs not allowed out of capital of fund. *Exp. Fletcher*, 17 L. J., N. S., Ch., 169; 12 Jur. 619.

1. Gift by will to trustees of 3,000*l.*, on trust to pay the interest to the separate use of R., and that the same should remain during her life under the direction of the said trustees, as a provision for her, and the interest of it given to her, on her personal appearance and receipt, by any banker. After the death of R. the 3,000*l.* was to be rendered back to the testator's estate. R. married. The 3,000*l.* was paid into court by the trustees, under the Trustee Relief Act. The assignee applied for the dividends:—Held, that the costs of all parties, except R., should come out of the corpus. *Re Ross's Trust*, 1 Sim., N. S., 196; 20 L. J., N. S., Ch., 293; 15 Jur. 241.

2. Application by the tenant for life of a sum of money which had been paid into court under the Trustee Relief Act, for payment of the dividends to her. The Court refused to order the costs of the application to be paid out of the corpus, but directed them to come out of the income. *Re Ingram*, 18 Jur. 811; 2 W. R. 679.

3. Costs of an application by tenant for life to obtain payment of the income of funds paid into court under the 10 & 11 Vict., c. 96:—Held, to be payable out of the income, and not out of the corpus. *Re Hamersley*, 23 Beav. 267.

4. On a petition by tenant for life under the 10 & 11 Vict., c. 96, for payment of the income, her costs were ordered to be paid out of the income, and those of the trustees out of the corpus. *Re Hadland*, 23 Beav. 266; 4 W. R. 690.

5. On a petition by a tenant for life of a trust fund in court for the payment of the interest of that fund to him for life:—Held, that his own costs of such an application must be paid by himself, the costs of the trustees out of the corpus of the fund. *Re Whitting*, 4 L. T., N. S., 739.

6. Upon petition by tenant for life of a fund paid into court under the 10 & 11 Vict., c. 96, for payment of income to him, the costs of the trustees and remainderman were ordered to be paid out of the corpus. *Re Whiting*, 7 Jur., N. S., 754; 30 L. J., Ch., 862.

In such cases it will, as a general rule, be unnecessary in future to serve the remainderman with the petition. *Ib.*

7. Costs of a petition by a tenant for life to obtain the income of a fund paid into court under the Trustee Relief Act ordered to be paid out of the corpus. *Re Leake*, 32 Beav. 135; 9 Jur., N. S., 453; 11 W. R. 352; 7 L. T., N. S., 816; 1 N. R. 417; 1 N. R. 417.

Circumstances under which trustees, having paid trust moneys into court, were refused their costs of appearance, upon the petition for payment of the dividends to the tenant for life. *Ib.*

8. Where money is paid into court under the Trustee Relief Act, and an application is made for payment of the dividends to a tenant for life, the trustees only are entitled to their costs out of corpus; the other costs must be paid out of income. *Re Tohitchagoff*, 12 W. R. 1100; 10 L. T., N. S., 860.

9. Where a fund has been paid into court under the Trustee Relief Act, the costs of a petition by the tenant for life for the payment to him of the income are payable out of the corpus of the fund. *Re Turnley*, 1 L. R., Ch., 152; 12 Jur., N. S., 305; 35 L. J., Ch., 313; 14 W. R. 322; 13 L. T., N. S., 662.

10. On the 25th July 1864 an order was made for the payment of the dividends on stock paid into court under the 10 & 11 Vict., c. 96, to the person entitled thereto for life. On the 12th June 1866, the Court, on the application of the tenant for life, made an alteration in the order, by directing the costs of the petitioner to be paid out of the corpus. *Re Tanner*, 35 L. J., Ch., 689.

11. Costs of petitions by tenants for life for payment of income arising from funds which have been paid into court under the Trustee Relief Act must come out of the income, and not out of the corpus of the estate. *Re Marner*, 35 L. J., Ch., 58; 15 W. R. 99; 3 L. R., Eq., 432.

12. Costs of trustees who were served with and appeared upon petition by a tenant for life for payment of dividends are payable out of corpus. *Re Gordon*, 6 L. R., Eq., 335; 37 L. J., Ch., 408.

13. The costs of all parties of a petition for payment to the tenant for life of the income of a fund paid into court under the Trustee Relief Act are payable out of income. *Re Muntion*, 39 L. J., Ch., 764.

14. Upon petition by tenant for life of a fund transferred into court under the Trustee Relief Act, the costs of the trustee are chargeable on the corpus. *Re Knight*, 37 L. J., Ch., 409.

15. When a fund has been paid into court by a trustee under the Trustee Relief Act, his costs, charges, and expenses properly incurred in, about, and preliminary to the payment into court, are payable out of the capital of the fund; his costs of appearance on a petition for payment of dividends are payable out of income. *Re Whitting*, 8 L. R., Eq., 352.

16. Upon a petition by a tenant for life for payment of the income of a fund paid into court, the costs of the trustees are payable out of the income, and not out of the corpus of the fund. *Re Smith*, 9 L. R., Eq., 374; 18 W. R. 513; 22 L. T., N. S., 220.

17. When a fund had been paid into court on account of the inability of a sole trustee to act, on an application relating solely to the payment of the dividends, the costs of the appearance of the trustee may be properly charged on the corpus. *Re Wood*, 11 L. R., Eq., 155; 40 L. J., Ch., 179; 19 W. R. 227; 23 L. T., N. S., 586.

18. The costs of a trustee, who was served with and appeared upon a petition by a tenant for life for payment of dividends, were ordered to be paid out of income. *Re Mason*, *Exp. Smithett*, 12 L. R., Eq., 111; 24 L. T., N. S., 869; 19 W. R. 1025.

19. When a trust fund has been transferred into court, and a petition is presented for payment of the income to the tenant for life, the costs of the trustees, as well as of all other necessary parties, will be paid out of the income. *Re Evans*, 7 L. R., Ch., 609; 41 L. J., Ch., 512; 20 W. R. 695; 26 L. T., N. S., 815.

Semble, that when the title of the tenant for life is clear, the trustees ought not to appear upon a petition simply affecting the income. *Ib.*

1. Upon a petition by tenant for life of stock which had been paid into court under the Trustee Relief Act for payment out of the dividends, the trustee, who appears on the petition after notice from the petitioner's solicitor not to do so, upon the ground that the petition relates to the income only, will not be allowed his costs of the appearance out of the funds representing income. *Re Battell*, 21 W. R. 138.

2. Other Cases.

2. The intention of the Legislature by the 10 & 11 Vict., c. 96, was merely to relieve trustees, and not to throw any additional burden on the *cestuis que trustent*, or disentitle them to costs, which before the Act would have been borne by the testator's general estate. *Re Sharpe's Trustees*, 15 Sim. 470; 17 L. J., N. S., Ch., 395; 12 Jur. 492.

3. Gift by will to trustees of 3,000*l.*, on trust to pay the interest to the separate use of R., and that the same should remain during her life under the direction of the said trustees, as a provision for her, and the interest of it given to her, on her personal appearance and receipt, by any banker. After the death of R. the 3,000*l.* was to be rendered back to the testator's estate. R. married. The 3,000*l.* was paid into court by the trustees, under the Trustee Relief Act. The assignee applied for the dividends:—Held, that the costs of all parties, except R., should come out of the corpus. *Re Ross's Trust*, 1 Sim., N. S., 196; 20 L. J., N. S., Ch., 293; 15 Jur. 241.

4. Upon a petition for payment out of court of the amount of a particular legacy paid in under the Trustee Relief Act, the Court has no jurisdiction to order payment of any of the costs in the matter out of the testator's general residuary estate. Observations upon the operation of the Act with regard to costs. *Re Bartholomew's Will*, 13 Jur. 380.

5. A question arose as to whether the next of kin (of which there were sixteen) of the testator's wife were entitled to a sum of money bequeathed to them as a class, or whether only such of the class were entitled as were living at the death of the testator. The trustees paid the amount into court under the above Acts. The Court, having decided that as to five shares such shares lapsed, and went to the residuary legatees, directed the eleven shares to be paid in full, and that the costs of all parties should be paid out of the five lapsed shares. *Re Ham's Will*, 2 Sim., N. S., 106; 21 L. J., N. S., Ch., 217; 15 Jur. 1121.

6. A legacy of 2,000*l.* being given to H. and D. for life, with remainder to their issue, and in default of issue, to fall into the residuary estate, and H. and D. being dead without issue, the trustees paid it into court, under the Trustee Relief Act, in the names of H. and D. The trustees at the same time paid into court, under the same Trustee Relief Act, another legacy of 5,000*l.*, in which C. was interested. C. presented a petition to have his share of the 5,000*l.* legacy paid to him, and have his costs paid out of the 2,000*l.* legacy, treating it

as a residue. There was no suit for the administration of the estate:—Held, that the Court had no jurisdiction to order payment of the costs of the petition out of any other fund than the 5,000*l.* legacy. *Re Hodgson*, 18 Jur. 786.

7. Where the executors of a will pay money into court in consequence of a difficulty created by the testator himself, the executors may retain their costs out of the residue, but the costs of the parties entitled to the fund must come out of the fund itself. *Re Feltham's Trust*, 1 Kay & J. 528, 533.

8. Where two distinct legacies have under the Trustee Relief Act been paid in to two distinct accounts, the costs of paying out one of such legacies cannot be obtained out of the other legacy, notwithstanding that in the events that had happened such latter legacy had become residue. Observations on *Re Tillstone's Trusts* (9 Hare, App. lix.) and *Re Everett* (12 Beav. 485). *Re Hodgson's Trust*, 2 W. R. 539.

9. When a particular fund is paid into court by an executor who has the general residue in his hands, the Court has jurisdiction to order the costs of a petition relating to the particular fund to be paid out of the general residue. *Re Trick, Exor. Willoby*, 5 L. R., Ch., 170; 39 L. J., Ch., 201; 21 L. T., N. S., 739; 18 W. R. 123.

10. Held, that the expenses attending the payment of money into court, under the stat. 10 & 11 Vict., c. 96, must be paid by the executor out of his testator's estate, but those of paying it out by the legatee. *Re Camthorne*, 12 Beav. 56; 18 L. J., N. S., Ch., 116.

11. A husband and wife resident abroad give a general power of attorney to their solicitor to act for them in this country. The wife is entitled to a legacy, which has been retained for many years by the trustee, who is also residuary legatee. The trustee is dead, and his executor, considering that the solicitor under the power of attorney cannot give him an effectual discharge, pays the legacy into court under the Trustee Relief Act, and, notwithstanding he is requested not to do so, appears by counsel on the petition. On the question whether the costs of the payment into court and of the appearance of the executor are payable out of the legacy:—Held, that the executor is not entitled to the costs of payment in, but is entitled to the costs of appearing on petition. *Re Jones*, 5 W. R. 336; 3 Drew. 679.

12. Costs occasioned by the fund being paid into court under the Trustee Relief Act, in the case of a trust for maintenance, must come out of the corpus. *Re Reid's Trusts*, 1 W. R. 13. And see *Re Robertson's Trust*, 6 W. R. 405.

13. Where a fund in which successive beneficial interests exist is transferred into court under the Trustee Relief Act, the costs incurred by the trustees in proceeding under the statute are payable out of the corpus, not out of the income of the fund. *Re Staples' Settlement*, 13 Jur. 273.

II. OF CLAIMANTS OR PARTIES SERVED.

14. A petitioner, claiming a fund under the 10 & 11 Vict., c. 96, allowed his costs although his claim failed. *Re Birch*, 2 Kay & J. 369.

1. A party served with a petition under the 10 & 11 Vict., c. 96, does not necessarily get his costs of appearing at the hearing of the petition. *Exp. Fisher, Re Smith*, 3 Jur., N. S., 659.

Thus, where assignees in insolvency alleged a claim, but failed to substantiate it, costs of their appearing at the hearing of the petition refused. *Ib.*

2. On a petition under the Trustee Relief Act to apply a fund, a wife who was a *cestui que trust*, with her husband and her mortgagees, having appeared and opposed the distribution, the Court properly ordered part of the fund to be applied to the costs of the opposition, and incurred by the husband's proceedings, though under the deed creating the fund it was to be paid to her separate use. *Newton v. Ricketts*, 7 Jur., N. S., 953; 10 W. R. 1; 5 L. T., N. S., 62.

3. Costs of parties served with or appearing on a petition under Trustee Relief Act. See *Re Wilson's Trust*, 14 W. R. 161.

4. Mortgagees of the reversionary interest of a married woman not allowed their costs of appearance to a petition for payment out of court of a fund representing such interest which had been paid in under the Trustee Relief Act. *Re Insole*, 14 W. R. 160.

5. A petition for payment out of a fund paid in under the Trustee Relief Act was served on a party who did not appear on the petition to have any claim, but had sent notice of a claim. She now disclaimed, and was not allowed her costs. *Re Parry's Trust*, 12 Jur. 615.

6. A testator bequeathed one-third of the capital in a fund to A., a married woman. In 1835 (long after the decease of the testator), A.'s husband took the benefit of the Insolvent Debtors Act, and assigned all his property, present and future, to his assignee. In 1851 A. died, and the husband took out administration to her estate. In 1852 the husband became the inmate of a county lunatic asylum. In 1854 the annuitant died, and the fund became divisible:—Held, as between the assignee in insolvency of the husband and the overseers of the parish to which his maintenance was chargeable (who have, as to lunatics, a preferential claim to all other debtors), that the assignee in insolvency was entitled to the share of the deceased wife *jure mariti*. *Re Tyler*, 2 Jur., N. S., 927.

The fund having been paid into court under the Trustee Relief Act, the assignee in insolvency had presented his petition claiming the fund, which he had served on the overseers; and the latter appeared and argued their claim:—Held, that they were not entitled to costs. *Ib.*

7. The Court has jurisdiction to order an unsuccessful claimant on a fund paid into court under the Trustee Relief Act, 10 & 11 Vict., c. 96, to pay the costs of an application for payment of the fund out of court. *Re Armston*, 4 De G. J. & S. 454; 10 Jur., N. S., 715; 4 N. R. 450.

8. Respondents who make an unfounded claim to a fund, and so occasion the payment of it into court under the Trustee Relief Acts, will be ordered to pay the costs of getting the fund out of court. *Re Benton*, 43 L. J., Ch., 715.

III. OF TWO PETITIONS.

9. When two petitions are *bonâ fide* separately prepared for obtaining payment out of court of a sum paid in under the Trustee Relief Acts, and both raise the same issue, the Court will in general allow the costs of the preparation of the second petition, but where solicitors had been informed that a petition was presented, and they persisted in presenting another for the same object, the costs of the preparation and presentation of the second petition were disallowed. *Re Chaplin's Trusts*, 3 N. R. 289; 33 L. J., Ch., 183.

IV. PAYMENT IN WHEN JUSTIFIED AND COSTS OF TRUSTEES.

1. *Payment in Justifiable. Costs Allowed*, 6850.

2. *Payment in Improper. Costs Disallowed*, 6851.

3. *Payment in Improper. Order to Pay Costs*, 6852.

4. *Where Bill filed on Trustees refusing to Pay in*, 6853.

5. *Where Bill filed instead of Payment into Court*, 6854.

6. *Deduction of Costs before Payment in*, 6854.

7. *Costs of Trustees. Other Cases*, 6854.

8. *Taxation*, 6855.

1. Payment in Justifiable. Costs Allowed.

10. A trustee will be allowed his costs of paying money into court under the Trustee Relief Act where there is a case of *bonâ fide* responsibility. He is not bound to take upon himself the responsibility of deciding between adverse claimants. *Re Headington*, 27 L. J., Ch., 175.

H. being entitled in remainder to 500*l.* under a will, makes an assignment for the benefit of his creditors, and becomes insolvent. The legacy falls into possession, and H. sends a written notice to the surviving executor of the will not to pay it to any one but himself. A claim is also made by the trustees of the deed, and the executor pays the 500*l.* into court under the Trustee Relief Act. Upon a petition for payment out of court, asking the costs against the executor:—Held, that he was justified in paying the money into court, and must have his costs. S. C. 6 W. R. 7.

11. Trustees have a right to some sort of discharge from their *cestuis que trustent*, not, perhaps, a release, unless the instrument creating the trust was under seal; and trustees, between whom and their several *cestuis que trustent* disputes have arisen as to the amounts actually due to them respectively, are justified in paying into court, to the separate account of each *cestui que trust*, the sum to which they believe him to be entitled, and may have their costs of making such payment out of the respective funds. *Re Wright*, 3 Kay & J. 419.

12. A sum of money having been left by will to a married woman, it was agreed by the husband and wife that a settlement should be made. Difficulties subsequently arose, and

the parties altered their views, and called upon the trustee of the will to hand over the money to the husband. The trustee declined to do so, and paid the fund into court under the 10 & 11 Vict., c. 96. Upon a petition by the husband and wife that the money might be paid out to the husband, and that the trustee might pay the costs occasioned by his conduct:—Held, that no binding agreement for a settlement had been shown, but that the trustee was justified in the course he had pursued, and his costs must be paid. *Re Bendyshe*, 3 Jur., N. S., 727; 26 L. J., Ch., 814; 5 W. R. 816.

1. Where a trustee has paid into court a fund to which a married woman is absolutely entitled, he is entitled as of course to his costs between solicitor and client, unless his conduct has been simply capricious or vexatious. *Re Swan*, 2 Hem. & M. 34; 12 W. R. 738.

Where a fund belonging to a married woman was paid into court under the Trustee Relief Act in order that she might have the benefit of a settlement, the trustees were allowed their costs, notwithstanding repeated expressions by her that she did not desire a settlement. S. C. 4 N. R. 53.

2. Trustees not entitled as of course to their costs of paying a fund into court under the Trustee Relief Act where such payment has been vexatious, and not justified by the possibility of a question as to the title to the fund. Where, however, the person entitled to the fund, and objecting to its being paid in, claims by representation, trustees will have their costs, as the possibility of a disposition by the deceased person through whom the claim is made is not excluded. *Re Lane's Trust*, 3 W. R. 134.

3. If a trustee entertains *bond fide* legal doubts as to the parties beneficially entitled to trust funds, he is justified in paying them into court, and he will not be made to pay the costs of payment out of court. *Re Wyll*, 6 Jur., N. S., 906; 8 W. R. 645; 28 Beav. 458.

4. A trust fund was paid into court by a trustee upon being informed that a new trustee, to whose proposed appointment he had previously objected on the ground that he was unknown to him, and believed not to be a fit and proper person, had been appointed joint trustee with him over the fund:—Held, that the trustee was entitled to receive his costs upon the petition of the *cestui que trust* for a transfer of the fund to new trustees. *Re Williams's Trust*, 6 W. R. 218; 4 Kay & J. 87.

5. Payment into court by an executor of a legacy bequeathed to a married woman, not specifically appropriated, the husband and wife being abroad, and the husband requiring it to be paid under a proof of attorney:—Held, that the executor had a right to pay it in; his costs of paying in to come out of the general estate, his costs of appearing on a petition to be paid out of the legacy. *Re Jones*, 3 Drew. 679.

2. Payment in Improper. Costs Disallowed.

6. Executors being informed that a bill was about to be filed against them by a person entitled to a share of residue, charging them

with breaches of trust, paid a sum of money into court under the Trustee Relief Acts, as the share of that person. The bill was afterwards filed, and, on an application for payment out of court by the person entitled, the trustees were not allowed their costs. *Re Waring*, 21 L. J., N. S., Ch., 784; 16 Jur. 652.

7. Trustees who had paid into court, under the 10 & 11 Vict., c. 96, an alleged balance, the title to which they believed undisputed, the party they believed entitled having previously demanded payment, and offered a discharge *pro tanto*:—Held, not entitled to costs upon a petition for payment of the fund out of court. *Re Heming*, 3 Kay & J. 40; 26 L. J., Ch., 106; 5 W. R. 33.

In 1855 H. conveyed property to trustees, on trust to sell and pay debts, and pay the residue (if any) to H. There were the fullest powers to the two trustees to make professional charges, to settle each other's charges, and to retain and indemnify themselves their expenses out of the fund. In July 1856, the trustees, having sold all the property and paid all the debts, handed in their account to H., by which it appeared that a balance was due to him. He protesting against the account, and reserving his right to impeach it, demanded payment of the balance. The trustees refused, unless upon a general release being given, to part with the balance, and they threatened to pay the money into court. On the 29th October he again wrote, offering them the fullest release from the amount which they should pay him, but still reserving his right to impeach their account, which he signified his intention to do. On the 30th October, the trustees, acting on the advice of counsel, paid the money into court under 10 & 11 Vict., c. 96, at the same time filing an affidavit by which they stated, that, except their own claims to an indemnity, no person but H. was interested in the fund:—Held, that inasmuch as by the payment into court the trustees acquired no additional security or discharge beyond that which H. had already offered, they could not receive any portion of the costs incurred by them on H.'s petition to get the money out of court, but that they were nevertheless entitled to the costs of paying it in. S. C. *nom. Esq. Hemming*, 2 Jur., N. S., 1186.

Acting on the advice of counsel is a favourable circumstance for trustees on the question of costs when the opinion has been taken upon the rights and interests of the *cestui que trustent*. *Secus*, where the opinion has been taken solely with regard to the best course for the interest of the trustees themselves. *Id.*

The Court will not in such a case exercise the discretion vested in it by the Act of causing a suit to be instituted for the purpose of taking accounts, or otherwise ascertaining the rights of parties, although that could not be done on the petition alone. *Id.*

8. Where a professed nun, while in a French convent, executed a deed, conveying all her real and personal estate to trustees upon trust to sell and pay the proceeds to the superior priest of a certain congregation, for the benefit of the congregation at his discretion, and covenanted to assign all her future property upon the same trusts, and subsequently, upon

the nun's becoming entitled to a legacy under a will, the trustees of the will paid the same into court under the Trustee Relief Act, and a petition was presented by the nun and the trustees of the deed praying payment to the latter:—Held, by Romilly, M.R., that the fund ought not, without distinct evidence that the petitioner was her free and unbiassed act, to be paid out of court; but upon appeal, the Court directed the fund to be paid out either to herself or to the trustees she had appointed, and considering that the trustees of the will were not justified in paying the money into court, refused them their costs. *Re Metcalfe*, 10 Jur., N. S., 287; 33 L. J., Ch., 308; 10 L. T., N. S., 78; 12 W. R. 538.

1. Trustees who, after accepting the trust, had paid the trust fund into court without sufficient reason, refused their costs of an application to pay the income to the tenant for life. *Re Leake*, 32 Beav. 135; 1 N. R. 417; 9 Jur., N. S., 453; 11 W. R. 352; 7 L. T., N. S., 816; 1 N. R. 417.

A fund was held in trust for A., an unmarried lady, for life, but to cease if "by any means whatever" it should vest in or become payable to any other person. A. afterwards married, and her life interest was settled to her separate use, without power of anticipation, by a settlement to which the trustees purported to be parties, but to which they never assented. The trustees thereupon paid the trust fund into court:—Held, that as the trusts which they had accepted had not been varied either by the marriage or the settlement, they were not justified in paying the money into court, and they were refused their costs of appearing on a petition for payment of the income to the tenant for life. *Ib.*

2. Trustees paying money into court, upon doubts as to questions of law and fact which the Court thought unreasonable, were disallowed costs of appearing on the petition. *Re Pearson*, 17 W. R. 365; 20 L. T., N. S., 8.

3. The trustees of a trust fund to which their *cestui que trust* has become entitled in default of appointment by a tenant for life are justified in paying it over to him on being informed in writing by the solicitor to the parties that he has reason to believe that no appointment has been made, and would be free from liability in doing so. *Re Cull*, 20 L. R., Eq., 561; 44 L. J., Ch., 664; 23 W. R. 850; 32 L. T., N. S., 853.

Trustees who under such circumstances pay the trust fund into court under the Trustee Relief Act will not, as a rule, be entitled to their costs. *Ib.*

4. Trustees will not be allowed the costs occasioned by paying money into court under the Trustee Relief Act, 10 & 11 Vict., c. 96, when they do so for the mere purpose of escaping liability, and when there is no reasonable doubt as to the performance of their trust. *Re Elliot or Eliot*, 15 L. R., Eq., 194; 42 L. J., Ch., 289; 21 W. R. 455.

5. A., the surviving executor of the last surviving trustee of a will whereby a fund was settled upon B. for life, with remainder to the children, who survived her, paid the dividends to B. during her life, and then paid the fund into court:—Held, that A. had accepted the trust, and there being no difficulty in ascertaining what children B. left, the pay-

ment into court was unnecessary, and he could not be allowed his costs. *Re Abbot*, 38 L. T., N. S., 442.

6. Trustees after being warned by their *cestuis que trustent* that if they paid the trust fund into court under the 10 & 11 Vict., c. 96, the *cestuis que trustent* would object to the trustees being allowed the costs of paying the fund into and taking it out of court, nevertheless paid the fund into court, stating by their affidavit, not that they had any doubts as to the title of their *cestuis que trustent*, but that "to the best of their knowledge and belief the *cestuis que trustent* were the only persons interested in or entitled to the trust fund, and that the facts mentioned in that affidavit were stated upon their own knowledge, and they had acquired such knowledge as trustees." The *cestuis que trustent* presented a petition for the payment of the fund out of court, and praying that the costs of the petition and of paying the fund into court might be paid by the trustees personally:—Held, that the trustees who had been served with and appeared upon the petition were not entitled to the costs of such appearance, but only to their costs of paying the money into court. *Re Corvington*, 1 Jur., N. S., 1157; 25 L. J., Ch., 238.

3. Payment in Improper. Order to Pay Costs.

7. Where a trustee has trust moneys in his hands, it is his duty to make inquiries as to the parties entitled, and upon sufficient evidence to pay over the moneys to his *cestuis que trustent*. *Re Knight*, 5 Jur., N. S., 326; 28 L. J., Ch., 625; 33 L. T. 54.

Where a trustee, without making reasonable inquiries, and without requiring evidence as to the title of the parties claiming the funds, paid them into court under the Trustee Relief Act, he was ordered to pay the costs of paying them in, and of the application for the payment of them out. *Ib.*

A trustee is not, in all cases, justified in paying a trust fund into court under the Trustee Relief Act, and where he does so without sufficient reason, he will be made liable for the costs of a petition for getting the fund out of court. 8. C. 27 Beav. 45.

The children of A. were entitled to a specific legacy under a will, and to a portion of a residue under a subsequent deed of compromise. B. was both the legal personal representative and the trustee of the deed. The legacy was paid to the two children on their attaining twenty-one, in 1839 and 1843, in a suit to which the trustee was a party; but the other fund remained unpaid and in the funds until 1858, when, the two sons being in the Austrian military service, the trustee paid the fund into court:—Held, that he was not justified in so doing under the circumstances, and he was ordered to pay the costs of a petition by the sons to obtain payment out of court. *Ib.*

8. Trustees paid the ascertained share of a residue of a married woman into court, under the Trustee Relief Act. The Court refused to make the trustees pay the costs, observing that it was not desirable to act too strictly in such cases. *Re Brocklesby*, 29 Beav. 652.

9. A trustee is not justified in paying a fund into court under the 10 & 11 Vict.

c. 96, s. 1, merely because, acting *bonâ fide*, he entertains a doubt as to the right of the claimant. There must be a reasonable case of uncertainty, or he may be ordered to pay the costs of the petition for payment out. *Re Elgar*, 11 L. T., N. S., 415.

1. Trustees are not justified, as a matter of course, in paying a married woman's legacy into court, but will be liable for costs if such payment appears vexatious and unnecessary. *Re Roberts*, 38 L. J., Ch., 708.

2. A. and B., being each entitled to one-fifth of a reversionary fund, mortgaged their shares with a power of sale. B. was a mere surety for A., and A. afterwards assigned his share to B. for his indemnity, with a power to sell and to give receipts for the share and the produce of the sale. The mortgagees sold the reversionary interest, and refused to pay the surplus to B. without the concurrence and release of A., and they paid the fund into court:—Held, that this was improper, and they were ordered to pay the costs of a petition to get the money out of court. *Re Folingo*, 32 Beav. 131.

3. By a marriage settlement, which empowered the husband and wife, or the survivor of them, to appoint new trustees, a sum of money was vested upon certain trusts in trustees, their executors, etc. The last survivor of the trustees appointed Sir R. de B. and Lady de B. executor and executrix of his will, and died. They proved the will; and afterwards the husband, who survived the wife, by deed, indorsed on the settlement, appointed three new trustees, and required Sir R. de B. and Lady de B. to transfer the trust fund to them. Sir R. de B. requested to have the opinion of counsel, the costs to be paid out of the dividends. This request was refused, on the ground that there was not any difficulty or risk. Sir R. de B. and Lady de B. thereupon brought the trust fund into court. On a petition by the husband for a transfer of the fund to the new trustees:—Held, that Sir R. de B. should pay the costs. *Re Wise*, 3 Ir. R., Eq., 599.

4. The Court has jurisdiction to order a trustee to pay the costs of an application for payment out of court of a fund paid in by him under the 10 & 11 Vict., c. 96. *Re Woodburn*, 1 De G. & J. 333; 3 Jur., N. S., 799; 26 L. J., Ch., 522; 5 W. R. 423, 642.

A trustee of a small trust fund, which had become divisible, called upon the claimants for proof of their title. They procured evidence which, though not technically complete, was tolerably satisfactory, and he declared himself ready to pay the fund to them. Afterwards, without assigning any reason, he receded from this determination, and the matter, which had been conducted on his behalf by his country solicitors, was placed in the hands of his London agents, who made various objections to the sufficiency of the evidence. The claimants produced additional evidence, and requested to know what more the trustee required, and offered to produce it. The trustee, however, without waiting for its production, paid the money into court. The applicants petitioned for payment of the fund to them, and made out their title to the satisfaction of the Court:—Held, that the trustee had been properly ordered to pay the costs of the petition. *Ib.*

The opinion of Wood, V.-Ch., on this point, expressed in *Re Hemming* or *Heming* (3 Kay & J. 40; 26 L. J., Ch., 106; 5 W. R. 33; 2 Jur., N. S., 1186) overruled. *Ib.*

5. A trustee vexatiously paying money into court under the Trustee Relief Act ordered to pay the costs of the petitioner for obtaining payment. *Re Cater*, 25 Beav. 361.

A trustee paid trust funds into court, under the Trustee Relief Act, merely because other trustees to whom it was payable declined to give a release. He was ordered to pay the costs of getting the money out of court. *Id.* 366.

6. A married woman having, under a settlement, a general power of appointment by will, appointed the fund, in pursuance of the power, to be divided among five persons, and appointed executors. The trustees of the settlement paid the money into court under the Trustee Relief Act, and the *cestuis que trustent* presented a petition for payment out, establishing their right to the fund by evidence:—Held, that the trustees should have paid the fund over to the executors of the will for distribution, and they were ordered to pay the costs; but, as the executors were the proper persons to present the petition, the trustees were exempted from payment of so much of the costs as were occasioned by the production of evidence by the *cestuis que trustent*. *Re Hoskin*, 5 L. R., Ch. D., 229; 35 L. T., N. S., 935; 46 L. J., Ch., 274.

Semble, on appeal, that the decision of Malins, V.-Ch., on the question of law was right, and that the executor of the donee of the power was the proper person to give a discharge. S. C., 25 W. R. 779; 46 L. J., Ch., 817; 6 L. R., Ch. D., 281.

4. Where Bill Filed on Trustees Refusing to Pay in.

7. Where trustees of a legacy given for the benefit of a lady, with limitations over, one of which trustees being also the residuary legatee under the will, refused to comply with the request of the tenant for life, that they would pay the legacy into court under the provisions of the Trustee Relief Act 1847, although she offered to pay the costs of the proceedings for that purpose, and she consequently instituted a suit and obtained an order for payment of the fund into court, the costs of the suit were directed to be paid out of the residue. *Handley v. Davis*, 5 Jur., N. S., 190; 28 L. J., Ch., 873.

8. On the sale of real estate part of the purchase money was invested in the names of trustees, who were to hold the fund until sufficient evidence should be produced of the death of a certain person, and on such evidence being produced were to pay the fund to the vendors. The vendors in the following year, thinking that they had sufficient evidence of the death, called upon the trustees either to pay the fund to them, or to pay it into court under the Trustee Relief Act. The trustees having refused to do so, a bill was filed to compel them to pay over the fund:—Held, that the trustees, having caused unnecessary expense by their refusal to pay the fund into court, were only entitled to such costs as they would have got if they had paid the fund into

court, and the vendors had presented a petition for the payment of the fund to them. *Weller v. Fitzhugh*, 22 L. T., N. S., 567.

1. Any trustee who entertains a reasonable doubt or difficulty as to the title of the person who claims to be his *cestui que trust* should pay the funds into court. *Gunnell v. Whitear*, 10 L. R., Eq., 664; 18 W. R. 883; 22 L. T., N. S., 645; 39 L. J., Ch., 869.

A trustee who, entertaining such doubt, did not pay the funds into court, but by his conduct caused the institution of a suit, was allowed out of the funds only the costs that he would have been entitled to if he had paid the funds into court and the costs of appearing on the petition. *Id.*

5. Where Bill Filed instead of Payment into Court.

2. The 10 & 11 Vict., c. 96, by enabling a trustee to pay a trust fund into court, does not deprive him of the right to file a bill to be relieved from the trusteeship, and he will, in a proper case, be allowed his costs of such bill as between solicitor and client. *Barker v. Piele*, 2 Dr. & Sm. 340; 11 Jur., N. S., 436; 34 L. J., Ch., 497; 13 W. R. 573; 12 L. T., N. S., 50; 5 N. R. 425.

3. Where a trustee has an ascertained sum in his hands which is claimed by opposite parties, the proper course is to pay the money into court under the Trustee Relief Act. *Wells v. Malbon*, 8 Jur., N. S., 249; 31 Beav. 48.

Where a trustee, instead of so doing, files a bill, he will be allowed only such costs as he would have received if he had paid the money into court under that Act. *Id.*

6. Deduction of Costs before Payment in.

4. The Trustee Relief Act provides no special means for making the costs, which trustees may deduct before paying money into court under its provisions, the subject of inquiry. *Re Bloye's Trust*, 1 Macn. & G. 488; 2 H. & Tw. 140; 19 L. J., N. S., Ch., 89; 14 Jur. 49.

5. Upon a petition under the Trustee Relief Act, the Court has no jurisdiction to order the trustees to refund any sum retained by them for their costs. *Re Leake's Will*, 1 N. R. 417; 32 Beav. 135; 9 Jur., N. S., 453; 7 L. T., N. S., 816; 1 N. R. 417.

6. Where an executor, paying into court a part of a legacy, has deducted his costs of paying it in, the Court has no jurisdiction, under the Trustee Relief Act, to order payment by the executor to the legatees of the amount of those costs. *Re Barber*, 9 Jur., N. S., 1098; 8 L. T., N. S., 825; 32 L. J., Ch., 709; 11 W. R. 1056; 2 N. R. 571.

7. Trustees, on paying a fund into court, retained a sum for their costs. On a petition to obtain the fund out of court, the trustees obtained the costs of their appearance, but all their costs were ordered to be taxed. *Re Hue*, 27 Beav. 337; 5 Jur., N. S., 1235; 28 L. J., Ch., 893.

8. Trustees, on paying a fund into court, deducted 4*l.* 1*s.* 6*d.* in respect of their costs. On a petition by the person entitled to the dividends praying that the same might be paid to her, and that the costs of the trustees,

who appeared on the petition, might be taxed:—Held, that the costs of their appearance and their costs, charges, and expenses properly incurred in relation to the fund in court, ought to be taxed, and that they ought to be charged with the sum deducted by them on payment into court. *Re Sweeper*, 19 W. R. 793; 24 L. T., N. S., 413.

9. When a trustee's claim for costs, charges, and expenses is contested, he is not entitled to retain the amount of such claim and pay the balance of the trust fund into court, but should pay the whole fund into court and leave it for the Court to award the proper amount to which he is entitled in respect of his claim. *Beaty v. Curson*, 38 L. J., Ch., 161; 7 L. R., Eq., 194; 20 L. T., N. S., 61.

10. The sum of 8*l.* is the proper sum to be deducted by trustees in the first instance for the costs of lodging money in court under the Trustee Relief Act. *Re Blayney*, 9 Ir. R., Eq., 413.

7. Costs of Trustees. Other Cases.

11. Trustees who have paid trust funds into court under the Trustee Relief Act, taking copies of affidavits by parties claiming to be beneficially interested in the fund, will not be allowed the costs of the copies so taken by them. *Re Lazarus*, 3 Kay & J. 555.

12. Although a trustee may, under the 4th Order of the 10th June 1848, present a petition under the Trustee Relief Act, 10 & 11 Vict., c. 96, as to moneys paid in by himself, the Court, in making an order on such petition, gave him respondent's costs only, even where his petition was presented at the request of one of the parties beneficially interested in the fund. *Re Hutchinson*, 1 Dr. & Sm. 27; 6 Jur., N. S., 136; 29 L. J., Ch., 356; 8 W. R. 253.

13. Executors, at the request of a legatee, sell out the stock representing the particular legacy. Having learnt that the legatee is an uncertified bankrupt, has been insolvent, and has assigned his legacy, the executors on the 7th December pay the money into court under the Trustee Relief Act, and give notice to the trade and official assignees of the legatee. On the 7th January they present a petition for declaration of the rights and distribution, amongst the parties interested, of the fund representing the legacy. A petition is also presented by the assignees:—Held, that although the Court had jurisdiction to declare the rights and distribute the fund upon the petition of the executors, they were not justified in taking such a proceeding, having discharged themselves from liability by paying the money into court; and they were only allowed such costs as they would have had if they had appeared as respondents. *Re Housman's Trust*, 4 W. R. 274; 2 Kay & J. 249; 20 Jur. 157.

14. Where trustees, having paid money into court under the 10 & 11 Vict., c. 96, afterwards apply by petition under the 4th Order of the 10th June 1848 for a distribution of the fund, the Court has jurisdiction to make an order upon the petition, and is bound to exercise that jurisdiction. *Re Cazneau*, 2 Kay & J. 249; 2 Jur., N. S., 157.

But where such a petition was presented by

trustees without consent of the parties claiming beneficial interests in the fund, and no cause was shown by the trustees for taking upon themselves to be movers in the matter, the Court, to discourage such applications, allowed them only respondents' costs. *Ib.*

1. A trustee who has paid funds into court under the Act 10 & 11 Vict., c. 96, and has been served with petition, is entitled to his costs. *Re Erskine's Trust*, 1 Kay & J. 302; 1 Jur., N. S., 156; 24 L. J., Ch., 327.

2. A fund paid in under the Trustee Relief Act to an account entitled the estate of a deceased person, will not be paid out without the presence of his legal personal representative and an admission of assets by him. Administration having been taken out to remove the difficulty, the trustees were allowed their costs, and the costs of the administration were given out of the fund. *Re Edwards' Estate*, 4 W. R. 801.

3. Trustees who have lodged money under the Trustee Relief Act will be allowed their costs of appearing on the hearing of a petition to draw it, if the claimant's title be doubtful. *Re Blayney*, 9 Ir. R., Eq., 413.

4. Trustees who were respondents to a petition under the Trustee Relief Act, and were tendered 42s. for costs under Rules of Court 1875 (Costs), Order VI., Rule 17, will not be allowed their costs of appearance unless they appear for the sake of giving the Court necessary information. *Re Sutton*, 21 L. R., Ch. D., 855; 46 L. T. 740; 30 W. R. 657.

8. Taxation.

5. An assurance company properly paying money into court under the Trustee Relief Act is entitled to costs as between solicitor and client. *Re Webb*, 2 L. R., Eq., 456; 12 Jur., N. S., 595; 35 L. J., Ch., 850; 14 W. R. 857; 14 L. T., N. S., 89.

6. Where an insurance company paid insurance money into court under the Trustee Relief Act and the company was afterwards served with and appeared on the petition to pay it out:—Held, that the company was entitled to costs as between solicitor and client. *Re Cobbe*, 15 W. R. 29; 15 L. T., N. S., 170.

7. Trustees who have paid trust funds into court under the 10 & 11 Vict., c. 96, and take copies of affidavits of parties claiming to be beneficially interested in the fund, will not be allowed their costs of the copies of affidavits so taken by them. *Re Lazarus*, 3 Kay & J. 555.

IV. Applications for Advice or Opinion of the Court, under the 22 & 23 Vict., c. 35, s. 30.

See also TRUSTS, XIX.

- I. *Retrospective Effect of Statute*, 6855.
- II. *Who may Apply*, 6855.
- III. *In What Cases. In General*, 6855.
- IV. *Opinion as to Investments*, 6856.
- V. *Opinion as to Construction of Instruments*, 6857.
- VI. *Indemnity to Trustees*, 6857.
- VII. *Practice on Application*, 6857.

I. RETROSPECTIVE EFFECT OF STATUTE.

8. The 22 & 23 Vict., c. 35, s. 30, is retrospective in its operation. *Re Simpson*, 1 John. & H. 89; 8 W. R. 388.

II. WHO MAY APPLY.

9. The Court will make an order under 22 & 23 Vict., c. 35, s. 30, on the petition of a *cestui que trust*. *Re Ward*, 14 W. R. 96; 13 L. T., N. S., 494.

See also Following Subdivisions.

III. IN WHAT CASES. IN GENERAL.

10. Where an important and difficult question is involved, the proper course is to file a bill instead of presenting a petition under the 22 & 23 Vict., c. 35 s. 30. *Re Mockett*, Johns. 628; 29 L. J., Ch., 294.

Where the opinion of the Court is sought by petition under 22 & 23 Vict., c. 35, by executors of a will upon which questions of difficulty arise, and the assets are not distinctly ascertained, the Court will not give its opinion unless at the wish, and with the consent, of all parties interested. S. C. 6 Jur., N. S., 142; 8 W. R. 235.

11. The Court will not give its opinion on an hypothesis; therefore when a petition was presented under 22 & 23 Vict., c. 35, to obtain the advice of the Court as to the mode in which calls not yet made on account of shares specifically bequeathed by a testator were to be met, the Court ordered the petition to stand over till the call had been actually made. *Re Box*, 11 W. R. 945.

12. The Court will, on a petition under 22 & 23 Vict., c. 35, s. 30, sanction the compromise by trustees of a claim depending on foreign law and the accounts of disbursements on an estate in a foreign country, which accounts the trustees have no means of verifying. *Re Mackintosh*, 42 L. J., Ch., 208.

13. A father bequeathed a share of a fund in trust for his daughter and her children, power being given to the trustees to invest it in the public funds of any colony or dependency of the United Kingdom. The daughter married a domiciled citizen of the Canadian Dominion, and was permanently resident in Canada. It was proposed to appoint two persons, citizens of Canada, trustees, and to transfer the share of the trust fund to them for the purpose of investment in securities in Canada. On a petition under 22 & 23 Vict., c. 35, s. 30, the Court was of opinion that such proposed appointment and transfer might be made. *Re Smith*, 26 L. T., N. S., 820; 20 W. R. 695.

14. A married woman who was of unsound mind, but not so found by inquisition, was entitled for her separate use to the income of certain trust funds. Her written consent was also required to the investments by the trustees. Upon a petition under Lord St. Leonards' Act (22 & 23 Vict., c. 35, s. 30) for the advice of the Court:—Held, that the Court had jurisdiction to entertain the petition; that the whole income might be paid to the husband on his undertaking to apply it to the maintenance of

the wife; and that her consent to the investments might be dispensed with. *Re T—*, 15 L. R., Ch. D., 78; 29 W. R. 42.

1. Upon a special case presented under the 22 & 23 Vict., c. 35, and the 23 & 24 Vict., c. 38, the Court declined to give power to trustees to grant leases of real estate for a term not exceeding ten years. *Re Shaw*, 25 L. T., N. S., 22; 12 L. R., Eq., 124; 19 W. R. 1025.

2. The Court will not give an opinion under the 22 & 23 Vict., c. 35, upon matters of detail, which cannot be properly dealt with without the superintendence of the Court and the assistance of affidavits. *Re Barrington*, 1 John. & H. 142; 6 Jur., N. S., 1073; 29 L. J., Ch., 807; 8 W. R. 577.

Therefore, where trustees of a settlement, having a power of purchasing lands on the request of tenants for life, desired the opinion of the Court as to the propriety of applying 1,200*l.* on such request in repairs and permanent improvement, no answer was given on the petition; but it was intimated that, on a bill filed, there would be no objection on principle to the course proposed to be taken, and subsequently the order was made in a suit instituted for the purpose. *Id.*

3. The trustees of settled estates presented a petition under s. 30 of Lord St. Leonards' Act 1859, asking the opinion of the Court (1) whether they were justified in applying money in their hands, proceeds of sales, and enfranchisements of the settled estates, towards paying costs incurred by the tenant for life as plaintiff and defendant in a series of actions undertaken by him to resist claims of rights of common over the settled estates; (2) whether they might apply similar sums to be derived from future sales, and towards discharging their costs; (3) whether in discharging these costs they might properly treat them as a solicitor and client costs; (4) whether they might adopt the acts and proceedings of the tenant for life. The petition was also entitled in the Settled Estates Act 1877, under which the trustees prayed that such costs as were not provided for as above might be raised and paid as between solicitor and client by means of a charge on the settled estates:—Held, that the first four questions might be answered in the affirmative, and that the order for raising and paying the residue of the costs as between solicitor and client might be made to the Court under s. 17, although no application had been made to the Court before commencing proceedings. *Re De la Warr's (Earl) Settled Estates*, 51 L. J., Ch., 407; 46 L. T. 340.

Where proceedings have been instituted (though without the preliminary sanction of the Court), whether by claim in an action, or by defence to an action, for the protection of a settled estate, the Court will, if it sees fit, give permission to the trustees to apply the proceeds of the sale of a portion of the estate in defraying the costs already incurred, and which must necessarily be incurred, by the tenant for life, in instituting such proceedings. S. C. 16 L. R., Ch. D., 587; 50 L. J., Ch., 383; 44 L. T. 56; 29 W. R. 350.

4. The tenant for life of settled estates having successfully opposed a sewage scheme proposed by the sanitary authority of the parish in which the settled estates were

situate, on the ground that the works would deteriorate the value of the estate, incurred certain costs. The trustees of the settled estates applied, under 22 & 23 Vict., c. 35, s. 30, for the advice of the Court whether they would be justified in paying these costs out of money in their hands, representing the proceeds of part of the settled estates sold under the order of the Court made in 1874. The petition was entitled in the matter of the Settled Estates Act 1856, and the Amendment Acts of 1858 and 1864, and the Act 22 & 23 Vict., c. 35. The Court was of opinion that s. 30 of the Act 22 & 23 Vict., c. 35 only gave the Court power to advise, and did not empower it to authorise the payment, but that the case came within s. 17 of the Settled Estates Act 1877, and ordered that the petition should be amended by entitling it in the matter of that Act, when, on the amount extended by the tenant for life, not exceeding a sum named, being proved before the registrar, the Court would advise the trustees to pay it. *Re Willan's Settled Estates*, or *Re Twyford Abbey Settled Estates*, 45 L. T. 745; 30 W. R. 268.

See also TRUSTS, XIX.

IV. OPINION AS TO INVESTMENTS.

5. On an application under s. 30 of 22 & 23 Vict., c. 35, for the opinion of the Court whether, under a trust for investment in Government or other approved securities, trustees would be justified in investing a trust fund in East India stock or railway debentures, or on mortgage of freehold, copyhold, or leasehold hereditaments, the Court approved of an investment on freeholds in England or Wales, but declined to give any answer sanctioning investments in the other securities mentioned. *Re Simson*, 1 John. & H. 89; 8 W. R. 388.

6. If an Act of Parliament contains provisions enabling trustees, with the sanction of the Court, to invest trust funds upon securities, neither recognised by the Courts, contemplated by the Legislature, nor sanctioned by the settlor or testator at the time the trusts were created, the Court, in the absence of an express legislative declaration, will not give the Act any other than a prospective operation, or advise trustees under the 22 & 23 Vict., c. 35, ss. 30, 32, to invest the trust funds upon any other securities than those comprised within the provisions of the instrument creating the trusts. *Re Mile*, 5 Jur., N. S., 1236; 29 L. J., Ch., 47; 1 L. T., N. S., 122.

Trustee of a will of a testator, who died in 1845, had power to invest "real securities in England or Wales, but not in Ireland." The Court declined advising the trustee to invest, under the powers contained in the 22 & 23 Vict., c. 35, s. 32, on a mortgage of Scotch estate. S. C. 27 Beav. 579.

7. A testator lent money on thirteen mortgages of 100*l.* each, granted under an Act of Parliament, on the security of stallage rents, and received 4*l.* per cent. interest. He devised and bequeathed all his realty and personality upon trusts for sale and conversion. After his death the trustees discovered that the mortgagors had exceeded their borrowing powers, and that the mortgages were only worth 74*l.*

each, and they sold five at that price. If the remainder were sold, the income of the beneficiaries would be reduced from 32l. to 20l. per annum. On a petition by the trustees, under 22 & 23 Vict., c. 35, the Court was of opinion that they would be justified in retaining the remaining mortgages in their hands. *Re Fanning*, 10 Jur., N. S., 307; 10 L. T., N. S., 61.

V. OPINION AS TO CONSTRUCTION OF INSTRUMENTS.

1. The Court declined, upon a petition for its opinion under 22 & 23 Vict., c. 35, s. 30, to decide whether an intestate's estate was liable upon a covenant to be implied in his marriage settlement. *Re Evans*, 30 Beav. 232.

2. The Court will not, upon a petition presented by a trustee or an executor under s. 30 of the 22 & 23 Vict., c. 35, for the opinion, advice, or direction of the Court, construe an instrument or make any order affecting the rights of the parties to property. Such petitions should relate only to the management and investment of trust property. *Re Lorenz*, 1 Dr. & Sm. 401; 7 Jur., N. S., 402; 9 W. R. 567; 4 L. T., N. S., 501.

3. Questions of construction affecting capital of considerable amount, will not be decided upon a petition under the 22 & 23 Vict., c. 35, s. 30. *Re Bunnett*, 10 Jur., N. S., 1098.

4. The Court will not, under 22 & 23 Vict., c. 35, s. 30, give its opinion for the guidance of trustees on the effect of a limitation contained in an instrument. *Re Hooper*, 29 Beav. 656; 30 L. J., Ch., 795; 9 W. R. 729.

The Court will not, upon a petition under the 22 & 23 Vict., c. 35, s. 30, determine questions of construction, but only advise executors and trustees in matters of discretion vested in them. S. C. 7 Jur., N. S., 595.

VI. INDEMNITY TO TRUSTEES.

5. The opinion of the Court upon a petition under the 22 & 23 Vict., c. 35, gives an indemnity to the trustees only upon the facts stated in the petition, is subject to no appeal, and will not preclude the filing a bill, which would seem the better course under the circumstances above stated. *Re Mockett*, 6 Jur., N. S., 142; 8 W. R. 235; 39 L. J., Ch., 294; Johns. 628.

VII. PRACTICE ON APPLICATION.

6. Where an application was, under the 22 & 23 Vict., c. 35, s. 30, made in chambers by trustees for the direction of the Court as to certain repairs of a permanent nature proposed to be made on the property mentioned in the will, the Vice-Chancellor directed that the matter should be brought before him in court upon petition, it not being, in his opinion, intended that the Court should deal with questions of this kind without the assistance of counsel. *Re Dennis*, 5 Jur., N. S., 1388; 1 L. T., N. S., 28.

7. On a petition under the 22 & 23 Vict., c. 35, s. 30, the Court will not direct an inquiry at chambers. *Re Mockett*, Johns. 628; 29

L. J., Ch., 294; 8 W. R. 235; 6 Jur., N. S., 142.

8. A petition under the 22 & 23 Vict., c. 35, s. 30, ought not, in the first instance, to be served upon any one, but an application should be made in chambers as to the persons upon whom the petition should be served. No affidavits can be read on such petition. *Re Muggeridge*, Johns. 625; 6 Jur., N. S., 192; 29 L. J., Ch., 288; 8 W. R. 235.

9. When a petition is presented under 22 & 23 Vict., c. 35, the petitioners must serve such persons as they think proper, and must not bring on the petition merely in order to ascertain who ought to be served. *Re Green*, 6 Jur., N. S., 530; 29 L. J., Ch., 716.

10. On a petition (not served on any person) by English and Irish trustees, under 22 & 23 Vict., c. 35, s. 30 (the domicile of the testator and the tenant for life being Irish and English respectively), for the opinion of the Court as to the power of the trustees to make certain investments, the Court, there having been no application to the Court of Chancery in Ireland, exercised the jurisdiction, and did not require the petition to be served on any one. *Re French*, 15 L. R., Eq., 68.

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I. CREATION OF TRUSTS.

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1. In General.

1. The Statute of Frauds has only imposed a form in declaring the use; the control of the use remains as it was before the statute, the absolute will and declared intent of the owner. *Wright v. Cadogan (Lord)*, 2 Eden 257.

2. Distinction between the 4th section of the Statute of Frauds requiring the agreement to be in writing and signed by the party to be charged, and the 7th section requiring that the trust shall be manifested, not that it shall be constituted by writing. *Randall v. Morgan*, 12 Ves. 74.

3. All declarations of trust under the Statute of Frauds must be in writing. *Willis v. Willis*, 2 Atk. 71.

4. A., being in possession of the office of clerk of the Crown, etc., in the King's Bench, in which B. has also an estate for life, procures B. to surrender, and solicits a patent for himself and C., and takes a note from C., promising to declare a trust for A. The

patent afterwards is obtained; A. dies in debt, and without calling for a declaration of this trust; this note was held to be a sufficient declaration of trust. *Bellamy v. Burrow*, Forrest. 97.

5. A lease for years to A., but by parol agreed to be in trust for A. and B. jointly; B. pays a moiety of the rent. If this is within the Statute of Frauds, etc., *quære*. *Riddle v. Emerson*, 1 Vern. 108.

6. A declaration of uses by the founder of a charity, presumed from an entry in an ancient book, purporting to be such declaration, but without signature or date, the book being kept by the trustees for entering their proceedings, and containing an order by the trustees dated six years after creation of the trust, that the declaration of the founder be then entered as a discretion to the trustees. *Att.-Gen. v. Boulbee*, 2 Ves. J. 379.

7. Testator made his will in 1738, whereby he devised to defendants and their heirs, without declaring any trust on the face of the will; but he subscribed a writing, wherein he recommended defendants to see his will performed according to the humble request and the wanted and well disposed charitable disposition of (defendant) C., towards all men, and to bring the whole affair to its desired issue. Testator soon died, and his heirs-at-law brought a bill to set aside his devise, as void by the Act of 9 Geo. II., c. 36. Lord Chancellor said that the declaration of trust must be executed according to the Statute of Frauds, to bring it within the Statute of Mortmain, and observed, that devises to charities had been repeatedly held to be within the Statute of Frauds, though it had been endeavoured to make wills, not executed according to that statute, operate as appointments, but that never could prevail in all cases of charity before the Court. It has been held that the declaration of trust for a charity meant to express as the Statute of Frauds directs, and his lordship added that if a bare parol averment of a trust for a charity upon a will was to be allowed, the Statute of Mortmain would do more harm than good. As to the next consideration whether the paper writing was a sufficient declaration of trust within the statute, Lord Chancellor held it was not, though in the case of a feoffment it might have been a good declaration of a use. His lordship offered to retain the bill that the heir, who was an infant, might bring an ejectment, but the parties chose to have the bill dismissed without costs. *Addington v. Cann*, 3 Atk. 141.

The Statute of Mortmain has not abrogated the Statute of Frauds, which being made for the public good, ought *normam imponere futuris*. 8 C. 3 Atk. 150.

The Statute of Frauds, though it does not govern the particular provisions of the Statute of Mortmain, yet it governs the construction of that Act as being a subsequent one. *Ib.*

The same solemnities required by the Statute of Frauds to dispose of a trust or equitable interest in freehold lands, as of a legal estate in such lands, nor can a testator revoke a trust any more than he can devise it without these solemnities. *Ib.*

8. The Statute of Frauds does not require that a trust shall be created by writing, but

that it shall be proved by writing, which may be subsequent to its commencement; therefore a trust may be raised by implication from letters, and a paper referred to by them in the handwriting of the party, though not signed or dated, and by operation of law from advances of money; but when letters are to raise a trust, there must be a demonstration that they relate to subject; in this case, the Master of the Rolls said, the Court had gone too far, on taking cases out of the Statute of Frauds on the ground of part performance, or the relief ought to be confined to compensation. On appeal, Lord Chancellor affirmed the decree at the Rolls, and determined that this case was not within the Statute of Frauds, the question being a question of fact, whether a partnership subsisted in a colliery; but the evidence from books and papers being admitted, and the interest in the lease of the colliery passing as an incident to the trade, by operation of law, his lordship refused to direct an issue. *Foster v. Hale*, 3 Ves. 696; 5 Ves. 508.

When letters are to raise a trust, there must be demonstration that they relate to the subject. S. C. 3 Ves. 708.

1. A son conveys an estate to his father nominally as purchaser, but really as a trustee, and in order that the father, who was in better credit than the son, might raise money upon it by way of mortgage for the use of the son. The father died shortly afterwards, and before any money was raised, having, by a will subsequent to the conveyance, made a general devise of all his real estate. The case is within the Statute of Frauds, and parol evidence is not admissible to prove the trust, but the son has a lien on the estate as vendor for the apparent consideration, no part of which was paid. *Leman v. Whitley*, 4 Russ. 423; 6 L. J., Ch., 152.

2. When the Court is called upon to establish or act upon a trust of lands by declaration or creation, it must not only be manifested and proved by writing, signed by the party by law enabled to declare the trust, but it must also be manifested and proved by writing, signed as required, what that trust is. *Smith v. Matthews*, 7 Jur., N. S., 378; 9 W. R. 644; 4 L. T., N. S., 266.

The Statute of Frauds (29 Car. 2, c. 3, s. 7) does not by any means require that all trusts should be created only by writing, but that they shall be manifested and proved by writing, so that there may be evidence in writing proving what the trust is. *Id.*

3. A., by will, gave lands to S., and, having afterwards purchased other lands, he on his death-bed desired B., his heir-at-law, not to hinder S. from enjoying the newly purchased lands, though he had not by any writing declared the trust for S. B. suffered S. to enjoy the lands eleven years, and then pretended he thought the after-purchased lands had passed by the will; declared, that this was out of the Statute of Frauds, and that B. letting S. enjoy it so long was an execution of the trust, and, though no express fraud was proved against B. (as in *Lester v. Fowcroft*, Colles's P. C. 108), yet the possession of eleven years was a strong presumption that he suffered it in execution of the testator's declaration. *Harris v. Horwell*, Gilb. Eq. Rep. 11.

4. Though there can be no parol declaration of a trust since 29 Car. 2, yet parol evidence is proper in avoidance of fraud. *Hutchins v. Lee*, 1 Atk. 448.

5. The Statute of Frauds is not available as a defence to a suit to establish a trust where it would be fraud to deny the trust. *Haigh v. Kays*, 41 L. J., Ch., 567; 7 L. R., Ch., 469; 20 W. R. 597; 26 L. T., N. S., 675.

The defence that the transaction under which the plaintiff claims was illegal, must be pleaded in distinct terms. *Id.*

The plaintiff conveyed an estate to the defendant by a deed which purported to be executed on a sale. No money was in reality paid. The defendant, in a suit to obtain a re-conveyance, stated in his answer that the conveyance was executed by the plaintiff in fear of an adverse decision in litigation then pending against him:—Held, that this was not, as pleaded, any defence. *Id.*

The defendant admitted that the conveyance was upon a verbal understanding that the estate should be re-conveyed when called for, unless in the meantime arrangements for a purchase by him should be completed. He alleged that such arrangement had been completed, and claimed to retain the estate, and he claimed the benefit of the Statute of Frauds as a defence to the case of trust set up by the plaintiff. The evidence did not support the allegation as to the arrangement for a sale being complete:—Held, that the Statute of Frauds afforded no defence. *Id.*

6. A trust of land may be created by parol, but must be manifested and proved by writing. *Davies v. Otty*, 10 Jur., N. S., 506; 12 W. R. 682; 10 L. T., N. S., 284; 33 Beav. 540. Affirmed 12 W. R. 896; 10 L. T., N. S., 632; 2 De G. J. & S. 238; 10 Jur., N. S., 506.

A plaintiff filed a bill to obtain from the defendant a reconveyance of land which he had previously granted to him absolutely, on the ground that the defendant was, in fact, only a trustee of the land for him. The plaintiff, however, did not state in his bill that the trust was in writing, and the defendant, therefore, demurred to the bill:—Held, that the demurrer must be overruled, for the Statute of Frauds only refers to the proof of a trust by some writing. *Id.*

7. In 1857 R., being seised of freeholds, and being also a holder of shares in companies, which he then feared would involve him in heavy liabilities, conveyed the property to H. The deeds conveying the property were in form of purchase deeds: and H. purported to give valuable consideration for it, though, in fact, no money really passed. R. received the rents till his death intestate. H., after R.'s death, executed a deed of trust, declaring that the property had been conveyed to him in trust for R.'s wife. The wife received the rents till her death, when she purported to dispose of the property by her will in favour of her daughters. The heir-at-law of R. claimed the property, and a reconveyance from H.:—Held, that the Statute of Frauds was not satisfied, and that, as no declaration of trust had been executed in the lifetime of R., there was a resulting trust in favour of R. at the time, and consequently that the heir-at-law was beneficially entitled to the property, and to have a reconveyance from H., and an account

of rents and profits. *Rudkin v. Dolman*, 35 L. T., N. S., 791.

1. F., a mortgagee with a power of sale, agreed with K., who was entitled to a reversionary interest in the lands comprised in the mortgage, not to sell without his consent; and afterwards proposed to make a lease for a term to W. at a fine; K. refused to consent, unless the lands were settled on his wife (who was the daughter of W.) and her children after the death of W.; and this being acceded to K. gave his written consent, and thereupon the lease was executed by W., and, upon the occasion of its execution, the following document was signed by W. and K.: "It is agreed by W. and K. that the lease and lands of Largin, after death of W., shall be and become, through his love for her, the property of Mrs. K. in trust for her child or children by K. (if blessed with such), if not, to be for her sole use and benefit":—Held, first, that this was a declaration of trust by W. in favour of Mrs. K. and her children, and that, after W.'s death, his personal representative became a trustee for them. *Kelly v. Walsh*, 1 L. R., Ir., 275.

Held, secondly, that if it was not a valid declaration of trust, it was an agreement which should be specially performed, upon the ground that, although the consideration expressed was not valuable, yet the consent by K. was a part performance which took the case out of the Statute of Frauds, and that evidence of the real consideration was admissible. *Ib.*

2. Signature by Person to Declare the Trust.

2. Where lands are held in trust, the declaration of trust required by the 7th section of the Statute of Frauds to be signed "by the party who is by law enabled to declare such trust," must be signed by the beneficial owner, and not by the trustee who has the legal estate. *Tierney v. Wood*, 19 Beav. 330; 23 L. J., Ch., 895; 2 W. R. 577.

The legal fee in lands was vested in A. in trust for B. B. signed a document addressed to A., directing the lands and other property should, after his death, be held for the benefit of certain persons. The document was not attested:—Held, that this was an effectual declaration of trust, within the 7th section of the Statute of Frauds, by the beneficial owner, and not a testamentary instrument. *Ib.*

3. When the legal estate in land is vested in a trustee for an absolute beneficial owner, "the party who is by law enabled to declare a trust" of the land, within the meaning of the 7th section of the Statute of Frauds, is the beneficial owner only. *Kronheim v. Johnson*, 7 L. R., Ch. D., 60; 47 L. J., Ch., 132; 37 L. T., N. S., 751; 26 W. R. 142.

In pursuance of an arrangement by which a settlement should be made on an infant by his grandmother, K., a lease was taken by J. in his own name. Part of the arrangement was that the real transaction should be kept secret, and that the settlement should appear to be made by J. Accordingly a settlement was executed by J., by which the property was settled on the infant, but which, the solicitors not having been instructed as to the real

nature of the transaction, contained an ultimate trust in favour of J. In an action by K. to have the property assigned to her:—Held, that the declaration of trust not being made by the beneficial owner was not valid within the 7th section of the Statute of Frauds. *Ib.*

K. had written a letter, signed with her initials, and in the same envelope was inclosed a postscript headed "supplement," written in the same hand, but on a separate paper and unsigned. The postscript began with the words, "I had quite omitted to tell you and Martin," and was alleged to contain a declaration of trust in favour of the infant:—Held, that the signature did not govern the postscript so as to make it valid as a declaration of trust within the 7th section of the Statute of Frauds. *Ib.*

II. RESULTING TRUSTS AND TRUSTS BY OPERATION OF LAW.

4. Resulting trusts of copyholds as well as of freeholds, are within the Statute of Frauds and Perjuries. *Withers v. Withers*, Amb. 152.

5. Mortgage in fee 700l. paid by A., but half of the money was B.'s; yet for want of a declaration in writing, B. was not admitted to read to the proof of it so as to create a trust for him, being against the Statute of Frauds. *Newton v. Preston*, Pre. Ch. 103.

6. Nothing is a resulting trust under the Statute of Frauds and Perjuries, but what are called trusts by operation of law. *Lloyd v. Spillet*, 2 Atk. 150.

7. C. lends money upon mortgage of copyhold, but being infirm, etc., surrender is taken in name of D., who executes declaration of trust. C. after purchases equity of redemption, and second surrender is made in name of D. also, but without a declaration of trust:—Held, sufficient trust within the Statute of Frauds, without a second declaration of trust. *Acherley v. Acherley*, 7 Bro. P. C. 273.

8. A. agrees for beneficial lease of forty-one years; B. advances money towards the fine, etc., and lease is taken in B.'s name without a declaration of trust:—Held, that B. was a trustee for A., and upon being repaid his advance with interest, should assign the lease to A., and account with him for the profits, and pay costs:—Held, also, that trust being proved by letters of B.'s own handwriting takes the case out of Statute of Frauds. *O'Hara v. O'Neill*, 7 Bro. P. C. 227.

9. The Statute of Frauds does not require that a trust shall be created by writing, but that it shall be proved by writing, which may be subsequent to its commencement; therefore, a trust may be raised by implication from letters, and a paper referred to by them, in the handwriting of the party, though not signed or dated, and, by operation of law, from advances of money; but when letters are to raise a trust, there must be a demonstration that they relate to the subject: in this case, the Master of the Rolls said the Court had gone too far in taking cases out of the Statute of Frauds, on the ground of part performance; the relief ought to be confined to compensation. On appeal, Lord Chancellor affirmed the decree at the Rolls, and determined that this case was not within the Statute of Frauds, the question

being a question of fact, whether a partnership subsisted in a colliery; but the evidence from books and papers being admitted, and the interest in the lease of the colliery passing as an incident to the trade by operation of law, his lordship refused to direct an issue. *Forster v. Hale*, 3 Ves. 696; 5 Ves. 508.

1. A son conveys an estate to his father nominally as purchaser, but really as a trustee, and in order that the father, who was in better credit than the son, might raise money upon it by way of mortgage for the use of the son. The father died shortly afterwards, and before any money was raised, having, by a will subsequent to the conveyance, made a general devise of all his real estate. The case is within the Statute of Frauds, and parol evidence is not admissible to prove the trust, but the son has a lien on the estate as vendor for the apparent consideration, no part of which was paid. *Leman v. Whitley*, 4 Russ. 423; 6 L. J., Ch., 152.

2. Where a resulting trust is insisted on in opposition to the legal operation of a will, parol evidence may be admitted to rebut the equity. *Lake v. Lake*, Amb. 127.

3. A plaintiff, believing that he was liable to be convicted for bigamy, absolutely conveyed his real estate to the defendant in consideration of 20*l*. It was proved by parol evidence that the deed was executed in pursuance of an arrangement that the defendant should hold the property at the disposal of the plaintiff. The plaintiff's alarm was groundless, the consideration was never paid, the plaintiff remained in possession, and paid certain sums due to a building society in respect of the property. The defendant denied the trust, and claimed the benefit of the Statute of Frauds:—Held, that the operation of the Statute of Frauds was excluded, first, by the fraud of the defendant in refusing to reconvey; and secondly by reason of a resulting trust within section 8. *Davies v. Otty*, 34 L. J., Ch., 252; 13 W. R. 484; 12 L. T., N. S., 789; 5 N. R. 391.

4. Where land is purchased with the money of A., in the name of B., the resulting trust to A. may be rebutted as to part of the land, or part of the interest in the land. Where A. took a mortgage in the name of B., declaring that the principal sum should be for the benefit of B., and received the interest during his life, this being personal estate is not within the clause in Statute of Frauds relating to resulting trusts, or the doctrine of resulting trusts under that statute, but the property after the death of A. will belong to B. by force of the parol declaration. *Benson v. Townsend*, 1 Myl. & K. 506; 2 L. J., N. S., Ch., 215.

5. A., owner of estates in the Bedford Level, wishing to give his son a qualification as bailiff, for which, according to the Bedford Level Act, it is necessary to "have" 400 acres in the Level, wrote to the registrar of the Level, stating his wish, and asking him to find a qualification. The registrar, thereupon, without any further instructions, selected out of A.'s land the smallest lot that exceeded 400 acres, and sent to him a deed, by which he purported to convey it to the son in fee, in consideration of natural love and affection. This deed was at once executed by A., and registered. The son died soon after, without having ever heard of the transaction. It clearly appeared that neither A. nor the regi-

strar intended to consider the transaction to have the effect of making the son beneficial owner, nor intended any fraud or illegality. On a bill being filed by A. to establish his title to the land:—Held, that the letter written by A. to the registrar excluded any defence grounded on the Statute of Frauds. *Childers v. Childers*, 1 De G. & J. 482; 3 Jur., N. S., 1277; 26 L. J., Ch., 743; 5 W. R. 793. Reversing 3 Kay & J. 310; 3 Jur., N. S., 509; 26 L. J., Ch., 643; 5 W. R. 586.

Held, also, in the construction of the Bedford Level Act, that a mere legal estate was a sufficient qualification, and that, therefore, there was nothing illegal in A.'s design, no intention to represent the son as beneficial owner appearing. *Id*.

Held, that on the ground of trust, or of mistake, or on both grounds, the plaintiff was entitled to the relief sought. *Id*.

Held, that this conclusion was not affected by the circumstance, that the legal estate was outstanding under a mortgage in fee not known to the registrar. *Id*.

Semble, that even apart from the plaintiff's letter the Statute of Frauds would not have been a good defence. *Id*.

6. A plaintiff in the county court stated that the plaintiff assigned to the defendant the agreement for a lease of certain premises, but it was alleged that there was a parol agreement that part of the premises was to be held by the defendant in trust for the plaintiff. Evidence was given on both sides, but the judge, being of opinion that actual fraud had not been proved against the defendant, and there being no resulting trust in the assignment, decided that the Statute of Frauds was applicable, and dismissed the plaintiff, without coming to any distinct decision upon the evidence:—Held, that the judge ought to have decided that the Statute of Frauds had no application; and the Court, upon a consideration of the evidence, decided that the plaintiff was entitled to relief, and reversed the decree. *Booth v. Turle*, 16 L. R., Eq., 182.

III. ASSIGNMENT OF TRUSTS.

7. Sect. 9 of the 29 Car. 2, Statute of Frauds, refers to assignments by the *cestui que trust*. *Jerdein v. Bright*, 2 John. & H. 325.

II. Creation and Declaration of Trusts.

- I. *General Principles*, 6868.
- II. *Declaration of Intention without Transfer of Property*, 6870.
- III. *Declaration of Intention Conjoined with Transfer to Proposed Trustee*, 6873.
- IV. *Orders addressed by Creditor to his Debtor or Deposittee of Fund*, 6875.
- V. *Voluntary Covenants or Promises to Transfer or Assign*, 6876.
- VI. *Assignment or Settlement by Legal Owner by Deed*, 6878.
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- VIII. *Evidence and Burden of Proof*, 6881.
- IX. *Other Cases*, 6881.
- X. *Revocation*, 6885.
- XI. *Powers in Nature of Trusts*. See POWER, II. IX.
- XII. *Precatory Trusts or Absolute Interests in Personal Estate*. See WILL.
- XIII. *Gifts*. See DONATIO MORTIS CAUSA—GIFT—HUSBAND AND WIFE, V. V.
- XIV. *Voluntary Settlement*. See SETTLEMENT, XVII.
- XV. *Assignment of Choses in Action*. See EQUITABLE ASSIGNMENT.
- XVI. *Trusts for Creditors*. See CREDITORS' TRUST DEEDS.
- XVII. *What are Express Trusts within the Statute of Limitations*. See LIMITATIONS, STATUTE OF, X. XIV.
- XVIII. *Secret Trusts*. See CHARITY, V. XII.—WILL.
- XIX. *Devises Prevented by Promises made to Testator*. See WILL.
- XX. *Creation of Trusts by Reference*. See WILL.

I. GENERAL PRINCIPLES.

1. There are three requisites to constitute a trust, viz., sufficient words, a definite subject, and a certain object. *Crumys v. Colman*, 9 Ves. 323.

2. A trust is, where there is such a confidence between parties that no action will lie, but is a case merely for the consideration of Equity. *Sturt v. Mellish*, 2 Atk. 612.

3. Trusts may be constituted, not merely by direct declaration of trusts, but also by the constructive operation of the consequences following from the acts of parties. Thus Equity will enforce the execution of a trust, not only against the trustees themselves, but against all persons who obtain possession of the property affected by the trust, provided they had notice of it. *Pooley v. Budd*, 14 Beav. 34.

4. A declaration of trust has, in a court of equity, the same effect as a transfer of the legal estate, or as the vesting of a legal interest has in a court of law. *Collinson v. Patrick*, 2 Keen, 123; 7 L. J., N. S., Ch., 83.

5. An instrument may be effectual as a declaration of trust, or tantamount to a declaration of trust, though it does not contain the word "confidence" or "trust," or the word "trustee." *Kekewich v. Manning*, 1 De G. Macn. & G. 176; 21 L. J., N. S., Ch., 577; 16 Jur. 625.

This Court will under particular circumstances convert an imperfect gift into trust, although not supported by valuable consideration. *Id.*

Whatever rule there may be against volunteers, it does not apply to the case of a *cestui que trust* claiming against his trustee, for that which is considered a trust may be created gratuitously, and the absence of consideration for its creation is in general immaterial. *Id.*

6. It is immaterial for the purpose of establishing a trust of personal property, whether declared orally or in writing; the only question is as to the evidence of its existence. The fact of a person having acted upon the faith of the verbal instructions given to him is immaterial, the real consideration being what the party creating the trust has himself done

in the matter. *Peckham v. Taylor*, 6 L. T., N. S., 487.

7. Where an instrument is in form a complete and an immediate assignment, and of such a nature as to give the assignee a right as between him and the assignor to take or receive the property comprised in it presently, it will, although voluntary, be supported in equity, and considered as a perfect declaration of trust of such of the property as was not assignable at law. *Richardson v. Richardson*, 36 L. J., Ch., 653; 3 L. R., Eq., 686.

8. The Court, in order to give effect to voluntary settlements, requires, where the settlor is the legal owner, everything to have been done which is requisite to transfer the legal ownership; and where he is the equitable owner, clear and distinct evidence of a declaration of trust in favour of the donee. *Bentley v. Mackay*, 15 Beav. 12.

9. Some consols belonging beneficially to A. for life, with remainder to B., stood in the names of two trustees, of the survivor of whom B. was the representative. B. voluntarily assigned the stock to A., but no transfer was made. The Court refused either to declare B. a trustee of the stock for A. or to compel her to transfer it. *Beech v. Keep*, 18 Beav. 285; 18 Jur. 971; 23 L. J., Ch., 539; 2 W. R. 316.

The distinction between an assignment for the benefit of a volunteer, and a declaration of trust in his favour, though very thin, yet pervades the cases. *Id.*

10. In order to render a voluntary settlement valid and effectual, the settlor must do everything which, according to the nature of the property comprised in the settlement, is necessary to transfer the property, and render the settlement binding upon him; as by actually transferring the property to the persons for whom he intends to provide, or to trustees for the purposes of the settlement, or by declaring that he himself holds the property in trust for those purposes; and if the property is personal the trust may be declared either by writing or by parol; but there is no equity to protect an imperfect gift. *Milroy v. Lord*, 8 Jur., N. S., 806; 31 L. J., Ch., 798; 7 L. T., N. S., 178; 4 De G. F. & J. 264.

If, however, the gift is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust. *Id.*

11. It is immaterial by what form of conveyancing, whether by assignment, declaration, etc., the equity of a fund be conveyed. Any of such modes, if everything be done that can be done, and if the intention be clear, will convey the equitable interest in the fund. But a covenant to convey the fund in a certain contingency will not, when that contingency arises, be held to amount to a conveyance of the equitable right. A covenant by a settlor to transfer, convey, and assure property (if any) which he might thereafter acquire, if of a certain value, does not amount either to an imperfect declaration of trust, or to an incomplete assignment of the property (if any) which afterwards came to be acquired, upon which a court of equity will operate. *Wilkinson v. Wilkinson*, 4 Jur., N. S., 47.

12. Trust to take effect, according to the whole intent or not at all. *Mogg v. Hodges*, 2 Ves. 54.

1. It has long been settled that the trustees and *cestuis que trustent* under a voluntary settlement cannot compel the settlor to perform any further act than he has already done, to render such a settlement operative. *Denning v. Ware*, 22 Beav. 184.

2. A manor having been conveyed upon trust for certain persons, their heirs and assigns, being tenants of certain messuages, etc., an assignee of one of those messuages was held not to have a right to the benefit of those trusts, because none of the assurances by which the property was conveyed to him expressly, mentioned them. *Hutchinson v. Morritt*, 3 Y. & Coll. 547.

3. When a trust is declared of land for the person entitled thereto, no party can avail himself of this trust without establishing aliunde that he is entitled thereto. *Walters v. Webb*, 18 W. R. 86.

Charge or Trust.] 4. Every charge on an estate does not create a trust, although it imposes a burden; but it may create a trust, depending on the nature of the charge. If the gift is an express one, and if the person taking the estate is bound to give effect to the gift as a trustee, then it is an express trust. Where a testator gives an estate to one, subject to a charge, the person to pay the charge is the person who is liable to the burden, and this in the case of a charity impresses him with the character of trustee for the charity. *Commissioners of Charitable Donations v. Wybrant*, 2 J. & L. 182; 7 Ir. Eq. R. 580.

5. Testator devised freeholds and copyholds to his son for life, and after his decease to his first and other sons, paying 10*l.* a year M. C. for life:—Held, that the word "paying" created a charge and not a trust. *Hodge v. Churchward*, 16 Sim. 71.

Condition or Trust.] 6. Testator gives to his son a public-house and stock in trade, on condition that he pay debts and a legacy. This is a condition and not a trust. If, therefore, the son accept the bequest, he is bound to pay the debts, although they amount to more than the value of the property. *Messenger v. Andrews*, 4 Russ. 479.

7. A testatrix, after giving several legacies, some of which were legal and others were void, as being contrary to the Mortmain Act, 2 Geo. 2, c. 36, proceeded as follows: "I give, devise, and bequeath to W. all my real estates, both freehold and copyhold, and all the residue of my personal estate and effects, to hold to him, W., his heirs, executors, administrators, and assigns, for ever, upon this express condition, that if my personal estate should be insufficient for the purpose, he or they do and shall, within twelve months after my decease, pay and discharge all and every the legacies bequeathed. And I feel confident that he will comply with my wish, it being my particular desire that all the legacies shall be paid. And I charge and make chargeable all my real and personal estate with the payment of the legacies and bequests." The testatrix nominated and appointed S. and C. executors and trustees of her will; and the will contained clauses for the protection of trustees. The personal estate was insufficient for the payment of the legacies, and W. did not, within twelve months after

her decease, pay any of them:—Held, that the words "upon express condition" did not create a condition for breach of which the heir might enter; but created a trust which W., taking the legal estate, would in equity be bound to perform. *Wright v. Wilkin*, 2 B. & S. 232; 31 L. J., Q. B., 196; 10 W. R. 403; 6 L. T., N. S., 221.

8. A testator left all his estate and property, real and personal, except such parts as were otherwise specifically devised, upon trust for the several uses, intents, and purposes therein-after mentioned. He gave to his wife an annuity of 400*l.* to be paid to her out of the profits of his trade, to be carried on by his sons L., J., and S. in trust for the benefit of his wife and children, as in his will directed, "as likewise out of all profits arising from all and every part of my property whatsoever." He left to L., J., and S., on their faithfully performing all matters therein directed, and carrying on his trade, the houses in which he carried it on, and all his stock-in-trade, which he ordered to be increased by the sale of certain lands. He left pecuniary legacies to his children, and house property and the chattel lands of S. to his wife for life, and after her death the houses to J. and S., and the lands of S. to L.; and he directed that all the bequests should "stand good to them, L., J., and S., only on condition of paying, etc., the several legacies, and discharging with fidelity the different trusts by this will committed to them;" and that a schedule of all his property should be taken, and copies given to his wife and all his trustees and executors, and that the property therein contained should go to L., J., and S., on paying and discharging the legacies and trusts in his will, provided that if L., J., and S., or any of them, should refuse to carry on his business, such of them as should so refuse should be paid 5,000*l.* and no more:—Held, that L., J., and S. took the property left to them upon an express trust. *Foot v. Cunningham*, 11 Ir. R., Eq., 306.

9. Little stress can be laid on the use, in a will making a gift to a charity, of the word "condition;" it may mean the same as "intent and purpose," and may be employed to create a trust and nothing more. *Att.-Gen. v. Wax Chandlery Co.*, 42 L. J., Ch., 425; 6 L. R., H. L., 1; 21 W. R. 361; 28 L. T. 681. Reversing 5 L. R., Ch., 503; 39 L. J., Ch., 782; 23 L. T., N. S., 173; 8 L. R., Eq., 452. And see *Merchant Taylors' Co. v. Att.-Gen.*, 40 L. J., Ch., 545; 6 L. R., Ch., 612; 25 L. T., N. S., 109; 19 W. R. 641. Affirming 19 W. R. 39; 23 L. T., N. S., 480.

Houses were devised to a city company for the intent and purpose and upon the condition, "that the company yearly distributes 4*l.* among the poor of parish A., 2*l.* among the poor of parish B., 3*s.* among the poorest members of the company, and 5*s.* between the master and wardens of the same company." The rest of the profits of the houses the testator willed should "be bestowed upon the reparations of the houses and tenements." If the company should neglect to do the things directed by his will, the testator willed, that his next-of-kin should enter on and hold the houses for ever, upon the condition that he and his heirs should do the things. It was proved, that eight years before the date of the

will, the rents out of which these payments were directed exceeded the amount of the payments by only 13s.; sixteen years after that date it was found by inquisition, that the annual value of the property was 16l., or more than double the amount of the payments. The rents having increased to an amount considerably larger than was necessary to meet the payments mentioned in the will:—Held, that this was not a gift upon condition, but upon trust, and as part of the rents was given for charitable purposes, the residue being directed to be applied in maintaining the property, the whole of the rent must be taken to be specifically dedicated to charitable purposes, and not to the purposes of the company, and therefore the whole increased rents must be devoted to charitable purposes. *Id.*

II. DECLARATION OF INTENTION WITHOUT TRANSFER OF PROPERTY.

1. A mother entitled to a considerable property, under the will of a relation, in a conversation with the executor of that relation expressed an intention to make a settlement of part of that property, which was standing in his name, upon her daughter; and requested the executor to instruct her solicitor to prepare such a settlement. On the prepared settlement being brought to her for execution, she had changed her mind and refused to sign it:—Held, that her intention expressed in the conversation with the executor of her relation, did not amount to a declaration of trust, although the property was personal estate. *Bayley v. Boulocott*, 4 Russ. 345.

2. A letter written by the trustee to the solicitor of a party who had advanced money for the purposes of the trust, stating that he (the trustee) would exercise all or any of the powers reposed in him by the trust-deed, for the purpose of securing the sum so advanced, will not give such creditor a *locus standi* in equity to enforce those trusts for his own benefit. *La Touche v. Lucan (Earl)*, 2 Dr. & Wal. 432; 7 Cl. & F. 772. S. C. *nom. Lucan (Earl) v. La Touche*, 2 Dr. & Wal. 271.

3. Where the owner of an estate charged with an annuity in favour of the lunatic, had acknowledged that she had in hand certain arrears of the annuity, which she was ready to pay to any person on his behalf who could give a good receipt for it:—Held, that this was a declaration of trust, which entitled the curator to sue in equity for those arrears. *Scott v. Bentley*, 1 Kay & J. 281; 1 Jur., N. S., 394; 24 L. J., Ch., 244.

4. Where a person beneficially entitled to the absolute interest in stock standing in his name deliberately and advisedly executes a deed, declaring himself a trustee of the stock for certain purposes to take effect immediately, and communicates and delivers the deed to the *cestui que trust*, this Court will not decline to enforce the trusts against their author because he executed the deed voluntarily or without consideration. *Kekewich v. Manning*, 1 De G. M. & G. 176; 21 L. J., N. S., Ch., 577; 16 Jur. 625.

An instrument may be effectual as a declaration of trust, or tantamount to a declaration of trust, although it does not contain the word

"confidence," the word "trust," or the word "trustee." *Id.*

This Court will, under particular circumstances, convert an imperfect gift into a trust, although not supported by valuable consideration. *Id.*

5. By a marriage settlement property was settled after the decease of husband and wife upon trust for the children of the marriage as the husband and wife should jointly appoint, and, in default of appointment, to the survivor of husband and wife. There was no issue of the marriage. By a deed-poll the husband and wife appointed the property to the three daughters of the wife's sister. The wife survived, and after the death of her husband appointed a new trustee of the trust funds; and in letters to her sister spoke of the deed as standing, and gave a precise statement of its purport and intended effect:—Held, that the wife had executed a valid declaration of trust in favour of the three daughters of her sister. *Re Bennett*, 17 L. T., N. S., 438.

6. A testator bequeathed 2,000l. on certain trusts, and he empowered his executor, who was also his residuary legatee, to retain the amount in his hands uninvested, he paying interest thereon. After his death, the executor being satisfied that the testator intended to bequeath 3,000l. and not 2,000l., promised to make it up to 3,000l.; he made no investment, but continued to pay interest on the 3,000l. to his death:—Held, that there was a complete voluntary trust as to the additional 1,000l. which the Court would enforce. *Gee v. Liddell*, 35 Beav. 621.

7. The consent of a married woman had been given before commissioners, for the transfer and payment to her husband of stock and cash standing in court to her separate account:—Held, that this did not amount to a declaration of trust, and that it was competent to her, at any time before the transfer had been completed, to retract her consent. *Penfold v. Mould*, 4 L. R., Eq., 562.

8. A person, who occupied a large farm under a lease, and who had by the outlay of capital considerably increased its value, having fallen into difficulties, the lease was surrendered by the trustees, to whom he had assigned it and his effects, to his landlord. His wife's brother then applied to the landlord to become tenant for the remainder of the lease upon the same terms—"with the view," as he stated in the application, "to benefit his sister and her unfortunate family;" and with that view, as the landlord stated in the correspondence and also in his evidence, the lease was granted, and he was allowed for the same purpose, contrary to the usual practice of the same landlord, to have a co-lessee, who was the actual occupier, and also to sublet a part, by which means he derived a clear 100l. a-year above the rent, which was paid by the co-lessee:—Held, in a suit against the executor of the brother, that by means of the letters (which were a sufficient writing within the Statute of Frauds) and the circumstances, there was a trust as to this 100l. a year for the wife of the original tenant and her children as joint tenants. *Morton v. Temart*, 2 Y. & Coll. C. C. 67.

9. A. and B., partners, being indebted to C. and D., the plaintiffs, A. by letter proposed to assign a claim which A. and B. had upon the

estate of P., then the subject of a suit in Chancery. Certain properties of P., having been sold under a decree, were purchased by A. in his own name, but, as he alleged in letters to C., in trust for C. and D. A., having shortly afterwards committed an act of bankruptcy, executed deeds declaring that he held his trust for C. and D. His assignee having obtained a judgment in ejectment against part of the premises, a bill was filed praying that he should be restrained from executing an *habere*; that he should be declared a trustee for the plaintiffs as to all the premises; and that he should be directed to convey to them:—Held, that the trust was clearly established, and that the plaintiffs were entitled to the conveyance sought. *Johnson v. Perrin*, Hayes 322.

1. R. signed a memorandum containing these words:—"I authorise my brother to claim as his own, after my death, 150*l.* out of the money lying in the bank at Carlisle, for the service rendered me during my lifetime." R. retained the possession of the document until his death:—Held, that the instrument was a valid declaration of trust, and that the fact of its remaining in R.'s possession up to the time of his death was immaterial. *Armstrong v. Timperon*, 19 W. R. 558; 24 L. T., N. S., 275.

2. D., who was possessed of leasehold business premises and stock-in-trade, shortly before his death purported to make a voluntary gift in favour of his grandson E., who was an infant and who assisted in the business, by the following memorandum, signed and indorsed on the lease: "This deed and all there belonging I give to E. from this time forth, with all the stock-in-trade." The lease was then delivered to E.'s mother on his behalf:—Held, that there was no valid declaration of trust of the property in favour of E. *Richards v. Delbridge*, 18 L. R., Eq., 11; 43 L. J., Ch., 495; 22 W. R. 584.

3. A married woman executed a voluntary settlement containing a recital that she had paid 2,000*l.* to the trustee, and declaring trusts of that sum. In point of fact she had not paid and never did pay any money to the trustee. The trustee also executed the deed:—Held, that neither the settlor nor the trustee incurred any obligation whatever in respect of the 2,000*l.* *Marler v. Thomas*, 43 L. J., Ch., 73; 17 L. R., Eq., 8; 22 W. R. 25.

4. A testator entered in a memorandum-book, and signed memorandum, that he had decided to invest the future proceeds of an annuity which had been absolutely assigned to him by his second son F., and that he intended to leave the proceeds at his death to F.'s daughter. An account, also in the testator's handwriting, was found, of the investments of the annuity, "from the period that I determined thus to appropriate this money." On his deathbed he referred his eldest son to the account-book, and said that he wished the accumulations to be given to the daughter of F., and the annuity at his death to revert to F. The annuity and accumulations were undisposed of by the will:—Held, that there was no declaration of trust, and that the annuity and accumulations went to the next-of-kin. *Re Glover*, 2 John. & H. 186.

5. A memorandum of a voluntary gift in this form, "I hereby give and make over to M an Indian bond, value 1,000*l.*," was signed

by S., and given by him to M., without handing over the bond. S. died, and the residuary legatees under his will claimed the bond:—Held, that the memorandum was a good declaration of trust in favour of M., and that he was entitled to the bond. *Morgan v. Malleon*, 10 L. R., Eq., 475; 39 L. J., Ch., 680; 23 L. T., N. S., 336; 18 W. R. 1125.

6. Expressions in letters under which a testator was held to have constituted himself a trustee of a fund for the benefit of his children then existing, reserving to himself at the same time the control *quâ* trustee over the fund, but no further control over it as owner. *Vandenberg v. Palmer*, 4 Kay & J. 204.

A. V., a merchant in China, directed his correspondents in London to transfer 1,000*l.* from his tea account, and employ it in exchange transactions for the benefit of his children. In subsequent letters he wrote to the same correspondents that "he had declined giving any opinion as to the reinvestment of the fund, as he considered he had no further control over it, as it belonged to his children, and that he had appropriated it to them, and his correspondents were to consider it as theirs." The correspondents accordingly opened a separate account, headed, "A. V., Esq., exchange account on account of children," previously informing him of their intention so to do:—Held, that by the first letter a trust was well created in favour of the children, although the fund was still so far in the control of A. V. as to be liable to his drawing, and notwithstanding A. V., in one of the letters, had desired his correspondents to consider it as subject to the order of his executors in the event of his death. *Ib.*

7. This Court will not enforce the transfer of stock in favour of a volunteer, to whom it has been merely assigned. *Beech v. Keep*, 18 Beav. 285; 18 Jur. 971; 23 L. J., Ch., 539; 2 W. R. 316.

Some consols belonging beneficially to A. for life, with remainder to B., stood in the names of two trustees, of the survivor of whom B. was the representative. B. voluntarily assigned the stock to A., but no transfer was made. The Court refused either to declare B. a trustee of the stock for A., or to compel her to transfer it. *Ib.*

The distinction between an assignment for the benefit of a volunteer and a declaration of trust in his favour, though very thin, yet pervades the cases. *Ib.*

8. A father who had been in pecuniary difficulties, and was indebted to his son, effected a policy on his own life, in the names of the son and another person, as trustees for the daughters of the father, and paid the premiums. The son accepted the trust, and on the father's death, some years afterwards, he, with the sanction of his co-trustee, received the policy moneys, and purchased from them debentures of a banking company, of which he was a director, and to which he was indebted. The company was wound up, and the son became bankrupt. The same person was appointed official manager of the company, and assignee under the son's bankruptcy. On the daughters claiming to be creditors of the company to the amount of the debentures:—Held, first, that, notwithstanding the state of the accounts between the father and the son,

the trust for the daughters ought to be assumed, for the purposes of the application, to have been well created. *Boyd's case*, 1 De G. & J. 223; 3 Jur., N. S., 897; 26 L. J., Ch., 737. Affirming Jur., N. S., 554.

Held, secondly, that the trust was not determined by the receipt of the money, and the investment in the debentures. *Id.*

Held, thirdly, that the right of the daughters to the debentures was not affected by the state of the accounts between the bankrupt and the company. *Id.*

Held, fourthly, that, there appearing no probability of this apparent state of things, on the existing evidence, being altered by further investigation, the official manager was not entitled to have an issue or further inquiry directed. *Id.*

1. A direction was given by C. to the firm of which he was the head, that an annual reserve of interest upon certain mortgaged estates should be placed to an account entitled "C., for himself, M., and S."—the same to be subject to his control alone, and in the absence of other instructions from him to be considered applicable towards liquidating the account in respect of the mortgaged estates, for which C., M., and S., as proprietors, were responsible. Upon a sale of the mortgaged estates after M.'s death more than sufficient was produced to pay the debt due from the three proprietors. Subsequently to the sale, C. and S. having received each one-third of the reserved interest fund, C. directed the remaining third to be remitted to his agents, "subject to my orders, my intention being to hand it over to the family of the late M. in such manner as I may think proper." C. died without taking any further steps as to this remaining third:—Held, that the fund had not been so permanently impressed with a trust in favour, as to one-third, of M. during his lifetime, that he, or his executors after his death, could have called for a transfer; and that the subsequent declaration by C. of an intention to hand it over to M.'s family did not constitute a complete and binding declaration of trust in their favour, to which the Court would give effect. *Forbes v. Forbes*, 6 W. R. 92; 3 Jur., N. S., 1206.

2. E., a partner in the firm of S., E., & Co., previously to April 1854, advanced to the firm moneys, some of which were standing in the books to the credit of an account intitled, "E.'s Trustee Account, and others to his private account." M. and C. had in that month sums belonging to them standing in the books of the firm to their credit. On the 4th April 1854 E. transferred 2,700*l.* from his trustee account to M. and C.'s account, by entries in the books of the firm, and on the same day S., E., & Co. signed a promissory note for that amount, which bore interest at 5*l.* per cent., and gave it to E., who placed it in an envelope, upon which he wrote, "This note of hand stands to the credit of M. and F. in the books of S., E., & Co., and is to be the property of Mrs. E." E., in the presence of Mrs. E., told M. that he had a security from his firm for his wife's money; that the note of hand securing it was in the joint names of her and her sister C., and that they were to recollect that it was his wife's money, and not theirs. E., in September 1854, without the knowledge or con-

sent of Mrs. E., or of M. and C., transferred the sum from M. and C.'s account to his own "trustee account," and at the same time wrote across the above memorandum, "The within amount of 2,700*l.* is transferred to E.'s trustee account, but it is to be considered the private property of Mrs. E." E., by will, dated in 1853, after bequeathing an annuity to his wife of 1,000*l.*, gave the residue of his estate to his niece. No reference was made to the 2,700*l.* E. died in 1856, and at his decease only the sum of 2,661*l.* 18*s.* 6*d.* was standing to the credit of his "trustee account" in the partnership books. On a bill filed by Mrs. E., the Court declared that a valid trust had been created for her sole and separate use, and that she was entitled to the 2,700*l.*, with interest at 5*l.* per cent. from the death of her husband. *Evans v. Jennings*, 4 Jur., N. S., 551; 6 W. R. 616.

3. Mere declaration of trust by the owner of property in favour of a volunteer is altogether inoperative, and a court of equity will not interfere in such a case; aliter where there has been a change of legal ownership, and so a trust is constituted. *Scates v. Maude*, 6 De G. M. & G. 43; 1 Jur., N. S., 1147; 25 L. J., Ch., 433; 3 W. R. 527; 1 Jur., N. S., 533.

Letters written by a mortgagee to the mortgagor and persons interested under him, containing the expressions, "I now give this gift, to become due at my death, unconnected with my will;" "I hereby request my executors to cancel the mortgage deed, etc.;" "I again direct and promise that my executors shall comply with my former request; that is, to cancel all deeds and papers I may have chargeable on the R. estate":—Held, not to operate either as a declaration of trust or as a valid gift. *Id.*

Semble, the letters were testamentary, and could have no effect until proved in the ecclesiastical court. *Id.*

4. A parol declaration of trust in favour of a volunteer may be valid, and may be enforced in equity. The dictum in *Scates v. Maude* (6 De G. M. & G. 51; 1 Jur., N. S., 1147), that a declaration of trust in favour of a volunteer is invalid, is not good law. *Jones v. Lock*, 1 L. R., Ch., 25; 35 L. J., Ch., 117; 13 L. T., N. S., 514; 11 Jur., N. S., 913; 14 W. R. 149.

The father of a child, nine months old, put into its hands a cheque for 900*l.*, saying, in the presence of his wife and the nurse, "I give this to baby; it is for himself, and I am going to put it away for him." He then took it back saying again that he was going to put it away for him. About the same time he told his solicitor that he intended to add 100*l.* to the 900*l.*, and invest it for the benefit of his son. The father died suddenly a few days afterwards, without having made any provision for the child, and the cheque was found in his possession:—Held, that there was no complete gift of the cheque to the infant, and no valid declaration of trust in his favour. *Id.*

5. T. was possessed of certain bonds, found in a box at his house after his death; there was an indorsement on the wrapper enclosing them that five of them were the property of H. D., and this was signed by T. The key of the box was kept by H. D., who had also the general custody of T.'s property, and she by her answer

alleged that the bonds were placed in her custody to the intent that she might have the beneficial interest in them. Upon the question whether T. was a trustee of the bonds for H. D., and whether the custody of them was a delivery of them by virtue of the indorsement, and constituted a gift *inter vivos*.—Held, that he was not a trustee, and that there was no sufficient delivery, and no sufficient gift *inter vivos*. *Trimmer v. Danby*, 4 W. R. 399; 25 L. J., Ch., 424.

1. A father who was the owner of a share in a colliery, on the 11th February 1865 wrote to his daughter as follows:—"I have another present to make shortly, one share of Ryhope colliery . . . and you may now consider that you have this yourself from 2nd January to receive dividends upon. I am also giving to Sarah one, the same." On the 17th he attended a meeting of shareholders in the colliery, and signed the following entry in the minute book:—"That Mr. N.'s" (his own) "proposition of transferring two of his shares to the parties undernamed be agreed to, viz." (the daughter and her sister). This signature was not sufficient, according to the regulations of the deed of partnership, to pass the property in the shares. On the 25th February he again wrote to his daughter:—"I have arranged and made all right with the shares for you and Sarah, and dividends will be sent from 2nd January." On the 4th March the testator wrote to her:—"Next meeting (private) we will be enabled to make another dividend, when you and Sarah will be informed." On the 16th March he sent her a cheque for the first dividend, with a letter thus:—"Herewith I enclose cheque for 37l. 10s., which you can receive at the bank . . . first dividend, made this day." On the 18th March he again wrote to her as follows:—"I have yours in reply to the receipt of dividend—long may you live to enjoy it;" and in the same letter, after referring to the meeting of the 17th January he further said: "Well, when I got in, I openly at once asked the question in the presence of" (four persons whom he named), "I was about to give to my two daughters one share each, and which is the way to do it? They were all pleased. It was entered in the minutes of the book":—Held, that these expressions in letters, signature of minute, and gift of dividend, did not amount to a declaration by the testator, nor to proof of an intention and determination on his part, that he would hold the shares for his daughter; but that the testator, having the desire and intention that she should, from and after the 11th February 1865, have the shares as her property, failed to fulfil that desire, and complete that intention. *Heartley v. Nicholson*, 19 L. R., Eq., 233; 44 L. J., Ch., 277; 22 L. T., N. S., 822.

2. In order to give validity to a declaration of trust of property, it is necessary that the donor or grantor should have absolutely parted with his interest in the property, and have effectually put such interest beyond his own reach. *Warriner v. Rogers*, 16 L. R., Eq., 340; 42 L. J., Ch., 581; 21 W. R. 766; 28 L. T., N. S., 863.

An unmarried lady, possessed of large property, being under obligations to her servant, called him one day into her room and showed him a box which, having opened it and put a

note inside, she locked and handed it to him, telling him to take it into his possession, that it would be of service to him some day, but that he must not open it till after her death. She herself kept the key. She afterwards made her will, whereby she gave the residue of her real and personal estate to a stranger in blood. After her death the box was opened, and found to contain a paper writing dated and signed by the testatrix, and addressed to the servant, to the effect that the contents of the box were a deed of gift to him of certain real and personal estate therein specified and described. In the box were also found title deeds relating to an estate, M., not mentioned in the paper writing, and some other papers, but nothing answering the description of a deed of gift. After the testatrix's death there was found by the servant, in an outhouse, to which the testatrix and he alone had access, another paper writing, dated the day after the date of the former paper, and also signed by the testatrix, and addressed to the servant, to the effect that the title deeds of the real property mentioned in the former paper were to be found in a particular repository, to be handed over to him "free, and all expenses to be paid out of the bulk, and writings of M.":—Held, that these papers were of a testamentary character, and did not amount to a valid declaration of trust in favour of the servant. *Id.*

Imperfect Gifts.] See GIFT.

See also SETTLEMENT, XVII. v. 2.

III. DECLARATION OF INTENTION COMJOINED WITH TRANSFER TO PROPOSED TRUSTEE.

3. A person, being at the time indebted, effects a policy of assurance on his own life. By deed he assigns the policy, and all benefit thereof, to a third party, by way of mortgage, and causes the mortgagee to write to him a letter, declaring that, after payment of the mortgage debt and interest, he held the surplus upon trust for M., a third party. The mortgagee then writes a letter to M., explaining this arrangement for her benefit, and inclosing the mortgagee's letter, declaring the trust of the surplus:—Held, that this would be *prima facie* a good trust for M.; but, *semble*, it would be void against creditors of the insured party whose debts were due at the time of the declaration of trust. Form of order. *Re Magawley's Trust*, 5 De G. & Sm. 1; 15 Jur. 1005.

4. A partner in a bank opened an account in one of the books of the firm, which was headed as follows: "Dr. Mrs. L. S. (the name of his wife), for the education of Bryan, Lavinia, Herman, and Robert S. (the names of his infant children), Cr.," and he caused an accountable receipt to be signed by his co-partner, on behalf of the firm, purporting to be for 800*l.*, received from his wife for the education of his children, and that sum to be placed to the credit of the account so opened, and his private account with the bank was debited with it:—Held, that the transaction was a

complete and irrevocable declaration of trust in favour of the children. *Stapleton v. Stapleton*, 14 Sim. 186.

1. A person voluntarily gave his promissory note to trustees for his natural child, and deposited with them the title deeds for the purpose of carrying into effect his intention as to the promissory note:—Held, that a valid trust had been created. *Arthur v. Clarkson*, 35 Beav. 458; 14 W. R. 754.

2. On the 13th November 1857 C., being in his last illness, made payable to his brother G., whom he afterwards appointed one of his executors, a promissory note for 500*l.*, and at the same time stated that he was desirous of making some provision, otherwise than by will, for the plaintiff. C. on the 16th November made his will, and directed his executors to convert the residue of his estate into money. G., after the death of C., mentioned that he had left 500*l.* for the benefit of the plaintiff, and he made several quarterly payments to her in respect thereof, and took her receipts, and then discontinued the payments, on the ground that he was not in law or equity bound to make them:—Held, that G. was a trustee of the note for the plaintiff, and that in the administration of the estate to C. the plaintiff might have liberty to prove for the amount. *Lloyd v. Chune*, 6 Jur., N. S., 1365; 3 L. T., N. S., 366; 2 Giff. 441.

3. In 1839 B. placed in the W. Bank a sum of 40*l.*, of his own moneys, in the name of J. P., the defendant, stating at the same time to the bank clerk, "I intend this for B. P." (the plaintiff, who was his illegitimate son). The settlor afterwards bequeathed other property to B. P., and died, having retained the property in his own possession up to the time of his death, and received the interest on the deposit. J. P., the defendant, obtained possession of the bank receipt and of the money, which he retained for his own use, denying the title of the plaintiff:—Held, on a claim by B. P., that the trust was well declared by parol in 1839; and order made accordingly, with costs, against J. P. *Petty v. Petty*, 17 Jur. 646; 22 L. J., Ch., 1065.

4. If property is vested in a trustee under a voluntary instrument, the Court will operate on that property, and compel the trustee to execute the trust; but where property is not so vested, the Court will not act against the author of the trust. *Walrond v. Walrond*, 4 Jur., N. S., 1099.

5. M. was adopted by C., her deceased mother's first cousin, and lived with her twelve years. C. then wrote to T., informing him of her intention to invest 1,800*l.* on mortgage in his name, saying, "It is, after six months of my decease, dear M.'s property." The next day she instructed her solicitors, by letter, to prepare the mortgage, inclosing a cheque for the amount, on the counterfoil of which she wrote, "In trust for M." Twelve days after, she had an interview with T., of which she entered this memorandum in her diary, "T. came, and agreed to take charge of 1,800*l.* for dear M.":—Held, that these several documents, in the handwriting of C., combined with the relationship and adoption of M., constituted a complete and final declaration of trust in favour of M., which could not admit of any parol variation by T.'s present recollec-

tions of what passed at the interview. *Re Cane*, 36 L. J., Ch., 744; 17 L. T., N. S., 112.

6. B., in 1842, transferred to three persons a debenture, without any declaration of trust other than an expression in a letter written by him to his solicitor shortly before the transfer, in which the three persons were named as trustees, and the trusts of a proposed settlement of the debenture were stated to be "for my niece C. M. and her children":—Held, that a valid trust was declared by the letter in favour of C. M. for life, and afterwards of her children as joint tenants. *Re Bellasis*, 12 L. R., Eq., 218; 24 L. T., N. S., 466; 19 W. R. 699.

The transferees of the debenture were already trustees of a will, which contained limitations for the benefit not only of C. M. and her children, but of the issue of deceased children, and from contemporaneous entries in a solicitor's book it appeared that, after the date of the letter, B. said he had made up his mind to transfer to the same three persons, "without stating any trust or condition;" also that B. was advised to take a letter from them that they held the debenture upon the same trusts as the will; but no trace of any such letter appeared. The trustees paid the income to C. M. during her life, and upon her death transferred the fund into court. There was issue of deceased children of C. M.:—Held, that a trust for the issue of the deceased children had not been sufficiently declared. *Id.*

7. It is immaterial for the purpose of establishing a trust of personal property, whether declared orally or in writing; the only question is as to the evidence of its existence. The fact of a person having acted upon the faith of the verbal instructions given to him is immaterial, the real consideration being what the party creating the trust has himself done in the matter. *Peckham v. Taylor*, 6 L. T., N. S., 487.

A lady refused to make a will, but told D. that she wished to dispose of all her property in her lifetime in a manner, which she stated to him. She gave him some money to carry out her instructions, and executed a power of attorney for the sale by him of stock belonging to her. D. in her lifetime distributed a part of the money given to him; but she died intestate before the stock was sold. After her death other moneys came to the hands of D., and there was also money in the possession of P. belonging to the deceased. Upon a bill filed to obtain a declaration whether a valid trust had been created of the whole, or any, or what part of the intestate's property, or in the alternative for the administration of her estate, in accordance with the above principles:—Held, that there was a valid trust of so much of the property as she gave to D. in her lifetime; but not as to the rest. *Id.*

8. A., being about to leave this country, indorsed a promissory note due to B., and directed B. to recover the sum thereby secured and hold the same until A. should write for it; but in case A. should die before the amount was recovered, then to hold the amount in trust for M. It was subsequently arranged between A. and B. that B. should retain, out of the sum secured by the note, a debt due

from A. to B. A. died before the note was paid to B.:—Held, that no irrevocable trust was created in favour of M. *Maguire v. Dodd*, 9 Ir. Ch. R. 452.

Held, also, that A.'s personal representative was entitled to recover at law, but not in equity, from B. the amount recovered by B., on foot of the note, subject to a deduction for the debt due by A. to B. *Ib.*

IV. ORDERS ADDRESSED BY CREDITOR TO HIS DEBTOR OR DEPOSITEE OF FUND.

1. Where, on a debt becoming payable, the creditor, by parol communication through a third person, desired the debtor, the defendant, to hold it in trust for the plaintiff, which he consented to do, and paid over a part, an injunction was granted to restrain the payment by the defendant to the administrator of the creditor in a suit for establishing the trust; *sed quære*, if sufficient to create a trust. *M'Fadden v. Jenkins*, 1 Hare 458; 11 L. J., N. S., Ch., 281; 6 Jur. 501. Affirmed on appeal, and trust, though voluntary, held binding on creditor's estate. S. C. 1 Ph. 153; 12 L. J., N. S., Ch., 146; 7 Jur. 27.

2. A creditor directed his debtor to transfer the debt in the debtor's books to the joint account of himself, the creditor, and his wife, stating that he wished her to have it after his death, and he cancelled the debtor's promissory note which he held for the amount of the debt, and took a new one in the joint names of himself and his wife. The wife survived:—Held, that there had been a trust created in her favour, and that she was entitled as survivor to the note. *Gosling v. Gosling*, 3 Drew. 335.

3. P., being indebted to J. in a sum of 300*l.*, to be repaid by instalments, drew up, but did not sign, a memorandum, which was signed by J., by which J. directed the instalments to be invested as therein mentioned, and the dividends to be paid, after the decease of J., to and among the children of P. M. and E. his wife; and when the youngest attained the age of twenty-one years, then the whole fund was to be divided among such children. If any child died before the youngest attained twenty-one years, his share was to go to the survivors in the same manner. This memorandum was never made known to the parties interested, but only to P. and J. Afterwards J. executed another memorandum, in effect revoking the direction in the first memorandum for investing the instalments, and directing payment of the instalments to herself:—Held, that the first instrument amounted to a full and complete declaration of trust, and was, therefore, not revocable. *Paterson v. Murphy*, 17 Jur. 298; 22 L. J., Ch., 882.

P., the trustee, had paid several instalments to the testatrix after the date of the second memorandum:—Held, that the *cestui que trust* under the first memorandum could not recover these payments in the present suit, which was a suit by P., the executor, for the administration of the estate of J. *Ib.*

4. A testator, who had lent 300*l.* to S. on his promissory note, payable on demand, directed him, after her death, to pay the interest to her sister for life, and afterwards to divide the principal among her sister's children, which S.

agreed to do. She died without having demanded payment of the note, which was found, uncanceled, among her papers at her death:—Held, that as she had not parted with her legal title to the money, the direction did not create a trust. *Re Caplen, Bulbeck v. Silvester*, 45 L. J., Ch., 280.

5. Where the testatrix, having by will given to the defendant a legacy of 100*l.*, afterwards gave a cheque on her bankers in favour of J. C. for 150*l.*, with verbal directions to apply so much of it as, with the legacy, would purchase a share in a railway company, which she wished to give instead of the legacy, but that she did not wish to alter her will; after the amount of the cheque was credited to J. C., and the account of the testatrix was thereby overdrawn to that amount; in a suit for the administration:—Held, that no trust was created by the transaction in favour of the legatee in the sum of 150*l.* *Hughes v. Stubbs*, 1 Hare 476; 6 Jur. 831.

6. Where A., having certain funds standing to his credit at his bankers', by letter directed them to carry some parts of such funds to the account of certain persons as trustees for his wife, and, after her decease, for his son, and other parts thereof to the account of certain persons as trustees for his son; and such sums were accordingly carried over by the bankers to the account of such persons in their books, and the dividends were from time to time carried to the same accounts, but the testator never communicated the facts to the trustees, and there was some evidence that the testator had directed the transfer under an impression that he should be able by that means to evade the legacy duty, and that he had shown an intention to exercise some acts of ownership over the funds: the Court held, that the appropriations were void, and that the testator might at any time have revoked them. *Gaskell v. Gaskell*, 2 Y. & J. 502.

7. Where an instrument set up as a declaration of trust, or a gift, shows that something more must be done, and is contemplated by the person said to have made the declaration of trust or gift to be done in order to perfect and complete it, the Court will not give effect to the instrument as either a declaration of trust or a gift, but will regard it as merely a promise of a future bounty, having no direct or immediate operation. Accordingly, where a mortgagee gave to the mortgagor a paper to the following effect, viz., "I now give to N. (the mortgagor) this gift, to become due at my death, unconnected with my will. I hereby request my executors to cancel the mortgage deed, bond, indentures, and all papers I may have chargeable on R. (the mortgaged estate) at my death, and give [the same] to N. or his daughters or daughter then living for their own use":—Held, that this instrument was a promise entirely *de futuro*, and was intended to operate as a mandate to the writer's executors, and therefore was not valid as either a declaration of trust or a gift, and consequently was not a bar to a suit for foreclosure by the mortgagee's executors. And so of another instrument to the following effect, viz., "You shall have all my former promises made good. You must present the gifts and papers to my executors. I again direct and promise that my executors shall comply with my former

request, that is, to cancel all deeds and papers I may have chargeable on R. at my death, also make good all other gifts for your sister and yourself, the second mortgage deed for your own use. I request all the before-named gifts to be transferred to you and your sister," etc. *Soales v. Maude*, 3 W. R. 527; 1 Jur., N. S., 583; 6 De G. M. & G. 43; 1 Jur., N. S., 1147; 25 L. J., Ch., 533.

1. A., being legatee of a residue in trust for his daughters, mixed up with it 1,000*l.* of his own, and, upon an account being rendered to his daughters, directed his solicitors in writing to include such 1,000*l.* as part of the trust fund:—Held, that a trust was created as to the 1,000*l.* *Thorpe v. Owen*, 5 Beav. 224; 11 L. J., N. S., Ch., 129.

2. A testator who had bequeathed two legacies of 50*l.* and 200*l.*, afterwards, in order to avoid legacy duty, revoked the legacies, and verbally instructed F., who owed him 300*l.* secured by a deposit of title deeds, to pay similar sums to the legatees, adding that one of the donees was to "hold the writings." F. accepted the trust, but the deeds remained in the custody of the donor:—Held, notwithstanding the retention of the deeds by the donor, that a valid trust was effectually created in favour of the donee. *Parker v. Stones*, 38 L. J., Ch., 46; 19 L. T., N. S., 259.

See also EQUITABLE ASSIGNMENT.

V. VOLUNTARY COVENANTS OR PROMISES TO TRANSFER OR ASSIGN.

3. Mother gave bond to son conditioned to surrender copyhold to him, for which she was heiress:—Held, that she became trustee for son. *Alison's Case*, 9 Mod. 62.

4. A bond voluntarily given after marriage, to settle a jointure, decreed in specie, because under hand and seal, though voluntary. *Beard v. Nuttall*, 1 Vern. 427.

A voluntary bond by the husband after marriage, to settle a jointure, which he settles accordingly; he dies, and the jointress is evicted; the wife, as administratrix, shall retain as much as her dower fell short of the value of the jointure. *Id.*

5. A father having, by a voluntary settlement, conveyed certain freehold, and covenanted to surrender certain copyhold, estates to trustees, in trust for the benefit of his daughters, afterwards devised part of the same estates to his widow, who, after his death, was admitted to some of the copyholds. A suit having been instituted by the daughters to have the trusts of the settlement carried into effect, and to compel the widow to surrender the copyholds to which she had been admitted, a decree was made for carrying into effect the trusts, as far as they related to the freeholds, the plaintiff's title to them being complete; but as to the copyholds, the bill was dismissed with costs. *Jefferys v. Jefferys*, Cr. & Ph. 138.

6. Agreement parol by a feme whilst sole, that if she died without issue, she would leave her heir-at-law the land or 500*l.* Agreement decreed to be executed. *Goilmere v. Battison*, 1 Vern. 48. And see *Maynard v. Mosely*, 1 Ch. Rep. 233, where such an agreement, after an estate tail, was decreed.

7. A voluntary contract in favour of a mother and her children:—Held, to be executory only as related to the children, and executed as to the mother, and therefore enforced for the benefit of the mother absolutely. *Burrows v. Greenwood*, 4 Y. & Coll. 251.

By the contract for sale it was agreed that 600*l.* part of the purchase-money, should be paid after the vendor's death to such uses as she should direct for the benefit of J. B. and her children. By the conveyance that sum was made payable to the executors, etc., of the vendor, or as she should appoint by her will; she appointed it to J. B. absolutely:—Held, that the settlement, being executory only as to the children, could not be enforced, and that J. B. took absolutely. *Id.*

8. A father, who had four natural daughters and a legitimate son, entered into an agreement with his son, evidenced by certain deeds, whereby the father covenanted to transfer the sum of 20,000*l.* to a trustee, for the benefit of his four natural daughters, and the son covenanted to pay the debts of the father. The son paid some of the father's debts, and died before the covenant on the part of the father was performed, having by his will given the whole of his property to his father, who became the son's personal representative. A demurrer to a bill filed by one of the natural daughters, and praying to have the agreement executed against the estates of the father and son, was allowed. *Colyear v. Mulgrave (Countess)*, 2 Keen 87; 5 L. J., N. S., Ch., 335.

9. A wife in extremis, and having just been delivered of a child, appointed by will real property to her husband in fee. After her death the husband gave a bond to trustees conditioned for securing 3,000*l.* to the infant; which bond recited, that he had, upon the execution of the will, given his wife an assurance that he would make provision for the child:—Held, that the 3,000*l.* was a lien on the estate. *Exp. Atkins, Re London & Southampton Railway Act*, 2 Y. & Coll. 536; 1 Jur. 332.

10. A trustee executed a settlement declaring trusts of 2,000*l.* belonging to the settlor (a married woman), which sum was thereby untruly recited to be in his hands, upon the faith of a promise by her to pay to him the sum out of her separate estate. The sum was never paid:—Held, that neither the trustee of the settlement, nor a volunteer under it, could enforce the promise. *Marler v. Tommas*, 17 L. R., Eq., 8; 43 L. J., Ch., 73.

11. A., having nine children, by his will gave all his property to one of them, who, at the funeral, said he would divide the property equally between his brothers and sisters and himself, and that the whole should be sold, that it might not be said he had taken any more than the others. He subsequently acted in respect of a portion of the property according to the intention thus expressed; and with the assent of the other children, and at a valuation approved by them, he became the purchaser of a house and premises, part of the estate:—Held, with regard to the property which remained undivided, that the expressions of the devisee were no more than a promise to give and devise it amongst the brothers and sisters, and that as such promise it was *nudum pactum*, and did not amount to

a declaration of trust in their favour. *Dipple v. Corles*, 11 Hare 183.

1. Where a father, being the heir of a lunatic, who might be induced to make a disposition of his estate injurious to him, was in embarrassed circumstances, and incapable of bearing the expenses of suing out a commission, agreed, in consideration of his son's prosecuting it, that in the event of the lunacy being established, and the estate descending unto him, he would execute a settlement in favour of his son and issue, regard being had to the ages and relative situation of the parties, and to the benefits secured by the issuing of the commission, there was some, and not very inadequate consideration. *Perse v. Perse*, 7 Cl. & F. 279; West 110; 4 Jur. 358.

2. A covenant by a settlor to transfer, convey, and assure property (if any) which he might thereafter acquire, if of a certain value, does not amount either to an imperfect declaration of trust, or to an incomplete assignment of the property (if any) which afterwards came to be acquired, upon which a court of equity will operate. *Wilkinson v. Wilkinson*, 4 Jur., N. S., 47.

A., by a post-nuptial settlement, in consideration of natural love and affection, and for divers other good causes and considerations, covenanted to transfer, and convey, and assure all property to which he might thereafter become entitled "at any time or times, by gift, descent, succession, or otherwise, from or through his mother," if of a certain amount in value at any one time, to trustees upon the trusts of that settlement. At the date of the settlement he was entitled to interests in remainder, subject to his mother's life interest. Afterwards he became entitled in reversion to another fund, subject to a life interest given to his mother; and, lastly, his mother died, leaving him property by will.—Held, that none of all these funds were in equity affected by the trusts of the settlement by virtue of the covenant. *Ib.*

It is immaterial by what form of conveyancing, whether by assignment, declaration, etc., the equity of a fund be conveyed. Any of such modes, if everything be done that can be done, and if the intention be clear, will convey the equitable interest in the fund. But a covenant to convey the fund in a certain contingency will not, whatever contingency arises, be held to amount to a conveyance of the equitable right. *Ib.*

3. By a voluntary settlement the settlor assigned a mortgage, and purported to convey copyholds; he also covenanted for quiet enjoyment and for further assurance. He died without having surrendered the copyholds:—Held, that the Court would not render its assistance to compel the voluntary settlement to be perfected. *Denning v. Ware*, 22 Beav. 184.

It has long been settled that the trustees and *cestuis que trustent* under a voluntary settlement cannot compel the settlor to perform any further act than he has already done, to render such a settlement operative. *Ib.*

4. A. B. and C. D. were married at Malta. Shortly after their marriage a paper was sent out from England by the advisers of C. D., the wife, headed as "proposals for a settlement upon the intended marriage of A. B. and C. D.," and containing certain terms upon which

C. D.'s fortune was to be settled; amongst others, that if no child of the marriage, the property to be disposed of by C. D. by will; if no disposition by her will, to go to her next-of-kin. This paper was signed by A. B. and C. D., but nothing further done by way of settlement. Soon after the marriage C. D. died intestate, without having had a child:—Held, that A. B., who had taken out administration to C. D., and possessed himself of her property, in which was included a reversionary interest, was entitled to it for his own benefit, no declaration of trust in favour of the next-of-kin having been created by this agreement to execute a future instrument. *Pownall v. Anderson*, 4 W. R. 407.

5. Where a testator in advanced years and ill-health induced his niece to reside with him as his housekeeper on the verbal representation that he would leave her property by his will, which he accordingly caused to be prepared and executed, but subsequently by a codicil revoked, the Court directed the trusts of the will to be performed. *Loffus v. Man*, 3 Giff. 592; 82 L. J., Ch., 49; 8 Jur., N. S., 607; 6 L. T., N. S., 346; 19 W. R. 513.

A gift made by a revocable instrument in pursuance of a verbal representation, whereby the donee is influenced, and on the faith of which he confers a benefit on the donor, becomes irrevocable. *Ib.*

6. An intestate induced a woman to serve him as his housekeeper without wages for many years, and to give up other prospects of establishment in life by a verbal promise to make a will leaving her a life estate in land, and afterwards signed a will, not duly attested, by which he left her the life estate:—Held, that there was no contract, and that even if there had been, and although the woman had wholly performed her part by serving till the intestate's death without wages, yet her service was not unequivocally and in its own nature referable to any contract, and was not such a part performance as, to take the case out of the operation of the Statute of Frauds, s. 4; and that she could not maintain an action against the heir for a declaration that she was entitled to a life estate in the land. *Loffus v. Man* (3 Giff. 592) disapproved. *Maddison v. Alderson*, 8 L. R., App. Cas., 467; 52 L. J., Q. B., 737; 49 L. T. 303; 31 W. R. 820. Affirming *S. B. sub. nom. Alderson v. Maddison*, 7 L. R., Q. B. D., 174; 50 L. J., Q. B., 466; 45 L. T. 334; 29 W. R. 556.

7. By a post-nuptial settlement executed in 1814, after reciting that S., the husband, had before marriage agreed to settle 1,000*l.*, and had paid that sum to G.; G. covenanted that he would stand possessed of the money upon trust with the approbation of S., to invest it in the names of S. and G., and trusts were declared of the fund for the benefit of the husband and wife successively for life, with remainder to the children of the marriage. By the same deed S. covenanted with G. to pay to him a further sum of 1,000*l.*, to be held upon the same trusts as the first-mentioned 1,000*l.* Neither of the two sons was, in fact, ever paid. S. survived his wife, and died in 1868. In a suit instituted for the administration of the estate of S., the children of the marriage claimed to rank as creditors for both sums:—Held, that, as to the first-mentioned

sum, S. had constituted himself a trustee of the settlement, and that his estate was liable for the amount; but that the claim to the other sum rested upon a mere legal obligation which was barred by the Statute of Limitations. *Stone v. Stone*, 39 L. J., Ch., 196; 5 L. R., Ch., 74; 22 L. T., N. S., 182.

1. A testator bequeathed 2,000*l.* on certain trusts, and he empowered his executor, who was also his residuary legatee, to retain the amount in his hands uninvested, he paying interest thereon. After his death, the executor being satisfied that the testator intended to bequeath 3,000*l.* and not 2,000*l.*, promised to make it up to 3,000*l.*; he made no investment, but continued to pay interest on the 3,000*l.* to his death:—Held, that there was a complete voluntary trust as to the additional 1,000*l.* which the Court would enforce. *Gee v. Liddell*, 35 Beav. 621.

See also SPECIFIC PERFORMANCE, IV.

VI. ASSIGNMENT OR SETTLEMENT BY LEGAL OWNER BY DEED.

2. Voluntary deeds good against representatives, if they amount to a complete conveyance or transfer. *Att.-Gen. v. Whorwood*, 1 Ves. 535.

3. The Court, in order to give effect to voluntary settlements, requires, where the settlor is the legal owner, everything to have been done which is requisite to transfer the legal ownership; and where he is the equitable owner, clear and distinct evidence of a declaration of trust in favour of the donee. *Bentley v. Mackay*, 15 Beav. 12.

4. A father having, by a voluntary settlement, conveyed certain freehold, and covenanted to surrender certain copyhold, estates to trustees, in trust for the benefit of his daughters, afterwards devised part of the same estates to his widow, who, after his death, was admitted to some of the copyholds. A suit having been instituted by the daughters to have the trusts of the settlement carried into effect, and to compel the widow to surrender the copyholds to which she had been admitted, a decree was made for carrying into effect the trusts, as far as they related to the freeholds, the plaintiff's title to them being complete; but as to the copyholds, the bill was dismissed with costs. *Jefferys v. Jefferys*, Cr. & Ph. 138.

5. H., by a voluntary settlement of personality, assigned to trustees certain particulars of property, described in the schedule to the deed, upon the trusts therein mentioned. He then covenanted to perfect all assignments and transfers, and do all necessary acts where they had not been done; and afterwards it was declared, that until such full and complete transfer and vesting could be effected, he should stand possessed thereof upon the trusts, etc., thereinbefore declared. The particulars of the schedule comprised: first, stock standing in the testator's own name, and which had not been transferred; secondly, a sum of 29,400*l.* standing in the name of other trustees, under an old settlement, to the beneficial interest in which the testator was solely entitled; thirdly, certain securities, principally foreign, which passed by delivery from hand to hand, without any written transfer; fourthly, railway shares and debentures, etc., requiring

a particular transfer by deed; and fifthly, mortgage securities, and the moneys secured thereon, and a beneficial lease of a mansion. The bonds, shares, title deeds, etc., representing the particulars under the third, fourth, and fifth of these heads had been, shortly before the execution of the settlement, delivered to one of the persons named trustees of the settlement. The settlor died before anything more was done:—Held, that all the particulars passed by the deed, and therefore none of them formed any part of his personal estate at the time of his decease. *Donaldson v. Donaldson*, 1 Jur., N. S., 10; 2 W. R. 601.

6. P., in April 1837, bequeathed the residue of his estate to trustees, to sell and convert the same, and to stand possessed thereof in trust for his daughters C., J., and E., in equal shares, as tenants in common, for their sole and separate use. On the 31st July following P. executed an indenture, whereby he assigned to trustees all his estates, except such part as had been devised, stock standing in his name, and cash in the hands of bankers, upon trust, after his decease, to settle the same for the benefit of his daughters, C., J., and E., during their lives, in equal shares, for their separate use, and without power of anticipation; and after the decease of each, for the benefit of her children, but subject to trusts in the nature of cross remainder between C., J., and E., and their respective child or children, in case they or either of them should die without leaving any child who should attain a vested interest. P. died on the 12th August 1837, at which time the consols were standing in his name, and the balance in the hands of the bankers amounted to more than the sum mentioned by him. On petition presented by E., praying that it might be declared that the consols and cash were not validly settled by the deed of 1837:—Held, that the trusts of the voluntary settlement were binding upon the sums in question. *Airey v. Hall*, 2 Jur., N. S., 658; 3 Sm. & G. 315; 4 W. R. 587.

7. Where, in a voluntary deed containing a clear declaration of trust of real estate, and professing to operate by appointment to trustees in exercise of a power, the limitation and conveyance were to the trustees, their executors, administrators, and assigns, omitting the word "heirs":—Held, that the real estate was impressed with the trust, and the court declared the heir-at-law of the settlor a trustee for the *cestui que trust*. *Dilrom v. Bone*, 3 Giff. 538; 8 Jur., N. S., 276; 10 W. R. 437; 6 L. T., N. S., 71; 31 L. J., Ch., 417.

8. A voluntary deed, purporting to assign mortgage moneys, notes of hand, and household effects upon certain trusts, with a power of attorney to trustees:—Held, to be valid. *Parnell v. Hingston*, 3 Sm. & G. 337.

Aliter, in cases where there is no actual assignment by deed, and no sufficient declaration of trust. *Id.*

H., by indenture of settlement in 1844, assigned to his brother W. mortgages, debts, notes, moneys, securities for money, benefit and advantage of a contract for the purchase of an estate, together with the balance of the purchase money, a sum in the bank, household goods, and all other his goods, chattels, and effects, upon trust to permit J. H. to receive the interest thereof for his own use during his

life; and after his death, and within six months, to pay P. and other persons mentioned therein certain sums of money; and subject thereto, the mortgages, debts, notes, moneys, securities for money, household furniture, personal estate, and effects were for the use and benefit of W. The indenture, which contained a power of attorney to enable W. to receive payment of the mortgage and other debts, was upon its execution delivered to W., and had ever since remained in his possession, except for a few weeks. All the mortgage and other debts, except one debt and one mortgage debt secured upon estate A., were paid to and received by W. or by H., and the equity of redemption of estate A. was purchased and paid for by H. out of the settled moneys. The purchase of estate W. was completed, and conveyed to H., and paid for out of the settled moneys. He by his will, dated in 1862, after giving legacies, bequeathed all his personal property, money, securities for money, and effects, the estate purchased subsequent to the date of the indenture and paid for out of the settled moneys, and all his real and personal estate, unto trustees, to uses and trusts in which P. took no interest. H. died in July 1864. On bill filed by P. alone, for the purpose of having the trusts of the indenture performed:—Held, that it was unnecessary to have before the Court the other parties interested in the property; that as to the benefit of the contract for the purchase of the real estate, there being no trusts declared, it resulted in favour of the settlor, and could not be made subject to P.'s demand; but that as to all the rest, the trusts declared were clear and distinct, and there was sufficient authority to show that the deed was a valid declaration of trust to bind the property in the hands of the settlor, and P. was therefore entitled to a decree. 8 C. 2 Jur., N. S., 854.

1. A. was entitled to 5,000*l.* charged on a freehold. It was secured by the legal estate vested in her, but no one was personally liable to pay it. A. executed a voluntary settlement, by which she assigned the money to trustees, and gave them a power of attorney to recover it; but she retained the legal estate:—Held, that as the money could only be recovered upon a re-conveyance of the legal estate to the owner which the trustees were unable to procure, the voluntary settlement was incomplete, and could not be enforced against the settlor, or her estate. *Woodford v. Charnley*, 28 Beav. 96.

2. Where an instrument is in form a complete and an immediate assignment, and of such a nature as to give the assignee a right as between him and assignor to take or receive the property comprised in it presently, it will, although voluntary, be supported in equity, and considered as a perfect declaration of trust of such of the property as was not assignable at law. *Richardson v. Richardson*, 36 L. J., Ch., 653; 3 L. R., Eq., 686; 15 W. R. 690.

E., by a voluntary deed, in 1858, assigned certain specific property, and "all other the personal estate, whatsoever and wheresoever, of her, E., to R. absolutely"; and appointed him, his executors, administrators, and assigns her attorney and attorneys in her name, but for the sole benefit of R., to sue for and recover the assigned premises, and to do and execute

all such acts and deeds as should be necessary for deriving the full benefit of the assignment. At the date of the assignment, E. was possessed of certain promissory notes, given to her to secure the repayment of advances made by her. These were not specifically mentioned in the deed. Upon R.'s death, in 1864, these notes were found in his possession, but not indorsed to him. There was no evidence as to any delivery of the notes by E. to R.:—Held, that the property in the notes passed by the deed to R., on the principle that the deed of assignment operated as a complete declaration of trust by E. of all her property in favour of R. *Id.*

3. M. executed a voluntary deed purporting to assign fifty of his shares in a bank to L., to be held by him upon certain trusts for the benefit of the plaintiffs. The shares were transferable only by an entry in the books of the bank; but no such transfer was ever made. L. held at the time a general power of attorney authorising him to transfer M.'s shares, and M., after the execution of the settlement, gave him a further power of attorney, authorising him to receive the dividends on his shares in the bank. M. lived three years after the execution of the deed, during which period the dividends on the shares were received by L., and remitted by him to the plaintiffs, sometimes directly, and sometimes through M.:—Held, that it was not the intention of the settlor to constitute himself a trustee of the shares, but to vest the trust in L.; there was no valid trust of the shares created in the settlor. *Milroy v. Lord*, 4 De G. F. & J. 264; 8 Jur., N. S., 806; 31 L. J., Ch., 798; 7 L. T., N. S., 178.

Held, also, that no valid trust of the shares was created in L.; for although he held a power of attorney under which he might have vested the shares in himself, he did not do so, and was not bound to do so without directions from the settlor, since he held the power only as agent for the settlor, and that, therefore, the disposition of the shares failed, as being an imperfect voluntary gift. *Id.*

4. A settlement whereby lands are assured to a trustee to the use of the settlor for life, and afterwards in trust for volunteers, and which is not communicated to the trustee until after the settlor's death, is valid, notwithstanding the disclaimer of the trustee. A power to appoint new trustees contained in the indenture is therefore exercisable. *Jones v. Jones*, 23 W. R. 1.

5. A., being seised in fee, executed a deed-poll, whereby he voluntarily granted it to his wife as her sole and absolute property for ever:—Held, that this was an imperfect voluntary gift, and that the relation of trustee and *cestui que trust* had not thereby been created, and that a court of equity would not interfere to assist either party. *Price v. Price*, 14 Beav. 598; 21 L. J., N. S., Ch., 53. Affirmed 1 De G. M. & G. 308.

6. By a deed-poll, a husband, reciting his desire to settle leasehold property on his wife, purported to "settle, assign, transfer, and set over" the same to his wife as though a single woman, her executors, administrators, and assigns. The wife entered immediately, and received the rents until the husband's death. There was a memorandum in his writing stating the particulars of the property belong-

ing to his wife, and the income to which she was entitled, in which the leaseholds were enumerated:—Held, that though the attempted assignment from husband to wife was void, he had constituted himself a trustee of the property for his wife. *Baddeley v. Baddeley*, 38 L. T., N. S., 906; 9 L. R., Ch. D., 113; 26 W. R. 850.

1. A husband, by three letters written and signed by him and handed to his wife, gave her furniture and other articles for her sole and absolute use. He afterwards made his will, bequeathing certain legacies and making other dispositions of his property, and giving the residue of it to trustees in trust for his wife for life with remainder to six nieces absolutely. The furniture and other articles were at the time of the husband's death in the house which had been occupied by him and his wife, and the whole had been used by them in the ordinary way:—Held, that there was no declaration of trust, but that the furniture, etc., formed part of the husband's estate. *Baddeley v. Baddeley* (9 L. R., Ch. D., 113) and *Fox v. Hawks* (13 L. R., Ch. D., 822) observed upon, and *Milroy v. Lord* (4 D. F. & J. 264) followed. *Re Breton's Estate, Breton v. Woolloen*, 17 L. R., Ch. D., 416; 50 L. J., Ch., 369; 44 L. T. 337; 29 W. R. 777.

See also SETTLEMENT, XVII.

VII. ASSIGNMENT OR SETTLEMENT OF EQUITABLE INTEREST BY BENEFICIAL OWNER.

2. A person, who was entitled to a certain stock standing in the names of two trustees, gave instructions to his attorney to prepare a settlement of it for the benefit of A., B., and C., and to procure from the trustees a transfer for the purposes of settlement. The settlement was prepared, and a power of attorney for the transfer of the stock executed by both the trustees, but the intended settlor died without having seen the settlement, and before the stock was actually transferred:—Held, that no trust of the stock was constituted for A., B., and C. *Cunningham v. Plunkett*, 2 Y. & Coll. C. C. 245.

3. A direction given by deed by a *cestui que trust* to her trustee to pay a certain portion of the interest of the trust fund to A., with a covenant to indemnify the trustee for such payment:—Held, to constitute an irrevocable trust, which was not affected by the fund being brought into court. *Ryecroft v. Christy*, 3 Beav. 238; 4 Jur. 599.

4. M., who, in the event of surviving her daughter, and of that daughter dying without issue, would, as next-of-kin, be entitled to a fund which was vested in trustees, executed a voluntary assignment of her interest in the fund to the husband of the daughter, and declared the trusts of the assignment as to part for the benefit of M. herself, and as to another part for the daughter's husband absolutely. No notice of the assignment was given to the trustees. The daughter afterwards died without issue, and the husband filed his bill against the trustees and M. to compel performance of the trust:—Held, that the voluntary assignment did not create a trust which a court of equity would enforce,

and the bill was dismissed. *Meek v. Kettlewell*, 1 Hare 464; 11 L. J., N. S., Ch., 293; 6 Jur. 550. Affirmed 1 Ph. 342; 13 L. J., N. S., Ch., 28; 7 Jur. 1120.

5. *Semble*, where the *cestui que trustent* convey their beneficial interest in a portion of the property to a purchaser, the purchaser may file a bill against the trustee for a conveyance of the legal estate, without making the *cestui que trustent*, who sold to him, parties to the suit. *Goodson v. Ellison*, 3 Russ. 583.

6. A., having vested interest in a portion of a trust fund subject to the life of B. therein, executes a voluntary deed of assignment of her expectant interest in reversion to C., and gives notice to D., the trustee of the fund:—Held, that although the assignment of this reversionary interest was purely voluntary, the instrument operated as an actual assignment transferring the equitable right from A. to C., and not as a mere agreement or executory instrument. *Voyle v. Hughes*, 2 W. R. 143; 2 Sm. & G. 18; 23 L. J., Ch., 238; 18 Jur. 341; 2 Eq. Rep. 42.

7. A., by a voluntary settlement, assigned land, held by him under an agreement for a building lease, to trustees, upon trust for himself for life, with remainder for his children and grandchildren. Shortly afterwards A. obtained a lease of the land, but he did not assign the legal estate to the trustees. There was no evidence that A. could have obtained the lease at the time when he executed the settlement:—Held, that the settlement was complete, and that the *cestui que trustent* were entitled to have it enforced against a person in possession of the legal estate, who derived his title through A.'s will. *Gilbert v. Overton*, 4 N. R. 420; 2 Hem. & M. 110; 10 Jur., N. S., 721; 33 L. J., Ch., 683; 12 W. R. 1141; 10 L. T., N. S., 900.

8. A trustee cannot prevent the *cestui que trust* from making an effectual gift of his interest in the trust property, or any part of it. *Kechewich v. Manning*, 1 De G. M. & G. 176; 21 L. J., N. S., Ch., 577; 16 Jur. 625.

Whatever rule there may be against volunteers, it does not apply to the case of a *cestui que trust* claiming against his trustee, for that which is considered a trust may be created gratuitously, and the absence of consideration for its creation is in general immaterial. *Id.*

9. On a voluntary assignment of an equitable reversion, there being no power in the assignor to deal with the legal interest, notice to the trustees is not necessary to the validity of the assignment. An unmarried woman, the owner, subject to a settlement, of a reversionary equitable interest in a sum of stock, assigned it by deed to volunteers. No one except her solicitor, who was also the solicitor to the trustees of the settlement, was informed of the assignment. She kept the deed in her possession, and afterwards destroyed it, and subsequently dealt with the fund by will:—Held, that the assignees were entitled to the fund as against the beneficiaries under the will. *Re Way's Trusts*, 5 N. R. 67.

10. The Court, in order to give effect to voluntary settlements, requires, where the settlor is the legal owner, everything to have been done which is requisite to transfer the legal ownership; and where he is the equitable owner, clear and distinct evidence of a declara-

tion of trust in favour of the donee. *Bentley v. Mackay*, 15 Beav. 12.

A father being entitled, during the life of his son, to the dividends on funds standing in the names of himself and three other trustees, directed two of the trustees to pay over the dividends for the future to his son. They acted on the direction, and the testator afterwards recognised the gift:—Held, that there was a valid and effectual voluntary settlement, which this Court would give effect to. *Ib.*

1. A., by voluntary deed, two days before his death, grants, assigns, and transfers to trustees all his personal property not effectually vested in them, to be held upon certain trusts, with a declaration by A. that, in the meantime and until the trust premises should be duly transferred to, and vested in, the trustees, he would thenceforth stand possessed of and interested in such property upon the trusts already declared. Part of the property was vested in the trustees of A.'s marriage settlement, in trust for him absolutely. As to this portion no transfer was made previous to A.'s death, and no notice had been given to the trustees in whom it was vested:—Held, that the assignment was effectual to pass the property, there having been a complete declaration of trust, which the Court would execute in favour of the donees. *Donaldson v. Donaldson*, 2 W. R. 691; 1 Jur., N. S., 10.

2. If the beneficial owner of stock standing in the name of trustees, assign it in favour of a volunteer, and notice is given to the trustees, who act upon it, equity will enforce the performance of the trust in favour of the volunteer. *Bridge v. Bridge*, 16 Beav. 315; 16 Jur. 1031; 1 W. R. 4; 22 L. J., Ch., 189.

Voluntary settlement of an equitable interest in real estate held ineffectual, the legal estate not having passed to the trustees thereof. *Ib.*

The plaintiff being entitled to shares in companies, foreign bonds, consols, cash, and real estate, which were vested in the trustees of his uncle's will, executed a voluntary deed, whereby he granted the realty to A. and B. to the use of himself and A. and B., upon trust to sell, and he directed that the produce and the bonds, etc., should thenceforth be considered vested in him and A. and B. on certain trusts for volunteers:—Held, that the deed was valid as to the shares and bonds, which had been transferred to the plaintiff and A. and B., but ineffectual as to foreign bonds, stock, and cash, of which there had been no transfer, and no acceptance of the trust by the trustees of the uncle's will, in whom they were vested, and ineffectual also as to the realty, the legal estate not having passed. *Ib.*

VIII. EVIDENCE AND BURDEN OF PROOF.

3. Parol evidence not admissible to raise an equity, that a pension granted by the Crown to the defendant was in trust for the plaintiff, against the oath of the defendant in his answer. *Fordyce v. Willis*, 3 Bro. C. C. 577.

4. Parol evidence admissible of declaration of devisee, to prove her only a trustee. *Strode v. Winchester*, Dick. 897.

5. Where a person sets up a case of declaration of trust, the *onus probandi* is upon him,

and the evidence must be clear and distinct; the Court must determine according to the evidence on both sides, having special regard to the consideration on whom the burden of proof lies. *Roberts v. Roberts*, 12 Jur., N. S., 971; 11 Jur., N. S., 992; 14 W. R. 123; 13 L. T., N. S., 492.

6. T., having certain gas shares, wished to give them to his sister, but was alleged to have abstained from making a will, because his father promised that she should have them. T. died, and the father, as his administrator, possessed the shares and died, having bequeathed them to his second wife, who refused to hand them over to the daughter and her husband. They filed a bill, nineteen years after she came of age, alleging a trust and constant recognition by the father of the daughter's right, but the allegation rested on their evidence alone, and the bill was dismissed with costs. *Poole v. Framell*, 13 W. R. 199.

7. An illiterate woman having wrongfully possessed herself of bonds belonging to the estate of a testator, whose executor the plaintiff was, was ordered to repay the proceeds of the sale of the bonds, although there was much doubt as to the equitable jurisdiction of the Court in such a case. *Inglis v. Pasco*, 27 L. T., N. S., 818.

It was alleged by the defendant that the testator, by whom she had several illegitimate children, had shown her an envelope containing the bonds and bearing an indorsement to the effect that they were to be delivered to her as the property of her and her children. The envelope was lost, and the testator had always retained possession of the bonds:—Held, that there was some foundation of truth in the story of the plaintiff, though uncorroborated, and that such an indorsement would have created a trust for her and her children, which, though a slight equity, might give the Court jurisdiction. *Ib.*

IX. OTHER CASES.

8. Grandmother buys an annuity in 14l. per cents. for 100l., in the grandchild's name; child's father gives the grandmother a bond to repay the 100l. if the child dies before the grandmother, who receives the income and keeps the tally; the grandchild making no claim; this no trust for the grandchild. *Lloyd v. Read*, 1 P. W. 607.

9. A. B., after depositing in his own name in a savings' bank to the full extent allowed, made further deposits to another account in the name of himself and sister, but nominally as trustee for her. By the terms of the Act of Parliament he retained a control over the fund:—Held, that the sister was not entitled, the Court thinking that the object was to evade the Act, and not to create a trust in favour of the sister. *Field v. Lonsdale*, 13 Beav. 78; 19 L. J., N. S., Ch., 560; 14 Jur. 995.

10. A. devised his real estate to trustees to the use of his wife for life, with remainder to his son for life, with remainders over. A. afterwards gave the H. estate to his son, and signed a memorandum as follows: "H., together with my other freehold estates, are left in my will to my wife; but it is her wish, and

I hereby join in presenting the same to our son for the purpose of furnishing him with a dwelling-house." The son took possession of the H. estate, and with the approbation of his father expended money on the erection of a building-house thereon. Upon his death:—Held, that the son was entitled to have a conveyance to himself of the fee simple of the H. estate. *Dillwyn v. Llewellyn*, 31 L. J., Ch., 658.

1. The sum of 2,000*l.* was, by the direction of H. O., carried by her bankers to an account, in the joint names of herself, as trustee for the plaintiffs, and the plaintiffs; the bankers gave a promissory note for the amount, payable in fourteen days, with interest at 2½ per cent., to H. O., trustee for the persons therein named. After the death of H. O., her executors received from the bankers the sum secured by the promissory note:—Held, that this amounted to a complete declaration of trust, and that executor was a trustee for plaintiff, in whose favour trust was declared. *Wheatley v. Purrr*, 1 Keen, 551; 6 L. J., N. S., Ch., 195; 1 Jur. 133. See *Hornby v. Hunter*, 1 Russ. 89.

2. A., having lent B. 1,000*l.*, without taking any security for it, states to C. and his family that the money had been held by him (A.) in trust for C. Afterwards B. becoming embarrassed in his circumstances, and unlikely to repay the money, A., at the urgent solicitations of C., gives the latter his promissory note for the amount. Subsequently B. dies insolvent, and without having repaid the money. Then A. dies. In a suit for the administration of A.'s assets (there being no evidence to rebut the trust):—Held, that C. may prove the note against A.'s estate as a valuable security. *Burkitt v. Ransom*, 2 Colly. 395; 15 L. J., N. S., Ch., 174; 10 Jur. 193.

3. A testatrix gave to A. and B., in trust for the benefit of C., her sister, a sum of 2,000*l.* 3*l.* per cent. consols. She afterwards expressed to B., whom she also appointed her executrix, an intention that C. should have a further sum of 2,000*l.* consols, but she did not alter her will. A. died in her lifetime; after her death B., the surviving trustee and executrix, sold 2,000*l.* consols, and invested the produce in her name in the 3*l.* per cent. reduced, and shortly afterwards she invested a further sum of 2,000*l.* 3*l.* per cent. reduced in her name; she was proved to have declared frequently her intention of carrying out the testatrix's intention:—Held, that the second sum of stock was duly impressed with a trust in favour of C. *Gray v. Gray*, 2 Sim., N. S., 273; 21 L. J., Ch., 745.

4. A. lent B. 100*l.* in October 1843, on which occasion B. wrote and signed the following document: "Received of A. for the use of C. 100*l.*, to be paid to her at A.'s death, but the interest, at 4*l.* per cent., to be paid to A." Underneath was written, "I approve the above," which was signed by A. This document was given to C. The money was not paid to A. in her lifetime. In June 1845 A. died:—Held, that B. was a trustee for C. of 100*l.* at the death of A. *Moore v. Darton*, 20 L. J., N. S., Ch., 626; 4 De G. & Sm. 517.

5. A bond debt being assigned to trustees on trust for such persons as A., a feme covert, should appoint, and, in default, for her separate use, she appointed it to a creditor of her

husband, to secure an existing debt. No other consideration appeared on the face of the deed:—Held, that this was an "executed trust" in favour of the creditor, which the Court would effectuate, notwithstanding the apparent want of consideration. *Collinson v. Patrick*, 2 Keen 123; 7 L. J., N. S., Ch., 83.

6. B. granted to six persons annuities, payable out of his life interest in an estate. He then executed a deed, called a receivership deed, to which the six annuitants and A. and B. were parties, by which he appointed A. and B. receivers of the rents; and it was declared that they should hold the rents in trust to pay the annuities, and then to pay the surplus to B. or his assigns. The receivers accepted the trust. By another deed B. conveyed his life estate to a trustee on trust for securing the six annuities, and subject thereto in trust for himself. He afterwards granted annuities to three other persons, and by a deed called a deed of direction, to which the three annuitants were parties, he directed the receivers and the trustee to pay the three annuitants out of the rents. Notice of this deed was immediately served on the receivers and the trustee:—Held, that the deed of direction made the receivers and the trustee express trustees for the three annuitants, subject to the rights of the six annuitants. *Knight v. Bowyer*, 2 De G. & J. 421; 3 Jur., N. S., 968; 26 L. J., Ch., 796.

7. A. B. voluntarily assigned to trustees bonds and promissory notes amounting to 600*l.*, in trust for himself and his wife and children, and he handed over the securities. The trustee gave no notice to the debtors. A. B. received 200*l.*, part of the 600*l.* (the securities for which had been returned to him), and the remainder was lost by the insolvency of the debtors. A. B. invested the 200*l.* with other moneys of his own on freeholds, and by writing acknowledged the 200*l.* to be trust property. He afterwards deposited the title deeds with the trustees as a security for the whole 600*l.*:—Held, that the equitable mortgage was valid to the extent of 200*l.*, but no further. *James v. Bydder*, 4 Beav. 600; 5 Jur. 1076.

8. A. and B., father and son, executed deeds for the settlement of some of their family estates, and for payment of the debts of A. Estates were conveyed to trustees, with a power to sell, on the consent in writing of A. and B., or the survivor, and to apply the produce in payment of debts therein specified. A. was indebted to D., as trustee for an infirmity, and A. and B. had given joint and separate warrants of attorney to secure the debt. Separate judgments had been entered up against A. and B. The amount of the sums thus due was stated in the deed. D. had some legal interest in the estates themselves; he was a party to the deed, and executed it:—Held, that this deed created a trust in favour of the infirmity of which it was a trustee. *Montefiore v. Browne*, 7 H. L. Ca. 241.

9. A lease was granted to W., who afterwards committed an act of bankruptcy, and then executed a deed, stating that his name had been used in the lease in trust for R., and declaring a trust accordingly; a bill was filed on behalf of the creditors of W. under the commission, claiming the lease as part of his estate; and

the Court directed an issue to try whether W.'s name was used in the lease as a trustee for R.:—Held, that the issue was properly directed. The jury having found a verdict in the affirmative:—Held, that the declaration of trust was valid, though executed after bankruptcy, and that the lease did not pass to W.'s assignees. *Gardner v. Rome*, 5 Russ. 258; 7 L. J., Ch., 2. Affirming 2 Sim. & S. 346; 3 L. J., Ch., 220.

1. In 1858, on the marriage of A., the eldest son of F., it was agreed by the marriage articles, to which A. and F. were parties, that certain lands, and all the stock, crops, etc., thereon, should be held by F. and A. until out of the profits they should have "suitably provided" for certain younger children of F. After the death of F., one of the children instituted a suit against A. and the executor of F. to have the trust carried into execution:—Held, that the suit was maintainable; that the term "suitably provided for" was not too uncertain to be given effect to by the Court, and that performance of the agreement should be enforced. *Brenan v. Brennan*, 2 Ir. R., Eq., 266.

2. W., landlord to P., having the power to distrain for rent in arrear, and having distrained for part, and being a creditor of P. for money lent, as well as for rent in arrear, upon P.'s representing to him that he is also indebted to G. to the amount of about 900*l.*, for which he is in fear of arrest, and about to leave the country, undertakes that, if P. will give up to him the farm and execute an assignment of all his property, he will pay G.'s debt in the first instance out of the proceeds, and apply the residue in satisfaction of his own demand, and pay the surplus (if any) to P., who executes a bill of sale to W. accordingly on the faith of such undertaking. Upon the bill of G. and P., this agreement was enforced against W. to the extent of 900*l.*, the alleged amount of G.'s debt, but no further, the actual debt having proved to exceed that amount; and not prevented from having effect, either by the circumstance that P.'s property fell short of the estimated amount, or of P.'s being at the time indebted to other persons besides G. and W., which formed no part of the consideration for the agreement, although noticed in W.'s undertaking as having been represented otherwise. The engagement to pay G. in the first instance not being made directly to G., but through the medium of P., by whom also the consideration was furnished, P. was held, in a court of equity, to be a trustee for G. But, *quære*, if the plaintiffs could recover at law upon such agreement. *Gregory v. Williams*, 3 Meriv. 582.

3. The plaintiff, being entitled to an annuity of 300*l.* charged upon plantations in the West Indies belonging to K., entered (as agent for K.) into an agreement with D., by which D., in consideration of having the produce consigned to him until his advances were satisfied, was to ship supplies to the plantations, and honour bills drawn upon him (D.) by K. for the expenses of management, and also to pay the plaintiffs annuity. The consignments were made, and D. paid the plaintiffs annuity for one year, and then discontinued the payment, although he received subsequent consignments. The bill prayed that D. might be ordered to

pay the annuity so long as he continued to receive the consignments:—Held, on demurrer, that without deciding whether the plaintiff could, with reference to the decision in the case of *Garrard v. Lauderdale (Lord)*, sustain a suit to enforce the agreement as against D., D. could not, after the payment of the annuity which he made under the contract, withhold from the plaintiff the benefit of the contract for the further payment of the annuity. *Kirnan v. Daniel*, 5 Hare 493; 16 L. J., N. S., Ch., 191; 11 Jur. 235.

4. An agreement recited that a sum of money, alleged by A. to be due to him from the plaintiff, was deposited in the Bank of England in the joint names of A. and B., on behalf of the plaintiff, and that A. agreed to forthwith commence and duly and diligently prosecute an action for the recovery of the money; and it was declared that the money was held in trust for the plaintiff in case no such action should be brought within one month, or in case the same should be brought within one month, but should not be duly and diligently prosecuted with effect. An action was brought and tried. Subsequently a rule was obtained, directing a case to be stated for the opinion of the Court; but the proceedings were, as alleged, not duly and diligently prosecuted by A. The plaintiff prayed that it might be directed that the money deposited in the bank should be paid to him. A. demurred to the bill for want of equity, and submitted that until the result of the action was known, the plaintiff was not a *cestui que trust*; but the demurrer was overruled. *Portugal (King of) v. Russell*, 7 Jur., N. S., 1143; 31 L. J., Ch., 34; 10 W. R. 36; 5 L. T., N. S., 277.

5. Where a son had in his possession moneys belonging to his mother, and she, in her last illness, drew an order upon the son in favour of his wife and retained it in her custody, but subsequently handed it to him and directed him to invest the amount for the benefit of his wife and children, and the son, after the mother's death, made the investment in the joint names of himself and his wife:—Held, that in consequence of the uncertainty of the objects of bounty, neither a complete gift had been made nor a valid declaration of trust created. *Roberts v. Roberts*, 11 Jur., N. S., 992; 14 W. R. 123; 13 L. T., N. S., 492; 12 Jur., N. S., 971.

6. A testator by his will gave his property in a certain newspaper in trust, out of the residue of the profits thereof to pay an annuity to his daughter for life. By a deed, to which the daughter was not a party, made upon the introduction of a new partner, it was agreed that a certain proportion of the profits should be annually set apart with a view to forming a capital fund of 1,000*l.* for the purpose of answering the said annuity, whereby the partnership property would be cleared of the same; and certain sums were so set apart accordingly:—Held, that the relationship of trustee and *cestui que trust* was created by the above deed, and that the daughter was entitled to the 1,000*l.* *Burton v. Jackson*, 4 W. R. 271; 2 Jur., N. S., 224.

7. C., M., and J. in 1829 mortgaged estates and plantations, of which they were joint owners in equal shares, to F. & Co., of Bombay,

as a security for advances, with interest, the repayment being further secured by the joint and several covenants of C., M., and J. The estates were for a long time not cultivated at a profit. In 1830 the firm of F. & Co. was reduced to two partners only, C. and J. In 1836 the interest charged in the books of F. & Co., in account with the proprietors of the estates, was directed to be divided under two heads, one being carried to an account called "Reserved Interest Account," and the amount of the balance of this account was to be held subject to the instructions of C. Both the partners concurred in these directions thus given to F. & Co. In 1837 both the partners concurred in another letter to F. & Co., of Bombay, directing that as to the portion of the interest passed to the "Reserved Interest Account," part of it should be carried to a new account, to be intitled "C., for himself, M. and J.," and in such letter it was directed that the balance of such new account was to be subject to the control of C. alone, and that in the absence of other instructions from C. it was to be applicable towards the liquidation of the account of the proprietors of the estates for which C., M., and J. were responsible. In 1839 M. died. In 1840 the estates sold for more than enough to liquidate all demands of the mortgagees. In 1841 C., with the concurrence of J., directed one-third of the balance at the credit of account "C., for himself, M. and J.," to be paid to himself, another third to J., and the remaining one-third to be retained, subject to the future instructions of C. In 1843 C., with the like concurrence of J., directed F. & Co., of Bombay, to remit this remaining one-third to London, subject to his orders, and stated his intention to be to hand it over to the family of the late M., in such manner as he might think proper. The fund was accordingly remitted to F. & Co., of London, "subject to the orders of C.," and so remained up to the decease of C. C. died in 1849, without having ever made any further disposition of the fund. On a bill by the widow and executrix of M.:—Held, first, that by the letter of 1836 there was no declaration of trust, or other clear appropriation of the fund, for the benefit of C., M., and J., in equal shares, which would have entitled M. to file a bill for his share. *Forbes v. Forbes*, 3 Jur., N. S., 1206; 6 W. R. 92.

Held, secondly, that by the letter of 1837 there was no declaration of trust, or clear expression of intention, which would enable the family of M. to make a claim. *Id.*

Semble, the letter of 1836 did not amount to a declaration of trust in favour of C., M., and J. generally, with a power of revocation and new appointment in C., but rather to a contingent declaration in favour of C., M., and J. in one event only, viz., a deficiency on a realisation; and that there being ultimately no deficiency, there never had been any positive declaration. *Id.*

1. An illiterate woman having wrongfully possessed herself of bonds belonging to the estate of a testator, whose executor the plaintiff was, was ordered to repay the proceeds of the sale of the bonds, although there was much doubt as to the equitable jurisdiction of the court in such a case. *Inglis v. Pasco*, 27 L. T. 818.

It was alleged by the defendant that the

testator, by whom she had several illegitimate children, had shown her an envelope containing the bonds and bearing an indorsement to the effect that they were to be delivered to her as the property of her and her children. The envelope was lost, and the testator had always retained possession of the bonds:—Held, that there was some foundation of truth in the story of the plaintiff, though uncorroborated, and that such an indorsement would have created a trust for her and her children, which, though a slight equity, might give the Court jurisdiction. *Id.*

2. The husband allowed his wife, who had a separate estate, to keep a separate banking account, and to draw cheques in her own name. He was in the habit of borrowing money of her, and, at the end of the year, of giving her a promissory note for the whole balance due to her. The husband died:—Held, that the promissory note might be construed as a valid declaration of trust. *Murray v. Glasse*, 1 Eq. Rep. 541; 17 Jur. 816.

3. The Court will not enforce an incomplete voluntary assignment, evidenced by delivery of a box (retaining the key), such box containing what purported to be a written memorandum of gift of real estates and chattels, the memorandum not being under seal. *Warriner v. Rogers*, 42 L. J., Ch., 581; 16 L. R., Eq., 340; 21 W. R. 766; 21 L. T., N. S., 863.

4. In 1837 B. insured his life, in the names of his sons, B. B. and M. B., and on the policy it was expressed to be held "in trust for his three daughters," one of whom died in B.'s lifetime. B. paid the premiums during his life, and died in October 1846, indebted to his sons, B. B. and M. B. After the death of B. the sum payable on the policy, amounting to 1,748l. 4s. 5d. was paid to M. B., who gave a receipt for the same, in the names of B. B. and himself. M. B. laid out 1,700l., part of the 1,748l. 4s. 5d., in the purchase of debentures of a bank. In the journal of the bank, the debentures were entered as having been handed to M. B., for the Misses B.; and in the books of B. B. and M. B., who were co-partners in the business, the Misses B. were entered as the owners of the debentures. In 1848 an order was made to wind up the affairs of the bank, subsequently to which B. B. died; and in 1855, after his death, M. B. became bankrupt. At the time of his bankruptcy he was indebted to the bank. Some months prior to M. B.'s bankruptcy he delivered the debentures to his brother, E. L. B., by whom they were given to the Misses B. The official manager of the bank was appointed assignee in bankruptcy of M. B., and the Misses B. had been admitted as creditors under the bankruptcy. The Misses B. having claimed to prove as creditors against the bank, for the sums respectively expressed to be payable on the debentures:—Held (affirming 3 Jur., N. S., 554), first, that there was a valid trust in the policy created for the benefit of the Misses B. *Exp. Boyd*, 3 Jur., N. S., 897; 26 L. J., Ch., 737. *S. C. nom. Boyd's case*, 1 De G. & J. 223.

Held, secondly, that such trust had never been determined. *Id.*

Held, thirdly, that the Misses B. were entitled to prove, as creditors against the bank, in respect of the sums respectively expressed to be payable on the debentures,

without prejudice to any proceedings which the official manager might be advised to take, as assignee of M. B. *Id.*

1. A woman who cohabited with a man as her husband handed to him sums of money without any specific directions as to their application, and he invested them in the purchase of leasehold and other property:—Held, that the transactions ought to be regarded, not as loans, to which the Statute of Limitations would be applicable, but in the nature of a trust, and that she was entitled to the investments. *James v. Holmes*, 4 De G. F. & J. 470.

2. A person being in prison on a charge of felony assigned real estate, which was in the hands of trustees, to his brother. He was acquitted on the ground of insanity. His brother accumulated the income except a small portion, which he spent for the benefit of the convict. After the brother's death it was held that he was a trustee for the convict. *Manning v. Gill*, 13 L. R., Eq., 485; 41 L. J., Ch., 736; 26 L. T. 14; 20 W. R. 357.

3. A father directed his property to be divided into nine shares, and gave one share and a half to each of his two daughters, "to be settled on themselves at their marriage." At his death the two daughters were infants. The two daughters having attained twenty-one, and being unmarried:—Held, that they were entitled to their shares absolutely, and that there was no trust for a settlement which the Court could execute. *Magrath v. Morehead*, 12 L. R., Eq., 491; 41 L. J., Ch., 120; 24 L. T. 868.

4. A person died intestate in America, leaving real and personal estate in New York. At a meeting of the next-of-kin in Ireland, one of them, A., who was a naturalised American citizen, asserted that, as such, he was by the law of New York entitled to the whole of the produce of the real estate. This was disputed by the others; and an agreement was entered into by A., that if they would contribute to the expense of sending B. and C. to America to recover the property, he would relinquish his exclusive claim and allow it to be divided equally. The others did contribute, and B. and C. went to America, where a suit was pending in relation to the property. B., who was himself one of the next-of-kin, wrote to A., saying that if he entertained his motion as to his exclusive claim, i.e. B., would have the case tried; but asking him if he still adhered to the original arrangement, to have a proper deed sent out to B. and C. Thereupon A. executed a deed reciting the pendency of the American suit, and his being a naturalised American, and declaring that, should the American Court declare him entitled in consequence to all or a larger portion of the property, he would not insist on his full claim, but thereby consented to accept an equal division with the other next-of-kin, and he thereby gave authority to B. and C. to give full effect to his declaration. B. and C., on receipt of this instrument, and relying on it, suffered the American Court to make a decree in favour of A. A. subsequently revoked the instrument:—Held, that the instrument, irrespective of any question of consideration, operated as a completely constituted and valid declaration of trust in favour of all the

next-of-kin, irrevocable by A. *Miller v. Harrison*, 5 Ir. R., Eq., 324.

Held, also, that if it was merely to be looked upon as a promise or unfulfilled intention, it was clothed with valuable consideration, and was binding. *Id.*

5. Her Majesty by royal warrant "granted" booty of war to the Secretary of State for India in council, "in trust" to distribute amongst the persons found entitled to share it by the decree of the judge of the Court of Admiralty, to whom the matter had been referred by the sovereign for that purpose, with a direction that doubts should be finally determined by the Secretary of State unless her Majesty should otherwise order. An action having been brought against the Secretary of State for India in council by K., on behalf of himself and all the other parties entitled, alleging that a portion only of the fund had been distributed, and claiming an account and the distribution of the residue:—Held, that the warrant did not operate as a transfer of property or create a trust; and that the defendant, being merely the agent of the sovereign to distribute the fund, was not liable to account to any of the parties found entitled. *Kinlock v. Secretary of State for India in Council*, 15 L. R., Ch. D., 1; 49 L. J., Ch., 571; 42 L. T. 667; 28 W. R. 619.

X. REVOCATION.

6. A. invests, in name of trustees, stock as security to B. against certain payments. Stock remains for a long time uncalled upon. A. cannot have it re-invested in himself, but dividends ordered in future to be paid to A. *Linton v. Hyde*, 2 Madd. 94.

7. Demurrer to a bill stating that the plaintiff had deposited moneys as security against a disputed claim, on trust that if the claimant should within one month bring and diligently prosecute an action, then to satisfy the amount recovered, otherwise on trust for the plaintiff, and that the claimant had brought the action and obtained a nominal verdict, with leave to the defendant to move to set aside the verdict, and which was afterwards turned into a special case, not yet determined, and asking for return of the deposit:—Overruled. *Portugal (King) v. Russell*, 3 Giff. 287.

8. Where money has been subscribed by bondholders for a particular purpose (such as the construction of a railroad) and part of that money has been placed in the hands of trustees for the bondholders, the duty of such trustees being to pay portions of the money as portions of the intended railroad are constructed, if no such railroad nor any portion of it is constructed, and its construction becomes impracticable, the bondholders are entitled to demand from the trustees re-payment of what remains in their hands. *National Bolivian Company v. Wilson*, 5 L. R., App. Cas., 176; 43 L. T. 60. Affirming 13 L. R., Ch. D. 1.

See also CREDITORS' TRUST DEEDS—SETTLEMENT, XII. and XVII. v.

III. Objects of Trusts. Validity and Legality.

- *Contrary to Particular Statutes.* See ACCUMULATION — BANKRUPTCY — CHARITY, V.—FRAUDULENT CONVEYANCES—IRELAND, I.—POACHING.
- *For Creditors.* See BANKRUPTCY—CREDITORS' TRUST DEEDS.
- *For Charitable Objects or Superstitious Uses.* See CHARITY, IV.
- *For Aliens and Rights of Crown.* See FOREIGNER AND FOREIGN LAW, IV. III.
- *For Separate Use of a Married Woman.* See HUSBAND AND WIFE, XI.
- *Rule against Perpetuities.* See PERPETUITY.

1. Although, where a trust has been created for an illegal purpose, the Court will not in general interfere, it will do so where the illegal purpose fails to take effect. *Symes v. Hughes*, 9 L. R., Eq., 475; 39 L. J., Ch., 304; 22 L. T., N. S., 462.

2. Bequest by a testator of 50*l.* per annum, to his executor, to be paid for the keep of a mare, with a direction that the executor should consider himself bound in honour to fulfil this wish, and see that she be well provided for:—Held, that the trust in favour of the mare ought to be performed, and that the executor was entitled to the surplus not required for the mare's keep. *Pettingall v. Pettingall*, 11 L. J., N. S., Ch., 176.

IV. Trusts of a Public or Quasi-Public Nature.

- *Charitable or Religious.* See CHARITY—ECCLIASTICAL PERSONS AND PROPERTY.

See also ARMY AND NAVY—BANKRUPTCY—CLUB—CORPORATION—BUILDING SOCIETY—FRIENDLY SOCIETY—OFFICE—PENSIONS AND PAY.

3. The Court has no jurisdiction to take account of money voted by Parliament for the general expenses of a branch of the executive. *Granville Murray v. Clarendon (Earl)*, 39 L. J., Ch., 221.

4. It is clear that a suit may be maintained against a public officer having in his hands money issued by Government for the use of an individual, for the recovery of such money; but where Government had ordered the money to be withheld, the question is only between Government and the individual or his assignees, and the Court has no jurisdiction. *Priddy v. Ross*, 3 Meriv. 102.

5. Commissioners were authorised by an Act of Parliament to raise money on the security of the assignment of parish rates. Interest on the debentures was to be paid *pari passu*, and the debentures were to be paid off by ballot:—Held, that the relation of trustee and *cestui que trust* was constituted by Act, and that the holders of the debentures

were entitled to sue for an account of the moneys received by the trustees, and of their payments; and that they were not bound to proceed on their bonds at law. *Fletcher v. Gibbon*, 23 Beav. 212.

6. The Bombay Civil Fund was formed to provide retiring pensions for civil servants, and annuities and portions for their widows and children. The fund was constituted by the subscriptions of the members, and by a grant from the Government. It was managed by a committee, the members of which resided in Bombay, and by the rules the property of the fund was vested in the committee of managers as trustees. In fact, however, the funds were always in the hands of the Government as a floating debt due to the association. A suit having been instituted by the representatives of the widow of a member of the association, against the trustees of the fund and the Secretary of State for India, claiming payment of an annuity which they alleged ought to have been paid to her in her lifetime:—Held, that there was no fiduciary relation between the trustees of the fund and a person making a claim against the fund, and that therefore the plaintiffs could only recover arrears of the annuity which accrued due within six years before the filing of the bill. *Edwards v. Warden*, 43 L. J., Ch., 644; 9 L. R., Ch., 495; 22 W. R. 669; 30 L. T., N. S., 540.

Held, also, that even assuming that the suit ought to have been instituted in Bombay, still inasmuch as the defendants resident in India had appeared unconditionally, had not moved to discharge an order made for service of the bill on them in India, and had not raised any objection to the jurisdiction by demurrer or plea, and as the Government of India in fact held the money, and had taken no objection to the suit, the Court ought to decide the question in dispute. *Id.*

7. If a trust fund is in the Court of Chancery, that Court may proceed to administer it, even although a foreign sovereign may be interested in it, and may not think fit to come before the Court in a suit relating to it. *Morgan v. Lartiere*, 7 L. R., H. L., 423; 44 L. J., Ch., 457.

8. The Irish Society held to be trustees for public purposes; and though accountable to the Crown and the city of London for any neglect, etc., they were not so to the companies of London, notwithstanding the latter were, after providing for the public objects, entitled to the surplus revenues of the estates vested in the former. *Skinner's Co. v. Irish Society*, 7 Beav. 593. Affirmed 12 Cl. & F. 425; 9 Jur. 1043. And see S. C. 1 Myl. & C. 162.

9. A collegiate body compellable to execute a trust as a private person, and though the bill not brought recently. *Green v. Ruthersforth*, 1 Ves. 468.

10. Where office of justice or profits is in trust, the acts of majority of the *cestui que trust* may bind the rest. *Younger v. Welham*, 3 Swan. 180.

11. Where a general trust of a public nature is created, it is essential to the purposes of the trust that a majority of the trustees should have the power, both at law and in equity, of binding the majority. *Perry v. Shipway*, 1 Giff. 1; 5 Jur., N. S., 535; 7 W. R. 406; 33

L. T. 1023. Affirmed 5 Jur., N. S., 1015; 28 L. J., Ch., 660; 7 W. R. 574; 33 L. T. 251.

1. A bridge Act provided that sixteen persons therein named, "and all other parties" who possessed a certain property qualification, "shall be, and they are hereby appointed, the trustees for carrying this Act into execution." It also provided for the holding and calling of meetings, but contained no expressed power of adjournment. It gave the trustees power to assess at meetings called for the purpose, but no assessment was to be valid unless notice of the intention of making it, and of the time at which it was intended to be made, should be given to all persons to be charged therewith. The word "trustees" was defined in the interpretation clause "the trustees acting by virtue of this Act." The trustees named in the Act were alone summoned to the meetings. K., who by his qualification was a trustee, but had never acted, and whose name was not inserted in the Act, brought an action to set aside the assessment and proceedings, on the ground that the meetings had not been duly called, and that one of the assessments was made at an adjourned meeting, without any fresh notice to the parties to be charged:—Held, that he never having acted as a trustee, was not entitled to require the statutable notice. *Kerr v. Wilkie*, 6 Jur., N. S., 383; 8 W. R. 286; 2 L. T., N. S., 501.

Held, also, that where notice of a meeting had been properly given, there was no necessity for notice of its *bonâ fide* adjournment. *Id.*

V. Executory Trusts, Construction and Execution of.

- I. *General Principles and Distinction between Executory Trusts by Marriage Articles or Wills*, 6887.
- II. *What is an Executory Trust*, 6888.
- III. *Limitations to Issue or Heirs (Rule in Shelley's case)*, 6889.
- IV. *Other Limitations*, 6893.
- V. *Express Directions to Settle in "Strict Settlement"*, 6900.
- VI. *Directions to Settle on a Female*, 6901.
- VII. *Directions to Settle Personalty as Heirlooms or on the Trusts of Freeholds*, 6902.
- VIII. *Directions to Settle Property to go with a Title*, 6903.
- IX. *What Powers Inserted in the Settlement*, 6904.
- X. *Trustees to Preserve Contingent Remainders*, 6907.
- XI. *Hotchpot Clause*, 6908.
- XII. *Estate of Tenant for Life made Unimpeachable for Waste*, 6908.
- XIII. *Other Cases*, 6909.
- XIV. *Cross Remainders and Shifting Clauses*. See VESTED CONTINGENT AND FUTURE INTERESTS.
- XV. *Rule against Perpetuities*. See PERPETUITY.
- XVI. *Rectification of Errors in Settlements or Articles*. See SETTLEMENT, XIII.

I. GENERAL PRINCIPLES AND DISTINCTION BETWEEN EXECUTORY TRUSTS BY MARRIAGE ARTICLES OR WILLS.

2. A trust to be carried into execution by the Court, must be of such a nature that it can be under the control of the Court. *Ommanney v. Butcher*, T. & R. 270.

3. In executory trusts the Court considers the intention of the testator, and acts according to it. In the latter this Court follows the law. *Jervoise v. Northumberland (Duke)*, 1 Jac. & Walk. 570.

No difference between marriage articles and executory trusts in wills, except that the former afford *primâ facie* evidence of intent which does not belong to the latter. *Id.* 574.

4. The general intent of a testator in creating an executory trust for a settlement of his property, not any strictly technical meaning attached to the words he has used, is to govern the preparation of the settlement. *Sackville West v. Holmesdale (Viscount)*, 4 L. R., H. L. Cas., 543; 39 L. J., Ch., 505.

The manner of executing an executory trust must be guided by the object of the author of the trust, provided such object is one which can be legally effectuated. *Id.*

There is no difference between the construction to be put on an executory trust created by marriage articles and on an executory trust created by a will, except so far as the former, by its very nature, furnishes more emphatically the means of ascertaining the intention of those who created the trust. *Id.*

5. There is no difference between executory trusts, whether created by marriage articles, by a voluntary settlement, or by a will: in the latter cases there is more difficulty in arriving at the conclusion that a particular trust is executory; for in the first case the nature of the instrument establishes the fact, in the latter it must be collected from the nature of the dispositions in the instruments. *Roehfort v. Fitzmaurice*, 2 Dr. & War. 1; 4 Ir. Eq. R. 375. S. C. *nom. Roehfort v. Fitzmaurice*, 1 Con. & L. 158.

6. Articles not construed in same manner as formal dispositions, *Taggart v. Taggart*, 1 Sch. & Lef. 84.

7. Equity exercises a power to modify and control the ordinary sense of language used in marriage articles, so as to give effect to the real intention; but its interference has always been supported by a necessary implication, resulting from the context of the articles. If it were to assign a power to control the contract from presumptions *dehors* the instrument, it would be making, instead of expounding, the agreements of parties. *M^cGuire v. Scully*, Beat. 378.

A deed executed in consideration of marriage, and reciting, as a consideration, payment of 1*l.* and the intended marriage, is to be considered as marriage articles, though the intended husband and his father were the only parties to it. The object of articles being to provide for the issue of the marriage, and the consideration being the marriage, it is presumed that the parties did not mean merely to pass through the form of executing a marriage contract, and at the same time to place the property under the unlimited

dominion of the husband. Issue female are entitled to have articles carried into specific execution on a limitation over of the estate, on failure of issue of their father. *S. C. nom. Magurie v. Scully*, 2 Hog. 113.

1. In the construction of articles the intention of the parties must be the guide. *Lecky v. Knox*, 1 Ball & B. 215.

2. Distinction between marriage articles and wills; all the parties to the former considered purchasers to effectuate their intention; none of the parties mentioned in the latter are so, as the testator's intention is alone to be considered. *Stratford v. Powell*, 1 Ball & B. 25.

3. No distinction between executory trusts by marriage articles and will, except the inference from the object of the former, to provide for the issue, that the father should not have the power to defeat it; therefore, estate for life, with remainder to the heirs of the body, a strict settlement in the one case, an estate tail in the other unless clearly not meant in their technical sense. *Blackburn v. Stables*, 2 Ves. & B. 367. But see 1 Jac. & Walk. 571.

II. WHAT IS AN EXECUTORY TRUST.

4. Definition of an executory trust as distinguished from a trust executed according to the sense of a court of equity. Per Lord St. Leonards. *Egerton v. Brownlow*, 18 Jur. 71; 23 L. J., Ch., 348; 4 H. L. Ca. 1.

5. Devise of copyhold estates, the legal estates being outstanding, "to my son R. W. G., to be entailed upon his male heirs, and failing such to pass to his next brother, and so on from brother to brother, allowing 2,500*l.* to be raised upon the estates for female children each." Whether a trust executed or executory, and, if the latter, whether an estate tail in R. W. G., *quære*. The point too doubtful to compel a purchaser to take the title. *Jervoise v. Northumberland (Duke)*, 1 Jac. & Walk. 559.

6. Executory trust defined, and the principles laid down upon which courts of equity act in executory trusts. *Boswell v. Dillon*, Dr. 291; 6 Ir. Eq. R. 389.

A testator devised his property to trustees, and the will contained the following passages, amongst others: "The said sum I will shall be taken from my real, freehold, and personal property; the residue to be divided between them by my said trustees, share and share alike, at such time, and in such manner, as to my said trustees shall seem most expedient, subject to this limitation," etc.; shares of sons, in certain events, were to go to survivors, "subject, however, to such jointure as my said sons, or any of them, may settle on any wife," etc.; premises were devised to the son carrying on the testator's business, "at such reasonable rent as my trustees shall think proper." "I further will my trustees shall lend out at interest" certain sums bequeathed in the way prescribed; a small annuity was given to W. B., "to be paid to him by my said trustees out of the issues," etc. A codicil bequeathed other property, "to be divided equally among," etc., "agreeable to the real intention of my will":—Held, that the provisions of this will did not constitute executory trusts. *Id.*

7. A testator devised his real and personal estate to trustees, and gave life estates therein

to several persons, namely, A., B., etc., and after their deaths he directed the trustees to pay the income to M. and N. during their respective lives, share and share alike, and in case either of them should, after the deaths of A., B., etc., depart this life without leaving issue male of his body in trust, to pay the whole income to the survivor for life; and he directed that if M. should, after the deaths of A., B., etc., die before N., leaving issue male, then the trustees should convey a moiety of the real estate to the use of the first and other sons of M. in tail male, with remainder to N. for life, with remainder to his first and other sons in tail, and in default to the testator's right heirs, and lay out a moiety of the personal estate in land, and convey the same to trustees to the like uses. The testator made a similar disposition *mutatis mutandis* of the other moiety, in case of the death of N., after the deaths of A., B., etc., leaving issue male; and he provided that, in case M. and N. should die without leaving issue male, or if such issue male should die without any issue male, the trustees should convey the property to such person as should at the death of the survivor of M. and N. be the right heir of the testator:—Held, that the trusts on which the question arose, were not executory so as to alter the construction as arising on an executed trust. *Franks v. Price*, 3 Beav. 182; 9 L. J., N. S., Ch., 383. And see *S. C.* at law, 5 Bing., N. S., 37 6 Scott 710.

8. Where an instrument, executed previously to a marriage under the name of articles of agreement, appears on the face of it finally to declare the intention of the parties, and does not point to a future instrument as necessary to complete the contract, it will not be treated as executory, though, in order to give full effect to its provisions, a future act may remain to be done after its execution. *De Havilland v. De Saumarez*; *De Havilland v. Bingham*, 14 W. R. 118.

9. A testator directed 6,000*l.* to be settled on the marriage of his daughter, and then went on to give it to trustees, with a separate life interest to his daughter; after her death for her children, on their attaining twenty-one, if the mother should be then dead; but if not, then not till after her decease; and if no child should live to attain a vested interest, then to fall into his residue. And he gave his residue to A. for life, remainder to B.:—Held, first, that the testator had made a positive settlement, and the Court could not add to it in any way. *Fullerton v. Martin*, 1 Dr. & Sm. 31; 6 Jur., N. S., 265; 39 L. J., Ch., 469; 8 W. R. 289.

Held, secondly, that the income undisposed of after the wife's death fell into the residue. *Id.*

Held, thirdly, that it was undisposed of income merely, and passed as such to the tenant for life of the residue. *Id.*

10. Words of a settlement held not to constitute an executory trust, but merely to amount to the gift of an equitable estate, by directing the property to be held in trust for the persons designated. *Doncaster v. Doncaster*, 2 Jur., N. S., 1066.

11. A testator left shares of his property to his daughters "to be settled on themselves at their marriage." One of the daughters

attained twenty-one, and applied to have her share paid to her absolutely:—Held, that she was absolutely entitled to her share, and that there was no trust for settlement. *Magrath v. Morehead*, 24 L. T., N. S., 868; 12 L. R., Eq., 491; 41 L. J., Ch. 120.

1. A will contained a direction to trustees to convey to the testator's son in strict settlement, if he should marry, followed by a declaration that if the son should die unmarried, or without lawful issue, the property should be limited and devolve upon A. for life, remainder to A.'s eldest son for life, remainder to his issue male, and in failure of such issue to A.'s other sons in succession, the eldest of such sons and his heirs male always to be preferred:—Held, that the trusts in favour of A. and her sons were not executory; and that the testator's son, having died unmarried, and A. having died subsequently, her eldest son was entitled in tail male. *Re Nelley*, 26 W. R. 88.

2. By a deed it was agreed and declared that A., his executors, administrators, and assigns, should raise out of certain hereditaments 800*l.*, and should invest the same in the names of trustees at interest upon government or real securities "upon trusts to be declared for the benefit of R., for her life, with remainder to her children, and as to R. and for her separate use, and with all the powers for changing the security, and for maintenance, and other powers and trusts which are usually inserted in a money settlement of the like nature." No subsequent declaration of trust of the 800*l.* was ever made:—Held, that the deed was executory only, and that the settlement so directed ought to have limited the 800*l.*, after the death of R., amongst her children as tenants in common, and not as joint tenants. *Mayn v. Mayn*, 5 L. R., Eq., 150. *S. C. nom. Mayne v. Mayne*, 17 L. T., N. S., 439.

See also Following Divisions.

III. LIMITATIONS TO ISSUE OR HEIRS (RULE IN SHELLEY'S CASE).

1. *Articles*, 6889.
2. *Devises*, 6891.

1. *Articles*.

3. Where, on a marriage agreement, the husband entered into a bond to surrender his copyhold to the use of himself for life; remainder to his wife for life; remainder to the heirs of their two bodies; remainder to the heirs of the husband: decreed, a surrender to the use of the husband for life; remainder to the first and other sons of the marriage in tail general; remainder to the daughters in tail general, in order, by making the issue purchasers, to secure them from being defeated. *Nandike v. Wilkes*, Gilb. Eq. Rep. 114.

4. In marriage articles to settle lands on the husband for life, remainder to the heirs male of his body, a court of equity will decree a conveyance to be made in strict settlement, according to the intent of the parties, viz., to the husband for life, remainder to the first and every other son in tail, etc., and not direct

an estate tail to the husband, according to the legal operation of the words. *Collins v. Plummer*, 1 P. W. 106; *Seale v. Seale*, *id.* 291.

5. By marriage articles, it was agreed that 3,000*l.* should be laid out in land and settled on husband and wife for their lives, remainder to such issue, etc., as they should appoint, and in default of appointment to the issue of their bodies. On the death of the husband without appointment:—Held, the land should be settled in strict settlement, viz., on wife for life, remainder to the first and other sons in tail, remainder to daughter in tail, remainder to right heirs of husband. *Dod v. Dod*, Ambl. 274.

6. When it is agreed by articles that, after an estate for life in the father, the estate is to go to the children in remainder, they take as purchasers. *Cordwell v. Mackrill*, Ambl. 517; 2 Eden 344.

Where marriage articles limited a joint estate to the intended husband and wife, and after the death of the survivor to the use of the heirs of the body of the husband begotten on the wife, and the settlement after marriage pursued the words of the articles; husband and wife levy a fine, and first mortgage, and then agree to sell. The articles not being produced, the Court would not decree them to be carried into execution by a strict settlement against the purchaser, who had notice of them. *S. C.* Ambl. 515; 2 Eden 344.

7. Marriage articles to settle estates to the use of husband for life, remainder to the wife for her life, remainder to the use of the heirs of the body of the wife by the husband. The Court refused to decree a strict settlement upon them, since the power of barring the entail was not in the husband alone. As to the distinctions where a court of equity will or will not rectify settlements made in pursuance of articles, etc., by decreeing a high settlement. Election as to copyholds. *Highway v. Banner*, 1 Bro. C. C. 584.

8. One devises his lands for payment of his debts, and then to A. for life, with power to make leases, etc.; remainder to the heirs male of the body of A.; though this be but the devise of a trust, and executory, and expressed to be to A. for life, yet it is an estate tail in A., barrable by a fine and recovery. *Secus*, in a case of marriage articles to settle an estate on A. for life, remainder to the heirs male of his body, this being an agreement to do a future act, and in which the issue are particularly considered and looked upon as purchasers. *Bale v. Coleman*, 1 P. W. 142.

9. A limitation in marriage articles to the husband for life, to the wife for life, remainder to the issue of their two bodies, will be carried into strict settlement. *Villiers v. Villiers*, 2 Atk. 73.

10. Where marriage settlement is executed, after marriage, in pursuance of articles previous to marriage, and limitations are to husband for life, to wife for life, and heirs of husband by wife, it is executory, and will be carried into strict settlement by Court. *Secus*, if executed after marriage, without previous articles. *Glanville v. Payne*, 2 Atk. 29; Barnard. 18.

11. Bill for a strict settlement, after long acquiescence by plaintiff's ancestor, and when impossible to bar the remainder, dismissed. *Parker v. Philips*, 1 Ves. 530.

1. Marriage articles not decreed in strict settlement, where, by a difference in the penning, the parties intended to leave part in the father's power. *Howel v. Howel*, 2 Ves. 358.

2. The rule that a limitation to the heirs of the body in articles shall be carried into execution by a strict settlement, does not prevail where the concurrence of both parties would be necessary to bar the entail. *Brudenell v. Elwes*, 7 Ves. 390.

3. One articles on marriage to settle lands on himself for life, remainder to the heirs of his body by his intended wife, with a covenant to make the settlement within two years, or in default thereof to stand seised to the same uses; though this be an estate tail at law, yet equity will turn it into a strict settlement. *Trevor v. Trevor*, 1 P. W. 622; 10 Mod. 436. Affirmed 5 Bro. P. C. 122.

4. Articles before marriage to settle were so expressed, that the husband would have had an estate tail; a settlement copying the very words of the articles was reformed, estate for life only being intended. *Randall v. Willis*, 5 Ves. 275.

Articles before marriage for settling real estates of the husband, and also all and singular his personal estate of what nature or kind soever; a proper execution would be by a covenant, that real estate that should be purchased with the personal, should, with respect to the objects of the settlement, be considered personal: the settlement, therefore, made after marriage contained no such covenant, and being in other respects a defective execution, real estates purchased by the husband according to the evidence, in order to defeat the right of his wife, were decreed to be conveyed by his devise according to the articles. A gift by him in his life, in consideration of service, was not disputed; but under the particular circumstances attending the marriage, and in the case of an infant, the Court appeared to question its validity. *Id.* 262.

5. On marriage, the husband executes a deed-poll, whereby he purports to settle all his real and personal estate on the wife, and the heirs of her body by him begotten, obliging her to give each of her children by him begotten 1,000*l.* a-piece at twenty-one, and to divide the residue equally amongst them at her death. This gives an estate for life only to the wife, with remainder in fee to the children as tenants in common. These marriage articles so far tied up the property of the settlor, that a real estate purchased by him in his lifetime, with part of his personal estate, shall be considered as personal estate, and be disposed of accordingly. *Lowther v. Westmoreland*, 1 Cox 64.

6. Marriage articles carried into execution, by limiting estates in strict settlement to A. and B. respectively, with cross-remainders between B. and the issue of A., with power to A. to appoint both estates among his children. The will of A. referring to the estate, but not to the power, declared a good execution of the power, to the extent of limiting estates tail to the children; the excess reformed to effectuate the general intention of the articles. *Dillon v. Dillon*, 1 Ball & B. 77.

7. Marriage articles for settling lands varied

by decreeing the estate to one for life, with remainder in tail to his issue instead of an estate tail to him. *Griffith v. Buckle*, 2 Vern. 13.

8. Marriage settlement rectified by a strict settlement agreeably to the ordinary course, notwithstanding it agreed with the articles verbatim, and both made before marriage, the plaintiff having however taken a benefit under the will which he disputed:—Held, to have made his election, and decreed to give up part of the settlement estate in satisfaction. *Roberts v. Kingsly*, 1 Ves. 238.

9. A., having seven daughters and no son, by articles entered into on the marriage of his daughter B., covenanted to secure "to her and her children by C. (her intended husband), a share of his real estate, equal to that of any other of his daughters." A. died without having made any settlement:—Held, that B. was entitled to an estate for life, remainder to her first and other sons in tail, remainder to her daughters in tail. *Hamilton v. Cathcart*, Wall. Lyn. 282.

10. By post-nuptial articles, J. F., having then two living sons, H. and T., and one daughter, M., covenanted with trustees to settle certain lands of which he was seised in fee as counsel should direct, to the use of J. F. for life, remainder to trustees to preserve, etc.; remainder to the use of H., and to permit him to take the rents and profits for his life; remainder to the heir male of the body of H., and to permit him to take the rents and profits for his life; remainder to the issue male of T., with remainders to the unborn sons of J. F. in tail male in strict settlement, with remainders over:—Held, that H. took an estate for life only. *Rochford v. Fitzmaurice*, 2 Dr. & War. 1; 4 Ir. Eq. R. 375. S. C. *nom. Rochford v. Fitzmaurice*, 1 Con. & L. 158.

Seemle, that a limitation to trustees to preserve contingent remainders, not confined to the lifetime of a tenant for life, will not be cut down to that life if there are contingent remainders which may require protection during a longer period. *Id.*

The only difference between an executory trust raised by a voluntary settlement, or a will, and such a trust raised by an ante-nuptial settlement, is, that in the latter the object of the settlement supplies an intention to create a strict settlement, and that in the former such an intention must appear on the face of the instrument. *Id.*

11. By settlement on the marriage of A. with C., in case there was no issue male, and there should be daughters living at the death of the father, who should attain twenty-one, or be married, then such daughters should have 2,000*l.* a-piece; there were three daughters and no sons; defendant, one of the daughters, married D., and previous to her marriage covenanted to assign (with D.'s consent) 500*l.* to trustees in trust, after the death of D. and the defendant, to pay it amongst the children of the bodies of the defendant and D.; and that D. should, after the marriage, assign to the trustees all the moneys and securities for it, then due and belonging to defendant. A. died in 1744; D. in 1745, intestate, to whom defendant administered, and received the

2,000*l.*:—Held, that the children, who were a son and daughter, have a right to the portion, which was decreed to be secured for their benefit, though under the articles the real estate was in the mother's power, and vested in her in tail; yet in equity it is to be carried into strict settlement to the wife for life, then to the first, etc., sons in tail, and, in default of issue male, to daughters. *Bash v. Dalway*, 3 Atk. 530.

1. By marriage articles a husband covenanted, in consideration of his wife's portion, to settle an estate to his own use, and after his decease to the use of his heirs on the body of his intended wife, and for want of such issue to his own right heirs for ever. The articles did not express any further intention of providing for the children of the marriage, and made a provision for the intended wife, in lieu of dower. No settlement was executed, and the husband mortgaged the estate and at the same time delivered the articles to the mortgagee:—Held, on his death, that under the articles, he was entitled to a life estate only, and that the mortgagee took with notice, and could not therefore hold as against the issue of the marriage. *Davies v. Davies*, 4 Beav. 54.

2. By post-nuptial articles of 1760, J. covenanted, in pursuance of articles before marriage, and for other valuable considerations, to settle his estate to the use of himself for life, remainder to trustees to preserve, etc., and after decease of J. (subject to a jointure) to the use of H., his son, and his assigns for life; and after his decease "to the heirs male of his body," in default of such issue "to T., a second son, and his assigns for life, and after his decease to his issue male; remainder to the third, fourth, and other sons and the heirs male of their respective bodies; remainders over. Power to J., H., T., or any of the issue male of J. who should become seised under the limitations, to make leases for three lives or thirty-one years. Power to H., etc., when seised to jointure not exceeding 150*l.* per annum:—Held, that H. took an estate for life only. *Brennan v. Fitzmaurice*, 2 Ir. Eq. R. 113.

3. In marriage articles in 1802 (which were to be, but never were, followed by a formal settlement), two separate estates, one belonging to the intended husband, the other to the intended wife, were included. Both were vested in trustees, to permit the husband and wife to receive the profits during life, and (as to her portion), should she survive her husband, "to such of her issue male by her husband as she may, by her last will and testament, notwithstanding her coverture, direct, limit, or appoint," and in case of no appointment, to the issue male of the husband and wife, and in case of no issue male, then to go amongst her daughters, and in case of failure of issue male or female, then to go to such person or persons as she should appoint. There were two children of the marriage, a son and a daughter. The wife survived the husband many years, and made a will, which, reciting the power reserved to her by the articles, appointed the property to her grandson, the son of her daughter, describing him as issue male of her marriage:—Held, that the articles were executory, that if in accordance with them a settlement had been executed, the

estate would have been put in strict settlement, and that the power reserved by them was not well executed, the grandson, the son of a daughter, not coming within the description of issue male therein contained. The lady married again, and on the settlement on this marriage, the surviving trustee of the articles granted, released, and confirmed to the trustees under the second settlement, "all his right to the use and behoof of the widow as under the articles." *Lambert v. Peyton*, 8 H. L. Ca. 1.

Held, also, that setting up a claim to the estate under the appointment by her, the grandson could not, as an objection to a suit, compel him to convey the estate in specific performance of the marriage articles, insist that the legal estate was not in him, nor could he object to the decree that it dealt only with the property over which the wife had assumed to exercise a power of appointment, and not with the whole property included in the marriage articles. *Id.*

4. A marriage settlement, purporting to be made in pursuance of articles recited in it, conveyed an estate to A. and his wife, and the heirs of their bodies:—Held, that they became tenants in tail special, and that a court of law could not construe the deed as rendering them tenants for life, with remainder to their issue in tail, even if that might have been the construction to be put upon the articles by a court of equity. *Doe d. Daniel v. Woodroffe*, 10 M. & W. 608; 12 L. J., Exch., 147. Affirmed 15 M. & W. 769; 7 Jur. 959; 2 H. L. Ca. 811; 13 Jur. 1013.

2. Devises.

5. A. devised 10,000*l.* to trustees in trust to be laid out in lands, and to be settled on B. for life without impeachment of waste, remainder to trustees and their heirs for the life of B. to support contingent remainders, with a power to B. to make a jointure, remainder to the heirs of the body of B., remainders over; and by the same will devises lands to B. to the same uses, and dies, leaving C. executor; B. sues C., the executor, for the deeds relating to the lands that are in his hands, and to have the money laid out in lands and settled. Decreed that B. had but one estate for life in the lands, and so not entitled to the deeds, but that they were to be brought into court, and that the lands to be bought with the money were to be settled on B. for his life only, remainder to his first, etc., son. But on appeal, B. was decreed to have an estate tail in the lands devised, and consequently to be entitled to the deeds relating thereto; though, as to the lands to be purchased, that being executory, and in the power of the Court, B. was to be but tenant for life, with remainder to his first, etc., son. *Papillon v. Voyce*, 2 P. W. 471; 2 Kel. 27; Fitzg. 38.

6. "To one for life, and to the heirs of his body," has been always held to be an estate tail; but where it is "to one for life, and after his death to the issue of his body," there is no instance where it has been so construed. *Meure v. Meure*, 2 Atk. 265.

7. The only difference between the construction of executory trusts in a marriage settlement and a voluntary settlement or will

is, that in the former the nature of the instrument affords a presumption that the intention is for a strict settlement, whereas in the latter case that intention must appear on the face of the instrument. *Rochford v. Fitzmaurice*, 1 Con. & L. 158. S. C. *nom. Rochford v. Fitzmaurice*, 2 Dr. & War. 1; 4 Ir. Eq. R. 375.

1. One devises his lands for payment of his debts, and then to A. for life, with power to make leases, etc., remainder to the heirs male of the body of A.; though this be but the devise of a trust, and executory, and expressed to be to A. for life, yet it is an estate tail in A., barrable by a fine and recovery: *secus*, in case of marriage articles to settle an estate on A. for life, remainder to the heirs male of his body, this being an agreement to do a future act, and in which the issue are particularly considered, and looked upon as purchasers. *Bale v. Coleman*, 1 P. W. 142.

2. Testator devised his estate to A. in case his daughter should die leaving no heirs of her body:—Held, a gift to the daughter for life, with contingent remainder to such heir of her body as should be living at the time of her death. *Read v. Snell*, 2 Atk. 646.

"Leaving" is a participle of the present tense, and relates to the time of the daughter's dying. *Ib.*

No weight has been laid on the want of the words "for life" when the intention of the testator has otherwise appeared, especially in the case of a trust executory, for then a court of equity is bound to see a settlement made agreeably to the intention of the testator. S. C. Atk. 648.

3. Tenant devised his estates to trustees, upon trust, as counsel should advise, to convey, settle, and assure the said premises to or for the use of or in trust for his daughter J. for her life, and after her death then on the heirs of her body, etc. The Court directed the estates to be settled upon J. for her life, with remainder to her first and other sons in tail general, with remainder to her daughters in tail general, etc. The limitations being to both sons and daughters in tail general, there is no necessity for a subsequent limitation to J. and the heirs of her body. *Bastard v. Proby*, 2 Cox 6.

4. A testator empowered his trustees to purchase freeholds, "to the amount of 1,500*l.* of his personal estate, for the use of A. during life, and then to be divided among his issue, if any":—Held, that this was executory, and that A. took for life, with remainder to his children as tenants in common in tail, with cross-remainders between them in tail, with an ultimate reversion in fee to A. *Hadwen v. Hadwen*, 23 Beav. 551.

5. Testator gave one-third of his residue to his niece, which he desired might be settled by his executors, on her, for her separate use, for her life, but to devolve to her issue at her death, and, failing issue, then to revert to his nephew. The Court directed the third to be settled in trust for the niece, for her separate use, for life, and after her death in trust for her issue then living, and if there should be no such issue then in trust for the nephew. *Stonor v. Curwen*, 5 Sim. 264.

6. A. devises lands to trustees to pay debts

and legacies, and then to settle the remainder on her son B., and the heirs of his body, with remainders over, and directs that special care should be taken in the settlement that it should never be in the power of her son to dock the entail. Decreed, the son should be only tenant for life, without impeachment of waste, and should not have an estate tail conveyed to him. *Leonard v. Sussex*, 2 Vern. 526.

7. A testator directed that an estate should be purchased by his executors, and that such estate should be made hereditary, and settled upon his constituted heir. He then appointed his nephew his heir and successor, and desired that the estate should be settled upon him, and should descend to his heirs and successors in the direct male line; and in case of his nephew dying without issue, the estate to devolve upon his brother, his heirs and successors in the direct male line:—Held, that the nephew was not to take as tenant in tail in possession, but that the estate was to be settled upon him for life, with remainder to his sons in tail male, and afterwards to the next taker and his sons in like manner. *Shelton v. Watson*, 16 Sim. 543; 18 L. J., N. S., Ch., 223; 13 Jur. 203.

8. A. devises lands to his sisters B. and C., and their heirs and assigns, upon trust, that until his granddaughter D. should marry or die, to receive profits, and thereout to pay her 100*l.* a year for her maintenance; residue to pay debts and legacies. After payment thereof, in trust for said D., and upon further trust, that if she lived, to marry a Protestant, and at time of such marriage be twenty-one, or upwards, or if under that, such marriage be with consent of said D., then to convey with all convenient speed after such marriage, to use of said D. for life, *sans waste*, voluntary waste in houses excepted; remainder to her husband for life; remainder to the issue of her body, with remainders over; and upon further trust, that if D. died unmarried, then to use of B. for life: remainder to son of his other granddaughter E., in tail; remainder to defendant C., remainder to his first and other sons: remainder to A.'s right heirs; and upon further trust, that if D. marry not according to will, then upon such marriage to convey to trustees, as to one moiety to use of D. for life; then to trustees to preserve contingent remainders; remainder to her first and every other son, being Protestant, with remainders over; and as to other moiety, to son of his daughter E., in like manner. A. dies, D. attains her full age; and upon treaty of marriage with F., applies to B. and C. for conveyance to herself for life; remainder to her intended husband for life; remainder to issue of her body: B. executes such conveyance, but C. refuses; D. suffers a recovery of the whole to use of herself in fee, and then marries F., who made considerable settlement upon her; she covenants to settle her estate upon husband and wife; remainder to first, etc., sons in tail; remainder to survivor of husband and wife in fee. They bring bill to compel C. to convey, etc. Decreed (not estate tail to D.) but an estate for life, *sans waste*, *ut supra*, as being intent of A., upon the will, with remainders over in strict settlement. *Glenorchy (Lord) v. Bosville*, Forrest 4.

1. A., by will, directed his trustees to convey his freehold lands to his daughter, P., and so as that she alone should receive the rents, and so as her husband should not intermeddle therewith; and from and after her decease, in trust for the heirs of the body of the said P. for ever:—Held, that this was an executory trust, and that the wife took an estate for life only; therefore the husband could not have curtesy; *sed secus*, if it had been an estate tail. Lord Hardwicke said in this case, that the devise being to the wife's separate use, would not bar the husband; for here is a sort of seisin in the wife. And though Coke says, that to make a tenancy by the curtesy, there ought to be an inchoate right to the husband in the wife's lifetime, he does not say he should be seised of the rents and profits. *Roberts v. Diamell*, 1 Atk. 607.

2. A testator devised some copyhold estate to his son Thomas, and "advised him to settle it upon himself, and his issue male by his lawful wife, and for want of such issue upon Edward and his lawful issue":—Held, first, that these words created a trust; and, secondly, that Thomas was entitled to a life estate only. *Parker v. Bolton*, 5 L. J., N. S., Ch., 98.

3. A testator directed his estates and house property to be settled on his son, D., and his heirs male; and should he have no heirs male, then the property to go to his grandson, E., on his taking the name of D., in addition to his own, within twelve months after his succession; and in the event of his having no heirs male, then the estate to go to his brother and his heirs male, he taking the name of D.:—Held, that an executory trust was created, which the Court directed to be carried out by a settlement, with limitations to the several devisees for life, and remainders to their sons in tail, successively. *Duncan v. Bluet*, 4 Ir. R., Eq., 469; 19 W. R. 41.

4. A testator directed his property to be divided between his children at twenty-five, share and share alike, and all moneys inherited by his daughters to be placed in the hands of trustees, to be settled on them for the sole use of themselves and their lawful issue:—Held, that "strict settlement" was not intended by these words, but the money inherited was to be settled upon the daughters and their lawful issue, which would have the effect of giving to the daughters an absolute interest. *Samuel v. Samuel*, 14 L. J., N. S., Ch., 222.

5. A testator devised to trustees, to the use of eight persons successively for life, and afterwards in trust to convey to all the sons and daughters of the eight who should be then living, and the heirs of their bodies "respectively in a due course of entail;" and he empowered his sister to cut down the estates of children "thereafter born of the eight to life estates." The plaintiff was a child of one of the eight born at the date of the will:—Held, that though the trust was executory, she was tenant in tail, and not tenant for life. *Randall v. Daniel*, 24 Beav. 193.

Settlement whereby real estate was conveyed in consideration of natural love and affection to trustees and their heirs, to the use of such persons as the settlor should appoint, and in default to the use of settlor for life, with certain intermediate uses, and then upon trust to convey the property to all and every

other the sons and daughters of G., and to all and every other the sons and daughters of S., and so on of six other persons in succession, who should be then living, and to the heirs male and female of his, her, and their body and bodies respectively, in a course of entail; the sons and daughters of G. and the heirs of his, her, and their body and bodies respectively, to take and be preferred before all the other persons last above named; with a similar clause for S. and each of the other six persons named, the sons of all and every the persons last named, and the heirs of his and their body and bodies to take before the daughters and the heirs of her and their bodies. The settlor then by his will devised other lands to trustees to the use of certain persons for life, and after the termination thereof upon trust to convey the estate to all the sons and daughters of eight persons and the heirs of their bodies respectively in a due course of entail, with power to one of the tenants for life to cut down the estates of children thereafter to be born, to life estates. Upon the above settlement it was held that the daughters of G. took in priority to the sons of S.; and that a daughter of G., who, at the death of the last tenant for life was the only child of G., took an estate tail in the devised estate. *Id.*

Held, also, that in construing the will, there being no ambiguity upon it, the settlement must not be looked at for the purpose of construing the will. *Id.*

6. Devise to trustees of money to be laid out in land, and to be settled as counsel should advise, in trust for A., and the heirs male of his body, to take in succession and priority, and the interest of the money till laid out, to be paid to A., his sons, and issue. A. shall have but an estate for life, with remainder to the first and other sons in tail, etc. *White v. Carter*, Ambl. 670. Affirmed 2 Eden 366.

7. A devise subject to the life interest of the testator's widow, upon trust to convey, assign, and assure freehold property "unto and to the use of my son T., and the heirs of his body lawfully issuing, but in such manner and form, nevertheless, and subject to such limitations and restrictions, as that if T. shall happen to die without leaving lawful issue, then that the property may after his death descend unincumbered unto and belong to my daughter B., her heirs, executors, administrators, and assigns," is an executory trust to be executed by a conveyance to the use of T. during his life, with remainder to his first and other sons and daughters as purchasers in tail, with remainder to R. in fee. *Thompson v. Fisher*, 10 L. R., Eq., 207; 18 W. R. 860.

IV. OTHER LIMITATIONS.

1. *Articles*, 6893.
2. *Devises*, 6897.

1. Articles.

8. Articles construed against the words for the sake of the intent, as where the wife's portion was to be laid out in land, to be settled on husband and wife, and the heirs of their bodies, and if not laid out in land during their

joint lives, and the wife should die first, that the money should go to the wife's brother and sister: wife dies first leaving issue, and the money is not laid out in a purchase; yet the issue, and not the wife's brother and sister, shall have it, Equity supplying the words, "if the wife die without issue." *Kentish v. Newman*, 1 P. W. 234.

1. Rights of children under marriage articles to annuities charged on certain leaseholds for lives and a term of years. *Richardson v. Nixon*, 2 J. & L. 250; 7 Ir. Eq. R. 620.

2. By the second clause of marriage articles, it was agreed that a sum should be settled on the wife (not stating how), and the husband renounced his marital right over it during the coverture. The fourth clause provided that in case of her death, leaving issue, it should belong to the husband and children successively; the fifth gave her a power of appointment, if she died without issue; and the sixth provided that the income should, "in all cases, belong to the husband during his life. There was no express life estate given to the wife:—Held, first, that the sixth clause being repugnant with the second clause, the husband's life interest was postponed until the death of his wife; and, secondly, that the wife, by implication, took an immediate life estate to her separate use. *Byam v. Byam*, 19 Beav. 58; 1 Jur., N. S., 79; 24 L. J., Ch., 209.

3. A., on the marriage of his son, articles to settle a jointure on the wife and her issue; but no provision is made for the son during his life. The father has the portion, and the wife dies without issue. Whether the son is entitled to an estate in the lands, *quære*. *West v. Delaware*, 1 Vern. 198.

4. The proper mode of giving an absolute interest to a wife after the death of her husband is by limiting the property to the wife, her heirs, executors, administrators, and assigns. *Witterbeek v. Barrow*, 23 Beav. 423; 3 Jur., N. S., 804.

5. Settlement by lease and release (the settlor being tenant in tail, and covenanting to suffer a recovery which was never suffered):—Held, ineffectual to carry out intentions in favour of younger children, as against the remainderman in tail. *Stanhouse v. Gaskell*, 1 W. R. 77; 17 Jur. 157.

6. A marriage settlement provided that the trusts of a certain sum in the settlement should be declared in favour of the wife and her children, giving the wife a life interest in that fund. No declaration of the trusts had been declared during the lifetime of the wife, who had had three children:—Held, that the usual trusts of a marriage settlement in favour of children of the marriage should be declared. *Mayne v. Mayne*, 17 L. T., N. S., 439.

By a deed it was agreed and declared that A., his executors, administrators, and assigns, should raise out of certain hereditaments 800*l.*, and should invest the same in the names of trustees at interest upon Government or real securities "upon trusts to be declared for the benefit of R., for her life, with remainder to her children, and as to R. to and for her separate use, and with all the powers for changing the security, and for maintenance, and other powers and trusts which are usually inserted in a money settlement of the like nature." No subsequent declaration of trust of the 800*l.*

was ever made:—Held, that the deed was executory only, and that the settlement so directed ought to have limited the 800*l.*, after the death of R., amongst her children as tenants in common, and not as joint tenants. *S. C. nom. Mayn v. Mayn*, 5 L. R., Eq., 150.

7. Where there is an ambiguity in expressions of settlement regarding issue, the presumptions are made in favour of the children. *Perfect v. Curzon (Lord)*, 5 Madd. 442.

8. Upon the words "issue of the marriage," the Court, on a bill for carrying articles into execution, have frequently directed the settlement to all the issue, to the first and other sons, and for default of such issue to the daughters, with proper remainders. In this case the Court determined in favour of the daughter. *Hart v. Middlehurst*, 3 Atk. 371.

9. Articles, on marriage, to settle lands on husband and wife for lives, remainder to heirs male of body of wife by husband, remainder to his heirs male by second wife, remainder to heirs female by marriage. Settlement is made before marriage, and said to be in pursuance of articles, whereby lands are limited to husband for life, without waste, and with power of making leases, remainder to first, etc., sons of marriage in tail male; remainder to first, etc., sons in tail by second marriage; remainder to heirs of body of husband. There are two daughters; husband suffers recovery, and devises to sister. Daughters may compel reconveyance. *West v. Evisay*, 1 Com. 412; 2 P. W. 349. *S. C.* on appeal 1 Bro. P. C. 225.

10. Articles between father and son; in consideration of 1*l.* and of the son's intended marriage, the father granted him an annuity charged on land; after the father's death, the son, his heirs, executors, administrators, and assigns to pay annuities to his sisters and their heirs; if one of them should marry without consent, her annuity to return to the son, who was also to pay an annuity to his father's widow during viduity, and several sums of money to the other children; if the son should happen to die without issue, his wife to be paid a jointure out of the lands; if he should happen to leave issue male, the estate to devolve to said issue male; and if he should happen to die without issue, the entire property to be divided equally between the eldest sons of his sisters; on the death of the father, the land to be given up to the son. The son died after the father, leaving a daughter, his only issue. To a bill to raise the arrears of an annuity for lives, granted after the execution of the articles by the father and son, a demurrer by the daughter, because they had not such an estate as enabled them to grant the annuity, overruled; as no limitations in favour of the female issue of the son could be imposed, for the articles, having expressed the intention to provide for the issue male, raised a negative implication against females being the object of the marriage provision. It is only where the contract has expressed an intention to provide for issue generally, that females are included in the provision. *McGuire v. Souilly*, Beat. 370.

11. By articles executed in consideration of marriage and the fortune of the wife, it was agreed that the trustees of a money fund, after the decease of the husband, should pay the residue of the interest, and also the principal

sum (subject to an annuity by way of jointure for the wife), to the issue of the marriage, in such shares and proportions to any one or more of them, in exclusion of the others of them, as the husband should by deed or will appoint, and in default of appointment to all the issue, in equal shares, to such of said issue as should be sons at twenty-one, and to such of them as should be daughters at twenty-one or marriage; and that power should be given to pay towards the advancement of any of said issue any sum not exceeding one-half of the principal sum belonging to such child respectively; and in case there should be no issue, or all such issue should die in the lifetime of the husband, then that the entire of the trust funds, subject to the jointure, should vest and be assigned and go to the husband, his heirs, executors, etc., absolutely, for his and their sole use and benefit. And it was further agreed, that a regular deed of settlement should be executed, which should contain the several clauses and covenants in such cases usual and proper:—Held, first, that the word “issue” in the articles was to be read “children;” secondly, that the settlement ought to contain clauses vesting the shares of the sons in them at twenty-one, and of the daughters in them at twenty-one or marriage; and also clauses of survivorship and accruer of the shares of sons dying under twenty-one, and of daughters dying under that age without having been married, in favour of the surviving or other children; thirdly, that the husband was entitled to the fund, either in the event of his surviving all his children, or of no child attaining a vested interest therein, and that the settlement ought to contain clauses accordingly. *Roche v. Roche*, 2 J. & L. 561.

1. In marriage articles there is a diversity between a limitation to the heirs of the body of a man, and to the heirs female of the body of a man, and the sons more favoured than daughters. *Powell v. Price*, 2 P. W. 539.

2. Testator gave 5,000*l.* stock to a female infant, to be paid or transferred to, or settled on her, by his executors, by such deed or instrument in writing, as they should think most prudent and proper, on her attaining twenty-one. The infant married in testator's lifetime, and afterwards attained twenty-one. The Court ordered the stock to be transferred to her on her sole receipt. *Laing v. Laing*, 10 Sim. 315; 9 L. J., N. S., Ch., 48; 3 Jur. 1119.

3. A being seised for life of certain lands, and B. in remainder in fee simple therein; by articles executed in 1771, previously to the marriage of B. with L. N., to which articles A. was a party, it was agreed that A. and B. should, within six months after the marriage, settle and assure the said lands, so as to secure a jointure for L. N., “and so that immediately after the death of the said B. (subject, however, to the provisions made for jointure), the said lands should go to and be vested in the issue of the said B. by the said L. N.; and that such issue should also be entitled to a further sum of 1,000*l.* to be charged upon all the estate, real and personal, of the said B., but in such shares and proportions as B., by deed or will attested by three witnesses, should direct or appoint, and, failing such appointment, then in equal shares.”—Held, that the word “issue” meant “children,” and that the articles were to be

carried into execution by giving all the children estates in common in fee. *Thompson v. Simpson*, 1 Dr. & War. 459.

But when the articles are very ambiguous, and there has been a great lapse of time, the Court will be slow to put a construction upon them, which would affect the rights of a purchaser, which it would have adopted without hesitation as between the parties themselves. *Id.* 491.

4. By articles relating to leases *pur autre vie*, and for years, and to money, it was agreed that said leases for lives and for years should be conveyed to trustees, in trust (after successive life estate to D. and J.). “After the decease of J., to the issue of J. and A., in such shares and proportions as the said J. should appoint, and for want of such appointment to go to such children equally, share and share alike; and for default of such issue, to the heirs, executors, and administrators of said J. during said leases; the money or the lands agreed to be purchased therewith, to go to issue of said J. and A., in such shares and proportions, etc.; and for want of such appointment, to be equally divided among such children, share and share alike; and if no children of said marriage, or all should die before twenty-one,” then a power to dispose of said money:—Held, that “issue” is to be construed “children,” and that the issue of J. and A. took the absolute interest in the chattel property, and a *quasi* fee in the freehold property; that a *quasi* estate tail cannot be barred by will, *semble*. *Campbell v. Sandys*, 1 Sch. & Lef. 281. *S. P. Williams v. Jekyl*, 2 Ves. 681.

5. On articles previously to the marriage of W. with R., the father of W. “bound the whole of the farm, etc., as a marriage portion to his son W., along with R.; the one-half of said farm to be the right, title, and interest of the issue, whether son or daughter, if begotten on the body of R. by W.” The issue take as tenants in common. *Taggart v. Taggart*, 1 Sch & Lef. 84.

6. T. H. by marriage articles covenanted to provide 30,000*l.* for an eldest son; and in case there should be issue of the marriage, an only son and an only daughter living at the time of his decease, to provide 10,000*l.* for such only daughter, to be paid to her at twenty-one or day of marriage; but in case there should be other issue of the marriage living at the time of his decease, besides one son and one daughter, then 20,000*l.* for all and every the child and children of the marriage, other than an only son, to be paid and payable to such child or children, and at such time, as T. H. should appoint, and in default of appointment to such child or children, share and share alike amongst them, if more than one, at twenty-one or day of marriage; there were living at the decease of T. H., one son and two daughters; one of the daughters died under age and unmarried:—Held, that the other daughter who attained twenty-one, being the survivor of a class, was entitled to the entire sum of 20,000*l.* provided for that class. *Hynes v. Redington*, Ll. & G. temp. Plunk. 33.

7. Before marriage, a husband executes a bond to trustees, the condition of which binds him to settle the property of the wife on her and her issue, in such manner as the trustees, in their discretion should think proper. After

the marriage a settlement is made, by which part of the property is to be applied in payment of his debts, and for his furtherance in life; another part is settled on the wife for life, remainder to the issue of the marriage, and, in case there should not be any such issue, to the husband absolutely; and a third part of the property is given to the wife for life, and, after her decease, in case there should be no issue of the marriage, as she should appoint:—Held, that this settlement was not according to the condition of the bond, and did not bind the rights of the wife. *Webb v. Kelly*, 3 L. J., Ch., 172.

1. By executory articles for valuable consideration, made between A. and his wife and sons, it was agreed, after the death of A., his estates should be limited to and settled upon B. (his eldest son) and his issue, with remainder, in the event of B. dying in the lifetime of A. without lawful issue, to each of the other sons of A. in succession, according to their seniority, with an ultimate remainder to the right heirs of A. B. survived A., and had issue:—Held, in a suit to carry these articles into execution, that B. was entitled to an estate tail in possession, with remainder to him in fee. *Dillon v. Blake*, 16 Ir. Ch. R. 24.

2. By marriage articles, the husband agreed to settle out of the lands of K., in favour of A., his daughter by a former marriage, a jointure on his intended wife, the remainder of the lands on the issue male begotten on the wife, and in failure of issue male on the issue female; and in case A. should survive, and the lands of K. should not be made good, that then the lands of K., which were not settled on the former marriage, should be subject to the jointure, and be settled on the eldest son of the marriage, and, in failure of the said son, on the daughters of the said marriage. There was no male issue of the marriage, but female issue, B., C., and D.:—Held, that the lands of K. should be settled on them as tenants in common in tail. No settlement was executed, and the lands descended to A., B., C., and D., subject to the trusts of the articles, in 1763, when B., C., and D. went into possession. In 1783 they levied a fine, and conveyed to a purchaser for value, and covenanted that they were seised in fee. There were several subsequent conveyances for value. In 1847 the lands were contracted to be sold:—Held, in a suit for specific performance against the purchaser, that the legal title of A. and her heirs to one-fourth of the lands was barred by the Statute of Limitations, as a court of law would not notice the executory trusts of the articles, and the several conveyances operated as disseisins. *Semble*, the equitable title of the heir of A., on failure of issue of B., C., and D., was also barred; but:—Held, that as a fine created no discontinuance in equity, the title was too doubtful to be forced on the purchaser. A conveyance of all her estate, etc., was obtained from the devisee of the heir-at-law of A., and was held to put an end to the objection; for although the reversion belonged to the heir of the settlor he must trace title through the daughters, and all their right was extinguished by this conveyance and the fine. *Stewart v. Conyngham (Marquis)*, 1 Ir. Ch. R. 534.

3. M. being entitled to an estate in fee, ex-

pectant upon the death of her father without other issue; by articles executed previous to her intermarriage with G. P. W. it was agreed that her estate should be settled to her separate use "if she should ever become entitled thereto," and on her issue; and that in case M. should die in the lifetime of G. P. W., he should receive the rents for his life, provided M. should ever become entitled thereto as aforesaid, but not otherwise; and G. P. W. covenanted to execute these limitations within six months after the celebration of the marriage. M. died before her father, who never had other issue, and did not execute the covenant:—Held, that under the articles, G. P. W. took an estate for life, although M. never became entitled to the possession, and that the breach of covenant did not affect the life estate. *Wallace v. Wallace*, 2 Dr. & War. 452; 1 Con. & L. 491.

4. Ante-nuptial articles were signed for the wife's personal estates being vested in trustees, "the trusts of the income being for the benefit of the husband and wife during their lives, and the trusts of the capital being for and amongst the children according to the appointment of the husband and wife, or the survivor of them; and in default of appointment, to the children equally; and in the event of there being no children, and of the husband being the survivor, the trust property to be at his absolute disposal." After the marriage a settlement was executed which limited the income to the husband and wife, during their joint lives, and to the survivor of them during his or her life, and then gave the capital to the children absolutely as tenants in common; but if there was no child, and the husband survived the wife, then to the husband. There was only one child of the marriage, and he died at the age of six months, in the lifetime of the parents. The husband died in the lifetime of the wife:—Held, that the capital of the fund and the arrears of income at the death of the husband belonged to the wife, for that the Court would have carried the articles into effect by giving the wife the first life estate to her separate use, and by making the shares of sons contingent on their attaining twenty-one, and of daughters on their attaining twenty-one or marrying, or by inserting clauses of survivorship and accruer on the death of sons under twenty-one and of daughters under that age and unmarried, so that the husband would have had no title as next of kin of his deceased infant child, and that the settlement must be rectified accordingly. *Cogan v. Duffield*, 2 L. R., Ch. D., 44; 45 L. J., Ch., 307; 24 W. R. 905; 34 L. T., N. S., 593. Affirming 45 L. J., Ch., 74; 20 L. R., Eq., 789.

5. By articles made previously to a marriage, lands were covenanted to be conveyed to the use of the husband and wife for their lives, with remainder to the use of the issue of the husband and wife, their heirs and assigns, for ever. There were a son and two daughters of the marriage, and each of them had two children:—Held (affirming 2 Dr. & Sm. 404; 12 L. T., N. S., 200; 13 W. R. 543), that the son would take an estate tail, with remainder to the daughters, and that the grandchildren took nothing. *Phillips v. James*, 11 Jur., N. S., 660; 13 W. R. 934; 12 L. T., N. S., 685; 3 De G. J. & S. 72.

1. By marriage articles, it was agreed that the interest of the amount of a policy of assurance, effected on the husband's life, should be applied, first, in payment of an annuity to the wife, and that the remainder of the interest should be paid among the issue of the marriage, in such shares as the husband and wife, or the survivor of them, should by deed or will appoint; and in default of appointment, share and share alike; and that the principal, after the death of the wife, should remain to the use of the issue of the marriage, in such manner and in such shares and proportions to and amongst the issue, as the husband and wife, or the survivor of them, should by deed or will appoint, and for want of such appointment, share and share alike. The articles contained a covenant to execute all acts necessary to carry them into execution. The husband survived the wife; but by a codicil to his will, made in 1854, and in her lifetime, he willed and devised that whatever property he should die possessed of, or be entitled to, either freehold or otherwise, after the payment of his debts and funeral expenses, should be equally divided amongst his sons and daughters which he then had or might have by his marriage; and that on the death of either of his sons or daughters by his marriage, before they arrived at twenty-one, the share or shares of him or her should be equally divided amongst the survivors. And he declared it to be his will and desire that, in the event of his being entitled to any property not named in his will, which contained an exclusive, and therefore invalid, appointment of the principal of the policy, his wife should be his residuary legatee:—Held, that the will and codicil did not amount to a valid execution of the power. *Cronin v. Roope*, 8 Ir. Ch. R. 103.

Held, also, that if a settlement had been executed, it should have contained a clause that, in the event of any of the children dying under age and unmarried, the share of the child so dying should go to the survivors. *Id.*

2. Devises.

2. In an executory trust a court of equity is sometimes obliged to depart from the words of a will, in order to direct a conveyance to be made, which will answer the intention of the testator. *Synge v. Hales*, 2 Ball & B. 507.

A devise, after the death of the survivor of testator's daughters, to all and every the child and children of his daughter S., who should be living at the time of her death, and to the heirs of such child or children, for ever, equally, share and share alike, afterwards revoked by a codicil, reciting the devise, and in lieu of it directing the trustees, upon the death of the survivor of his daughters, to convey the lands charged with 1,000*l.* for a granddaughter to the two sons of his daughter S. and their heirs; the 1,000*l.* to be paid by the grandsons as soon as they became entitled to the possession of the estate. The grandsons take as tenants in common. *Id.* 499.

3. If a testator directs his real estate to be settled on his son, his heir apparent, for life, with remainder to the first and other sons of his son in tail, with remainder to A. for life, with remainder to his first and other sons in

tail, with remainders to other persons and their sons in like manner, and, ultimately, on his right heirs, and his personal estate to be settled on the same persons, in the same order and succession, and for the same estates and interests, so far as the nature of the property and the rules of law and equity will admit of, the Court, if a suit is instituted immediately after the testator's death for the purpose of having a settlement made, will order the ultimate limitation of the personal and real estate to be made to the person who is the testator's heir. *Boydell v. Golightly*, 14 Sim. 328; 9 Jur. 2.

4. Devise in strict settlement, with power to the tenants for life to jointure, on condition that two-thirds of the portion should, upon such marriage, be settled, one-third upon the eldest son of the marriage, and one other third upon the younger children. Upon the intention that the settlement should be conformable to the limitations of the real estate, a trust for the father for life was established, and the interest of the eldest son was not to be devested, except by his death under twenty-one, without issue male. *Burrell v. Crutchley*, 15 Ves. 544.

5. Proviso that if any of the tenants for life, in a devise and executory trust to convey in strict settlement, shall become possessed of the family estate, the devise or limitation directed shall thereupon cease and become void and not take effect; and the person next in remainder, under the said limitations or directions, thereupon become entitled to the possession. The first tenant in tail is entitled under the proviso, notwithstanding the descent of the other estate upon his father for life. *Stanley v. Stanley*, 16 Ves. 491.

6. When the general intent is to make a strict settlement, it shall prevail, though some of the limitations may seem contingent; but where the intent to create an estate tail is not plain, but doubtful, the Court will lay hold of anything, rather than put it in the power of a person on a remote contingency to bar all subsequent remainders. *Lethieullier v. Tracey*, 3 Atk. 781, 797.

7. Where trust is executory, and to be carried into execution by the Court of Equity, it will direct a conveyance of lands, notwithstanding they are gavelkind, according to the rule of common law. *Roberts v. Diamell*, 1 Atk. 608.

8. A will directed real estate to be settled to uses which did not exhaust the fee. In a suit to carry out the trusts of the will, to which the persons beneficially interested, who were an infant and a married woman, and the trustees of the will, were parties, the Court approved of a settlement purporting to be made in accordance with the will, the uses of which did exhaust the fee:—Held, first, that the decree approving the settlement was erroneous. *Head v. Godlee*, and *Reynolds v. Godlee*, Johns. 536; 6 Jur., N. S., 495; 29 L. J., Ch., 633.

But secondly, *semble*, that in a suit by persons claiming under one of the beneficiaries against persons claiming under the other beneficiary through the medium of the uses in excess of the limitations directed by the will, the Court was bound by the former decree until set aside upon a re-hearing. *Id.*

9. A trust created by will to purchase land,

to be added and closely entailed to testator's family estate, in the possession of T. B.: testator declaring that his object was to have a head to the family, and that if T. B. should die without male issue, or dispose of the family estate, the residue of his fortune should go to A., or his nearest relative in the male line; how to be executed. *Woolmore v. Burrows*, 1 Sim. 512.

1. Devise to A. in fee, with directions to settle on descendants of his mother for their several lives, etc., A. may limit an inheritance to effectuate the general intent. *Godolphin v. Godolphin*, 1 Ves. 21.

2. Testator directed his estates to be settled on G. R. for life, with remainder to his issue in tail male in strict settlement, upon condition that all persons from time to time to come into possession of the estates should take and use the name and arms of T.:—Held, that the estates ought to be settled on G. R. for life, with remainder to his sons successively in tail male, with remainder to his daughters as tenants in common, with cross-remainders in tail male: and that the proviso to be inserted in the settlement, as to taking the name and arms and for giving over the estates on default, ought to be so expressed as to take away the estates from the defaulting party and his descendants only; that is, if a grandson of G. R. were the defaulting party, the consequence ought not to extend to the grandson's brothers. *Trevor v. Trevor*, 13 Sim. 108; 11 L. J., N. S., Ch., 417; 6 Jur. 863. Affirmed 1 H. L. Ca. 239.

Testator made two wills, one of his estates in Sussex, and the other of his estates in Bedfordshire. By the latter he devised those estates to trustees in trust to settle them on G. R., who was heir to the barony of D., for life, with remainder to his issue in tail male in strict settlement; "Upon the like condition to that I have made my will of my Sussex estates, so far as the change of circumstances will permit, that the said estates shall go over to the party next entitled, on the person for the time being possessed becoming entitled to the barony of D.":—Held, regard being had to the will of the Sussex estates, that the succession of a child or any male issue of a child of G. R. to the barony ought not to exclude that child or his issue male from the enjoyment of the Bedfordshire estates, unless some other child or the issue male of some child of G. R. were in existence to whom those estates might go over. *Id.*

3. A testator by his last will and testament directed the trustees therein appointed, to call in a certain sum of money to which he was entitled, and invest the same in the purchase of freehold estates in lands or hereditaments, of a clear estate of inheritance for the use of his son A. for and during his natural life, and after his death to the use of his first and other sons, according to seniority of age and priority of birth; and in case the said A. should happen to die without issue male, then in trust for his second son B. and the heirs male of his body, according to seniority of age and priority of birth; and desired that his said sons, and the several persons who should be in possession of such estates, should have a power to make leases not exceeding three lives or thirty-one years, at the full improved

value:—Held, that A. was entitled to an estate tail in the lands to be purchased. *Herbert v. Blunden*, 1 Dr. & War. 78.

4. L. by his will devised his manors to trustees upon trust, to convey the same to his son J., for life, with remainder to trustees to preserve contingent remainders; with remainder to the second and other younger sons of J., in tail male. There was no limitation to the first son of J.; but the declaration of the trust of the term contained a provision to raise money for the daughters, on failure of issue male of the body of J. The will also provided, that in case J. should have any children, other than and besides an eldest or only son, then J. might raise money for the portion of younger sons or daughters:—Held, that the true construction of the will was, that the first son should have an estate tail male in reversion, after the death of his father. *Langston v. Pole*, Tam. 119; 7 L. J., Ch., 185.

5. Testatrix by her will gave 500*l.* to each of her two nieces to be settled as she should thereinafter describe, and directed that the provision therein made for her nieces should not be subject to the control of any husbands they might marry, but should remain vested in her executors in trust until a proper settlement was made. And by a codicil she directed that if either of her nieces should die without leaving issue, the legacy given to her should devolve to the other niece and her children, with a gift over if both should die without issue:—Held, that this was an executory trust, and that the nieces took life interests with remainder to their children and cross remainders between them. *Holloway v. Collier*, 1 W. R. 266.

6. Devise to trustees, as soon as his three daughters attained their respective ages of twenty-one, to convey to them and the heirs of their bodies as joint tenants, this not a joint estate, but to be construed as near as it may be; so that the conveyance must be at twenty-one respectively, with cross remainders. *Marryat v. Townly*, 1 Ves. 102.

7. Testator directed that if his daughter should marry a professional gentleman, or a man embarked in trade or business, and not possessed of landed property whereon to charge a suitable provision for her, certain trust funds should be settled upon her for life, and, after her decease, the principal to the issue of her marriage; but if she should marry a gentleman possessed of landed estate and he should make a suitable provision for her, and settle his estate on the issue of the marriage, that the trust fund should be paid to her husband. The daughter married a country gentleman not possessed of any landed estate, and not a professional gentleman, or embarked in any trade or business. He afterwards purchased a landed estate, and offered to make a settlement of it upon being paid his wife's fortune; but it was held, that the trust fund should be settled according to the directions in the will; and that the husband was not entitled to a life interest therein. *Briscoe v. Briscoe*, 1 J. & L. 334; 7 Ir. Eq. R. 123.

8. Testator directed his trustees to purchase lands in the counties of N. and D. to be settled, on the death of the eldest son of J. S. without issue (which happened), to the use of every

son of J. S. then living, or who should be born in the testator's lifetime, and the assigns of such son during his life, with remainder to trustees to preserve contingent remainders; but to permit such son and his assigns to receive the rents during his life, and after his death to the use of such son's first and every other son successively in tail male, and on failure of such issue, to the use of the testator's right heirs:—Held, that the younger sons of S. took as tenants in common for life, with remainder as to each son's share to his first and other sons in tail male, with cross remainders over. *Surtees v. Surtees*, 12 L. R., Eq., 400; 25 L. T., N. S., 288; 19 W. R. 1043.

1. Under an executory trust in a will to settle lands, to be purchased with certain funds, upon A. for life, and afterwards according to her appointment, and, in default of appointment, to convey to the right heirs of A., with a similar trust as to the residue of the fund not laid out in the purchase of land; the trust, in default of appointment, being for the executors or administrators of A., it was held, that, as A. took an absolute interest in the money under the last trust, in default of appointment, the direction to convey the lands to her right heirs must be construed as words of limitation, and not to vest any estate in her heirs as purchasers. *Webb v. Shaftesbury (Earl)*, 3 Myl. & K. 590.

2. Devise in trust for a son of the testator's nephew A., at the age of twenty-four; if he have no son, to A., son of the testator's great-nephew B.; but if neither have a son, then to a son of the testator's great-niece's daughter, taking his name, whoever should take not to be put in possession of any part of the testator's effects until twenty-four, nor the executors to give up their trust till a proper entail be made to the heir male by him; is an executory trust in tail for an only son of A. *in ventre* at the testator's death; and not void for uncertainty, nor too remote. *Blackburn v. Stables*, 2 Ves. & B. 367.

3. Devise to the heir-at-law and his issue male in strict settlement, remainder in trust to be sold, and the money to be distributed among certain persons, or the survivors or survivor of them, and that the share of one should, previous to her marriage, be settled upon her for life, and after her death upon her issue, in default of issue upon her right heirs; the produce of the sale is to be considered as personal estate, and vests in the survivors at the death of the tenant for life, without issue male. A settlement in trust for the husband for life, then for the wife for life, then for the children as they should appoint; in default of appointment, equally; if no children, according to their joint appointment; in default thereof, to the husband, his executors, etc., is a sufficient execution of the direction in the will. *Brograve v. Winder*, 2 Ves. J. 634.

4. A testator directed that upon the death of his wife, to whom he gave a life interest in all his property, both real and personal, his nephew, whom he named, should be heir to all his property not otherwise disposed of; but added, that as he had had little intercourse with his nephew, and was apprehensive that his habits might require some control, whatever portion of the property might be possessed by

him was to be secured by the executors for the benefit of his family:—Held, that the real estate was to be settled on the nephew for life, with remainder to his sons successively in tail male, with remainder to his daughters as tenants in common in fee, and the personal estate upon the nephew for life, with remainder to all his children as joint tenants, with a proviso, that in the event of all the children dying under twenty-one, and daughters unmarried, or if sons, without issue, the personalty should be held in trust for the nephew absolutely. *White v. Briggs*, 2 Ph. 583; 17 L. J., N. S., Ch., 196.

5. One devises all his money in the government funds, to be laid out in the purchase of land of 300*l.* or 400*l.* per annum, to be settled on the eldest son, and the heirs male of his body, remainder to the second son, and the heirs male of his body, etc., and devises the rest of his personal estate to his eldest son, and the heirs male of his body; remainder to his second son, etc. The personal estate cannot be entailed; but the whole vests in the eldest son. *Seale v. Seale*, 1 P. W. 290; Pre. Ch. 421; Gilb. Rep. 105.

6. It does not follow, because the word "issue" in one part of the will means children only, that it should have that meaning also in another part; and where, after a bequest to A. and B. and their issue, in the sense of children, the residue was given to A. and B. equally, and to be divided between them, with benefit of survivorship, upon the death of either under twenty-one; not to be subject to the control of their husbands, but to be held in trust for them and their issue respectively until they attained twenty-one, if unmarried, or if married until a proper settlement could be made upon them and their issue, so that they should receive the dividends exclusively of their husbands, and if they both died under twenty-one, and without issue, then over; both attained twenty-one, and one of them died leaving children and grandchildren:—Held, that both the children and grandchildren were entitled to her share *per capita* as tenants in common. *Head v. Randall*, 2 Y. & Coll. C. C. 231; 7 Jur. 298.

7. B., in 1842, transferred to three persons a debenture, without any declaration of trust other than an expression in a letter written by him to his solicitor shortly before the transfer, in which the three persons were named as trustees, and the trusts of a proposed settlement of the debenture were stated to be "for my niece C. M. and her children":—Held, that a valid trust was declared by the letter in favour of C. M. for life, and afterwards of her children as joint tenants. *Re Bellaria*, 12 L. R., Eq., 218; 24 L. T., N. S., 466; 19 W. R. 699.

The transferees of the debenture were already trustees of a will, which contained limitations for the benefit not only of C. M. and her children, but of the issue of deceased children, and from contemporaneous entries in a solicitor's book it appeared that, after the date of the letter, B. said he had made up his mind, to transfer to the same three persons, "without stating any trust or condition;" also that B. was advised to take a letter from them that they held the debenture upon the same trusts as the will but no space of any such

letter appeared. The trustees paid the income to C. M. during her life, and upon her death transferred the fund into court. There was issue of the deceased children of C. M.:—Held, that a trust for the issue of the deceased children had not been sufficiently declared. *Th.*

1. Testator devised lands, subject to an annuity to his wife, to his son for life, with remainder to the son's first and other sons in tail, with remainder, subject to another annuity to his wife, to his grandson and the grandson's first and other sons in like manner, with remainder over. The son died without issue; and, thereupon, the testator, by a codicil, charged the lands with three further annuities. He afterwards made two other codicils, not duly attested. He then made a fourth, which was duly attested, "revoking several of the dispositions heretofore made by me in my said will and codicils, of all my freehold, copyhold, and personal estate, of every kind; and, instead of such devise, disposition, and bequest thereof, I do give all my freehold, copyhold, and personal estate of every kind and wheresoever situate, unto my daughter, for her life; and, after the determination of that estate, unto my grandson and his heirs in strict entail as in my will directed." He then directed that his grandson, who was an infant, should not be put in possession of his estates until he attained thirty-one; and that, in the interval, the rents should be accumulated for the benefit of his grandson and his heirs; "and, in failure of issue of my said grandson, I order that my said estates and effects shall go and descend as is by my said will directed." The testator then confirmed the several annuities and donations bequeathed in his will and former codicils, and gave another annuity to his wife; thereby, in all other respects but what was above mentioned, ratifying and confirming his will and codicils:—Held, that the grandson took only an estate for life. The Court, advertent to the clause postponing the possession, which would be nugatory if A. was to be tenant in tail, and also observing that a strict mode of construction would, if applied to the words "in failure of issue," defeat the limitations over, held, in accordance with the certificate of the Court of Queen's Bench, that A. was tenant for life. *Graves v. Hicks*, 11 Sim. 536; 10 L. J., N. S., Ch., 185; 5 Jur. 674; and at law, 5 Adol. & Ell. 38; 8 Bingh. 479.

2. A testator who was seised in fee of three estates, devised one of them, called the Tempo Estate, to his daughter Letitia for life, with remainder to her issue in tail, and, in default of such issue, to his nephew, Robert James, for life, with remainder to his issue in tail, with several remainders over, but leaving the ultimate reversion in fee undisposed of. He then devised the two remaining estates to his other daughters in strict settlement, but made no disposition of the ultimate reversions in fee. The testator was also seised of divers freehold lands, and was possessed of considerable personal property, and after devising various parts of his freehold lands to the different persons, and bequeathing some pecuniary legacies, he concluded with these words: "I leave and bequeath the rest, residue, and remainder of my properties, both freehold and personal, of whatsoever nature and kind I may die possessed of, to my brother Robert;

and if my said brother Robert shall survive me, I request and desire that he shall convert all the personal property into fee simple property, and at his decease leave the same entailed on his son Robert James, in the same manner as I have myself entailed the Tempo Estate":—Held, that the freehold estates which passed under the residuary devise, as well as the residuary personal property, are within the trust to entail contained in the residuary devise. Held, also, that this trust was to be executed by giving a life estate to Robert James, with remainder to his sons and daughters in tail, according to the limitations of the Tempo Estate. *Tennent v. Tennent*, 1 Dr. 161; 1 J. & L. 379; 7 Ir. Eq. R. 361.

3. A lady devised freehold estates to trustees for her sister E. for life, with remainder in strict settlement to her sons, excluding the second, and with powers of jointuring and charging portions. By letters patent, subsequent to the will, a barony was created and limited to E. for life, with remainder to her second son R. and the heirs male of his body, and in default of such issue to the third and younger sons of E. and the heirs male of their bodies respectively and successively. The patent contained a shifting clause, by which if any person taking thereunder should succeed to the earldom of D., and there should then or thereafter be a younger son or heir male of a younger son of E., then the succession to the barony was to devolve upon the son of E. or the heir who would be next entitled to succeed thereto if the person succeeding to the earldom of D. was dead without issue. By a subsequent codicil, the testatrix devised her estates to trustees on trust, to settle the same in a course of entail corresponding as nearly as might be with the limitations of the barony, and the provisos affecting the same contained in the patent, and with all such powers, provisos, declarations, and agreements as the trustees should think proper or their counsel advise. The House of Lords after E.'s death declared that the estates ought to be limited in strict settlement to the second son for life, with remainder to his first and other sons in tail male, with remainder to the third and other younger sons of E. and the heirs male of their bodies respectively and successively in tail male, and that the settlement should contain a shifting clause similar to that in the letters patent:—Held, that clauses postponing the vesting of portions until the death of the person creating them, and providing for the cesser of jointures and portions charged on the estates upon the person charging them succeeding to the earldom of D., ought not to be inserted in the settlement. *Holmesdale (Viscount) v. West*, 40 L. J., Ch., 795; 12 L. R., Eq., 280.

V. EXPRESS DIRECTIONS TO SETTLE IN "STRICT SETTLEMENT."

4. If lands are devised in trust to be settled on A. and his heirs, in strict entail, the lands ought to be settled on A. for life, and on the persons designated as his heirs, in succession. Testator devised lands, subject to an annuity to his wife, to his son for life, with remainder to the son's first and other sons in tail, with

remainder, subject to another annuity, to his wife, to his grandson, and the grandson's first and other sons in like manner, with remainders over; and he gave his residuary personal estate to his son. The son died without issue; and, thereupon, the testator, by a codicil, charged the lands with three further annuities, one for his wife, another for his daughter, and the third for her husband; and gave his residuary personal estate to his wife. He afterwards made two other codicils, but they were not duly attested. He then made a fourth, which was duly attested, "revoking several of the dispositions, heretofore made by me in my said will and codicils, of all my freehold, copyhold, and personal estate of every kind; and, instead of such devise, disposition, and bequest thereof, I do give all my freehold, copyhold, and personal estate of every kind, and wheresoever situate, unto my daughter, for her life; and, after the determination of that estate, unto my grandson and his heirs in strict entail as in my will directed." He then directed that his grandson, who was an infant, should not be put in possession of his estates until he attained thirty-one; and that, in the interval, the rents should be accumulated for the benefit of his grandson and heirs: "and, in failure of issue of my said grandson, I order that my said estates and effects shall go and descend as is by my said will directed." The testator then confirmed the several annuities and donations bequeathed in his will and former codicils, and gave another annuity to his wife; thereby, in all other respects but what was above mentioned, ratifying and confirming his will and codicils:—Held, that the grandson took, not an estate tail, but only an estate for life in the lands. *Graves v. Hicks*, 11 Sim. 536; 10 L. J., N. S., Ch., 185; 5 Jur. 674. And see S. C. at law, 5 Adol. & Ell. 38; 8 Bing. 479.

1. When an executory trust for the settlement of freehold estates in strict settlement directs, either expressly or by reference to the trusts of other property, that certain persons shall take life estates, the use of the words "in strict settlement" does not make the tenants for life dispensable for waste. *Stanley v. Coulthurst*, 10 L. R., Eq., 259; 39 L. J., Ch., 650; 18 W. R. 969; 23 L. T., N. S., 761.

2. Directions as to the proper settlement to be made where property was directed by will to be "settled strictly." *Loch v. Bagley*, 15 W. R. 1103.

VI. DIRECTIONS TO SETTLE ON A FEMALE.

3. A legacy given to a married woman, to be settled on her in Italy, was ordered to be paid to a banker in Italy, on his giving security that it should be settled, according to the law of Italy, on the wife, for her separate use. *Brown v. Tatnall*, 6 L. J., N. S., Ch., 371.

4. Where a testator directed that his daughters' shares under his will should be "settled upon themselves strictly":—Held, that the income of each daughter's share should, during the joint lives of herself and her husband, be paid to her for life for her separate use, without power of anticipation; and if she died first, then her share should go as she should by will appoint, and in default of appointment to her next-of-kin, exclusively

of her husband; and if she survived, then to her absolutely. *Loch v. Bagley*, 4 L. R., Eq., 122.

5. Form of settlement directed by the Court, where a testator had directed his trustees to hold a fund in trust for his daughters, to be settled on them and their issue free from their husband's control during the life of such daughters. *Stanley v. Jackman*, 5 W. R. 302; 23 Beav. 450.

6. Form of settlement directed by the Court, where a testator directed personality to be settled on his daughters, independent of their coverture. *Eustace v. Robinson*, 7 L. R., Ir., 83.

7. A father directed his property to be divided into nine shares and give one and a half share to each of his two daughters, "to be settled on themselves at their marriage." At his death the two daughters were infants. The two daughters having attained twenty-one, and being unmarried:—Held, that they were entitled to their shares absolutely, and that there was no trust for a settlement which the Court could execute. *Magrath v. Morehead*, 12 L. R., Eq., 491; 24 L. T., N. S., 868; 41 L. J., Ch., 120.

8. A testator gave to his daughter the sum of 15,000*l.*, to be kept in trust by his executors till she should attain the age of twenty-one or marry with consent, whichever might first happen, when this sum was to be settled on his said daughter, but, failing her attaining twenty-one or having issue by such marriage, then the money to devolve upon others. The daughter attained the age of twenty-one, without having been married:—Held, that she was entitled to the legacy absolutely, without any settlement being made. *Arnold v. Arnold*, 16 Sim. 404; 18 L. J. (N. S.), Ch., 90.

9. A testator by his will dated the 2nd July 1870, gave a legacy to a married woman for her separate use without power of anticipation, and directed that "for the purpose of securing to her the separate enjoyment without power of anticipation against any husband for the time being, the trustee should settle the legacy in such manner as would carry out the said purpose." Previously to the date of the will the legatee had been judicially separated from her husband, and had ever since lived apart from him:—Held, that she was entitled to have the legacy paid to her. *Munt v. Glynes*, 41 L. J., Ch., 639; 27 L. T., N. S., 366; 20 W. R. 823.

10. Bequest of the testator's property to his wife to bring up and educate his children, and when they should come of age, to settle on them what she should deem prudent, reserving to herself a sufficient maintenance; and, at her death, the property remaining to be equally divided amongst his children; with a gift to trustees for the children, in case of the marriage of his widow:—Held, that the widow took a life interest in the property, with a power to settle or appoint the same on or to the children of the testator, but not on or so his grandchildren; and that the children took vested interests in the property at the testator's death, liable to be divested by such appointment. *Kennerley v. Kennerley*, 10 Hare 160; 16 Jur. 649.

11. Testator gave 5,000*l.* stock to a female infant, to be paid or transferred to or settled on her, by his executors, by such deed or

instrument in writing as they should think most prudent and proper on her attaining twenty-one. The infant married in the testator's lifetime, and afterwards attained twenty-one. The Court ordered the stock to be transferred to her on her sole receipt. *Laing v. Laing*, 10 Sim. 315; 9 L. J., N. S., Ch., 48; 3 Jur. 1119.

1. A father gave the residue of his estate in trust for all his children who being sons should attain twenty-one, or being daughters should attain that age or marry, and if any of his children should die before attaining a vested interest, leaving issue, their shares to go to their children with a proviso that, notwithstanding the trusts aforesaid, on the marriage of any daughter a moiety of her share should be held in trust for such daughter for life, and afterwards for her children.—Held, that the daughters who had attained twenty-one, and had not married, were entitled to the whole of their shares absolutely. *Re Dowling*, 14 L. R., Eq., 463.

2. Bequest of 2,000*l.*, for the benefit of a feme sole, "to be paid upon her marriage, and to be settled upon her by her settlement," the interest to be paid to her in the meantime; and, in case she should not marry before attaining the age of thirty-five years, the principal sum to be paid to herself. The legatee married under the age of thirty-five years, and applied for payment of a sum of money in court, which represented the legacy:—Held, that a settlement should be made of the legacy upon the legatee and her children. *Duckett v. Thompson*, 11 L. R., Ir., 424.

3. Where a precatory trust has been created by will in favour of "children," simpliciter, the trustee may, in executing the trust, limit the shares of daughters to their separate use. *Willis v. Kymor*, 7 L. R., Ch. D., 181; 47 L. J., Ch., 90; 38 L. T., N. S., 207.

4. Where articles for a settlement directed the property to be conveyed on trust to pay the income to the wife, or such person as he should appoint, during her life, for her own absolute use and benefit, free from marital control and liability:—Held, that in the settlement a restraint against anticipation should not be inserted. *Symonds v. Wilkes*, 11 Jur., N. S., 659; 13 W. R. 1026; 12 L. T., N. S., 598.

5. A father gave real and personal property to trustees for his daughter, and directed that, if she should marry, it should be so settled that she might enjoy the income during her life for her separate use:—Held, that the trust for the separate use during life, being merely executory, should be carried into execution with a restraint upon anticipation. *Re Dunnill*, 6 Ir. R., Eq., 322.

6. A testator, by his will, gave real and personal property to his daughter A. absolutely; but by a codicil made subsequent to her marriage, he directed that "it should be settled to the exclusion of her present or any future husband, that the same might belong to her during her life, and be secured for the benefit of her children, equally, after death, so that the issue of any such child dying in her lifetime might take his or her parent's share;" and in default of such children or other issue over:—Held, that the property must be settled in trust for A. for life, to her separate use with-

out power of anticipation; and, after her decease, upon trust for such of her children as should survive her, and for the issue living at her death of such of her children as should not survive her equally as tenants in common, the issue to take *per stirpes*, but *inter se* equally as tenants in common. That there should be limitations, in the nature of cross-remainders, in favour of such of the children and issue as should survive A. in respect of the share of any child dying in her lifetime without leaving issue, and in respect of the share of any issue of any child similarly dying. That the realty should be settled as realty; and (as the testator, by simply directing a settlement, must have intended) with powers of leasing and sale and exchange, and with a receipt clause; and that the settlement should contain provisions for maintenance, education, and advancement, and a power to appoint new trustees. *Turner v. Sargent*, 17 Beav. 515; 2 W. R. 50.

Form of the limitations to the issue *inter se* in such a settlement. S. C. 2 W. R. 50.

7. J. T. by his will gave all his property to trustees in trust for his three daughters equally, to be paid to them as they respectively attained twenty-one, or married with the consent of the trustees. Provided that if they married with such consent under age, the trustees at their discretion might pay the share to such daughter so marrying, or settle it upon her or her issue, with a gift over. One of the daughters having married under age and without consent, the question was, whether her share could be settled, the trustees being willing to settle it:—Held, that there was nothing in the will to authorise a settlement, and nothing could be done until she attained twenty-one. *Taylor v. Auston*, 1 W. R. 252; 1 Drew. 459.

See also IX. *infra*.

VII. DIRECTIONS TO SETTLE PERSONALTY AS HEIRLOOMS OR ON THE TRUSTS OF FREEHOLDS.

8. Covenant in marriage settlement, to settle leasehold estates in trust for such persons, and such or the like estates, ends, intent, and purposes, as far as the law would allow, as declared concerning real estates limited to the first and other sons in tail male, with several remainders; the Court, in executing the covenant, declared that no person should be entitled to the absolute property unless he should attain twenty-one, or die under that age, leaving issue male. *Newcastle (Duke) v. Lincoln (Countess)*, 3 Ves. 387. But see the variations in this decree, *id.* 398. n., and 12 Ves. 218, on appeal.

9. A testatrix bequeathed jewels to S. "to go and be held as heirlooms by him and by his eldest son on his decease, and to go and descend to the eldest son of such eldest son, and so on to the eldest son of his descendants, as far as the rules of law or equity would permit," and she requested him to do all in his power, by his will or otherwise, to give effect to that her wish:—Held, that these words created an executory trust in S., and that the jewels must be settled on him for life, with remainder to his eldest son for life, with remainder to the eldest son of such eldest

son, but to be divested in case of his death in his father's life, or after his father's death under twenty-one; but that, subject to these limitations, the beneficial interest in the jewels remained in him. *Shelley v. Shelley*, 37 L. J., Ch., 357; 6 L. R., Eq., 540; 16 W. R. 1036.

Family jewels may be settled as heirlooms independently of any real estate. *Ib.*

1. A settlement, on marriage, of real estate, upon trust for the intended wife for life, remainder to the husband for life, and, after the death of the survivor, "in trust for and to be released and conveyed unto" the children, as the parents or the survivor should appoint; in default, "in trust for and to be released and conveyed unto" the children, as tenants in common in tail; and in default of issue, if the wife should survive the husband, "in trust for and to be released and conveyed unto" the wife, "her heirs and assigns for ever." By the same deed personal property was assigned to the trustees, upon trust to pay the income and principal "to such person and persons, for such uses, ends, intents, and purposes, and in such manner and form, and subject to the same powers, provisos, contingencies, declarations, and agreements, as were expressed concerning the payment by the trustees of the rents and profits of the real estate, and concerning their release and conveyance of the same, or as near thereto as circumstances and the nature of the case would admit".—Held, that this trust of the personality was not rendered executory by reference to the direction to release and convey the real estate, such direction being merely superadded to a distinct declaration of trust of such real estate. *Doncaster v. Doncaster*, 3 Kay & J. 96.

This construction was not altered by a proviso immediately following the limitation of the personal estate, that the ultimate limitation in favour of the heirs of the wife should, with respect to the personal estate, be construed to be for her next-of-kin; the meaning of such proviso being only, that if, by the failure of the preceding limitations, the real estate should at any time become vested in possession in the heirs of the wife, the personality, which was settled upon corresponding trusts, should belong to her next-of-kin. *Ib.*

There was only one child of the marriage, who died an infant in the lifetime of his father. On the death of the father:—Held, that such child took an absolute interest in the personality, subject to open and let in other children, if any. *Ib.*

Part of the personal property consisted of a share of real estate under a will, by which it had been devised in trust for sale; and the settlement contained a power for the trustees, with the consent of the husband and wife, and with the concurrence of the persons entitled to other shares of this property, to elect to take it as real estate, and to hold it upon the trusts of the other real estate contained in the settlement:—Held, that this power did not alter the construction of the limitations of the personal estate; but that, when the settled personal estate became the absolute property of the child, the power could no longer be exercised. *Ib.*

[*Executed Settlements.*] See SETTLEMENT, XVI.

VIII. DIRECTIONS TO SETTLE PROPERTY TO GO WITH A TITLE.

2. Direction by deed, after the decease of the settlor, to convey and settle estates in such a manner that the same shall, so far as the law will permit, be strictly settled, so as to go along with a barony, so long as the person possessed of the dignity shall be a lineal descendant of the settlor, and be held and enjoyed by the person for the time being possessed of the dignity and being such lineal descendant, so that during every suspension or abeyance of the dignity, within the limits prescribed by law for strict settlements, the rents and profits of the estate shall be equally divided amongst the co-heirs *per stirpes* of the person or persons respectively, by reason of whose death or deaths without issue male, the suspension or abeyance shall be for the time being occasioned:—Held, that the Court would endeavour to give effect to this direction, and, for that purpose, refer it to the Master to approve of a proper settlement in conformity with it. *Banks v. Le Despencer*, 10 Sim. 576; 9 L. J., N. S., Ch., 185; 4 Jur. 601.

Estates settled so as to go along with a barony in fee. Form of a settlement approved of by the Court, in pursuance of a direction contained in a deed executed by the late Lord Le Despencer, that his estates should, so far as the law would allow, be strictly settled, after his death, so as to go along with the baronial dignity of Le Despencer (which was a barony in fee), and be held and enjoyed by the person for the time being possessed of the same dignity, for the support thereof, so long as the person possessed of the same dignity should be a lineal descendant of the late Lord, but with a provision that in case the dignity should, at any time or times within the limits prescribed by law for strict settlements, be suspended or in abeyance, the rents and profits of the same estates should, during the continuance of every such suspension or abeyance, be equally divided amongst the co-heirs *per stirpes* of the person or persons respectively by reason of whose death or deaths without issue male, such suspension or abeyance should be, for the time being, occasioned. The Court approved of a settlement in which the latter object was secured by a proviso, subject to be defeated by a recovery, and not as suggested by the Court at the first hearing, by a term of 1,000 years, prior in limitation to all the other uses; and the Court also declined to appoint a protector of the settlement, by reason of his irresponsibility if appointed. S. C. 11 Sim. 508; 12 L. J., N. S., Ch., 293; 7 Jur. 210.

3. A., having a power of revocation and new appointment over an estate, of which B., his heir, was tenant in tail, by his will directed the estate "to be attached to his title as closely as possible":—Held, that the estate of B., and those of all other tenants in tail *in esse* at A.'s death (living in the line of the title), were abridged to estates forlife only. *Dorchester (Lord) v. Eppingham (Earl)*, 2 Beav. 180. n.

4. A trust created by will to purchase land to be added and closely entailed to testator's family estate, in the possession of T. B., testator declaring that his object was to have a head to the family, and that if T. B. should

die without male issue, or dispose of the family estate, the residue of his fortune should go to A. B., or his nearest relative in the male line; how to be executed. *Woolmore v. Burrows*, 1 Sim. 512.

1. Property was by a codicil directed to be settled "in a course of entail to correspond as far as may be practicable" with the limitations of a newly created peerage contained in letters patent, which limitations were to a countess for life, remainder to her second son and the heirs male of his body, remainder to her third and other younger sons and the heirs male of their respective bodies successively:—Held, that a strict settlement of the property ought to be directed corresponding in order of succession with the limitations of the peerage, but limiting the estates of the second and other younger sons of the countess, being lives *in esse* at the death of the testatrix, to estates for their respective lives, with remainder to their first and other sons in tail male, mainly on the ground that the object was to endow the title, and that a peerage being inalienable, such limitations would best correspond in effect with the limitations of the peerage. *West v. Holmesdale (Viscount)*, 4 L. R., H. L., 543; 39 L. J., Ch., 505.

The codicil, by which the settlement was directed, referred to a will thereby revoked, limiting a different course of entail, and containing powers of jointuring and charging portions, and making the estates for life unimpeachable for waste. The codicil only directed that the settlement should "contain such powers, provisoes, declarations, and agreements, as the trustees therein named should consider proper, or their counsels should advise":—Held, that the will ought to be the model of the settlement, and that the estates of tenants for life should be without impeachment of waste, and that the settlement should contain powers of jointuring and charging portions to the limits contained in the revoked devise. *Id.*

2. A lady devised freehold estates to trustees for her sister E. for life, with remainder in strict settlement to her sons, excluding the second, and with powers of jointuring and charging portions. By letters patent, subsequent to the will, a barony was created and limited to E. for life, with remainder to her second son R. and the heirs male of his body, and in default of such issue to the third and younger sons of E. and the heirs male of their bodies respectively and successively. The patent contained a shifting clause, by which if any person taking thereunder should succeed to the earldom of D., and there should then or thereafter be a younger son or heir male of a younger son of E., then the succession to the barony was to devolve upon the son of E. or the heir who would be next entitled to succeed thereto if the person succeeding to the earldom of D. was dead without issue. By a subsequent codicil, the testatrix devised her estates to trustees in trust, to settle the same in a course of entail corresponding as nearly as might be with the limitations of the barony, and the provisoes affecting the same contained in the patent, and with all such powers, provisoes, declarations, and agreements as the trustees should think proper or their counsel advise. The House of Lords after E.'s death

declared that the estates ought to be limited in strict settlement to the second son for life with remainder to his first and other sons in tail male, with remainder to the third and other younger sons of E. and the heirs male of their bodies respectively and successively in tail male, and that the settlement should contain a shifting clause similar to that in the letters patent:—Held, that clauses postponing the vesting of portions until the death of the person creating them, and providing for the cesser of jointures and portions charged on the estates upon the person charging them succeeding to the earldom of D., ought not to be inserted in the settlement. *Holmesdale (Viscount) v. West*, 12 L. R., Eq., 280; 40 L. J., Ch., 795.

Executed Settlements.] See SETTLEMENT, XVI. i. 3.

IX. WHAT POWERS INSERTED IN THE SETTLEMENT.

1. *Powers of Appointment*, 6904.
2. *Powers of Appointment of New Trustees*, 6905.
3. *Powers to Jointure or Charge Portions*, 6905.
4. *Powers of Leasing*, 6906.
5. *Powers of Sale or Exchange*, 6906.
6. *Other Powers*, 6907.

1. Powers of Appointment.

3. A testator left to his daughter Jane the sum of 2,000*l.*, to be settled on her when she married, or to be paid to her on her attaining twenty-one; should she die not leaving issue, the 2,000*l.* to fall into the residue of his estate. Jane married in her father's lifetime. The Court directed the legacy to be settled in trust for her separate use for life, remainder for her children living at her death, according to her appointment; in default of appointment, for her sons at twenty-one, and her daughters at that age or on marriage; remainder for her next-of-kin; and if she had no child living at her death, the legacy to become part of the testator's residue. *Young v. Mackintosh*, 13 Sim. 445; 7 Jur. 383.

4. A father directed a fund, given to his daughter, to be settled "upon her and her issue," so that "the same might not be liable or subject to the debts, control, or engagements of any husband" whom she might happen to marry during her lifetime:—Held, that the settlement ought to give the daughter a power of appointment by will, in default of issue. *Stanley v. Jackman*, 23 Beav. 450; 5 W. R. 302.

Form of settlement in such a case. *Id.*

5. Where a testator had directed, that, in the event of the marriage of his daughter, a portion of his property should be secured to her and the issue of her marriage by a settlement or some other good assurance, in such manner as his trustees or trustee for the time being might think fit, the Court, on the application, to which the surviving trustee was a party, approved of a power in the settlement made on the marriage of the daughter enabling her to appoint by will a life estate in the property to her husband. *Charlton v. Rendall*, 11 Hare 296.

1. Upon the marriage of H. T. with L. N., he covenanted to convey certain lands upon trust, that the same should go and be vested in the issue of H. T. by L. N., and that such issue should also be entitled to a further sum of 1,000*l.*, to be charged on all other the real and personal estates of H. T. not therein comprised, but in such shares and proportions as H. T. should by deed or will appoint, and in default thereof as L. N., in case she survived H. T., should by deed or will appoint, and failing such direction in equal shares:—Held, that a court of equity would execute the articles by giving successive powers of appointment to H. T. and L. N., and in default of appointment a limitation to the children of the marriage as tenants in common in fee. *Thompson v. Simpson*, 1 Dr. & War. 459.

2. In settling a fund in pursuance of a will by which the fund was bequeathed to a man until marriage and then to be settled on his wife and children, the Court inserted a power for the husband and wife jointly by deed, and for the survivor by deed or will, to appoint among the children. Observations on *Oliver v. Oliver* (10 L. R., Ch. D., 755). *Re Gowan, Gowan v. Gowan*, 17 L. R., Ch. D., 778; 50 L. J., Ch., 248.

Form of judgment settling a fund. *Id.*

An order of the Court making a settlement should bear the usual settlement stamp. *Id.*

2. Powers of Appointment of New Trustees.

3. A lady being entitled to a sum, payable at a future time, out of her father's estates, it was agreed, by articles on her marriage, that in the settlement to be made in pursuance thereof a power should be inserted for her father in his lifetime, or his executors within six months after the sum should be payable, to invest that sum in the names of trustees to be appointed for the purpose, and for the trustees, with the consent of the husband and wife, or the survivor, or of their own authority, as the case should happen, to change the securities, the trusts of the fund being for the husband for his life, then to the wife for her life, then to the children. No settlement was executed, and the father and the husband died before the fund was invested, leaving the wife surviving and four children:—Held, that the wife had no power to appoint a trustee to receive the funds. *Brasier v. Hudson*, 9 Sim. 11.

4. Where a marriage was contracted abroad, by articles stipulating that the funds settled should, "under the laws of England, be regulated, made binding, and carried into full and complete effect;" on a subsequent bill filed for carrying the articles into effect:—Held, that powers to appoint new trustees, as often as should be necessary, was a proper power to be inserted in the settlement. *Sampayo v. Gould*, 12 Sim. 426; 11 L. J., N. S., Ch., 121.

5. Court will not order a clause to enable trustees to appoint others to be inserted in a conveyance, there being no provision to that effect in trust deed. *Bayley v. Mansell*, 4 Madd. 226.

6. Testator directed his real estates to be settled on certain persons in strict settlement,

and that there should be inserted in the settlement so to be made powers of leasing, sale, partition, and exchange. "And my will is that, in such intended settlement, shall be inserted all such other proper and reasonable powers, as are usually inserted in settlements of the like nature":—Held, that a power to appoint new trustees was a proper and reasonable power to be inserted in the settlement. *Lindon v. Fleetwood*, 6 Sim. 152. And see *Turner v. Sargent*, 17 Beav. 515; 2 W. R. 50.

3. Powers to Jointure or Charge Portions.

7. Will directed settlement to be made of real estate on A., and his first and other sons in tail, with power of jointuring, leasing, sale, and exchange, and all other clauses, powers, and provisos usually inserted in settlements of same kind:—Held, these last words did not give power to charge with portions. *Higginson v. Barneby*, 2 Sim. & S. 616.

8. A power was reserved, in articles before marriage, to husband and wife to alter and vary the provisions and terms of the articles, in such manner as to them should seem fit, previous to the execution of the settlement:—Held, not to authorise the insertion in the settlement of a power enabling the husband to jointure a future wife, or to charge portions for younger children of a future marriage. *Bedford (Duke) v. Abercorn (Marquis)*, 1 Myl. & C. 312; 5 L. J., N. S., Ch., 230.

9. Testator directed a settlement to be made of his estates, and a power to be inserted in it enabling the tenant for life to jointure any wife or wives, at one or several times, to the extent of one-fifth part of the then ordinary annual rental of the estates:—Held, that the settlement ought to authorise the tenant for life to charge the estates with a clear yearly rent-charge not exceeding one-fifth of the yearly rent of the estates payable at the time of creating the charge. *Trevor v. Trevor*, 1 H. L. Ca. 239. Affirming 13 Sim. 108; 11 L. J., N. S., Ch., 417; 6 Jur. 863.

10. A covenant in marriage articles to settle an estate, after the payment of an annuity to the intended wife, "upon his issue" by the intended wife, must be construed as a covenant for strict settlement, and excludes the husband from creating charges in favour of younger children. *Grier v. Grier*, 5 L. R., H. L., 688. Affirming 6 Ir. R., Eq., 1.

By articles of marriage it was recited that the intended husband had received 600*l.* from his intended wife, and he covenanted to settle upon her his lands, with the ordinary powers of distress and entry, and to settle the remainder of his lands "upon his issue by" his intended wife. There were several children of the marriage. Some years after the marriage he executed a deed, by which he charged on his lands various sums of money in favour of younger children, devising the lands themselves to his eldest son and his other sons successively in tail male:—Held, that this deed creating these charges was void, for that the covenant in the articles gave him no power to charge the lands for the benefit of the younger children, and must be interpreted to mean that he would settle the lands in the ordinary form of strict settlement. *Id.*

4. Powers of Leasing.

1. Articles for a settlement on ward of court, with a power of leasing for twenty-one years, and other usual powers, etc., do not authorise the introduction of a power granting building leases for long terms. *Pearse v. Baron*, Jac. 158.

2. A reference was made to the Master, to inquire whether certain proposed powers of leasing were usual in that part of Ireland in which the estates were situated, and whether any circumstances connected with the property rendered such powers expedient, and to the interest of all parties; with liberty to state special circumstances. *Bedford (Duke) v. Abercorn (Marquis)*, 1 Myl. & C. 312; 5 L. J., N. S., Ch., 230.

3. In a settlement of personal property, the parties covenanted to settle all future acquired property upon the same trusts and subject to the same powers, or as near thereto as the nature and tenure of the property would admit of:—Held, that this authorised the insertion of a power to grant mining leases in the settlement of subsequently acquiring freeholds, the prior owner having granted such leases, though the mines had never been effectually worked under them. *Scott v. Steward*, 27 Beav. 367.

4. A testator, by his will, gave real and personal property to his daughter A., absolutely; but by a codicil made subsequent to her marriage, he directed that "it should be settled to the exclusion of her present or any future husband, that the same might belong to her during her life, and be secured for the benefit of her children, equally, after her death, so that the issue of any such child dying in her lifetime might take his or her parent's share;" and in default of such children or other issue, over:—Held, that the property must be settled in trust for A. for life, to her separate use; without power of anticipation; and, after her decease, upon trust for such of her children as should survive her, and for the issue living at her death of such of her children as should not survive her equally as tenants in common, the issue to take *per stirpes*, but *inter se* equally as tenants in common. That there should be limitations, in the nature of cross-remainders, in favour of such of the children and issue as should survive A. in respect of the share of any issue of any child similarly dying. That the realty should be settled as realty; and (as the testator, by simply directing a settlement, must have intended) with powers of leasing and sale and exchange, and with a receipt clause; and that the settlement should contain provisions for maintenance, education, and advancement, and a power to appoint new trustees. *Turner v. Sargent*, 17 Beav. 515; 2 W. R. 50.

5. Powers of Sale or Exchange.

5. A stipulation was made, in articles before marriage, that the intended settlement, which related to estates in Ireland, should contain all the covenants, provisions, and conditions usually contained in marriage settlements made in England:—Held, to authorise the

insertion of a power of sale and exchange under which lands in England might be taken in exchange for lands in Ireland. *Bedford (Duke) v. Abercorn (Marquis)*, 1 Myl. & C. 312; 5 L. J., N. S., Ch., 230.

6. By marriage articles, it was agreed that estates should be settled in strict settlement, and that there should be contained in the settlement powers to the husband to charge the estates, by way of mortgage, with a certain sum, and also to charge the estates with another sum for younger children, and to create terms for raising those sums, and likewise all other powers, etc., usually inserted in settlements of the like nature, and which should be proper for effecting any of the purposes aforesaid:—Held, that a power of sale and exchange might be introduced into the settlement. *Hill v. Hill*, 6 Sim. 136.

7. A will directing a settlement of estates, and that there should be inserted all proper power for making leases, and otherwise according to circumstances, to and for the tenants for life, to be exercised by them when qualified, and when not by the trustees, does not authorise the insertion of a power of sale and exchange. *Horne v. Barton*, Jac. 437.

8. Powers of sale and exchange inserted in a settlement under clause in articles for all usual powers. *Peake v. Penlington*, 2 Ves. & B. 311.

9. A will, directing settlement of estates, and that there should be inserted all proper powers for making leases, and otherwise, according to circumstances, for the tenants for life, to be exercised by them when qualified, and when not by the trustees, does not authorise the insertion of a power of sale and exchange to the trustees, to be exercised with the consent of the tenant for life. Whether the will authorises the introduction of a power of sale and exchange of any description, *quære*. *Bromster v. Angell*, 1 Jac. & Walk. 625.

10. A testator having, by his will, devised his freehold and copyhold estates in trust for his son in strict settlement, with remainder to his nephew; and having given by his first codicil a special power of sale over a part of his estates, to be exercised at the request of his son, in favour of his nephew; and by his second codicil a general power of sale over "all or any part of his estates," to be exercised at the discretion of his trustees, the conveyance by the trustees must contain both the particular and the general power of sale. *Green v. Wigglesworth*, 1 Swan. 234; 1 Wils. 313.

11. Purchaser not compelled to take a doubtful title, viz., by executing a power of sale, introduced under a direction by a decree, establishing a will, to the Master to approve a proper settlement: the will not authorising the insertion of such a power; nor could it be sustained under a power by a former settlement; which, if not extinct by the failure of the limitations, and the union of the estate for life with the reversion, could not be duly applied to purposes clearly foreign to its original object; and, though purchasers are not put to exercise a very nice and critical judgment with regard to the purposes for which powers are created, it could never be intended to refer to a perfectly new set of limitations, in a new settlement, at a long

subsequent period, under a disposition by the will of the owner of the fee, to be exercised, not for any purpose in the least degree connected with the settlement, but avowedly as an expedient to supply the want of a valid power in that settlement, and enable those whom he had made only tenants for life to dispose of the estate. *Wheate v. Hall*, 17 Ves. 80.

1. A testator, who made his will in 1810, and died in 1820, directed by his will that his daughters' shares in his property (which consisted of realty and personalty) should be so settled that, if they married, one-half of their fortune should be settled on them and their children, exclusive of their husbands:—Held, that this direction authorised the insertion in the settlement of a power of sale and exchange of that moiety of a daughter's share in the testator's real estate which was to be settled on her and her children. *Wise v. Piper*, 13 L. R., Ch. D., 848; 49 L. J., Ch., 611; 41 L. T. 794; 28 W. R. 442.

Turner v. Sargent (17 Beav. 515) followed. *Ib.*

Wheate v. Hall (17 Ves. 80) distinguished. *Ib.*

[*Implication of Powers of Sale.*] See POWER, XXI. 1.

6. Other Powers.

2. Testator devised F. (a well-timbered estate) to defendant in fee, and directed him to settle it on himself for life, with divers remainders over, and directed that such settlement should contain such powers of jointuring, etc., as defendant should direct, and all other usual and proper provisions for giving effect to his intentions therein expressed, and all such other powers and provisions as counsel should advise:—Held, that the successive tenants for life ought not to be made punishable for waste, but power should be inserted in the settlement for trustees to cut timber in a due course of management for the benefit of all parties interested. *Davenport v. Davenport*, 3 N. R. 26; 1 Hem. & M. 775; 12 W. R. 6.

3. A., before marriage, covenants to settle lands, in consideration of 2,000*l.* portion, on himself for life, remainder to the first and other sons in tail, remainder to the daughters in tail, remainder to himself in fee, with a power of revocation reserved to the wife's father, then beyond sea. The marriage is had, and a daughter born, and the husband, being taken sick, devises 1,500*l.* to his daughter, and, if his wife (being *enclente*) should have a posthumous daughter, she to have 500*l.* of the 1,500*l.*, and if either should die before twenty-one, or marriage, the survivor to have the whole; and gives all his lands to his wife and her heirs, and the surplus of his personal estate, after debts paid, to his wife, her executors, etc., and makes his wife executrix; then another daughter is born, and the husband dies without any alteration of his will, or any settlement made:—Decreed, that a settlement be made, with a power of revocation to the father, and the legacies be likewise paid the children, the youngest daughter being a posthumous child, within

the intent of the will. *Jaggard v. Jaggard*, Pre. Ch. 175.

4. A marriage contract in the Portuguese language, between British subjects resident in Lisbon, expressed that the parties were desirous it should be regulated, made binding, and carried into full and complete effect according to the laws of England; some years afterwards the parties, who were then resident in England, filed a bill, praying that a settlement in strict conformity with the contract, and containing all the covenants, clauses, powers, etc., usually inserted in marriage settlements and deemed necessary, and at the same time consistent with the substance of the contract, might be executed under a decree of the Court:—Held (notwithstanding the contract provided that the settled moneys should be invested, as they had been, in the English and French funds), that a power to change those securities for any other of the government stock or funds of England or France or for real securities in Great Britain or Ireland, was a proper power to be inserted in the settlement. *Sampayo v. Gould*, 12 Sim. 426; 11 L. J., N. S., Ch., 121.

5. A testator, by his will, gave real and personal property to his daughter A., absolutely; but by a codicil made subsequent to her marriage, he directed that "it should be settled to the exclusion of her present or any future husband, that the same might belong to her during her life, and be secured for the benefit of her children, equally, after her death, so that the issue of any such child dying in her lifetime might take his or her parent's share;" and in default of such children or other issue, over:—Held, that the property must be settled in trust for A. for life, to her separate use; without power of anticipation; and, after her decease, upon trust for such of her children as should survive her, and for the issue living at her death of such of her children as should not survive her equally as tenants in common, the issue to take *per stirpes*, but *inter se* equally as tenants in common. That there should be limitations, in the nature of cross-remainders in favour of such of the children and issue as should survive A. in respect of the share of any issue of any child similarly dying. That the realty should be settled as realty; and (as the testator, by simply directing a settlement, must have intended) with powers of leasing and sale and exchange, and with a receipt clause; and that the settlement should contain provisions for maintenance, education, and advancement, and a power to appoint new trustees. *Turner v. Sargent*, 17 Beav. 515; 2 W. R. 50.

X. TRUSTEES TO PRESERVE CONTINGENT REMAINDERS.

6. Where testator directed that money should be laid out in lands to be conveyed after the expiration of a term to the use of B. for life, and his first and other sons in tail male, remainder to several others successively for life, with like limitations; remainder to his own right heirs, and there were no trustees to preserve contingent remainders: decreed, that such trustees should be inserted in the con-

veyances, to be settled by the Master, of the lands purchased with the money. *Baskerville v. Baskerville*, 2 Atk. 279.

Lord Hardwicke said, in the directions he gave in this case, that he adhered to the rules of conveyancing laid down by the great men before the Restoration, and during the Usurpation. *Id.*

1. A. devised his estate to trustees, in trust for H., and E., his wife, for their lives, and life of longest liver; remainder to first son of E. for ninety-nine years, if he should so long live; remainder to heirs male of body of such first son; remainder to all and every the sons of said E. for ninety years, if every such son respectively should so long live; remainder to heirs male of every of them, to take not jointly, but successively, one after other, according to births of each, sons to take term of ninety-nine years, with immediate remainder to his said heirs male. On bill brought for conveyance of this estate according to testator's will, it was decreed that in such conveyance, where any part of the estate was limited in use to plaintiff for ninety-nine years, if he should so long live, there should be a limitation over to trustees and their heirs, during his life, to preserve contingent uses in remainder, and then to first and other sons of plaintiff successively. *Stamford (Earl) v. Hobart*, 3 Bro. P. C. 31.

2. Testator directs his executors to invest personal estate in the purchase of real estates, which, when purchased, he devises to A., to him and the male heirs of his body for ever, and if A. should die without issue male, then he devised the same to the heir male of the body of B., after in tail to A.: the Court will insert a limitation to trustees to preserve contingent remainders. *Harrison v. Naylor*, 2 Cox 248; 3 Bro. C. C. 108.

3. Upon a trust in equity, no estate can be gained by disseisin, abatement, or intrusion, while the trustee continues in possession of the land, neither will equity suffer a merger of the trust estate; for uses and mere trusts stand on very different foundations, and are not governed by the same reasoning. All trusts are executory, and the Court must follow the intent of the parties, as far as the rules of law will admit, howsoever improperly a will may be penned; therefore, if a testator intended a strict settlement the Court will direct it; and where the Court make use of the words "strict settlement" in an order, it implies a direction to the Master to have trustees to preserve contingent remainders inserted, and, whether a conveyance be directed or not, the Court must decree one, when asked at the proper time. *Hopkins v. Hopkins*, 1 Atk. 593. And see *Cholmondeley (Lord) v. Clinton (Lord)*, 2 Meriv. 173, 358; 2 Jac. & Walk. 18, where the report of this case is corrected from an MS. note.

4. The only difference between the construction of executory trusts in a marriage settlement and a voluntary settlement or will is, that in the former the nature of the instrument affords a presumption that the intention is for a strict settlement, whereas in the latter case that intention must appear on the face of the instrument. *RoCHFORD v. Fitzmaurice*, 1 Con. & L. 158. S. C. *nom. RoCHFORD v. Fitzmaurice*, 2 Dr. & War. 1; 4 Ir. Eq. R. 375.

Semble, that a limitation to trustees to preserve contingent remainders, not confined to the lifetime of a tenant for life, will not be cut down to that life if there are contingent remainders which may require protection during a longer period. *Id.*

5. Devise of freehold and copyhold surrendered to the use of the will to trustees, and the survivor and his heirs, in trust to pay debts and legacies, an annuity to the testator's son, and for other purposes; then on the marriage, or attaining twenty-one, of his granddaughter, to convey to her for life, remainder to trustees, etc., remainder to her first and other sons in tail male, remainder to her daughters in tail general, remainder to such persons for such estates, and subject to such charges and conditions, as he should by any deed or instrument, with two or more witnesses, appoint: the next day, by deed poll with two witnesses, reciting his will, and that he had reserved a power of disposing of his estate, further, he directed his trustees, immediately after the death of his granddaughter, and failure of her issue, to convey all his real estate to the first and other sons of his son in tail male, then to his daughters in tail general, then to the right heirs of the survivor of his trustees, his heirs, and assigns for ever. No conveyance was made. The granddaughter died without issue; then the son died without issue, leaving one trustee surviving. Under the will alone, the trustees have a mere legal estate, and all the equitable interest beyond the express dispositions would result to the son as heir; but the deed was considered as a codicil sufficiently executed to pass copyhold, but not freehold. The last limitation is a contingent remainder to the heir of the surviving trustees, and a conveyance was directed with an insertion of trustees to support that remainder as to the copyhold; the rents and profits of the copyhold during the life of the trustee, and all the freehold, to go to the heir of the testator. *Habergham v. Vincent*, 2 Ves. J. 204; 4 Bro. C. C. 353.

Contingent Remainders. In General and Duties of Trustees. See VESTED CONTINGENT AND FUTURE INTERESTS.

XI. HOTCHPOT CLAUSE.

6. The Court of Chancery will not insert a hotchpot clause in executory marriage articles in the absence of any words therein indicating the intention of the parties to introduce such clause. *Lees v. Lees*, 5 Ir. R., Eq., 549.

XII. ESTATE OF TENANT FOR LIFE MADE UNIMPEACHABLE FOR WASTE.

7. A testator directed his trustees to invest his property in the purchase of estates of inheritance to be settled "in strict settlement":—Held, that tenancies for life created by will were not without impeachment of waste. *Stanley v. Coulthurst*, 23 L. T., N. S., 761; 10 L. R., Eq., 259; 39 L. J., Ch., 660; 18 W. R. 969.

8. The right of a tenant for life of estates devised upon an executory trust for settlement

to take them without impeachment of waste, depends upon the intention of the testator, to be gathered from his will, to give to the objects of his devise the fullest possible enjoyment of its subject short of the power of alienation. *Davenport v. Davenport*, 33 L. J., Ch., 83; 9 L. T., N. S., 870; 10 Jur., N. S., 35; 12 W. R. 6; 1 Hem. & M. 775; 3 N. R. 26.

A testator devised his residuary real estate to his son D., and directed him to settle the F. estate, which was included in the devise, to the use of D. for life, with remainder to his first and other sons successively in tail male, or tail general, or in tail male, with remainder in tail general, or otherwise in tail, as he should think proper, with remainder to H. for life, with remainders over, and an ultimate limitation to the survivor of D. and H., his heirs and assigns. And the testator directed that such settlement should contain such powers of jointuring, of charging with portions for younger children, of sale and exchange, as D. should direct; and should also contain all other usual and proper provisions for giving effect to his intentions as therein expressed, and such other powers and provisions as counsel should advise. There was a large quantity of timber on the F. estate:—Held, that in settling the property the estates for life ought not to be limited without impeachment of waste, but that powers must be given to the trustees to cut timber in a due course of management for the benefit of all parties interested. *Id.*

1. A grandfather devised his residuary real estate to trustees for his granddaughter in fee at twenty-one or marriage, and directed that if she should marry under twenty-one his trustees should settle the real estate on her for life for her separate use, without power of anticipation, with remainder to her children as tenants in common in tail, and he authorised his trustees to give a life estate to his granddaughter's husband, to commence after her death, and to be either with or without impeachment of waste:—Held, that the life estate given to the granddaughter must not be without impeachment of waste; such an estate being inconsistent with the restraint on anticipation. *Clive v. Clive*, 7 L. R., Ch., 433; 41 L. J., Ch., 386; 20 W. R. 477; 26 L. T., N. S., 409.

See also VIII. *supra*.

XIII. OTHER CASES.

2. Direction to trustees to correct any defect or incorrect expression in the will, and to form the settlement, from what appears to them to be the testator's real meaning, does not authorise them to change the limitations. *Stanley v. Stanley*, 16 Ves. 491.

3. Conveyance to trustees, in trust to sell and purchase other estates to be settled. Those entitled under the limitations directed of the estates to be purchased, have equitable interests co-extensive until a sale; therefore, a specific performance was decreed of an agreement for partition against an objection to a title under a fine by a person who would have been tenant in tail of the estates to be purchased; the effect being an election to keep the estate, binding the trustees,

though it may be questionable, whether they could take upon themselves to convey in fee to a person entitled to an estate tail only. *Pearson v. Lane*, 17 Ves. 101.

4. Money was to be laid out in land to be settled to the husband for life, remainder to raise portions for younger children; the money was afterwards invested by direction of the husband in S. S. annuities; afterwards, by will, he devised generally all his manors, etc., to certain uses: the money in the funds must be laid out in land. *Hickman v. Bacon*, 4 Bro. C. C. 333.

5. Money devised to be laid out in land, and settled on the children of J. S.; land is purchased and settled on them and their heirs, and one dies. Decreed the land should not survive. *Saunders v. Browne*, 2 Vern. 46; 3 Ch. Rep. 214.

6. In an executory trust to be effected by the Court, it is sufficient if it can satisfy itself of the testator's intention to carry it into execution; therefore, where testator gave his real estate to A., to devise in strict settlement, and ordered other estates to be sold, and converted into personalty, and the produce, with the residue of his property, to be laid out in land in A., contiguous and convenient to his estate in A., and by strong expressions (though without direct words) showed he intended it to go to the same uses, it was decreed so to be. *Browne v. De Laet*, 4 Bro. C. C. 527.

7. Testator having seized in fee of T., S., and B., and also seized as of freehold of divers lands, and possessed of considerable personal property, by his will devised T. to his daughter L., and her issue, taking his surname, in strict settlement; and, in lieu of such issue, to his nephew, R. J. T., and his issue, in strict settlement, with divers limitations over; but left the ultimate reversion in fee undisposed of. He also devised S. and B. in strict settlement, leaving the ultimate reversion in fee undisposed of; and, after making several devises of parts of his freehold properties, devised the residue "of my properties, both freehold and personal, I may die possessed of, to my brother R. T.; and, if my brother R. T. shall survive me, I request and desire that he shall convert all his personal property into fee simple property, and, at his decease, leave the same entailed on his son R. J. T., in the same manner as I have myself entailed the T. estate":—Held, that the direction to entail applied as well to the freeholds which passed by the residuary devise, as to the fee simple lands to be purchased with the residuary personal estate. *Tennent v. Tennent*, 1 J. & L. 379; Dr. 161.

8. By a contract for sale it was agreed that 600*l.*, part of the purchase money, should be paid after the vendor's death to such uses as she should direct, for the benefit of J. B. and her children. By the conveyance, that sum was made payable to the executors, etc., of the vendor, or as she should appoint by her will; she appointed it to J. B. absolutely:—Held, that the settlement, being executory only as to the children, could not be enforced, and that J. B. took absolutely. *Burrows v. Greenwood*, 4 Y. & Coll. 251; 5 Jur. 384.

9. Testator gave property to his trustees, upon trust to pay, distribute, and divide equally between his daughters, naming them, to be

paid and assured to them as they should attain the age of twenty-one, or be married under that age with the consent of his trustees. Proviso, that if they should marry with the consent of his trustees, he empowered the trustees to pay the shares at the times of such marriages, or at their discretion to settle the same. There was a power of maintenance, and gifts over as between the daughters on dying unmarried under twenty-one, and if all the daughters should die under twenty-one unmarried, and without leaving issue then over:—Held, that the trustees had no power to direct a settlement where one of the daughters married under twenty-one without consent. *Taylor v. Austen*, 1 Drew. 459; 1 W. R. 252.

1. In articles there was a covenant in the conveyance that the lands were free from incumbrance. This is not a covenant that the lands are free; and if any incumbrance is discovered between the execution of the articles and of the conveyance, whereof the party had no notice, that shall be discharged before the sealing of the conveyance, as the concealment of it would be a fraud, though, against all incumbrances discovered afterwards, there is only the party's own covenant to protect a purchaser. *Vane v. Bernard (Lord)*, Gilb. Eq. Rep. 6.

2. Marriage articles authorised the tenant for life to withdraw the fund from the settlement, with the assent of the "under-signed trustees":—Held, that the power of assent was annexed to the office, and might therefore be exercised by new trustees appointed by the Court. *Byam v. Byam*, 19 Beav. 58; 1 Jur., N. S., 79; 24 L. J., Ch., 209.

By marriage articles, a wife was authorised to divert the trust funds for the benefit of herself or children, provided the diversion be acceded to by the trustees:—Held, that the trustees had a discretion to consent or not; that it must be *bonâ fide* exercised; and to justify their assent, the purpose for which the money was to be applied must, in their judgment, appear to be really for the benefit of the wife or children. *Ib.*

To save expense, the Court declared the construction of executory marriage articles, instead of directing a settlement to be executed in conformity therewith. *Ib.*

3. Where it is referred to the Master to approve of a settlement in pursuance of an executory trust, the Court does not usually insert in the order declarations as to the interests which the parties are thereafter to take, but merely directs the Master to approve of a settlement in conformity with the will, articles, or other directions upon which it is to be founded. *Williams v. Teale*, 6 Hare 254.

4. Under a direction by will to accumulate and lay out a certain sum of money in the purchase of land to be settled to uses thereby declared, the costs of the investment are to be paid out of the particular sum directed to be invested. *Gwyther v. Allen*, 1 Hare 505.

5. Bill for a strict settlement, after long acquiescence by plaintiff's ancestor, and when impossible to bar the remainder, dismissed. *Parker v. Philips*, 1 Ves. 530.

6. The Court will not decree a partial performance of articles: but when some parts appear unreasonable they always dismiss the bill. *Goring v. Nash*, 3 Atk. 189.

VI. Constructive Trusts.

- *Liability of Third Persons Parties to a Breach of Trust*. See XXIV. VI. *post*.
- *Secret Profits and Commissions paid to Agents and Servants*. See PRINCIPAL AND AGENT, VII. 3.
- *Personal Liability of Agents Employed by Trustees*. See XXII. II. *post*.
- *Profit on Trust*. See XXV. *post*, and *Cross References there*.
- *Lien of Vendor*. See VENDOR AND PURCHASER, XIV. V.
- *Right to Renewed Leases*. See XX. *post*.
- *Devolution of by General Devise*. See XII. I. *post*.

See also FRAUD, II.—TENANT IN COMMON, III.

7. Constructive trustees, how constituted, and liabilities of. *Esq. Watson, Re Aoramau*, 7 Jur. 1001.

8. Trusts may be constituted, not merely by direct declaration of trust, but also by the constructive operation of the consequences flowing from the acts of parties. Thus equity will enforce the execution of a trust, not only against the trustees themselves, but against all persons who obtain possession of the property affected by the trust, provided they had notice of it. *Poolley v. Budd*, 14 Beav. 34.

A., who sold 500 tons of iron stacked on his wharf to B., in consideration of a bill accepted by a third party, gave an acknowledgment engaging to deliver it to the bearer, he (A.) "having been paid for the same." B. mortgaged the iron, and, the bill having been dishonoured, A. refused to deliver the iron. The mortgagee proceeded in equity to make A. responsible for the iron:—Held, that A. had no ownership or property in the iron so stacked, and was a trustee, and therefore a demurrer for want of equity was overruled. *Ib.*

9. A trust may well be created in the absence of any expression importing confidence; and in the case before the Court the obligation on the surviving partner created by the partnership articles, with reference to the legal interest in the partnership, did not in substance differ from a trust, and it was therefore held that the articles of partnership created a trust attaching on the property. *Page v. Cox*, 10 Hare 163.

10. Where two purchase in equal moieties between them, and one has abatement in price, etc., made to him, he shall account as to it to the other. *Carter v. Horne*, 1 Eq. Abr. 7.

11. Two persons article that whatever J. S. shall leave to either of them, shall be equally divided between both; such agreement good, and shall be carried into execution by this Court; also, if after this, one of them contrives that J. S. shall lease part of his estate to a third person in trust for him, this is within the articles. *Beckley v. Nowland*, 2 P. W. 182.

12. A. and his wife, being assignees of a lease, mortgage to B.; A. becomes insolvent, and, the title not being good, C., who had the real title, in compassion to A.'s wife, makes a lease in trust for her. Decreed, the trustees to make a new mortgage to B. *Seabourne v. Powell*, 2 Vern. 11.

1. Where a man enters into a treaty with a mortgagee for his purchase of his interest, but, finding he has not the legal estate, procures it to be conveyed to himself without privity of the mortgagee, equity will consider such person as a trustee for the mortgagee. *Hovess v. Wadham*, Ridgw. 199.

2. Real estate having been applied, for a century and a half, upon trusts specified by will, which named a trustee, the Court assumed the will to have created an express trust in the heir-at-law. *Re Gore's Charities*, 2 Con. & L. 411; 4 Dr. & War. 270.

3. The position that the mortgagee is a trustee for the mortgagor, to be received with considerable qualifications. *Cholmondeley v. Clinton*, 2 Jac. & Walk. 182. Affirmed 4 Bligh. 1.

4. If mortgagor and mortgagee deposit deeds with A., A. is a trustee for mortgagor before condition broken, and for mortgagee afterwards. *Anon.*, 2 Eq. Abr. 284.

5. Vendee under contract for purchase dying before conveyance, vendor is trustee for him. *Darris' case*, 3 Salk. 85.

6. If a purchaser for a valuable consideration has not the legal estate properly conveyed to him, though the consideration cannot create a use by way of covenant to stand seised, yet the vendor will be considered a trustee for the purchaser. *Polleffen v. Moore*, 3 Atk. 273.

7. P. bequeathed all his property, right, and interest in and to a public newspaper, and all the benefit and advantage thereof unto three trustees, in trust to carry on and conduct the same, and, after paying certain expenses, out of the residue to pay an annuity to his daughter B. for life, for her separate use, and restrained from alienation. The testator died in 1831, and in 1832 the parties entitled to the newspaper property subject to the annuity entered into a partnership with Z., whereby it was provided, that after payment of certain expenses, the clear profits should be applied in the first place in the payment of the annuity; and for clearing the partnership of the annuity, and for making some provision for the children of B., a reserve of 200*l.* a year for five years should be made, and retained by the trustees, who should be at liberty to settle the same as they should think proper for answering the annuity, and for the benefit of B.'s child or children. Entries were, as alleged, made in the books of the partners relating to the partnership deed. B. was not a party to this deed. The annuity was paid half-yearly during the lives of and after the deaths of the trustees. The property became vested in other parties, who subsequently, as alleged, disputed the validity of the partnership deed, and stated that an arrangement had been come to between the surviving trustees and Z., whereby they put an end to the arrangements effected by the deed, and divided the annuity among certain parties:—Held, on a bill filed by B. and her children, that the partnership deed, having dealt with the property charged with the annuity, had created such a trust in favour of B. and her children as the Court would give effect to; and the annuity was ordered to be raised for their benefit. *Burton v. Jackson*, 2 Jur., N. S., 224.

8. A. and B. cohabited from 1849 to 1860. B., having a considerable sum of money of

her own, in 1849 placed it in the hands of A., upon trust, as she alleged, to invest it on her behalf. During the cohabitation B. was maintained by A. In 1860 the woman filed a bill, charging A., as a trustee, with the moneys received by him on her account, and A. thereupon put an end to the connection between them. A. admitted the advance of some money by B., but denied the trust, and he set up, as a defence, the Statute of Limitations. The existence of the trust was supported by the evidence of the plaintiff:—Held, that having regard to the position of the parties, they must be considered to have stood in the relation of trustee and *cestui que trust* in respect of the moneys paid to the defendant, and that he was bound to account for what he had received, with interest at 5*l.* per cent. *James v. Holmes*, 8 Jur., N. S., 553; 10 W. R. 487. Affirmed 8 Jur., N. S., 732; 31 L. J., Ch., 567; 10 W. R. 634; 6 L. T., N. S., 589.

Held, also, that the defendant was not entitled to any allowance for the maintenance of the woman, or an illegitimate child which she had had by a former connection. *Id.*

9. C. assigned to H. his interest in a fund in court by way of trust for sale, to secure what was due from C. to H. Before the execution of the deed H. bought up a debt owing by C. for half its amount, of which transaction C. was cognisant:—Held, that the relation of trustee and *cestui que trust* did not exist between H. and C. in respect of the debt which H. had so purchased; but that H. was a creditor of C. for the whole amount of such debt, and not merely in respect of the amount which H. had actually paid. *Crompton v. Huber*, 3 W. R. 847; 1 Jur., N. S., 465.

10. By 1 & 2 Vict., c. 42—an Act to empower the Commissioners of Woods and Forests to confirm the titles to and grant leases of encroachments in the Forest of Dean—it was enacted that as to encroachments made between 1787 and 1812, and coloured "blue" in the survey, the Commissioners of Woods and Forests might grant to possessors leases of these encroachments for three lives, at a nominal rent, with possessors to purchase the fee-simple within ten years from passing the Act. J. Y., who died in 1824, was in possession by encroachment of some forest land coloured "blue," and also of land coloured "red," as to which by the Act an absolute title in fee-simple was conceded to the possessors. By his will he gave all his real estate to his widow B. Y. for her life, and after her death to be equally divided between his five sons. After the passing of the Act, B. Y. obtained a lease, and subsequently a conveyance in fee (for a very small consideration) from the Commissioners of Woods and Forests of the lands coloured "blue," which had been in her possession since the death of her husband. B. Y. devised these lands upon trust to sell:—Held, that this devise was inoperative, and that the sons of J. Y. named in his will were entitled: the Act which ratified the possessory title upon certain conditions not intending to determine the rights of parties interested in remainder, etc., by the accident of possession at the time in the party obtaining a legal title under the provisions of the Act. *Yem v. Edwards*, 5 W. R. 552; 3 Jur., N. S., 462; 3 Kay & J. 564; 26 L. J., Ch., 590.

1. An attorney is bound to give sufficient advice to his client; and if any advantage of property come to him by his ignorance, or the neglect of his duty, he shall be trustee thereof for the benefit of the person who would be entitled thereto, if the attorney had known and done his duty. *Bulkeley v. Wilford*, 2 Cl. & F. 177; 8 Bl. N. S. 111.

2. A. sued B., a debtor of his intestate, upon a bond debt and obtained a decree against him for the amount. B. appealed from this decree to the Sudder Court. By a deed of arrangement entered into by A. and C., after the commencement of the suit, C. became entitled to a six-anna share of the debt. Pending the appeal to the Sudder Court, A. entered into a compromise with B., postponing the payment of the amount recovered by the decree, for three years, and foregoing altogether interest upon the principal. This was done without the privity or consent of C. B. failed to pay the amount within the stipulated time, and proceedings were taken by A. against him, but he had not realised the amount of the decree. In a suit by C. against A. to make him chargeable for the six-anna share in the decree, the Sudder Court held that A. was chargeable to C. for such share, with interest. Upon appeal, such decree reversed; the Judicial Committee holding, that A. must be treated as a trustee for C., and that in the absence of fraud upon the *cestui que trust* in executing the compromise, or that it was not beneficial for all parties, he was responsible only to C. for such amount of the debt as had been recovered, or without his wilful default might have been recovered. *Doorga Persad Roy Chowdry v. Torra Persad Roy Chowdry*, 4 Moo. Ind. App. 452.

3. A. placed his son, who was much addicted to intemperance, under the care of B., a relation by marriage, and at his death left his son an annuity of 500*l.* The son resided with B. for several years after his father's death and until a few months before his own death. B. always accompanied him when he went to receive his annuity from his father's executors, and he as soon as he received it handed it over to B. to keep for him; and B. from time to time gave him small sums and paid his bills:—Held, that B. was accountable in a court of equity for what he had received from the son. *Terry v. Wacher*, 15 Sim. 447.

4. A scheme, made in 1855, provided that no person should act as trustee of the charity, who should hold or occupy any part of the charity property. At that time one of the trustees held a small piece of charity land, under a twenty-one years' lease granted in 1847 by public tender:—Held, that he must either give up the lease or the trusteeship. *Foord v. Baker*, 27 Beav. 193.

5. A tenant for life of an estate under settlement agreed, in consideration of 3,000*l.*, to withdraw his opposition to a bill in Parliament by a railway company, authorising the construction of a line of railway through the estate. The bill passed and the money was paid, but the Act was allowed to expire. Subsequently the company obtained another Act for construction of a similar line, and took part of the settled estate:—Held, that the 3,000*l.* must be treated as having been received for the benefit of the tenant for life, and those entitled to the estate in remainder. *Pole*

v. De la Pole, 2 Dr. & Sm. 420; 11 Jur., N. S., 477; 34 L. J., Ch., 486; 13 W. R. 648; 12 L. T., N. S., 337; 6 N. R. 19.

6. The foreign agent of a mercantile house in London, dealing in African produce, was appointed executor of A., a merchant at Sierra Leone, with directions to sell the testator's property, and invest the proceeds in the Bank of England. The agent accordingly wrote to his principals in London, advising them of consignments which he should make to them of some of A.'s property, and directing them to place the proceeds to his credit as executor of A. The consignments were made, and the merchants placed the proceeds to a separate account, namely, that of A.'s estate:—Held, that the goods were specifically and not generally consigned, and that the produce of the consignments was trust money in the hands of the merchants, which, upon a motion in a suit filed against them by the representative of A. for an account, they were bound to pay into court. *Leigh v. Macaulay*, 1 Y. & Coll. 260; 4 L. J., N. S., Exch. Eq., 37.

7. Whether, where A., a residuary legatee, by artful and fraudulent misrepresentations to the testator of the character of B., induces the testator to revoke a legacy given to B., the benefit of which revocation results to A., this Court has jurisdiction to affix a trust on A. in favour of B. to the extent of the fruit of the fraud possessed by A., or whether the matter belongs exclusively to the Ecclesiastical Court; and, secondly, whether such trust can be declared after a sentence of the Ecclesiastical Court, in which the question of undue influence was in issue, *quære*:—Held, in the affirmative by the Master of the Rolls, and in the negative by the Lord Chancellor. The parties thereupon appealed to the House of Lords. *Allen v. M'Pherson*, 1 Ph. 133; 12 L. J., N. S., Ch., 97; 7 Jur. 49. Reversing 5 Beav. 469; 11 L. J., N. S., Ch., 59. The judgment of the Lord Chancellor was affirmed. S. C. 1 H. L. Ca. 191; 11 Jur. 785.

8. The plaintiff, through his brokers, purchased ten shares in a company on the Stock Exchange from the defendant. A transfer was duly executed and left for registration. Before it was registered, issue of new shares in respect of original ones was made, within fourteen days, for shareholders to accept or refuse. The defendant, whose name was still on the register for the ten shares sold to the plaintiff, applied for ten new shares in respect of them, and they were allotted to him. The plaintiff did not become aware of the issue of the new shares till after the expiration of the fourteen days, and he then applied to the defendant to hand over to him the ten new shares, which the defendant refused to do:—Held, that the defendant was a trustee of the ten new shares for the plaintiff. *Stewart v. Lupton*, 22 W. R. 855.

VII. Implied and Resulting Trusts.

- I. *In General*, 6913.
- II. *Purchases*, 6914.
- III. *Charitable Gifts*, 6916.
- IV. *Effects of Statute of Frauds*. See I. II. *ante*.

- v. *Mortgages of Wife's Property*. See HUSBAND AND WIFE, VI. v.
- vi. *Joint Mortgages*. See MORTGAGE, XI. i.
- vii. *Failure of Heirs or Cestuis que Trustent. Beneficial Interest of Trustees*. See CROWN, V.—WILL.
- viii. *Title of Residuary Devisee or Legatee to Undisposed of Interests*. See WILL.
- ix. *Gift of Residue to Executor. Rights of Next-of-kin*. See EXECUTOR AND ADMINISTRATOR, VIII.
- x. *Lapse of Legacies charged upon Land and Surplus beyond the Charge*. See WILL.
- xi. *On Failure of Purposes for which Conversion is Directed*. See CONVERSION, II.
- xii. *To Heir in Real Estate not beneficially Disposed of by Will*. See WILL.
- xiii. *To Heir on Failure of Particular Estates. Acceleration of Remainders*. See WILL.
- xiv. *Failure of Limitations in Marriage and other Settlements*. See SETTLEMENT, X. xv.
- xv. *Surplus Unappointed or Passing in Default of Appointment*. See POWER.
- xvi. *Trusts for Undefined or Indefinite Objects (Precatory Trusts)*. See WILL.
- xvii. *Surplus under Trusts for Maintenance*. See VIII. II. 4 post.
- xviii. *Surplus under Trusts for Accumulation*. See ACCUMULATION, IV.
- xix. *Trusts. Whether Express or Implied under the Statute of Limitations*. See LIMITATIONS, STATUTE OF, X. XIV.

I. IN GENERAL.

1. Trust by implication, without the word "trusts." *King v. Denison*, 1 Ves. & B. 273.
2. Nature of presumptive trusts. *Cook v. Fountain*, 3 Swan. 491.
Trusts never implied or presumed without necessity. *Id.* 592.
3. If, in voluntary deeds and wills, there is no declaration of trusts of term, it results to donor; but *secus* if "for valuable consideration," and in nature of a contract for the benefit of the wife and issue. *Brown v. Jones*, 1 Atk. 190.
4. Payment made in the name of A. with his money raises a trust, but it is an equity which may be rebutted by evidence. *Graham v. Graham*, 1 Ves. J. 275.
5. Where lord of manor by feoffment grants certain parcels of common, etc., to trustees, for the benefit of themselves and the rest of tenants of manor, in lieu of and recompense for their several claims of common in all the rest of the common lands, etc., in the manor, the whole interest passes from the lord, and there is no resulting trust for him as to the ownership of the soil. *Irwin v. Simpson*, 7 Bro. P. C. 306.
6. A mortgagee assigns over his mortgage to S., and declares a trust by parol for other persons; J. acknowledges the trust: there being an express trust declared, though by parol only, shall prevent a resulting trust to the assignee. *Bellaris v. Compton*, 2 Vern. 294.
7. By a deed between a father and son,

reciting that the father was desirous of settling the property therein comprised, so as to make the same provision for himself during his life, and for his wife, and her children by him, after his decease, he released and assigned the same and every part thereof to the son, upon the trusts therein mentioned concerning the same. The father proceeded to declare the trusts as to part of his property in favour of his wife and daughter, and a niece, but no trust was declared as to the surplus:—Held, that the surplus did not result to the grantor, but belonged to the son, and, the father having been maintained by the son for fifteen years, a bill filed after the father's death, by his representative, was dismissed with costs as to that part of it which sought an account of interest. *Cook v. Hutchinson*, 1 Keen 42.

8. A., jointly seised with two others, conveys his third part to the use of himself for life: remainder to his wife for life, remainder to his son in fee, and at the same time makes his will and gives the same lands to his son in tail, charged with his debts. The son not a trustee for the father in the settlement; otherwise it would have been, if the entire fee had been conveyed to the son. *Baylis v. Newton*, 2 Vern. 28.

9. Where the plaintiff, being entitled to the residuary estate of his father, filed a bill against his mother, the executrix, for an account, etc., and she, by arrangement with him, by deed covenanted to settle a yearly sum on him and his family, and to advance a sum for the benefit of his creditors, if they would accept it in full discharge; the latter having refused:—Held, that no resulting trust arose in favour of the son, as to the sum so to have been advanced to the consenting creditors. *Sherwood v. Walker*, 6 Beav. 401; 7 Jur. 293. Affirmed 13 L. J., N. S., Ch., 253; 8 Jur. 229.

10. A trustee is not entitled to retain for his own use a sum of money bequeathed to him in trust, under circumstances which rendered the trust void for remoteness. A trust differs from a charge in this—that where a man has an estate subject to a charge, if the charge fail he has the benefit of it; but a trust once declared, although unlawful or impossible, excludes the notion of a beneficial interest being intended in the trustee. The subject matter of the trust in question to fall into the residue. *Joy v. Aspinwall*, 18 Jur. 284.

11. A grant of the next avoidance to one without his privity:—Held, a resulting trust for the grantor, no other trust being declared. *Norfolk v. Broune*, Fre. Ch. 80.

12. A. grants lease to B., which is intended to be in trust for A., and B. declares a trust accordingly. B. afterwards surrenders the lease to A., who makes a new lease to C. without a declaration of trust:—Held, that C. was entitled to full benefit, and that no trust existed for A. *Pilkington v. Bayley*, 7 Bro. P. C. 383.

13. A person being in prison on the charge of felony assigned real estate, which was in the hands of trustees, to his brother. He was acquitted on the ground of insanity. His brother accumulated the income except a small portion which he spent for the benefit of the convict. After the brother's death it was

held that he was trustee for the convict. *Manning v. Gill*, 41 L. J., Ch., 736; 13 L. R., Eq., 486; 20 W. R. 357; 20 L. T., N. S., 14.

II. PURCHASES.

1. *Joint Purchases and Purchase in Name of a Stranger*, 6914.
2. *Purchase in Name of Wife or Child, and by Persons in loco parentis*. See ADVANCEMENT.
3. *Purchase by Partners*. See PARTNERSHIP, VI.

1. Joint Purchases and Purchase in Name of a Stranger.

1. Trusts by implication arise where one party pays the purchase money, and the conveyance is taken in the name of another; but the rule is not so large as to extend to every voluntary conveyance. *Young v. Peachy*, 2 Atk. 256.

2. Resulting trust by a joint advance upon a purchase in the name of one. *Wray v. Steele*, 2 Ves. & B. 388.

3. Conveyance to B. of an estate, the money being paid by A.; B. is a trustee, and C., taking from B. with notice, is also a trustee. *Mackreth v. Symmons*, 15 Ves. 350.

4. If A. buy land in name of B., A. may prove he paid the money, and there will be a resulting trust for him. So, where there is a declaration as to part of the land, the rest results. *Lane v. Dighton*, Ambl. 411.

5. When an estate is purchased in the name of one person, and the money is paid by another, he has a resulting trust; or, when it is declared only as to part, and nothing said as to the rest, what remains undisposed of remains to the heir-at-law. *Lloyd v. Spillett*, 2 Atk. 150.

In no other instance has the Court declared resulting trusts by operation of law, unless in cases of fraud, and where transactions have been carried on *malá fide*. *Ib*.

The heir-at-law does not want an express intention to take by will, though it is otherwise with regard to a deed. *Ib*.

6. A. by marriage article covenanted that all lands he should afterwards purchase in the parish of K. should be to the uses of the articles. He purchased lands in K. and took a conveyance in fee in the name of his youngest son; but there was no declaration of trust:—Held, that youngest son was a trustee as to the lands for the parties entitled under the settlement. *Blake v. Blake*, 7 Bro. P. C. 241.

7. In a manor the custom was to grant for three lives successively; A., being the last life in an old copy, obtained a fresh grant to B. and C.; A. paying the whole fine, B. and C. were held trustees for A. *Withers v. Withers*, Ambl. 151.

8. Where a personal office or employment is purchased with the partnership funds for the benefit of the partnership, the partner in whose name it is purchased is not necessarily a trustee for the profits of the office for the other partners, after the term of the partnership has expired. *Clarke v. Richards*, 1 Y. & Coll. 351; 4 L. J., N. S., Exch. Eq., 49.

9. A lease was granted to W., who afterwards committed an act of bankruptcy, and then executed a deed, stating that his name had been used in the lease in trust for R., and declaring the trust accordingly. A bill was filed on behalf of the creditors of W. under the commission, claiming the lease as part of his estate; and the Court directed an issue to try whether W.'s name was used in the lease as a trustee for R.:—Held, that the issue was properly directed. The jury having found a verdict in the affirmative:—Held, that the declaration of trust was valid, though executed after bankruptcy, and that the lease did not pass to W.'s assignees. *Gardner v. Rome*, 5 Russ. 258; 7 L. J., Ch., 2. Affirming 2 Sim. & S. 346; 3 L. J., Ch., 220.

10. A purchase by A. in name of B., a stranger in blood, is a trust for A., unless presumption is repelled by evidence. *Rider v. Kidder*, 10 Ves. 360.

11. The person in whose name South Sea stock is entered in the company's book, is with regard to them the proprietor. *Stockdale v. South Sea Co.*, 2 Atk. 141.

12. Parol not admitted to show that a party, having agreed for purchase of an estate in his own name, had in fact purchased it on behalf of another person. *Bartlett v. Pickersgill*, 1 Cox 15; 1 Eden 515.

13. Purchase by A., and receipt in his name; evidence admitted to prove trust for B. *Knight v. Peachey*, Dick. 327.

14. He who pays purchase money has a resulting trust, but he must clearly prove payments. *Willis v. Willis*, 2 Atk. 71.

Parol evidence admitted to show a trust from the mean circumstances of the pretended owner of the real estate. *Ib*.

15. Where land is purchased with the money of A., in the name of B., the resulting trust to A. may be rebutted as to part of the land or part of the interest in the land. Where A. took a mortgage in the name of B., declaring that the principal sum should be for the benefit of B., and received the interest during his life, this being personal estate is not within the clause in the Statute of Frauds relating to resulting trusts, or the doctrine of resulting trusts under the statute; but the property, after the death of A., will belong to B. by force of the parol declaration. *Bonbow v. Townsend*, 1 Myl. & K. 506; 2 L. J., N. S., Ch., 215.

16. Custom of manor, that, if tenant for life of copyhold obtains a grant in reversion, in the name of a third person, unless a trust is mentioned on the rolls of the manor, such third person should be beneficially entitled thereto, and not as trustee:—Held, good. *Edwards v. Fidel*, 3 Madd. 237.

17. A. purchases an estate in the name of B., and suffers him to execute lease thereof, and gives receipt for rents in name of B., but no declaration of trust was executed by B. Bill by A.'s heir for conveyance and account dismissed. *Delane v. Delane*, 7 Bro. P. C. 279.

18. A., being in possession of lands for a long term of years, contracts for the purchase of the reversion and inheritance, but to prevent merger of the term takes conveyance to B. absolutely and without declarations of trust from B. The title deeds remain throughout in the custody of A. and those claiming

under him. B. held to be a trustee only for A. *Lover v. Andrews*, 7 Bro. P. C. 288.

1. C. lends money upon mortgage of copyhold, but being infirm, etc., surrender, etc., is taken in name of D., who executes a declaration of trust. C. afterwards purchases the equity of redemption, and second surrender is made in the name also of D., but without a declaration of trust:—Held, sufficient trust within the Statute of Frauds without a second declaration of trust. *Acherley v. Acherley*, 7 Bro. P. C. 273.

2. A. purchases in the name of B., and pays the purchase money; B. claims the estate, there being no declaration of trust. A. may be admitted to read proofs that he paid the purchase money, but then those proofs must be very clear to make it a trust arising by implication of law. *Gascoigne v. Thwing*, 1 Vern. 366.

3. A., a freeman of London, purchases in the name of B., but no trust declared; A. dies, and B. gives a declaration of trust: this is good against the custom. *Ambrose v. Ambrose*, 1 P. W. 321.

4. A., seized of freehold estates, and of customary freeholds, which were not devisable, made a voluntary surrender of the latter to B. in fee, in trust, as B. admitted for A., and after his death for the purposes of his will; but B. executed no declaration of trust. A. made a general devise of all his real estates, and after A.'s death B. was admitted:—Held, that he was a trustee for the devisees, and not for A.'s customary heir. *Wilson v. Dent*, 3 Sim. 385.

5. By the rules of a joint-stock company, only principals could become subscribers. The petitioner purchased forty shares in the name of the bankrupt, who verbally declared that he held them as a trustee for the petitioner, and the certificates of the shares were kept in the possession of the petitioner; but no notice was given to the company of the trust, nor did the bankrupt sign a written declaration of trust, until seven days before the fiat was issued:—Held, that the shares were in the order and disposition of the bankrupt as reputed owner, and passed to his assignees. *Exp. Ord.*, 1 Dea. 166; 2 Mont. & A. 724; 4 L. J., N. S., Bky., 84.

6. A. buys a copyhold estate for his own use and two lives in the manor of M., where the custom was, that whoever purchases in it the estate shall go in succession, and by his will devises all his real and personal estate to his wife:—Held, that though the legal interest was according to the custom of the manor, yet A. has an equitable interest from being the sole purchaser, and it shall be construed as a trust for him, he having advanced the money. *Smith v. Baker*, 1 Atk. 385.

7. Where in a grant of a copyhold for three lives, viz., to the husband and wife and a third person, the fine was mentioned to be paid by the husband and wife, this, there being no full evidence to the contrary, made the third person only a trustee for the husband and wife and the survivor of them. *Benger v. Drew*, 1 P. W. 781.

8. A. agrees for a beneficial lease of forty-one years. B. advances money towards paying the fine, etc., and lease is taken in B.'s name without any declaration of trust:—Held, that

B. was a mere trustee for A., and upon being repaid his advance with interest, should assign the lease to A., account with him for the profits, and pay his costs. Held, also, that the trust, being proved by letters of B.'s own handwriting, takes the case out of the Statute of Frauds. *O'Hara v. O'Neill*, 7 Bro. P. C. 227.

9. Though, in the purchase deed, the consideration money is mentioned to be paid by the purchaser, and there is no express declaration of a trust, yet upon the circumstances of the case decreed a trust, though to the disappointment of the purchaser's will and of his creditors. *Plymouth (Earl) v. Hickman*, 2 Vern. 167.

10. Testator on renewal of a lease takes it in the names of his brother and himself, paying the fine, and receiving the profits himself:—Held, not to be assets, but vested in the brother beneficially upon the ground of intention, though proved but by one witness. *Maddison v. Andrew*, 1 Ves. 58.

11. Purchase in the name of another is a trust for the party who pays the consideration, except by a parent in the name of his child, which is presumed an advancement; the presumption capable of being rebutted, but does not give way to slight circumstances. *Finch v. Finch*, 15 Ves. 43.

12. A testator, under the 33rd section of the Savings Bank Act, 9 Geo. 4, c. 92, made deposits in the names of himself and his sisters; but he did not communicate to them the fact of such deposits being made:—Held, that a trust was not thereby created for the benefit of the sisters, the testator's object being, in the opinion of the Court, merely to evade the provisions of the Act. *Field v. Lonsdale*, 13 Beav. 78; 19 L. J., N. S., Ch. 560; 14 Jur. 995.

13. In 1805 A. B. purchased an estate with the money of C. D., and executed a mortgage to secure the amount. A. B. was evicted, and he died in 1812; C. D. died in 1816. The same individuals represented both A. B. and C. D., and in 1845 they established, under the covenant for title, a claim against the vendor's estate, for the amount of the purchase money. The residuary legatees of C. D. filed a bill in 1846 against the representatives to recover the amount. The Court thought, that there was so much probability, at least, of their ultimately establishing their equity, that it overruled a demurrer to the bill, leaving the question open at the hearing. *Norman v. Stiby*, 9 Beav. 560.

14. C. proposed to A. that A. should take out a lease of certain lands in his own name, but in trust for C., to which A. verbally consented, and C. paid the fine for the lease, which was afterwards executed by A. A difference having arisen as to the terms of the agreement between A. and C.:—Held, that it lay on C. to sustain his view beyond all doubt, or be bound by the offer made by A. in his answer. Before the bill was filed A. had repudiated the trust, but having admitted it by his answer upon terms:—Held, entitled to his costs from the filing of the answer. *Chartrres v. Ainsworth*, 1 Hay. & J. 68.

15. Transfer of stock of intestate into name of himself jointly with that of husband of one of his two nieces, accompanied with proof of his having said in his lifetime that it was

his intention to give husband stock at his death in consideration of affection, etc., and that he had transferred it for that purpose (if not repelled by counter testimony):—Held, to be sufficient proof of gift of such stock, and no trust; and the Court will not continue injunction granted to restrain husband, who had administered, from disposing of it. *George v. Howard*, 7 Price 646.

1. D., having expressed a wish to save her sister legacy duty, in her lifetime transferred stock into the name of herself and sister, whom she made her universal legatee, the husband of the sister being a witness to the will. On bill filed for a declaration that the testatrix died intestate, and that the stock formed no part of her personal estate:—Held, that the bequest by the will was void, and that the stock formed no part of the personal estate, but the sister was entitled to the beneficial interest in it. *Deacon v. Colquhoun*, 2 W. R. 67; 2 Drew. 21; 23 L. J., Ch., 16; 2 Eq. Rep. 319.

2. H., married in 1840 the sister of a deceased wife. He afterwards invested parts of the savings of his income in consols in their joint names. It did not appear that the reputed wife had at the time of performing the ceremony of marriage any property of her own. In 1845 H. died, leaving his reputed wife surviving:—Held, that she was a trustee of the stock, and that it formed part of the estate of H. *Soar v. Foster*, 4 Kay & J. 152; 4 Jur., N. S., 406.

No intention of advancement in cases of a purchase in joint names will be presumed, except in the case of a lawful wife, or a person to whom the purchaser stands in loco parentis. *Id.*

In all other cases the onus of proving the intention to advance is thrown on the person claiming the advancement, and such a circumstance as the performance of the ceremony of marriage, where the parties knew it to be inoperative, will not be regarded. *Id.*

3. Where one claimed as an advancement shares purchased in his name by an elder brother, and also alleged a gift of them seven years after the purchase, and stated his belief they were intended to be ultimately for his benefit:—Held, no advancement. *Forrest v. Forrest*, 5 N. R. 299; 11 Jur., N. S., 317; 34 L. J., Ch., 428; 13 W. R. 380; 11 L. T., N. S., 768.

4. A married woman, out of the savings of her separate estate, purchased stock in the name of a niece, and told the niece by letter that it was her intention that the stock should be for the niece herself, but took from the niece a power of attorney to receive the dividends, and sell the stock:—Held, that on the death of the aunt the niece was entitled to the stock. *Beecher v. Major*, 13 W. R. 1054; 11 Jur., N. S., 537; 12 L. T., N. S., 562. Affirmed 13 L. T., N. S., 554; 6 N. R. 370.

5. M. took a lease of Bellevue in the name of his sister M. from S. He subsequently agreed to purchase Bellevue from S., and an agreement was entered into between them in June 1860. It was afterwards discovered that proceedings in the Landed Estates Court were necessary to establish the title of S., and a new agreement between N. and S. was prepared for this purpose. N. had this draft

agreement altered by substituting the name of his sister M. for his own, and M., when directed to do so, signed the agreement, as also did S., in October 1860. During the proceedings in the Landed Estates Court N. died intestate. The purchase of Bellevue was subsequently completed: a conveyance was made to M., and she, as administratrix of N., was allowed credit for the purchase money out of the assets of N. In his lifetime he acted as master and absolute owner of Bellevue, and had spoken of Bellevue as purchased by him for M., and as intended by him for her benefit:—Held, that there was no evidence sufficient to rebut a resulting trust; but that M. was the agent of N. authorised by parol, with a right to be indemnified inconsistent with any beneficial interest belonging to her. *Nicholson v. Mulligan*, 17 W. R. 659.

Held, also, that her representative capacity, reconciling the two agreements, excepted the case from the operation of the doctrine admitting evidence to rebut a resulting trust. *Id.*

6. On a purchase by two contributing equally to the cost of it, parol evidence of surrounding circumstances and of subsequent dealings is, notwithstanding the Statute of Frauds, admissible to prove an intention to hold it severally. But, *semble*, parol evidence of statements of intention is not admissible. *Harrison v. Barton*, 1 John. & H. 287; 7 Jur., N. S., 519.

7. Stock purchased in the joint names of two sisters, and a balance to their joint account at their bankers:—Held, under the circumstances, to belong to them as tenants in common, notwithstanding they had contributed equally, the Court looking to the source whence the funds were derived, viz., rents of land, of which the two were tenants in common. *Robinson v. Preston*, 4 Kay & J. 585; 4 Jur., N. S., 186; 27 L. J., Ch., 395.

The rule as to the investment of moneys in the names of two or more persons in the purchase of property is this: if invested in unequal shares, the purchasers remain tenants in common of the purchased property; if in equal shares, and the matter on the face of it purports to be a joint tenancy, it is considered to be a joint tenancy, and no equity is supposed to intervene by which it can be reduced to a tenancy in common. *Id.*

8. Money which was standing in the funds in the name of a married woman was claimed, after her decease and that of her husband, by her mother, as having been invested by her while separated from her husband in her daughter's name. The only evidence of the trust was the affidavit of the mother, and proof that the dividends had been received by her with the assent of the daughter and her husband:—Held, that the claim of the mother was established. *Down v. Ellis*, 35 Beav. 578.

See also JOINT TENANT, III.—GIFT.

III. CHARITABLE GIFTS.

1. *Failure of Gifts*, 6917.
2. *Surplus and Increased Revenue*. See CHARITY, VI. VI.
3. *When Trusts for Conversion*. See CONVERSION, II. II. 3.

1. Failure of Gifts.

1. Legacies to charity, void by the stat. 9 Geo. 2, c. 36, fell into the general residue. *Page v. Leapingwell*, 18 Ves. 463.

2. When there is a clear intention to give to charitable purposes, and the gift is immediate, there is no resulting trust for the next-of-kin, although the particular application of the fund directed by the will would not of necessity take effect within any assignable limit of time, and could never take effect at all except upon the occurrence of uncertain and contingent events. But if the gift to charity is conditional and the condition is so remote and indefinite as to transgress the rules of law against perpetuities, the gift fails *ab initio*. *Chamberlayne v. Brookett*, 21 W. R. 299.

3. Trust of an annuity for a charity charged upon a devised estate, being void under the Act 9 Geo. 2, c. 36, does not pass by a residuary disposition, but sinks for the benefit of the specific devisees. *Baker v. Hall*, 12 Ves. 497.

4. A leasehold house, the bequest of which, being to a charity, fails, passes under a general disposition of the residue, and does not belong to the next-of-kin as undisposed of. *Shanley v. Baker*, 4 Ves. 732.

5. Trusts declared for certain Roman Catholic chapels, for saying masses and requiems for the soul of the donor and for other souls, and for the souls of the "poor dead," and for other purposes:—Held, that the gift for masses, etc., for the dead was superstitious and void; that the pious uses could not, as religious uses, be separated from the others, and were therefore also bad; and that the words "pious uses" could not be construed charitable uses; consequently, the property given to these uses went to the residuary legatees of the donor. *Heath v. Chapman*, 2 Drew. 417; 23 L. J., Ch., 947; 2 Eq. Rep. 1264.

6. Devise of copyhold land in fee, on condition to pay 1,000*l.* to charity. Testator having left no next of kin, nor any customary heir, and gift of charity being void, devisee held entitled to 1,000*l.*, and not the crown or lord of manor. *Henchman v. Att.-Gen.*, 3 Myl. & K. 485. Reversing 2 Sim. & S. 498.

7. Money charged upon a real estate for a charity void by the Statute of Mortmain shall sink in favour of the specific devisee, not go to the heir-at-law or residuary legatee. *Secus*, when it is an exception out of the devise. *Wright v. Row*, 1 Bro. C. C. 61.

8. Upon a devise to a charitable use, the heir has no right to the rents and profits accrued before the devise is carried into effect. *Att.-Gen. v. Bomyer*, 3 Ves. 714.

Devise upon a future contingency, and no intermediate disposition of the rents and profits, is a resulting trust for the heir. *Id.* 725.

9. When lands are given to charity purposes on the happening of a particular event, there is a resulting trust in the meanwhile; but where real estate was vested in A. in trust, out of the rents, to keep it ready for the reception of plague patients during their sickness, but no longer, and for a burying-place for them, and for no other use:—Held, first, that this was a present gift to charitable purposes, and not merely a gift contingent upon the re-appearance of the plague; and, secondly, that there was no resulting trust

in the meanwhile for the donor or his heirs, though the plague had not re-appeared for more than 180 years. *Att.-Gen. v. Craven (Earl)*, 21 Beav. 392; 2 Jur., N. S., 296; 25 L. J., Ch., 291; 4 W. R. 340.

10. A bequest of personal estate "to be appropriated for the pious and benevolent uses and purposes" of a charitable association, the objects of which included the purchase of and erection upon land, and also other purposes not within the stat. 9 Geo. 2, c. 36, held to be valid, but that any appropriation of the fund towards purchasing more land would be an illegal application of the bequest. Testator, by a codicil, declared that in case any of the charitable bequests in his will should be incapable of taking effect, he gave all such moneys, etc., to four legatees absolutely, free from any trust or conditions whatever. These four legatees were the trustees named in the will of the charitable bequests:—Held, that in the event of the charitable bequests being void, the four legatees were entitled, and not the next-of-kin of the testator. *Carter v. Green*, 5 W. R. 856.

11. Bequest in trust for such objects of benevolence and liberality as trustee in his own discretion should most approve, cannot be supported as a charitable legacy, and is therefore a trust for the next-of-kin. *Morice v. Durham (Bishop)*, 9 Ves. 399. Affirmed 10 Ves. 522.

12. After giving charitable legacies by her will, a testatrix, by codicil, declared that if any of them should fail, by reason of any part of her estate being of such a nature as could not legally be made applicable to charitable purposes, she gave such part to A. and B., for their absolute use and benefit, having full confidence that they would desire to carry out her intentions, but she declared that that should not have the effect of imposing a trust upon them, or in any manner qualify their interest in the bequest:—Held, that A. and B. took beneficially, and not as trustees for the next-of-kin. *Cawood v. Thompson*, 17 Jur. 798; 22 L. J., Ch., 835; 1 Sm. & G. 409.

A testatrix gave charitable legacies, and the residue to her sister, who survived her, and also made several bequests to charities:—Held, that the impure personalty, which the sister took under the former will, and kept unconverted until her death, was not to be treated as converted for the purpose of the charitable legacies in her own will. *Id.*

13. A testator gave all his real and personal estate to his executors: then mentioned a specific house, 71, Queen's Road, Bayswater, which he gave to the inhabitants of B., to found a charity, directed the executors to call a meeting of the inhabitants, to appoint trustees to carry his scheme into execution, named his godson, W., to be one of the trustees, leaving to the inhabitants to choose as many more as they pleased; and then said, in the event of the inhabitants not being willing to carry out the scheme, "I will that all my property so given to the charity shall absolutely belong to my godson." He afterwards made some pecuniary gifts, and devised leasehold and freehold houses for life to different persons; each house, on the death of the devisee, being given to the "residuary legatee or legatees" for the charity. As to one freehold house alone, 4, Douglas Place, there was a

gift of it to W. for life, then to the trustees of the charity; but should there be no charity established, then to W. absolutely. The gifts to the charity being contrary to the Statute of Mortmain, no meeting of inhabitants was called, nor were any trustees appointed:—Held, that on the general failure of the gift to the charity, the gift overtook effect; and therefore, in the case of the house, 4, Douglas Place, W. became entitled to it absolutely. *Hall v. Warren*, 9 H. L. Ca. 420.

Held, also, that W. was only entitled, in addition, to the house, 71, Queen's Road, Bayswater, for that the words "all my property so given" must be restricted to that house, and did not affect the general property of the testator, as to which he must be treated as having died intestate. *Id.*

1. More than fifteen years before his death, a testator purchased two Southampton Pier Bonds for 500*l.* each, having, before the purchase, told the plaintiff that he had left her by his will more than her sisters, to enable her to subscribe to some charities, and, very soon after the purchase, that he had invested the 1,000*l.* on the pier bonds in her and his own name, but did not mention any trust or purpose. He privately applied the interest in subscribing to certain charities; and, fourteen years after the purchase, mentioned in several letters the charities to which he wished her to apply the interest, but said he did not intend to bind her by any legal document:—Held, that no valid trust was created, and no resulting trust, but that the sister was entitled to the fund. *Wheeler v. Smith*, 1 Giff. 800; 6 Jur., N. S., 62; 29 L. J., Ch., 194; 9 W. R. 173.

2. A married woman having a power of appointment under her marriage settlement over estates A. and B., appointed, by will in September 1838, estate A. to her husband in fee, "and all other the hereditaments comprised in the settlement not hereinbefore disposed of to another person." By codicils to her will she revoked the appointment of estate A. to her husband, and gave him the same estate for life, with remainder to trustees to sell and pay certain legacies and pay the residue to charities:—Held, that the devise of "all other the hereditaments," etc., by the will was not residuary, but specific; and that the void gifts to the charities did not pass by it, but lapsed as unappointed. *Re Brown*, 1 Kay & J. 522; 3 W. R. 542.

3. A testatrix gave certain lands in the parish of H. to A., B., and C., as joint tenants in fee, and devised to the plaintiff "the rest of my freehold hereditaments in the parish of H., and all my freehold hereditaments in the parishes of," etc. The devise to A., B., and C., having been declared void, as made on a secret trust for a charity:—Held, that the lands comprised in that devise did not pass under the gift of "the rest of my freehold hereditaments in the parish of H.," but were undisposed of. *Springett v. Jennings*, 6 L. R., Ch., 333; 40 L. J., Ch., 848; 24 L. T., N. S., 643; 19 W. R. 575. Affirming 23 L. T., N. S., 132.

4. A testator gave 10,000*l.*, and all the money he had invested in the funds, to trustees upon trust to invest such portion upon mortgage of freehold security as would be sufficient to produce certain annuities; and gave the residue of the 10,000*l.* and

money in the funds to A. The will contained a general residuary clause. Some of the annuities, being for charitable purposes, were void:—Held, that the void bequests fell into the particular and not the general residue. *Aston v. Wood*, 31 L. T., N. S., 293; 43 L. J., Ch., 715; 22 W. B. 893.

5. Testatrix, after giving certain legacies, bequeathed "all her moneys, securities for money, moneys secured on mortgage, railway stocks and shares, moneys to be produced from sale of any property at S. or P. to which she was entitled, all moneys to which she was entitled under the will of her late grandfather, and also all her moneys secured upon any securities or in any way or manner howsoever" to trustees, upon trust, after payment of her legacies and debts, to invest and pay the income to A. for life, and after her decease to pay thereout a certain charitable legacy, and as to the residue thereof, upon certain trusts, in favour of the defendants. The will contained a general residuary bequest in favour of A. The charitable legacy was partially invalid under the Statute of Mortmain:—Held, that the portion of such legacy which failed passed to the defendants under the particular gift of residue, and not to A. under the general residuary gift. *Champney v. Davy*, 11 L. R., Ch. D., 949; 48 L. J., Ch., 268; 27 W. R. 390; 40 L. T. 189.

VIII. Trusts for and Powers of Advancement and Maintenance.

- I. *Advancement*, 6918.
- II. *Maintenance*, 6922.
- III. *Effect of on Vesting*. See VESTED CONTINGENT AND FUTURE INTERESTS.
- IV. *Absolute Interests or Trusts where Gifts to a Person for the Benefit of Himself and Children, or to Benefit a Legatee in a Particular Way*. See POWER II.—WILL.

I. ADVANCEMENT.

1. *Persons Entitled*, 6918.
2. *Consents to Exercise of Power*, 6919.
3. *Duration and Cesser*, 6919.
4. *What are Proper Advances*, 6920.
5. *Fund Raised for. Failure of Purpose*, 6921.
6. *Allowances to Trustees in Accounts*, 6922.
7. *Other Cases*, 6922.

1. Persons Entitled.

6. A. makes two of his daughters his executors, and directs them to distribute a sum of 400*l.* and also the residue of his personal estate among themselves and their brothers and sisters, according to their needs and necessities, as they in their discretion should think fit. The Court restrained the exercise of this power, by decreeing a double share to the eldest son and heir, looking upon him as a necessitous person. *Warburton v. Warburton*, 4 Bro. P. C. 1.

7. Bequest of residue to A. for life, with power thereout to advance her eldest son, and a gift, after A.'s death, of the said residue to

A.'s children equally:—Held, on the context, that the amount advanced to A.'s eldest son was not to be taken into account in the ultimate division of the remainder amongst A.'s children. *Upjohn v. Upjohn*, 7 Beav. 152.

1. By a marriage settlement certain stock in the funds was settled upon the intended husband and wife for their joint lives, and the life of the survivor, and then upon the children of the marriage, with a power to the trustees, with the consent of the wife, to advance part of the fund for the benefit of the children in her lifetime. There were four children of the marriage; the husband died; the wife married again; the second husband assigned the wife's life interest for value; after the assignment the trustees, with the consent of the wife, exercised the power of advancement in favour of the children of the first marriage:—Held, that the power was well executed as against the assignee of the second husband. *Whitmarsh v. Robertson*, 1 Colly. 571; 14 L. J., N. S., Ch., 157; 9 Jur. 125. And see S. C. 1 Y. & Coll. C. C. 715; 11 L. J., N. S., Ch., 404; 6 Jur. 921.

2. Consents to Exercise of Power.

2. A tenant for life of a fund under a settlement which empowered the trustees with his consent to advance part of the presumptive share of a child, assigned his life interest in the fund by way of mortgage:—Held, that the trustees might be restrained from making any advancement to a son of the tenant for life during his life, he having by executing the mortgage lost his power to consent. *Nottidge v. Green*, 33 L. T., N. S., 220.

3. By a settlement made on the marriage of A. with B., certain funds, the property of B., were transferred to trustees, upon trust, during the joint lives of A. and B., to pay the dividends to B., to her separate use; and, after the decease of such one of them as should first depart this life, to pay the dividends to the survivor during his or her life, for his own or her own benefit; and, after the decease of the survivor upon trust for the children of the marriage, as tenants in common. The settlement provided, that it should be lawful for the trustees, at any time or times after the decease of the survivor of A. and B., or in "the lifetime of them or of the survivor of them, with their, his, or her consent, in writing," to levy and raise any part or parts of the portion or portions intended to be thereby provided for such child or children, not exceeding one moiety of such expectant portion, notwithstanding the same should not then have become vested or payable, and to apply the money so be raised for the preferment, etc., of such child or children. A. died, leaving B. and seven infant children. Shortly afterwards B. intermarried with C.; but on that occasion no settlement was made. Subsequently, by indenture, C. and B., for valuable consideration, assigned B.'s life interest to D.:—Held, that, notwithstanding such assignment, B. was entitled effectually to exercise the power of consent under the advancement clause, and the trustees were authorised to give effect to that consent. *Whitmarsh v. Robertson*, 9 Jur. 125; 1 Colly.

571; 14 L. J., N. S., Ch., 157. And see S. C. 1 Y. & Coll. C. C. 715; 11 L. J., N. S., Ch., 404; 6 Jur. 921.

3. Duration and Cesser.

4. On the construction of a power of advancement, it was held not to be restricted to minority, and did not cease by the expiration of twenty-one years from the date of the testator's death, when the power of accumulation ceased. *Pride v. Fooks*, 2 Beav. 430; 9 L. J., N. S., Ch., 234; 4 Jur. 213.

"Collieries" held to mean freehold collieries, and not shares in leasehold collieries, the testator having both. *Id.*

5. Under a will a mother was tenant for life of a fund, to her separate use, without power of anticipation. After her death the fund was to go to her children as she should appoint by deed or will, and in default of appointment, among her children equally, the shares of sons being vested at twenty-one, and the shares of daughters at twenty-one or on marriage. The trustees had power to advance the whole or any part of the share to which each of the children being a minor was actually or presumptively entitled:—Held, that there was no power, even with the consent of the mother, to make an advance to a son who had attained twenty-one. *Clarke v. Hogg*, 19 W. R. 617.

6. By a separation deed between husband and wife a fund was vested in trustees for the wife for her life, with remainder as to four-sixths for F. for his life (determinable as therein mentioned), with remainder to his children, with remainder over. The deed contained a power for the trustees, if they in their discretion should think fit, but they were to be under no fiduciary obligation, as to the exercise of this discretion at any time while F. should continue to hold a commission in the army, to raise out of the fund settled for the benefit of himself and his children any sum or sums not exceeding in the whole 2,000*l.*, and to apply the same in or towards the purchase of or effecting his promotion in the army. During the life of the tenant for life, the money was only to be raised with her consent. In 1869 the sum of 850*l.* was raised and applied in effecting F.'s promotion in the army. In 1871 promotion in the army by purchase was abolished:—Held, that the trustees could not after that raise the rest of the 2,000*l.*, and pay it to F., or exercise the power at all. *Re Ward*, 20 W. R. 1024; 7 L. R., Ch., 727; 42 L. J., Ch., 4; 27 L. T. 668.

7. A power in a settlement to withdraw funds and lay them out in the purchase of a trade for the benefit of the husband and wife may be exercised after the death of one of them for the benefit of the survivor alone. *Dooley v. Arnold*, 18 W. R. 540.

In exercising it the trustees ought to see that a purchase is *bond fide* made, but they need not inquire into the value of the property or expediency of the purchase. *Id.*

8. Trust by will as to the residue of real and personal estate, for a nephew and his heirs, to pay him the interest for life, with power to the trustees, in case they should see it would be for his benefit, to advance him, when it may be in their power, any part of the principal for his advancement in life, that

they will not withhold such assistance as they may deem necessary; but in case no part should be advanced, the residue to be divided among the nephew's issue; with a limitation over, if he should leave no issue. The nephew is entitled, not to the absolute property, but for life only; and no advancement having been made, an inquiry was directed, whether his circumstances required advancement. *Robinson v. Cleator*, 15 Ves. 526.

4. What are Proper Advances.

1. A fund bequeathed by will was directed to accumulate till infants should attain twenty-one, deducting annually from the interest such portion as might be necessary for their education and other expenses, with benefit of survivorship; in case of either dying under twenty-one, the shares to be vested at twenty-one. The Court (parties to whom the fund was given over consenting) directed an advancement for the purchase of a commission for one of the infants, but with considerable hesitation. *Evans v. Massey*, 1 Y. & J. 196.

2. Under a marriage settlement, stock was vested in trustees, in trust to pay the interests and dividends to the wife for life, remainder to the husband for life, with a power to them and the survivor to appoint the principal among the children of the marriage. The wife died, and the husband appointed a third part thereof absolutely and at once in trust for an infant child, payment to be postponed till twenty-one. The Court, on the application of the infant that the trustees might apply a sufficient part of the capital of his share of the stock in payment of the expenses incurred and to be incurred for his education as a cadet, and his advancement in India, granted the prayer of the petition so far as related to payment of part of the expenses incurred, and as to the expenses of education and residence as a cadet at Addiscombe, and ordered the rest of the petition to stand over. *Re Lane*, 17 Jur. 219.

3. Trustees having a power of advancement for the benefit of children, were authorised by the Court to make an advancement for the passage and outfit of the children with their parents to New Zealand, for the sake of their health, each child's share contributing equally to the passage and outfit of their parents. *Re Long*, 38 L. J., Ch., 125; 17 W. R. 218; 19 L. T., N. S., 672.

The Court declined to sanction the transfer of the trust funds to new trustees resident in New Zealand. *Ib.*

4. The trustees of a marriage settlement were authorised, with the consent of the parents, to advance to each or any of the sons of the marriage any part not exceeding half of his expectant share for the purpose of placing or establishing him in any business, profession, or employment, or otherwise for the advancement or preferment in the world of such son or sons. A son attained twenty-one and married. Neither he nor his wife was entitled to any property producing an immediate income, and the son being engaged in study, preparatory to entering the legal profession:—Held, that the trustees were authorised to raise and pay half the son's expectant share to the trustees of a settlement which had been prepared for the purpose of settling the same upon the son, his wife and children, but that the trustees were not autho-

aised to raise and pay the same to the son on his undertaking forthwith to settle it. *Roper-Curzon v. Roper-Curzon*, 19 W. R. 519; 24 L. T., N. S., 406; 11 L. R., Eq., 452.

5. Testator after making a certain provision for A., the son of a relation, till he attained the age of sixteen, added: "I then leave him to the care of my trustees to provide for him in some business or profession, and his future maintenance, out of my funded property":—Held, that these words created a trust for placing him out, was referred to the Master. *Kilvington v. Gray*, 10 Sim. 293.

6. Trustees of a marriage settlement had authority, with the consent of the husband and wife, or the survivor, to raise 2,000*l.* for placing the issue of the marriage to any profession, trade, or business, or for their advancement in life:—Held, that in the case of a daughter, "advancement in life" might be taken to mean "advancement in life by way of marriage." *Lloyd v. Cooker*, 6 Jur., N. S., 336; 29 L. J., Ch., 513; 8 W. R. 252; 27 Beav. 645.

7. A discretionary power of advancement vested in trustees for setting up testator's sons and daughters in business may not be exercised in favour of the married daughters' husbands, either for paying their debts or setting them up in business. *Talbot v. Marshfield*, 37 L. J., Ch., 52; 4 L. R., Eq., 661. Affirmed with a variation, 3 L. R., Ch., 632.

But where a share was advanced for the purpose of setting up a married daughter in a farming business, her husband covenanting that the business should be for her separate use:—Held, that this was a good execution of the power. *Ib.*

If such a power is exercised by the trustees pending a suit for administration of their testator's estate, the Court will require the strictest evidence of *bona fides*, and of the propriety of the advancement. *Ib.*

Trustees having, in the opinion of the Court, exercised such a power *mala fide*, for the purpose of defeating the plaintiff's interest, were ordered to refund the sums advanced, and pay all costs of the litigation occasioned beyond the estimated costs of an ordinary administration suit. *Ib.*

8. Trustees having power to advance for the benefit of a testator's daughter at any period of her life half the capital, the income of which was given by the will to her separate use, were authorised by the Court to make the advance for the purpose of setting up her husband in business. *Re Kershaw*, 37 L. J., Ch., 751; 6 L. R., Eq., 322.

9. E. B. by will gave 1,000*l.* to trustees to invest and stand possessed of the same until P. L. attained twenty-one, and then pay the interest to him for life, with remainder to his children at twenty-one or marriage, with power to the trustees if they thought proper, but not otherwise, to advance all or any part of the legacy for the advancement of P. L. P. L. had twelve children; seven died infants, and unmarried, and five attained twenty-one; and P. L. being distressed, and having mortgaged the legacy, now petitioned, with the consent of four of the surviving children, one being abroad, that the security might be paid off out of the legacy, and the residue paid to him under the power in the will:—Held, that

the trustees had no power to do what was asked. *Inard v. Pease*, 1 W. R. 527; 22 L. J., Ch., 2069.

1. Where there was a power of advancement in favour of an infant female legatee to whom an interest for life for her separate use, without power of anticipation, was given, with remainder to her children, the Court, after the legatee had attained twenty-one, and married, ordered an advancement to be made for the purpose of enabling the husband to enter into a partnership, upon the husband insuring his life, and entering into a bond for the payment of the sum advanced and the premiums on the policy. *Phillips v. Phillips*, 18 Jur. 69; 23 L. J., Ch., 7; 1 Kay 40; 2 Eq. Rep. 362.

2. The whole of a small legacy, and its accumulations, were paid out of court to the solicitor of an infant who had no other property upon his undertaking to apply it in discharging a sum claimed for past maintenance, and for a prospective outfit, and after deducting the costs to pay any remaining balance to the infant at majority. *Re Welch*, 23 L. J., Ch., 344.

3. A testator gave 5,000*l.* to trustees upon trust to pay and apply so much of the interest as they should in their uncontrolled discretion think necessary or expedient to be paid and applied yearly and every year from the time of his death until A. should attain thirty-two, in aid of the allowance which A's father should or ought to make for that purpose in order to prepare A. for his establishment in and to enable him to follow some profession, and subject thereto, to accumulate the income by way of compound interest, and upon A. attaining thirty-two to pay the interest and the accumulated fund arising therefrom to A. during his life, so long as he should not have been bankrupt. And after the death of A. the 5,000*l.* and the accumulated fund were to be held in trust for the children of A. On the testator's death in 1842, A. was six years old, and his father died in 1849. The testator's estate was being administered in Chancery, and a considerable fund arose from the accumulations of the income. A. was married and had one child, and having contracted debts which prevented his living in this country he petitioned the Court that a sufficient sum for their payment might be raised out of the accumulated fund:—Held, that there was power to apply a portion of the accumulations for that purpose, and that as it was clearly under the circumstances for A.'s benefit, the Court directed the necessary sum to be so raised and applied in payment of the debts. *Edwards v. Grove*, 29 L. J., Ch., 839; 2 De G. F. & J. 210.

4. A father bequeathed a fund upon trust for L. during his life, and after his death for his children, as he should by will appoint, and in default of appointment for his children, who being sons should attain twenty-one, or being daughters should attain that age or marry, in equal shares. The testator empowered the trustees, at any time or times during the life of L., to apply any part of the fund not exceeding one moiety in or towards the preferment or advancement of L., or otherwise for his benefit as the trustees should in their discretion think fit. At the date of the will L. was thirty years of age, and had been married for nearly three years:—Held, that the trustees might apply one moiety of the trust fund in

payment of debts incurred by L., the interest on which absorbed nearly the whole of L.'s income, and the principal of which he was unable to pay out of his own resources. *Lowther v. Bentinck*, 19 L. R., Eq., 166; 31 L. T., N. S., 719; 44 L. J., Ch., 197; 32 L. T. 156.

5. Power of advancing the capital of a fund was given to a trustee for the "benefit and advancement in the world" of the person entitled to the income of the fund for life, and there were words at the end of the clause conferring the power, which seemed to indicate that the power was to be a wide one:—Held, that the word "and" must be read disjunctively, and that the trustee could advance the fund, not only for the advancement, in a strict sense, of the object of the power, but also for such wider purposes as would come within the meaning of "benefit." *Re Brittlebank, Coates v. Brittlebank*, 30 W. R. 99.

5. Fund Raised for. Failure of Purpose.

6. In the event of the object failing for which money has been advanced by trustees, under a power of advancement, the money belongs to the person for whose benefit it was advanced, and cannot be recalled into the original fund. *Lawrie v. Bankes*, 4 Kay & J. 142; 4 Jur., N. S., 299; 27 L. J., Ch., 265; 6 W. R. 244.

Therefore where, under such a power, the trustees purchased a commission in the army, and the person for whom the commission was purchased sold out shortly after joining his regiment, there being no fraud:—Held, that he was, and not the trustees were, entitled to the purchase money. *Ib.*

7. A testator, after giving a life annuity, from and after the death or marriage of his sister-in-law, in trust for his nephew, her son, bequeathed the residue of his mixed real and personal estate specifically in favour of his nieces, their husbands and children. He then declared that for making a further provision for the maintenance of his nephew, it should be lawful for his trustees, during the life of his sister-in-law upon her request in writing, to expend any sums not exceeding 6,500*l.* in the purchase of a commission for, or in obtaining the promotion of, his nephew in the army. After the testator's death the nephew, being in the army, exchanged from one regiment into another, and in so doing paid 600*l.* for the exchange and 550*l.* for horses and outfit; after which, in May 1868, his mother signed and sent a formal request to the trustees, desiring that the whole of the 6,500*l.*, with interest from the day of the date of the request, should be raised out of the residuary estate, and paid to her son. From the 1st November 1871 purchase of commissions in the army was by royal warrant abolished:—Held, that the nephew was entitled to the full sum of 6,500*l.*, with interest at 4 per cent. from the date of the request, subject to the payment of legacy duty. *Palmer v. Flower*, 13 L. R., Eq., 250; 41 L. J., Ch., 193; 25 L. T., N. S., 816; 20 W. R. 174.

8. But when by a separation deed a sum of money was directed to be held by trustees for the wife for life, and after her death, as to four-sixth parts, for W., one of the children of the marriage, who was then an officer in the

army, during his life, and after his death for his children, and it was declared that it should be lawful for the trustees, if in their discretion they should think fit, to apply any portion of the fund, not exceeding 2,000*l.*, in or towards effecting the promotion of W. in the army, and the trustees applied 850*l.* in the way pointed out by the deed, but in consequence of the abolition of purchase of commissions in the army, no further sum could be applied for the same purpose:—Held, that the purpose for which the power was given to the trustees having failed, the residue of the 2,000*l.* could not be raised and applied in any manner for the benefit of W. *Re Ward*, 7 L. R., Ch., 727; 20 W. R. 1024.

6. Allowances to Trustees in Accounts.

1. A trustee *bonâ fide* advanced a sum to apprentice an infant, in the life of his father, who was in great pecuniary distress, and while the infant's interest in the trust fund was contingent, and before a power of advancement had come into operation:—Held, that in taking the accounts as against the trustee, the amount ought to be allowed him. *Worthington v. McCrae or McCraw*, 23 Beav. 81; 26 L. J., Ch., 286; 5 W. R. 124.

2. Trustees applied a part of the capital, of a fund belonging to infants, who had been left destitute by their father, for their benefit. They were allowed the amount. *Prince v. Hine*, 26 Beav. 634.

7. Other Cases.

3. A settlement contained a power of advancement, a power of appointment, and a hotchpot clause, applicable to the former, and not to the latter. Part of the trust fund having been taken out of the settlement and paid over to a child, without stating under which power:—Held, that it was *primâ facie* attributable to the advancement clause, and that this was confirmed by subsequent memoranda in the handwriting of the donee of the power. *Re Gosset*, 19 Beav. 529.

4. When two trustees under a will, one of them the wife of the testator, had a power to make advances to the testator's children, and there was a direction to appoint new trustees, or a new trustee, in case of the first two or either of them dying or not acting, and the wife only acted and made advances without the concurrence of the other trustee, as was alleged:—Held, that the power of making advances was not vested in her, and the Court refused to inquire into the propriety of particular advances made by her with a view to their being allowed. *Palmer v. Wakefield*, 3 Beav. 227.

5. A deed, after reciting that A. was desirous of securing the payment after his death of the several annuities and the gross sum thereafter specified, to the several persons thereafter named, contained a covenant by A. with trustees that if B. should attain the age of twenty-one, either in the lifetime or after the death of A., then the heirs, executors, or administrators of A. should at such time after his death, or after the day on which B. should attain the age of twenty-one,

whichever should last happen, as the trustees or the survivors or survivor of them should in their or his uncontrolled discretion think fit, and either in one sum or from time to time in various sums pay to B., or for his use or benefit, any sum not exceeding 300*l.*, without any deduction or abatement whatever. The covenant, as originally drawn, was an absolute covenant for the payment of 300*l.*, but was altered by the direction of the covenantor at the time when he executed the deed. The sum of 300*l.* was the only gross sum mentioned. The trustees proposed to exercise their discretion by paying B. 5*l.*, and expressed their intention of not exercising it further for his benefit:—Held, that the discretion of the trustees was confined to the time at which the sum or sums was or were to be paid to B., and that he was entitled to the full sum of 300*l.* *Palmer v. Newell*, 25 L. T., N. S., 892.

II. MAINTENANCE.

1. *Persons Entitled*, 6922.
2. *Duration and Cesser*, 6923.
3. *Out of What Fund*, 6929.
4. *Surplus*, 6930.
5. *Discretion of Trustees*, 6933.
6. *Account against Trustees*, 6935.
7. *Lunatics*, 6936.
8. *Married Women or Widows. Separate Use*, 6937.
9. *Statutory Powers* (23 & 24 Vict., c. 145, and 44 & 45 Vict., c. 41), 6938.
10. *Other Cases*, 6939.
11. *Maintenance of Infants. In General and Orders of Court*. See INFANT, VII.
12. *Gifts on Condition as to Maintenance or Education of Infants*. See CONDITION, IV.

1. Persons Entitled.

6. A direction for maintenance in general terms, comprehending all children, not restrained by the bequest of the capital in terms, limited to those living at the date of the will. *Freemantle v. Taylor*, 15 Ves. 363.

7. Bequest in trust to pay the interest to the testator's wife for life, for the separate use of his wife and their children, and applied for the maintenance and support of himself, and the maintenance, education, clothing, and support of such children. The widow mortgaged her interest and became insolvent:—Held, that the trust was only for the benefit of those children requiring support, and a reference was directed to ascertain what part of the income was necessary for that purpose. *Carr v. Living*, 28 Beav. 644.

8. Devise to the children of A., B., and C., who should be living when the youngest attained twenty-one, with a direction that "the present yearly rents" should be paid to the persons who brought up the children of C.:—Held, upon the context, that until the contingency happened, the rents were to be paid to such person in trust not only for the children of C., but of A. and B. *Sanders v. Miller*, 25 Beav. 164.

9. Power of maintenance of the "person for the time being entitled" to the estate:—Held, to include persons absolutely or presumptively entitled. *Sidney v. Wilmer*, 25 Beav. 260.

2. Duration and Cesser.

- (a) *Whether for Life, or determined on attaining Twenty-one or Marriage*, 6923.
- (b) *Effect of Bankruptcy, Insolvency, or Composition with Creditors*, 6926.
- (c) *Effect of Assignments*, 6928.
- (d) *In Other Cases*, 6929.

(a) *Whether for Life or determined on attaining Twenty-one or Marriage.*

1. Testator gave, devised, and bequeathed to his executors all his real and personal estate upon trust, to permit his wife M. to receive the income thereof for her own use and benefit, and for the maintenance and education of his children, naming them, so long as she should continue his widow; and in case she should marry, to pay her an annuity of 100*l.* per annum; and subject to such trusts, in trust, after the decease or marriage of M., for his said children in equal shares, when and as they should attain the age of twenty-one:—Held, that a trust was constituted of a sufficient part of the income of the property for the maintenance and education of the children, and that such trust was capable of continuance beyond the period of a son attaining twenty-one, or a daughter attaining that age or marrying. The Court, however, being of opinion that a discretionary power as to the mode of executing the trust was given to M., directed inquiries for the purpose of ascertaining how such discretionary power had been and how it ought to be exercised. *Longmore v. Eloum*, 2 Y. & Coll. C. C. 363; 12 L. J., N. S., Ch., 469.

2. Testator bequeathed one-fifth of his residuary personal estate to trustees, upon trust for all and every the children or child of his son J. B., born and to be born, and who, being a son or sons, should live to attain twenty-one, or, being a daughter or daughters, should live to attain that age or be married, to be equally divided between them, if more than one, share and share alike, as tenants in common; and he directed that the dividends, interest, and income of the share or expectant share of each such child should be paid to his said son J. B., during his life, and after his decease then during the minority of each such child should be retained by his said trustees or trustee, and be applied by him or them, as the event should happen, in, for, or towards the maintenance, clothing, and advancement of each such child, in such proportion, manner, and form as his said son J. B., or, as the event might happen, his said trustee or trustees, should think fit. At the date of the will and of the testator's death, J. B. had three children, one of whom, a son, afterwards attained twenty-one, married, and lived separately from his father:—Held, first, that a trust was constituted in J. B., of the income, for the maintenance, clothing, and advancement of his children, which trust did not terminate upon all or any of his three children attaining a majority in his lifetime; secondly, that J. B. was not entitled to apply the income arbitrarily, according to his own will and pleasure; thirdly, that he was entitled to apply the income of a child's prospective share

towards that child's maintenance, clothing, and advancement, without reference to his ability to maintain and educate that child; and, fourthly, that the son who had attained his majority was not entitled to an immediate transfer of one-third of the fund, inasmuch as it did not appear that the testator intended to exclude after-born children, and, at all events, he did intend to authorise an unequal distribution, from time to time, of the income, for the benefit of J. B.'s children. *Bateman v. Foster*, 1 Colly. 118.

3. Testator directed maintenance for his sons during minority and for daughter till twenty-one or marriage, and gave her a legacy in case she should attain twenty-one, payable at and to carry interest from that time. Having married at eighteen, she was allowed maintenance for the interval until twenty-one. *Chambers v. Goldwin*, 11 Ves. 1.

4. Testator directed his residue to be converted into money, and his wife to receive the interest of it for the maintenance of herself and children, and at her death he bequeathed the whole, share and share alike, to all the children she might have by him. The testator left a son and a daughter. Some years after his death the daughter married:—Held, that thereupon her right to maintenance ceased. *Bowden v. Laing*, 14 Sim. 113.

5. A discretionary trust, for the maintenance of children during their minority, and for their future advancement in life:—Held, not to be determined as to the maintenance, by marriage of a female object of it, but only on her attaining the age of twenty-one; and as to the advancement to be still subsisting after her marriage. The trust was as to the income of a fund which was directed to be accumulated, subject to the trust, and the period of lawful accumulation had expired before the suit. *Pride v. Fooks*, 2 Beav. 430; 9 L. J., N. S., Ch., 234; 4 Jur. 213.

6. Under a trust for maintenance of an infant till twenty-one, at which age the *corpus* of the fund was given her, maintenance allowed from her marriage at twenty till twenty-one. *Coleman v. Rackham*, 8 Jur. 556.

7. A testator bequeathed a fund to his widow to be at her sole and entire disposal for the maintenance of herself and their children. There was only one child, a daughter, who attained twenty-one and married:—Held, that the trust for maintenance did not cease when the child attained twenty-one or married, and that the widow was not entitled to have the fund transferred to her. *Scott v. Key*, 11 Jur., N. S., 819; 13 W. R. 1030; 35 Beav. 291; 6 N. R. 349.

8. A testator gave the income of his estate to his wife and daughters for their respective lives, with a survivorship clause amongst them for their respective lives in case of the death of his wife or of any of his daughters leaving no issue. In the event of a daughter dying and leaving issue, the trustees were empowered to apply all or any part of the trust moneys or annual produce and premises to which such daughter, if living, would be entitled, in the maintenance, education, and advancement of such her issue. After the death of his wife and all his daughters, the principal was to be divided amongst the issue then living of his daughters:—Held, that the trustees had power

to make allowances for the maintenance of the deceased daughter's children after they attained their majority. *Hill v. Rawlinson*, 15 W. R. 148.

1. Testator devised estates to trustees in trust to pay 300*l.* a year for the maintenance, clothing, and education of his son's children during the life of their father. The son had three children, all of whom attained twenty-one, and then one of them died:—Held, that the personal representative of the deceased child was entitled to one-third of 300*l.* a year during the father's life. *Leves v. Leves*, 16 Sim. 266; 17 L. J., N. S., Ch., 425.

2. A party whose interest in a fund had not vested:—Held, under the terms of a power in a will, entitled to maintenance, even after attaining twenty-one. *Ellis v. Maxwell*, 3 Beav. 587; 10 L. J., N. S., Ch., 266.

3. A gift of the income to arise from a fund during the life of A. to B., for his maintenance, is an absolute gift to B., his executors and administrators, during the life of A., and is not confined to the joint lives of A. and B. *Attwood v. Alford*, 2 L. R., Eq., 479; 14 W. R. 956.

4. A bequest of 30*l.* a year to A., together with her children B., C., and D., and for their joint maintenance:—Held, a bequest of that annual sum to the mother and her children as joint tenants for the life of the longest liver of them. *Wilson v. Maddison*, 2 Y. & Coll. C. C. 372; 12 L. J., N. S., Ch., 420; 7 Jur. 572.

5. A bequest of an annual sum to be raised for the support of the children of H., to be paid them from time to time as their necessities require, without regard to their father or mother, cannot be confined to the minority of the children. *Alexander v. M'Culloch*, 1 Cox 391.

6. A testatrix devised lands to trustees, in trust, in the first place, at their discretion, to pay an annuity to her son A.; and next to apply the rents to the maintenance, education, and bringing up of the three children of A. during A.'s life; the sole survivor of the three children attained twenty-one in the lifetime of A.:—Held, that the interest of such surviving child in the surplus rents and profits did not cease on his attaining twenty-one, but that he continued entitled to them during the life of his father. *Badham v. Mee*, 1 Russ. & M. 631.

7. R. N. gave and bequeathed the residue of his estate and effects to trustees, upon trust, out of the rents, profits, and dividends, to pay each of his children, R. C. N. and P. N., an annuity of 150*l.*; and as his other children respectively attained the age of twenty-one, to pay to each of them an annuity of 100*l.*; all the annuities to be paid until the period should have arrived for the distribution and division of his estate and effects between his children in the manner after mentioned; and when and so soon as all his children should have attained twenty-one, or at such earlier or deferred period as the trustees might think proper, the testator authorised and empowered the trustees to sell and convert into money all his estate and effects, and to invest the residue in their names upon trust, during such time as any of his children should be under the age of twenty-one, to pay to those who might have attained twenty-one the said

several annuities until such period of distribution and division; but when and so soon as all his children should have attained the age of twenty-one, then the trustees were directed to distribute and divide the stocks, funds, etc., between all those who should have attained that age. The testator directed "that the rents and profits of his real and personal estate and effects, remaining unsold and unconverted, should be applied in the same manner as the income of the produce of such estate and effects, if sold and converted, might be applicable." The youngest son attained the age of twenty-one years on the 15th May 1853, and an order had been obtained for the sale of the real estate, but no conversion had actually taken place:—Held, that the annuities did not determine upon all the children attaining the age of twenty-one, but were to be continued until the period of distribution; and that, as the conversion of the estates had not been effected, no present distribution could be made; the annuities, therefore, to be continued until the period for actual distribution should have arrived. *Nicholson v. Locke*, 18 Jur. 263.

8. Bequest of an annuity to a father for the maintenance of his children until they respectively attained twenty-one, and a further bequest of a principal sum to be divided among the children as they respectively attained twenty-one, the amount of the annuity will not be reduced proportionately as the children respectively come of age. *Bortoft v. Wadsworth*, 12 W. R. 523.

9. Bequest by a man to his wife, to be applied for the maintenance of herself and their children:—Held, that the right of an unmarried daughter to maintenance did not cease on her attaining twenty-one. *Carr v. Living*, 33 Beav. 474.

10. A testator gave an annuity to his niece of 8*s.* a week "towards the support and maintenance of her two children until they shall attain the age of twenty-one years." By a codicil the testator gave certain leasehold property to the niece "to enable her to provide for her children," and referred to his will as "my said will in her favour." One of the children of the niece died, and the other attained twenty-one:—Held, that the words in the gift of the annuity referring to the support and maintenance of the children were merely descriptive of the testator's motive in making the gift, and that they did not cut down the life estate of the niece. *Farr v. Hennis*, 44 L. T. 202.

11. A testator, by will, made in 1810, bequeathed "one annuity or clear yearly rent-charge or sum of 300*l.*" to his niece, "for and during the term of her natural life"; and after her decease he bequeathed "the said annuity, yearly rent-charge, or sum of 300*l.* unto all and every the children, if any, of his said niece lawfully to be begotten; if more than one, share and share alike; and if but one, then to such only child, to be applied in the "support, maintenance, and education of such child or children" until such only child, or the youngest of such children, should attain twenty-one, when he directed that the annuity should "be absolutely sold and disposed of by such child or children," and the produce to be derived from such sale to be equally divided

among such children, if more than one, share and share alike; and he charged his real estates with the annuity, and, subject thereto, devised the same to H. in fee:—Held (affirming 27 L. J., Ch., 769), that the annuity was a perpetual charge upon the real estate. *Man- sergh v. Campbell*, 4 Jur., N. S., 1207; 3 De G. & J. 232.

The devise of an estate in fee-simple charged with an annuity is not of itself sufficient to indicate an intention that the duration of the annuity should correspond with the limits of the estate charged. *Id.*

1. A gift of the interest of a sum of money, for the "maintenance and education" of A., is a gift for life: *aliter*, "bringing up." *Soames v. Martin*, 10 Sim. 287; 8 L. J., N. S., Ch., 367; 3 Jur. 1144.

A direction by testator to apply the interest of a fund for the maintenance and education of his infant nephew, without any disposition of the principal:—Held, to give the interest for life to the nephew. *Id.*

2. Under a trust in a will to apply the yearly sum of 50*l.* (and so on in proportion for any less term than a year) for the maintenance and education of A. in such manner as the trustees should, in their own discretion, think proper, the will containing gifts of other annuities during life:—Held, that this annuity ceased upon A.'s attaining twenty-one. *Gardiner v. Barber*, 2 W. R. 407; 18 Jur. 508; 2 Eq. Rep. 888.

Soames v. Martin (10 Sim. 287) overruled. *Id.* Held, also, that the annuities being in arrear, they should abate *pro tanto* for the present, to be recouped out of the interest accruing on the outstanding portions of the trust funds, which, when paid, was to be regarded as income for this purpose. *Id.*

3. A testator gave the residue of his estate and effects to his four children equally to be divided between them, share and share alike, with a gift over to the survivors or survivor, in the event of any dying under twenty-five. He appointed guardians during their minorities, with a power to apply accumulations of the income of each child's share, during minority, in maintenance, education, etc.:—Held, that the children were entitled, for maintenance, etc., to the income of their shares between twenty-one and twenty-five. *Fraser v. Fraser*, 8 L. T., N. S., 20; 1 N. R. 430.

4. An annuity to the children of A. "for their maintenance and education" is not confined to the minorities of the children. Bequest of an annuity of 100*l.* to A., followed by a direction in these words: "In the event of her death the annuity is to be continued to her children for their maintenance and education, and I have to request Mr. W. G., banker, to see it carried into execution." A. survived the testator and died. On the death of A.:—Held, that the annuity of 100*l.* was payable to the children, not merely during their respective minorities, but during their joint lives and the lives and life of the survivors and survivor of them. *Wilkins v. Jodrell*, 13 L. R., Ch. D., 564; 49 L. J., Ch., 26; 41 L. T. 649; 28 W. R. 224.

5. By a marriage settlement property was vested in trustees upon trust, after the death of the wife, to pay the rents and profits to the husband for life, or until he married again,

and in case he married again and there was issue of the intended marriage, then to pay him one-half of the rents and profits, and out of the other half to levy and raise for the maintenance and education of one child one-fourth, of two or three children one-third, and of four or more children the whole income of such other half, and subject thereto to pay the whole income thereof to the husband for his life, and if there should be no issue, then to pay the whole of the rents and profits to the husband. The husband married again, and at the date of the decree there were four children of the first marriage, two daughters and one son who had attained twenty-one, one son under age, and a child of a deceased daughter:—Held, that the trust for maintenance and education did not cease upon the children attaining twenty-one, but that the four children were entitled equally to one-half of the rents and profits during the life of their father, that the daughters were equally entitled in the event of their marrying, and that the word "issue" was restricted to the first generation, and, therefore, that the child of a deceased daughter took no interest. *Frewen v. Hamilton*, 47 L. J., Ch., 391.

6. A husband directed his trustees to pay to his widow 100*l.* per annum for the maintenance and support of each of his children until he or she should attain twenty-one, with power to increase or decrease such allowance; and he empowered his trustees, with the consent of his widow, to advance any sums not exceeding in the whole one-fourth of the presumptive share of any child for his or her placing out or advancement in life, or otherwise for his or her benefit; the residue to be held in trust for all the children of the testator, who being sons should attain twenty-one, or being daughters should attain twenty-five or marry, without any provision for the maintenance of unmarried daughters during the interval:—Held, that the trustees had no power, either under 23 & 24 Vict., c. 145, s. 26, or by way of interest on their contingent shares, to allow maintenance to unmarried daughters during the interval; but that the advancement clause enabled them to advance the necessary sums of money for the purpose. *Re Breeds*, 1 L. R., Ch. D., 226; 45 L. J., Ch., 191.

Semble, that, if the testator's estate was being administered by the Court, interest on their contingent shares would have been given by way of maintenance. *Id.*

Held, also, that the trustees would be justified in increasing the allowance for infant daughters of the testator so as to meet the expenses of education, as included in maintenance and support. *Id.*

The doctrine whereby interest on a contingent legacy or share of residue is given for the purpose of maintenance depends upon the natural obligation which the father would be under, if living, to maintain the child during infancy, and is not applicable to a case where that obligation would not arise. S. C. *nom. Re Breed*, 24 W. R. 200.

7. An annuity charged on lands was bequeathed to three trustees and the longest liver of them, to continue during the life of the longest liver of them, and no longer, in trust to apply it, "to assist in the support of" the testator's daughter, A., "in aid of, and towards

the clothing, maintenance, and education of her children, free from the control or interference of her present or any future husband, and not subject to his or their debts, contracts, or engagements." After the death of the daughter, her children, being all of full age, and forisfamiated, filed a bill, praying for a declaration that the annuity was well charged on the lands, and that they were entitled to have it applied towards their clothing and maintenance, or otherwise for their benefit:—Held, that the will created no trust in favour of the children of the daughter of A. of which they could enforce the execution in equity; and, therefore, that the trusts of the annuity ceased on the death of A. *Ryan v. Keogh*, 4 Ir. R., Eq., 357.

1. The testator bequeathed to his son an annuity of 40*l.* from the period of his majority to the death or second marriage of the testator's wife. The son attained twenty-one, and died before the widow:—Held, that the legal personal representative of the son was entitled to the annuity until the death or second marriage of the widow. *Re Ord, Dickinson v. Dickinson*, 12 L. R., Ch. D., 22; 41 L. T. 13. Affirming 9 L. R., Ch. D., 667; 26 W. R. 880.

(b) *Effect of Bankruptcy, Insolvency, or Composition with Creditors.*

2. Legacies in trust for the testator's son for his own use and benefit, provided no misfortune in business shall in the meantime have happened to him, so as to deprive him or his family of the benefit of it, the testator declaring his intention, his son's fortune being amply sufficient by this fund to form a certain and permanent provision for him or his family; but in case he fail in business at any time before the age of thirty-two, then in trust for the support of him, his wife, and children, as the trustees think proper, so long as he shall labour under the effects of any misfortune in trade: but as soon as he shall be freed and absolutely discharged from the effects of any misfortune or failure in trade, then (but not before) to be paid to him; otherwise, the interest to be continued to be paid for the support of him, his wife, and children, for his life; and if, at his death, he shall be under any difficulty, from misfortune or failure in business, in trust for his wife and children according to his appointment by will, and if he shall leave no widow or child according to his disposition. There was a considerable settlement. The son, in the twenty-eighth year of his age, being discharged under a deed of composition, the legacy was decreed to him, the trustees and his children not opposing it; but the Court observed, that if he should not be discharged, as in case it should end in a bankruptcy, the trustees would not be indemnified. *De Mierre v. Turner*, 5 Ves. 306.

3. An annuity given to A. for his personal support, not to be liable to his debts, and to be paid from time to time into his proper hands, and not to any other person, and his receipt only to be a sufficient discharge, passes on A.'s bankruptcy to his assignees. *Graves v. Dolphin*, 1 Sim. 66; 5 L. J., Ch., 46.

4. Testator devised his estates to trustees, in trust to pay out of the rents 300*l.* a year for

the maintenance of his son's children, and to pay the surplus rents during his life for the maintenance of himself and his family; but so that he should not have any power to charge or alienate the same, provided that if his son should, in any manner, impede or frustrate the trusts of the will, then the surplus rents should be no longer paid to him, but should be accumulated by the trustees, for the benefit of the children. The son conveyed his interest under the will to trustees for his creditors:—Held, that thereupon the trust for accumulation took effect. *Lewes v. Lewes*, 6 Sim. 304; 3 L. J., N. S., Ch., 55. Affirmed 4 L. J., N. S., Ch., 77.

5. A testatrix gave the interest of a share of her residuary personal estate to A. for life; and afterwards, by a codicil, she noticed the facts of the bankruptcy of A., and of his becoming of unsound mind, and thereby revoked the bequest to A., and gave the same to her executors, upon trust, during the life of A., to apply the whole or such part thereof, at such time, and in such proportions and manner, for the maintenance and support of A., and for no other purposes whatsoever, as her executors should in their discretion think expedient:—Held, that the interest given by the said bequest did not pass to the assignees of A. under his bankruptcy. *Twopeny v. Peyton*, 10 Sim. 487; 9 L. J., N. S., Ch., 172; 4 Jur. 456.

6. Testator bequeathed his residuary estate to trustees, and, after making a provision out of it for the benefit of his son for his life, and after the son's death for his wife and children, directed, that if his son should assign or charge the interest to which he was entitled for life, or attempt or agree to do or commit any act whereby the same or any part thereof might, if the absolute property thereof were vested in him, be forfeited to or become vested in any person or persons, then the trustees should pay and apply the said interest for the maintenance and support of his son, and any wife and child or children he might have, and for the education of such issue as the trustees should in their discretion think fit. Some years after the testator's death the son became bankrupt:—Held, that the trust for the benefit of the son, his wife, and children was valid, and that the assignees were not entitled to any part of the provision. *Godden v. Crowhurst*, 10 Sim. 642; 11 L. J., N. S., Ch., 146.

7. Trust for the support, clothing, and maintenance of an adult:—Held, to be a trust for his benefit generally, and to devolve to his assignees under the Insolvent Act, notwithstanding a provision to the contrary in the will by which the trust was created. *Young-husband v. Gisborne*, 1 Colly. 400; 8 Jur. 750. Affirmed 15 L. J., N. S., Ch., 355; 10 Jur. 419.

8. Where trustees under a will have a discretion as to the manner of the application of the trust fund for the benefit of a particular person, but no power to apply it otherwise than for the benefit of that *cestui que trust* during his life, his interest passes to his assignees under the Insolvent Act, notwithstanding a proviso in the will, that he shall not have power to sell, mortgage, or anticipate the income of the fund. *Green v. Spicer*, 1 Russ. & M. 895; Tam. 396; 8 L. J., Ch., 106.

9. A testator bequeathed a legacy of 400*l.*

to his executors, upon trust to pay the same to his son, in such smaller or larger portions, at such time or times, and in such way or manner, as they should, in their judgment and discretion, think best:—Held, that the discretion of the executors was determined by the insolvency of the legatee, and that the legacy vested in the assignee of the insolvent. *Piercy v. Roberts*, 1 Myl. & K. 4; 2 L. J., N. S., Ch., 17.

1. A. assigned 800*l.* to trustees, in trust, during the life of B., or such part thereof as they should think proper, or at such other times, and in such portions as they should judge expedient, to pay the interest to him; or, if they should think fit, to lay it out in procuring for him diet and other necessaries, but so that he should not have any right to the interest, other than the trustees, in their uncontrolled discretion, should think proper, and so that no other creditor of his should have any claim thereon, nor should the same be subject to his debts, disposition, or engagements; and it was declared, that after his death the 800*l.* and all savings and accumulations of interest, if any, should be in trust for his children, and if he should have no child, then in trust for C. B. became a bankrupt. The trustees had paid him the interest down to his bankruptcy:—Held, that his life interest passed to the assignees. *Snowden v. Dales*, 6 Sim. 524; 3 L. J., N. S., Ch., 188.

2. Property was settled on J. R. by his father, until he should take the benefit of the Insolvent Debtors Act, and then the trustees were, during his life, to apply it in such manner and to such persons, for the board, lodging, and subsistence of J. R. and his family, as the trustees should think proper; and after his decease upon trust for such persons as J. R. should appoint, and in default of appointment in trust for his children. J. R. took the benefit of the Insolvent Debtors Act. He had three children, but his wife was dead:—Held, that his children, who were all infants, became entitled to three-fourths, and the assignees to one-fourth, of the life interest of J. R. *Rippon v. Norton*, 2 Beav. 63.

3. Settlement of husband's estate on his marriage, in trust to pay the rents, etc., "unto or for the maintenance and support of the husband, wife, and children, or otherwise, if the trustees should think proper to permit the same to be received by the husband during his life, without power to charge, etc.;" on the bankruptcy of the husband:—Held, that a trust had been created for the maintenance and support of the wife and children out of the property during the husband's life. *Page v. Way*, 3 Beav. 20; 4 Jur. 600.

4. Bequest of shares in certain trust funds, in trust for A., his executors, administrators, and assigns, provided that if A. should during the life of B. and C. assign, charge, or otherwise dispose of his share in the principal or interest thereof, or attempt or agree so to do, or do any act whereby his share in the said moneys, if payable to himself or his executors or administrators, would become vested in some other person, then and in such case all his estate, right, title, and interest in such trust moneys should absolutely cease and determine, and thereby and thereupon become absolutely forfeited; and the trustees should

thenceforward stand possessed of the share or shares so forfeited, in trust to pay, apply, and dispose of the annual produce thereof, during the lives of B. and C., for the support and maintenance of A., and of his wife and family, or otherwise for his and their benefit, in such manner as the trustees should think proper; and after the death of B. and C. should settle and assure, or pay and apply, and dispose of the share so forfeited, in trust for, or for the benefit of A. and his family, in such manner as they should in their discretion think proper; A. assigned all his property to trustees for his creditors, and thereby committed an act of bankruptcy, and a fiat being issued against him, he was declared a bankrupt:—Held, that upon the execution by A. of the assignment, his share and interest in the trust moneys became subject to the trust declared by the will for the benefit of A., and his wife and family; that A. was not of necessity entitled to any part of the income of the trust moneys separately from his wife and children; but that any interest of A. in the trust moneys not applicable for the support and maintenance of his wife and children passed to his assignees on his bankruptcy. *Kearsley v. Woodcock*, 3 Hare 185; 8 Jur. 150.

5. Under a marriage settlement, trustees were, after the bankruptcy of the husband and the death of the wife, to pay the income "in such manner, for the maintenance and support or otherwise for the benefit of the husband and the issue," as they might think proper:—Held, that the discretionary power of the trustees, as to the application of the income, was not taken away by the bankruptcy, so as to entitle the objects to take equally. An inquiry was directed as to what had been properly applied for the maintenance of the issue, and the assignees were declared entitled to the surplus. *Wallace v. Anderson*, 16 Beav. 533.

6. A testator bequeathed the dividends of certain stock to his nephew, solely for the maintenance of himself and his family, declaring that such dividends should not be capable of being charged with his debts or engagements, and that he should have no power to charge, assign, anticipate, or incumber them; but that if he should attempt so to do, or if the dividends, by bankruptcy, insolvency, or otherwise, should be assigned or become payable to any other person, or be or become applicable to any other purpose than for the maintenance of the nephew and his family, his interests therein should cease, and the stock be held upon trusts for his children. Long subsequently to the date of the will, and a few weeks prior to a codicil confirming it, the nephew took the benefit of the Lords Act (1 Geo. 4, c. 119), in the usual way; and some years afterwards the testator died:—Held, that this insolvency operated as a forfeiture of the life interest given to the nephew by the will. *Yarnold v. Moorhouse*, 1 Russ. & M. 364.

7. A person conveyed certain freehold and leasehold property to trustees upon trust, to pay the rents and profits to his son T. for life, provided that in case T. should be declared bankrupt, or be discharged under any Insolvent Act, the trustees should apply the rents and profits in or towards the maintenance,

clothing, lodging, and support of T. and his then present or any future wife, and his children or any of them, or otherwise for his, her, their, or any of their use and benefit, in such manner as the trustees should in their discretion think proper. T. was taken in execution for debt, and sent to prison at the suit of a creditor who obtained a vesting order against him under the 1 & 2 Vict., c. 110. The insolvent was afterwards discharged under that Act:—Held, that the life estate of the insolvent was forfeited at the time of his discharge; that from the date of the vesting order to the time of the discharge the rents and profits of the estate belonged to the assignee under the Act; that upon the discharge taking place, the discretionary power given to the trustees by the settlement might be exercised by them in favour of the insolvent, his wife and children collectively, or in favour of any of those persons, to the exclusion of the others; and that to whatever extent the power might be exercised in favour of the insolvent, the benefit which he would take by the appointment would vest in the assignee. *Lord v. Bunn*, 2 Y. & Coll. C. C. 98.

1. A testatrix gave real and personal estate to trustees, during the life of her nephew, an uncertificated bankrupt, at their uncontrolled discretion, to apply the interest for the benefit of him, or his wife, or his children; and as to the income which should not be applied, to invest the same; but should he at any time obtain his certificate so as to enable him to hold and enjoy real and personal estate for his own personal use, enjoyment, and benefit, then she directed that thenceforth during his life, and so long as he should be able to hold and enjoy real and personal estate for his own personal use, enjoyment, and benefit, the whole income should be paid to him for his own use. The nephew never married, and after several years he obtained his discharge:—Held, that the will conferred on the nephew a contingent interest in the income, which passed to the assignees, and, upon his obtaining his discharge, vested in them absolutely. *Davidson v. Chalmers, Perry v. Chalmers*, 10 Jur., N. S., 910; 33 L. J., Ch., 622; 12 W. R. 592; 11 L. T., N. S., 217.

2. After G. had been adjudged a bankrupt by a Scotch sequestration, and before he obtained his discharge, his wife, who had taken part in procuring the sequestration, made her will, and thereby gave an annuity to him for life, and declared, that if he should become bankrupt, or should assign, the annuity should cease; and she also empowered the trustees of her will in their discretion at any time to refuse or discontinue payment of the annuity to her husband. After the death of the testatrix, and before the first payment of the annuity became due, G. obtained a discharge which did not divest the property from the trustee in the sequestration:—Held, that the annuity was forfeited. *Trappes v. Meredith*, 41 L. J., Ch., 237; 26 L. T., N. S., 5.

3. A bequest of a share of residuary personal estate in trust for A. for life, and after the decease of A. for his children equally, to be vested interests in such children at twenty-one, with power to apply the income for their maintenance during their minorities, and a gift over, on default of such children, and a

proviso, that, if A. should in any manner sell, assign, transfer, incur, or otherwise dispose of, or anticipate, his share, or any other part thereof, then, immediately after such alienation, sale, assignment, transfer, or disposition, the bequest in trust for A. should cease, determine, and become utterly void, as if the same had not been mentioned in the will, or as if A. were dead. A., being in prison for debt, presented a petition for his discharge, under the Act 1 & 2 Vict., c. 110, and thereupon the vesting order was made:—Held, that there was a valid limitation over of the share of A.; that taking the benefit of the Insolvent Act was a voluntary alienation of his share by A., and was the event, or one of the events, on which the limitation over was to take effect; that the declaration in the will, that the gift should thereupon be void, as if the same had been mentioned in the will, applied to the event of there being no children; that, although the limitation over took effect, the capital was not to be necessarily forthwith divided, for the determination of the life interest did not alter the class which was to take, and which class included after-born children; that the children of the insolvent who had attained twenty-one had a vested interest in their respective shares of the residuary share bequeathed in trust for the insolvent, and had become entitled to receive the interest of the same, and that the infant children of the insolvent were entitled to contingent interests in their respective shares thereof; and that both interests were subject to the interests of any after-born children of the insolvent who might become entitled. *Rockford v. Hackman*, 9 Hare 475; 21 L. J., N. S., Ch., 511; 16 Jur. 212.

4. A. being entitled to a life interest in the dividends of 9,000l. consols, and being largely indebted, his brother agreed to pay all debts not charged on A.'s life interest, upon condition that such life interest should be settled so as to be applicable for the maintenance of A., his wife and children, or any of them, at the absolute discretion of the trustees. This transaction having been carried into effect:—Held, that such settlement was valid against subsequent creditors, and also against a person who was a creditor of A. at the time of the settlement, and whose debt was concealed by A. from his brother, and was the only one not paid by him. *Holmes v. Penney*, 2 Kay & J. 90; 3 Jur., N. S., 80; 26 L. J., Ch., 179.

(c) Effect of Assignments.

5. A fund was bequeathed to trustees upon trust after the death of testator's widow to make a weekly allowance to S. and his children, if he should have died leaving any, towards his or their maintenance and support, such allowance to be in the discretion of the trustees. Testator also declared that it should be in the discretion of the trustees during the life of his widow with her consent to advance and pay all or any part of the principal money to S. or his children towards his maintenance and advancement in the world, it being his wish that S., if living, should have the whole benefit of such moneys if he should conduct himself to the satisfaction of the trustees. S. assigned all his interest under

the will to X. The trustees having paid the fund into court without imputing any unsatisfactory behaviour to S.—Held, that X., the assignee of S., took the whole fund. *Re Coe's Trust*, 4 Kay & J. 199; 4 Jur., N. S., 158.

(d) In Other Cases.

1. Gift to a widow, she maintaining and educating the testator's son and two daughters thereout, until the son attained twenty-one:—Held, that the son, who had married and ceased to reside with his mother, but was still a minor, was not entitled to maintenance. *Staniland v. Staniland*, 34 Beav. 536.

2. A testator directed his executors to apply 500*l.* for the support and education of his nephew, whose education for holy orders he directed to be under the control of certain persons named, and that, if any part of the sum should remain after providing for such support and education, such residue should be applied for certain religious purposes:—Held, first, that this was not a general legacy. *Re Lee*, 10 Ir. R., Eq., 157.

Held, secondly, that although the nephew had determined not to enter holy orders, and had been apprenticed to a trade, an adequate part of the sum bequeathed should be applied for his maintenance and education. *Ib.*

3. A widow who was by the terms of the will to be allowed money by the trustees during the minority of an infant—her son—abandoned the child, for whom other guardians were appointed by the Court, and afterwards having cohabited with a married man, and by him had several illegitimate children, lived with them in a house to the use of which she was entitled under the will. The trustees under these circumstances refused to make her any allowance out of the trust moneys:—Held, that she could not compel the trustees so to do, but was disqualified from making any claim by her abandonment of the child independently of other misconduct. *Mellor v. Mellor*, 20 W. R. 51.

4. Gift to A. of 15*l.* per annum for bringing up B.:—Held, that a trust was created for the benefit of B., which did not fail by the death of A. *Pilcher v. Randall*, 9 W. R. 251; 4 L. T., N. S., 398.

5. Testator made a certain provision for the infant son of his relation M. W. until the age of sixteen, and then left the infant to the care of his trustees, to provide for him in some business or profession, and his future maintenance, out of the testator's funded property:—Held, that the infant, on attaining sixteen, was entitled to receive out of the testator's funded property a sum sufficient to provide for him in some business or profession, and to an annual allowance for his future maintenance during his life; and it was referred to the Master to inquire and state what sums were proper to be allowed for those purposes. *Kilvington v. Gray*, 10 Sim. 293.

6. By marriage settlement maintenance for daughters is made payable half-yearly, at Lady-day and Michaelmas, until the portion became payable, which was at eighteen or marriage. A daughter attained her age of eighteen the 16th August. Decreed to have her maintenance *pro rata*, from the last Lady-day to the time of

her attaining her age of eighteen. *Hay v. Palmer*, 2 P. W. 501.

7. By a marriage settlement, a term was limited to trustees for raising, on failure of issue male, 3,000*l.* for daughters' portions, payable at eighteen, or marriage. The father and mother die, leaving issue two daughters only, who at the death of the father (who survived the mother) were fifteen or sixteen years of age, and who had, by the father's will, 500*l.* a piece devised to them, payable at the same time with their original portions; but the estate was devised to S., one of the daughters, being married and being of the age of twenty:—Held, on her bill, that she must have maintenance from the time of her father's death till the portion became due, and from thence interest at 5 per cent. till paid. *Greenhill v. Waldoe*, Pre. Ch. 367; Gilb. Eq. Rep. 31.

8. A legacy to unborn children of a person named in a will to vest at twenty-five being void for remoteness, a direction in the same will to apply the income in the meantime for their maintenance is also void, and cannot be supported even for a period of twenty-one years. *Pickford v. Brown*, 2 Kay & J. 426; 2 Jur., N. S., 781; 25 L. J., Ch., 702.

3. Out of What Fund.

9. General rule, that trustee shall not break in of his own authority upon the capital of infant's fortune. *Walker v. Wetherell*, 6 Ves. 473.

10. Trustees may, in a case of necessity, be justified in breaking in upon the capital of a trust fund, either for the maintenance and education, or for the advancement in life of infant children, even where there is a gift over to the issue of such children in the event of their dying under twenty-one. *Re Tibbs*, 17 W. R. 804.

11. A testator left stock to trustees for the maintenance of his two granddaughters till twenty-one, and then to be divided between them. The Court refused to assume as a fact against one of these granddaughters, who, after the lapse of many years, was claiming her share of the principal fund against the estate of the surviving trustee, that that share had been expended by the trustees in maintaining her. *Clarke v. Wyburn*, 12 Jur. 613.

Quære, whether the trustees would have a right so to have applied the principal fund. *Ib.*

12. A testator, in 1853, devised freeholds to trustees, to pay the rents (after satisfying certain premiums and repairs) to and for the use of his grandson for life, and after his decease "to and for the use of all and every child or children of his grandson, equally as tenants in common, who should attain the age of twenty-one being sons, or being daughters, should attain that age or marry," and if but one such child, to him or her absolutely. The testator devised and bequeathed the residue of his estates to his trustees, to convert, invest, and hold the same and the accumulations, upon similar trusts for his grandchildren and their issue. He then directed his trustees to apply a competent part of the income of the investments for the maintenance and education of such "grandchildren and their issue;" and to accumulate the residue, as in his will was

mentioned. The grandson attained twenty-one and died in 1869, leaving three children, infants:—Held, that they were entitled to maintenance out of the interim rents and profits of the specifically devised freeholds. *Best v. Donmall*, 40 L. J., Ch., 160; 19 W. R. 400; 24 L. T., N. S., 217.

1. A testator gave a share of his residuary estate to trustees upon trust to pay the annual produce to the plaintiff for her life; or to apply the same, or so much as might be necessary for her support and maintenance, in such manner as might be most for her comfort and advantage. The plaintiff having been found lunatic by inquisition, an allowance out of her fortune was made for her maintenance. The plaintiff was also entitled to certain property in her absolute right:—Held, that the income of her life estate, under the will, must be first applied for her maintenance in exoneration of her absolute property. *Rudland v. Crozier*, 6 W. R. 305; 27 L. J., Ch., 261; 4 Jur., N. S., 675.

2. A legacy of 5,000*l.* was bequeathed to trustees, to pay and apply so much of the interest as they, in their uncontrolled discretion, should think necessary or expedient, yearly and every year from the time of the testator's decease, until A. should attain thirty-two, in aid of the allowance which A.'s father should or ought to make for that purpose, in order to prepare A. for his establishment in, and to enable him to follow, some profession or business, and subject thereto, to accumulate the income until A. should attain thirty-two or die, whichever should first happen; and on A. attaining thirty-two, to pay the interest of the capital, and of the accumulated fund arising therefrom, to A., during his life, so long as he should not have been found bankrupt, or taken the benefit of the Insolvent Acts, or have assigned his estate for the benefit of, or have compounded with, his creditors for payment of less than the debts due to them; and subject to the trust above mentioned, the principal and the accumulated fund were to be held in trust for the child or children of A. in manner therein mentioned, with a gift over in default of a child or children becoming entitled under such trust. A., soon after attaining his majority, became involved in debt, and, in consequence, unable to provide for his wife and infant child, or to pursue any profession or business. The Court directed a portion of the fund which had arisen from accumulations of surplus income to be applied in payment of his debts. *Edwards v. Grove*, 2 De G. F. & J. 210.

Power of trustees to resort for future maintenance to accumulations of dividends which would, if required, have been applicable to past maintenance. *Ib.*

3. Testator gave his real estate and residuary property to wife for life, remainder to an infant great-nephew for life; a statement in the will that it was his particular wish and request that his wife and the infant's grandfather would superintend and take care of the infant's education, so as to fit him for any respectable profession or employment, was held, under the circumstances, and upon the effect of the whole instrument, to charge the maintenance and education of the infant upon the interest taken by testator's widow under

the will. *Foley v. Parry*, 2 Myl. & K. 138; Coop. temp. Brough. 219; 5 Sim. 138.

4. When a settlor directed maintenance for his children to be paid to their mother for their support up to fourteen years of age out of yearly income, and from fourteen to twenty-one to be allowed by trustees "out of the share" of each child in a certain fund of 6,000*l.*, to which each would be entitled on attaining the latter age, and there was no direction for the payment of interest on that fund from fourteen to twenty-one:—Held, that the maintenance for each child from fourteen to twenty-one must come wholly out of the capital of the share of that child in the 6,000*l.* *Cusack v. Jellico*, 22 W. R. 344.

5. A testator bequeathed pecuniary legacies to each of his children, some of whom were minors; and he bequeathed the residue of his property, after payment of all his just debts, and funeral and testamentary expenses, and the several legacies bequeathed by his will, to be equally divided between all his sons and daughters; and he directed that the "interest of the legacies" thereby given to such of his children as should not be of age at the time of his decease should be paid to his wife, to be applied by her for and towards their maintenance and education:—Held, that the interest of the respective shares of the residue, as well as that of the pecuniary legacies, was applicable to the maintenance of the minor children. *Guinness v. Guinness*, 14 Ir. Ch. R. 218.

4. Surplus..

6. T. gave the residue to trustees, *inter alia*, to lay out one-third part in securities, the interest to accumulate for the benefit of the children of his niece, and, if she should survive her husband, and have issue under twenty-one years of age, the trustees were to apply the interest for their maintenance till twenty-one, and, upon the children attaining their ages of twenty-one, equal shares of the principal to be transferred to them; the interest accrued between the elder and the younger children coming of age decreed to be divided between them. *Hawkins v. Combe*, 1 Bro. C. C. 335.

7. A testator directed that certain funds should be payable to children on their arriving at the age of twenty-one, and that his trustee should in the meantime pay and apply the interest towards the maintenance of such children until their respective shares should become payable; and that it should be lawful to apply the whole or any part of the principal to which any infant might be entitled under the provisions thereinbefore contained, at any earlier period than the same would become vested or payable by virtue of such provision, for the advancement of such infant:—Held, that the representatives of a child who died under the age of twenty-one were not entitled to the interest accrued during his minority. *Skaife v. Stewart*, 10 Jur. 299.

8. A., seized of an estate of 600*l.* per annum, devises 300*l.* per annum to an infant, whose father was his heir-at-law, and the other 300*l.* per annum he devises to the father for his care in looking after the son's estate till he should come to the age of twenty-one. The father dies, leaving the son six years of age, having,

by his will, devised this 300*l.* to his wife, and desired her to save what she could out of it for a portion for his daughter, and appointed her guardian for his son. This 300*l.* per annum does not determine by the father's death, but the wife shall have it till the son arrives at the age of twenty-one. *Anon.*, Pre. Ch. 597.

1. A testatrix devised lands to trustees, in trust, in the first place, at their discretion, to pay an annuity to her son A.; and next to apply the rents to the maintenance, education, and bringing up of the three children of A. during A.'s life; the sole survivor of the three children attained twenty-one in the lifetime of A.:—Held, that the interest of such surviving child in the surplus rents and profits did not cease on his attaining twenty-one, but that he continued entitled to them during the life of his father. *Badham v. Mee*, 1 Russ. & M. 631.

2. Upon the construction of a will:—Held, that the surplus dividends of a legacy, after payments for maintenance during the minority of the legatee, go with the *corpus*. *Slade v. Parr*, 1 Y. & Coll. C. C. 565.

3. Bequest of stock, etc., and interest and dividends to accrue to testator's two great-nieces, equally to be divided and to be assigned, transferred, etc., to them, when and as they should respectively attain twenty-one, with limitations of their respective shares, on the event of death under twenty-one, to their respective children; survivorship in case of no children, and a direction that the executors should, during the respective minorities of the legatees, receive the dividends, interest, etc., and that so much as should be necessary should be applied for maintenance, etc., and the residue accumulate for their benefits respectively, until they should respectively become entitled to their respective parts. The surplus interest held to go with the principal upon the death of one under twenty-one without children. *Sisson v. Shaw*, 9 Ves. 285.

4. Such part of interest of legacy of 4,000*l.* as was not wanted for support of M. Q. to accumulate and be added to, and managed along with, the principal sum for the benefit of the persons to be entitled to the same after M. Q.'s death. In that event the principal and accumulations to go to her child or children. If no issue 1,000*l.*, part thereof, to J. H.; 750*l.*, other part thereof, to G. W.; 750*l.*, other part thereof, to J. M.; and the remainder to T. H.:—Held, that the latter took the whole accumulations. *Woodhead v. Marriot*, C. P. C. 62.

5. Testator bequeathed the residue of his personal estate to three trustees, in trust to pay, apply, and dispose of all the interest thereof for the maintenance, support, and benefit of his three children and the survivors and survivor of them, in such shares and proportions, and in such manner, as they should think most proper and advisable; and if all the children should die without leaving issue, then that the trust fund should remain vested in two of the trustees in trust for the persons thereafter mentioned:—Held, that the whole income of the residue was given for the children's benefit, and, the trustees having applied only part of it for their benefit, that the surplus devolved on the survivor's death to his personal representative. *Bevor v. Partridge*, 11 Sim. 229; 10 L. J., N. S., Ch., 89.

6. Where after a devise for successive estates

for life, with remainders in tail, subject to a term of ninety-nine years, the trusts of such term were declared to be that the trustees should, out of the rents and profits of the estates, insure the messuages and keep the same in repair during the respective lives of the several tenants for life, and should, during the respective minorities of every person thereby made tenants for life or in tail, apply the surplus or residue of the rents and profits for the maintenance and education of the tenants for life or in tail, who for the time being should be entitled in possession to the estates; and in case the whole of the surplus of the said rents and profits should not, during the minority of any such tenant for life or in tail as aforesaid, be applied for his or her maintenance and education, then the surplus thereof was from time to time to be laid out on real or Government securities, at interest, in the names of the trustees, upon trust for such person or persons from time to time, as for the time being should under the limitations of the will be entitled in possession to the said estates; and if any person who might become entitled in possession or remainder to an estate tail in the estates under any of the said limitations should die under twenty-one, without issue inheritance to such estate tail, then the absolute interest in the moneys so directed to be laid out and invested was to be considered as not having been vested in such person, but the same was to go over to the next taker:—Held, that the first tenant for life in possession of the estates was not absolutely entitled to the accumulations of the rents and profits which had accrued during his minority, but was only tenant for life of such accumulations. *Crosse v. Glennie*, 2 Y. & Coll. 237; 7 Jur. 274.

7. Devise of houses to executors in trust to receive the rents for the support, clothing, maintenance, and education of the testator's children, until they should respectively attain the ages of twenty-one years or marriage, and from and after which to A., B., and C., or such of them as shall be then living:—Held, that the devise to A., B., and C. did not take effect in possession until after all the children attained twenty-one or married. *Furran v. Smith*, 11 Ir. Eq. R. 254.

Quere, whether there was an intestacy as to the surplus rents beyond what was necessary for maintenance and education of the children during their minorities. *Id.*

8. A particular sum being given for maintenance will not bar the party from being entitled to the surplus profits. *Stafford (Earl) v. Buckley*, 2 Ves. 171.

9. A testator directed his executors to apply the dividends of the property belonging to him, which might remain after paying legacies and providing for the payment of annuities, with his funeral expenses, his debts being all paid, to the maintenance, education, and benefit of R. S., as they should judge most advantageous for him; and in the event of the death of R. S. under twenty-one, he directed the dividends to be applied as therein mentioned. R. S. survived the testator about two years, and the executors applied a part of the dividends to his maintenance, education, and benefit:—Held, that the unapplied part of the dividends, with the accumulations, formed part of the residue.

McDonald v. Bryce, 2 Keen 517; 17 L. J., N. S., Ch., 217; 2 Jur. 295. And see S. C. 2 Keen 276.

1. Testator gave all his property to trustees in trust to pay an annuity to his wife, and, subject to that payment, to convey, assign, or transfer all his property unto and equally between his children, when and as they severally attained twenty-one; and in the meantime to pay to his wife, or otherwise apply the rents and proceeds of their respective shares for or towards their respective maintenance, education, and advancement. But in case of the decease of any of the children under twenty-one, then upon trust to convey, assign, or transfer the shares of such of them as should so die, and the accumulations, if any, unto and equally between such of them as should attain twenty-one. The testator's widow maintained and educated the children for several years, and advanced three of them, out of the income received by her from the testator's property, exclusive of her annuity, and, the income being more than sufficient for those purposes, a considerable surplus remained in her hands:—Held, that the surplus belonged, not to the children, but to the widow. *Brown v. Paull*, 1 Sim., N. S., 92; 20 L. J., N. S., Ch., 75; 15 Jur. 5.

2. C., by his will, devised all his freehold and copyhold estates to his two daughters, A. and M., and all other daughters that he might thereafter have, as tenants in common fee; he had afterwards another daughter L. He then gave directions for another will, by which he gave all his real estates to his two eldest daughters, and a sum of 15,000*l.* to his daughter L. The attorney took the minutes of this second will in writing, but before it was prepared the testator died; these minutes were proved in the Spiritual Court as a testamentary paper:—Held, first, this paper, being proved in the Spiritual Court, is sufficient to pass copyhold estate; secondly, but is so totally void as to the freehold, that it will not put L. to her election, and she thereafter will take her share of the freeholds under the first will, as well as the 15,000*l.* under the second; thirdly, the testator gave the 15,000*l.* to his daughter L., to be paid to her at twenty-one or marriage, without interest for the same in the meantime; but if she died before twenty-one or marriage, then the 15,000*l.* was not to be raised, but was to sink into the residue of his personal estate. And he directed that, out of the interest of the 15,000*l.*, certain sums of money should be applied for the maintenance or L. The interest of this legacy, beyond the maintenance, is vested in L., and must be appropriated to accumulate for her benefit. *Carey v. Ashem*, 2 Bro. C. C. 51; 1 Cox 241. And see 8 Ves. 492, 498, 499.

3. A testator, after bequeathing certain shares of his residuary estate (the produce of a mixed fund) to his son and daughter respectively, directed that the interest of the share given to the son should be applied for his maintenance and education till twenty-one, and that after such period he should have power to receive and dispose of such interest till his age of twenty-five, when the whole of the property bequeathed to him was to be at his own disposal. He further directed that half the property given to his daughter should

be invested, in trust, for her maintenance, education, use, and benefit, during her life, and for her children, if any, after her decease; and if there was no issue living at her decease, the said property was to devolve to his son; and in case he was dead also, and had left no issue, the said property was to devolve to his executors thereafter named. The other half of the property bequeathed to his daughter he directed to be invested for her sole use and benefit till twenty-one, and that the said property should then be at her own disposal; and if either the son or daughter should die under twenty-one, the property bequeathed to the one so dying should devolve to the other; and if both should die under that age, then the property bequeathed to them should devolve to and become the property of the four persons therein named and described, to be divided betwixt them, in equal proportions, and their heirs for ever; which four persons he also appointed his executors. One of the four persons named executors renounced probate, and declined to act; and afterwards both the son and daughter died under twenty-one, and without issue:—Held, that the interest which accrued upon the shares of the son and daughter, during their respective minorities, so far as it had not been applied to their maintenance and education, vested absolutely in them, and passed to their personal representatives. *Barber v. Barber*, 3 Myl. & C. 688; 8 L. J., N. S., Ch., 36; 2 Jur. 1029. Affirming on this point, 7 L. J., N. S., Ch., 70; 1 Jur. 915.

4. An estate was devised to trustees for five hundred years, with remainder to persons still unborn, with remainder to the plaintiff. The trustees had active duties as to the management of the estate and large discretionary powers, and they were authorised, "during the minority of any person absolutely or presumptively entitled," to apply the surplus income for the benefit of such person, accumulating the surplus:—Held, that the plaintiff, who had attained her majority, had no right to any part of the surplus rents accruing prior to her estate becoming vested in possession. *Sidney v. Wilmer*, 25 Beav. 260.

5. Testator directed his executors to pay and apply the whole or any part of the rents, issues, and profits of his real and personal estates during the life of J. S. for or towards his maintenance, attendance, and comfort; and after the death of J. S., to sell the real and personal estate, the produce of the sale to be deemed part of the testator's personal estate, and the rents and profits of the real estate in the meantime, and until a sale, to be deemed part of the annual income of his personal estate. The whole of the rents of the real estate, and part only of the personal estate, had been applied by the trustees for the maintenance of J. S., who was of unsound mind, without touching upon his private property:—Held, that the personal representatives of J. S. were not entitled to the unapplied savings of the testator's real and personal estate as upon an absolute gift of the income to J. S., though the whole income, however large, might have been applied by the trustees for his maintenance, if necessary; but that the mixed fund must be apportioned between the testator's heir-at-law and residuary legatees.

Held, also, that if the trustees had accumulated the testator's estate, and allowed J. S. to have been maintained out of his own property, his administration would have been entitled to be recouped to the full extent. *Re Sanderson's Will*, 5 W. R. 864; 3 Kay & J. 497; 3 Jur., N. S., 658; 26 L. J., Ch., 804.

1. A legacy was given to trustees to be expended by them for the benefit and advancement of an infant as they in their absolute discretion should think fit. There was also a gift by the will, of the income of a share of the residue to the infant for life on his attaining twenty-one, with a power to the trustees to apply the income during his minority for his maintenance and education. A suit for administration was instituted by the trustees immediately after the testator's death, and orders were from time to time made in it for the advancement, and also the maintenance and education of the infant out of the legacy. On his attaining twenty-one:—Held, that he was absolutely entitled to the unapplied residue of the legacy. *Furley v. Hyder*, 41 L. J., Ch., 583; 26 L. T., N. S., 864.

Held, also, that inasmuch as maintenance would have been ordered out of the income of the contingent share of the infant, he was entitled to be recouped out of the past income of the residuary estate what had been expended out of the legacy for his maintenance and education. *Id.*

2. By settlement, trustees were directed to pay the income of 1,000*l.* for the maintenance, education, and support of the children of the marriage, and when they should attain twenty-one years to pay the same sum and the accumulations thereof accruing to such children. The father had maintained the children at a greater expense than the income of the 1,000*l.* There was no direction to accumulate:—Held, that the father was entitled to the past accumulations of income and the future income during children's minority. *Birch v. Sumner*, 3 Jur., N. S., 712.

3. Funds were vested in trustees by M., upon trust (after certain intermediate trusts) to pay the whole or so much as they should think fit of the dividends thereof towards the maintenance, etc., of an infant; and upon trust, when the infant attained twenty-one, to pay the whole dividends to her, with further trust as to *corpus* of the fund for her children; but if the infant died under twenty-one without issue, then upon trusts as to the *corpus* of the fund, and the dividends thenceforth to accrue for the next-of-kin of M. A power was contained in the settlement authorising the trustees to invest so much of the income to which the infant "shall be entitled" as might not be required for her maintenance, etc., and to transfer such investments to the infant on her attaining twenty-one, with power to the trustees to resort to the accumulations of any previous year, and apply the same for the infant's maintenance, etc., in any succeeding year. The infant died under twenty-one, and there was a considerable sum invested, being accumulations of unapplied income:—Held, as between the parties claiming under the gift over, the next-of-kin of the infant, and the personal representatives of the settlor, that the invested accumulations passed to the personal representatives of the settlor as

a resulting trust. *Baker v. Pugh*, 5 W. R. 239.

4. By a post-nuptial settlement the sum of 15,000*l.*, secured by mortgage of the settlor's property, was settled upon his children, with power for the trustees to apply the income for their maintenance. The money was never raised or paid to the trustees; the settlor maintained his children until his bankruptcy:—Held, that the children were entitled to the arrears of the fund. *Re Morrison*, 40 L. J., Ch., 637; 25 L. T., N. S., 57; 19 W. R. 967.

5. Property was bequeathed to trustees in trust for an infant, with a gift over in case of his death under twenty-one. The trustees accumulated the income of the property not required for his maintenance, in pursuance of the powers given by s. 26 of Lord Cranworth's Act. The infant died under twenty-one:—Held, that the accumulations of income to the time of the death of the infant belonged to the infant, and were not to be held for the benefit of the remainderman, who ultimately became entitled to the property from which the accumulations arose. *Re Buckley's Trusts*, 22 L. R., Ch. D., 583; 52 L. J., Ch., 439; 48 L. T. 109; 31 W. R. 376.

5. Discretion of Trustees.

(a) *In General*, 6933.

(b) *Exercise of pending Suit or after Payment into Court*, 6934.

(c) *Interference of the Court*, 6935.

(a) *In General*.

6. A disinherits his son, and by will gives the greatest part of his estate to B., and tells B., if his son behaved well, he might pay him 20*l.* a quarter; and if he used that well, he might make it up 40*l.* a quarter. Decreed 40*l.* a quarter to the son. *Kingsman v. Kingsman*, 2 Vern. 559.

7. A testator directed his trustees, in their uncontrolled discretion, to apply such part of his residuary estate for the maintenance, comfort, and support of his wife, as, together with her own property, should make up her annual income to 500*l.* At the date of the will, and at his death, the wife was of unsound mind, but she afterwards recovered:—Held, that she was entitled to have her income made up to 500*l.* per annum. *Bullock v. Bullock*, 11 Jur., N. S., 29.

8. Trustee, being directed to apply in his discretion such portions of the income as he should think fit, towards the support of F. H. and her children, and to invest and accumulate such part of the income as should not be so applied:—Held, to be justified in keeping considerable balances in his hands to answer contingencies, and not chargeable with interest on such balances. *Cantrell v. Higgins*, 1 Jur. 792.

9. Under a settlement, discretionary power over a fund of 500*l.* a year was given to two trustees upon trust, to apply it to the maintenance of an infant, or else in their discretion to accumulate it, and if the trustees did not apply the fund to either of these objects, it was to be paid to Mrs. W. They both agreed the fund was not required for maintenance, but differed on the question of accumulation:

—Held, that as the maintenance was amply provided for, and the Court in the exercise of its discretion on the point, when the trustees differed, thought the accumulation unnecessary, Mrs. W. was entitled to the fund until further order. *Windham v. Cooper*, 24 L. T., N. S., 793.

1. Devise and bequest of freehold, copyhold, and personal estate, upon trust for sale at the discretion of the trustee, and that the rents, interest, and proceeds should be divided amongst a class, either equally or in other proportions, as the trustee, having regard to their circumstances, should appoint; followed by an unattested codicil, directing the application of such rents, interest, and proceeds for the benefit of such of the class as were unsettled, and particularly for the comfortable support of P. (one of the class), who was of weak mind; and in case the trustee should not live to perform the whole trust, the rest to be executed by any persons he might appoint, having regard to the said intentions. The trustee by deed directed the manner in which the estates should be sold, and the proportions of the proceeds applied, and directed the division thereof amongst the other objects to be postponed until after the death of P., and nominated other persons to execute the trusts, which might remain unexecuted at his (the trustee's) death, with the same discretionary power that he had himself:—Held, that the trustee, for the government of his own discretion, might properly have regard to the direction of the unattested codicil, even as to the proceeds of the real estate, so far as he was not restrained by the effect of the will; that the prospective directions in the deed of appointment were not necessarily invalid, especially those which related to the future maintenance of P.; and that the attempt to delegate powers which the trustee could not transfer did not invalidate the directions in the same deed which he had power to give. *Hitch v. Lenworthy*, 2 Hare 200; 15 L. J., N. S., Ch., 235.

2. Under a marriage settlement, property was to be held by the trustees, after the death of the wife, for all and every or such one or more of the children of the marriage, etc., as the wife should appoint, and in default of appointment, for the children equally; and the trustees were empowered during the minorities of the children to apply the income of their presumptive shares for their maintenance and education; although the father might be of ability to maintain them. In exercise of the power, the wife appointed the property among the children equally, and directed that, during their minorities, the income of their respective shares should be paid to the husband, to be applied by him for their maintenance:—Held, that the discretion of the trustees as to the application of the income during the minorities was not thereby taken away. *White v. Grane*, 23 L. J., Ch., 863; 18 Beav. 571.

3. By a will a sum was given to two trustees on trust to pay the income to C. for his life, with a gift over of the principal on his death; but the trustees had a discretionary power to purchase with the principal an irredeemable annuity for the life of C. for his benefit. The trustees did not purchase an annuity, but one

of them paid to C. during his life, from time to time, various small sums, amounting in the aggregate to more than the total income, but less than the principal:—Held, that this was a proper exercise of the discretionary power. *Messena v. Carr*, 9 L. R., Eq., 260; 39 L. J., Ch., 216; 22 L. T. 3; 18 W. R. 415.

4. A widow, who was by the terms of the will to be allowed money by the trustees during the minority of an infant—her son—abandoned the child, for whom other guardians were appointed by the Court, and afterwards having cohabited with a married man, and by him had several illegitimate children, lived with them in a house to the use of which she was entitled under the will. The trustees under the circumstances refused to make her any allowance out of the trust moneys:—Held, that she could not compel the trustees so to do, but was disqualified from making any claim by her abandonment of the child, independently of other misconduct. *Mellor v. Mellor*, 20 W. R. 51.

5. Where trustees have unlimited discretionary power to postpone, as long as they may think fit, the payments of shares of a residuary fund; and where of the time and manner of exercising the power they are to be the sole and final judges, asserting creditors of the fund will be defeated by the trustees executing, even after action raised, a deed applying the fund as an alimentary provision for the behoof of the beneficiaries. No proceedings resorted to by creditors of the beneficiaries can in such a case abridge the powers of the trustees. *Chambers v. Smith*, 3 L. R., App. Cas. (Sc.), 795.

(b) *Exercise of pending Suit or after Payment into Court.*

6. Where, under a will, the income of a fund is payable for the maintenance of T., the trustee, by paying the fund into court, relinquishes his discretionary power. *Re Tegg*, 15 W. R. 52; 15 L. T., N. S., 236.

7. Power given by a will to trustees, at their discretion, to apply during the life of testator's wife any part not exceeding one moiety of the annual income of the trust estate for or towards the maintenance and education of his daughter, or otherwise for her benefit, in such manner as the trustees should think proper, may be exercised, notwithstanding bill filed by trustees to have the trusts of the will performed and carried into execution under the direction of the Court. *Sillibourne v. Newport*, 1 Kay & J. 602; 1 Jur., N. S., 608; 3 W. R. 653.

8. When a testator by his will gives his trustees a discretionary power of advancement for the maintenance and education of children presumptively entitled under the will, the Court will not control the trustees in the exercise of their discretion, because a decree has been made in a suit for the administration of the testator's estate. *Brophy v. Bellamy*, 29 L. T., N. S., 380; 8 L. R., Ch., 798; 43 L. J., Ch., 183.

9. A testator bequeathed to his executors a sum of £50L, which he directed should be held by them in trust for his brother James's family; and should be by his said executors expended

for the benefit of the said family, in such a manner as to them should seem most expedient. The executors having paid the 450*l.* into court under the Trustees Relief Act:—Held, that the payment into court terminated the discretionary power of applying the fund. *Re Mulqueen Trusts, Ex p. Mulqueen*, 7 L. R., Ir., 127.

(c) *Interference of the Court.*

1. Where a testator has given a discretionary power to trustees to apply the income of his estate for the maintenance of an infant, the Court will not interfere, unless the trustees have been guilty of extravagance. *Douglas v. Andrews*, 3 Jur. 949.

2. Where a testator has reposed a discretion in his trustees as to the application of rents and profits in the maintenance, etc., of his widow and children, the Court will not interfere, in the absence of misconduct, without their consent. *Collins v. Vining*, C. P. C. 472.

3. A direction by will that the testator's widow shall receive all the income of his real and personal estate, and pay and apply the same to and for the use of herself and the children of their marriage agreeably and according to her own discretion during her life, confers on the wife a discretionary power which the Court will not disturb so long as it is reasonably and honestly exercised. *Costabadie v. Costabadie*, 6 Hare 410; 16 L. J., N. S., Ch., 259; 11 Jur. 345.

4. Testator bequeathed an annuity to his granddaughter, to be applied whilst she was under age in and towards her maintenance and education, in such manner as his trustees should in their absolute and uncontrollable discretion think fit, and whether her father should be able to maintain and provide for her or not. The trustees having made a very small payment on account of the annuity, and having made no provision for the maintenance or education of the infant, who had been wholly provided for by her father, the Court declared, that, in the event of its appearing that the father had properly maintained and educated the infant from the testator's death, he should receive the whole annuity for the time past and till further notice, he undertaking properly to maintain and educate her, and to abide by the order of the Court. *Stephens v. Lawry*, 2 Y. & Coll. C. C. 87.

5. A testator gave to his executors certain real and personal estate, upon trust to permit his wife M. to receive the rents, etc., thereof for her own use and benefit, and for the maintenance and education of his children (naming them), so long as his said wife should continue his widow, and, in case she should marry, to pay her an annuity of 100*l.* per annum, and subject to such trusts, in trust, after the decease or marriage of M., for his said children in equal shares, when and as they should attain the age of twenty-one:—Held, that a trust was constituted of a sufficient part of the income of the property for the maintenance and education of the children, and that such trust was capable of continuance beyond the period of a son attaining twenty-one, or a daughter attaining that age or marrying. The Court, however, being of opinion that a discretionary power as to the mode of executing the trust was given to M., directed inquiries

for the purpose of ascertaining how such discretionary power had been, and how it ought to be, exercised. *Longmore v. Eloum*, 2 Y. & Coll. C. C. 363; 12 L. J., N. S., Ch., 470.

6. A testator gave a legacy of 3,000*l.* to three children, or the survivors or survivor, who should attain twenty-one; but if all three died under twenty-one there was a gift over. The will contained a direction to the trustees to apply the whole or such parts as they should think fit of the income of the legacy for the maintenance and education of the legatees while under twenty-one:—Held, that the Court had power to control the discretion of the trustees in the allowance to be made for children; and the Court, in opposition to the trustees, directed that the whole income should be paid to the father of the children for their maintenance, together with an equal amount for past maintenance. *Re Hodges, Davey v. Ward*, 7 L. R., Ch. D., 754; 47 L. J., Ch., 335; 26 W. R. 390.

7. Where in a marriage settlement the trustees had power to apply the income of the settled fund for the benefit of the husband and wife and their children as they should "in their uncontrolled and irresponsible discretion think proper," the Court, while expressing an opinion that the trustees were not acting judiciously, declined to interfere with their discretion, there being no proof of *mala fides*. *Tabor v. Brooks*, 10 L. R., Ch. D., 273; 48 L. J., Ch., 130; 39 L. T. 528.

8. Where a fund was by will given to trustees for infants, and the trustees were desired to pay the income to the mother to be by her applied for their benefit at her discretion:—Held, that the Court had power, where the mother had not exercised a sound discretion, to order the income to be paid to the father for the maintenance of the infants. *Re Roper's Trusts*, 11 L. R., Ch. D., 272; 27 W. R. 408; 40 L. T. 97.

See also 7 infra.

6. Account against Trustees.

9. Where lands are devised to maintain an infant till twenty-three, and then to account, he shall not have an account until he attains twenty-three, unless the trustee be insolvent. *Tilly v. Simpson*, Mos. 244.

10. A testator gave his residue, on trust to apply the income for the maintenance, education, and support of his children until the youngest attained twenty-one. The children having been maintained and educated, the Court declined directing an account of the application of the income during the minority of the youngest child, without a special case being made out. *Hora v. Hora*, 33 Beav. 88.

11. Testator gave an annuity to a trustee in trust to pay the same to his daughter for her separate use for life, remainder to her husband, to enable him to maintain his children by her until the youngest attained twenty-one; and if the husband should die before the youngest child attained twenty-one, then upon trust for the trustee to apply the annuity in like manner as the husband was directed to do:—Held, the daughter being dead, that the husband was bound to apply the annuity for the maintenance

of the children; but that if he maintained them properly, they would not be entitled to an account against him. *Leach v. Leach*, 13 Sim. 304; 7 Jur. 273.

1. When an annuity was given to A. in trust to apply it at his discretion for the benefit of B. during his life, and for his advancement, maintenance, support, or otherwise for his benefit, without being answerable for any of the money so laid out, or the exercise of the discretion so vested in the trustee as to the mode and extent of expending and laying out the same:—Held, that A. could not apply any portion of the annuity for his own benefit, but was bound to account for all sums not shown to be applied for the advancement, maintenance, support, or benefit of B. *Wainford v. Heyl*, 20 L. R., Eq., 321; 33 L. T., N. S., 155; 44 L. J., Ch., 567; 23 W. R. 848.

2. Trustee, being directed to apply in his discretion such portions of the income as he should think fit, towards the support of F. H. and her children, and to invest and accumulate such part of the income as should not be so applied:—Held, to be justified in keeping considerable balances in his hands to answer contingencies, and not chargeable with interest on such balances. *Cantwell v. Higgins*, 1 Jur. 792.

3. Charges by trustees for money laid out in luxuries under colour of maintenance, and for money unnecessarily expended in pulling down and rebuilding a house, disallowed. *Bridge v. Brown*, 2 Y. & Coll. 181.

4. If a trustee be sued in Chancery for an account, and it appears that he has properly expended sums of money for the protection and safety, or for the maintenance and support, of his *cestui que trust*, at a time when he, though adult, was incapable of taking care of himself, the Court will allow him credit in account for such sums of money. *Nelson v. Duncombe*, 9 Beav. 211; 15 L. J., N. S., Ch., 296; 10 Jur. 399.

5. The fact that a will contains an express direction to accumulate, and no power of maintenance, will not be a ground for charging the trustee with sums properly paid for maintenance. *Aveline v. Melhuish*, 10 Jur., N. S., 788.

6. The sum of 100*l.* devised to an infant payable at twenty-one, and if he dies before, then it is devised over, and the interest of the 100*l.* is for the child's maintenance. The trustee lays out 20*l.* of the 100*l.* for placing out the child as apprentice, and the child died under twenty-one. This 20*l.* shall be allowed. *Franklin v. Green*, 2 Vern. 137.

7. Maintenance to some extent allowed out of capital, though the direction in the will applied only to income, the whole estate amounting to about 12,000*l.*, but the income having proved insufficient, owing to temporary charges; but sums expended in luxuries, etc., as for the purchase of ponies, were disallowed, and 100*l.* only was allowed out of 145*l.*, expended by executors for funeral expenses, on an estate of about 12,000*l.* *Bridge v. Brown*, 2 Y. & Coll. C. C. 181.

7. Lunatics.

8. A mother, whose only daughter, a lunatic, was entitled to a large real and personal estate

under her father's will, bequeathed the residue of her estate and effects to trustees, upon trust to apply the interest, amounting to about 1,600*l.* a year, towards the maintenance and support of her daughter, and otherwise for her comfort and advantage, as they should think proper, without being liable to account; and after her decease to pay the principal, and also such interest as should not have been actually so applied, to the testatrix's nieces:—Held, that the allowance of the lunatic ought to be borne exclusively by the maternal estate, as that arrangement, in the event of her recovery, would be most beneficial for her. *Re Ashley*, 1 Russ. & M. 371.

9. A father, by will, directed the income of his real and personal estate to be expended as the trustees might think fit, in the maintenance of his son, a lunatic, and gave the corpus so that it vested in the lunatic absolutely. Afterwards, the mother of the lunatic gave her personal estate to trustees, upon trust, to apply a sufficient part of the income in his maintenance, with a direction to accumulate the surplus, and gave the corpus and accumulations over:—Held, that the mother had dedicated the whole of the income of her estate for the benefit of her son, subject to a provision that the surplus should be added to the principal, and that the question of contribution between the two estates to the lunatic's maintenance must be decided solely with reference to his interest; and the income of the mother's estate alone being insufficient for the lunatic's maintenance, the whole thereof must be applied for that purpose in the first instance, before any part of the income of the father's estate should be applied. *Methold v. Turner*, 4 De G. & Sm. 249; 15 Jur. 810; 20 L. J., Ch., 201.

10. A testator gave a fund to trustees in trust to pay the income to his sister for her life, or apply the same, or so much as may be necessary, for her support and maintenance, in such manner as may be most to her comfort and advantage. He then directed the surplus, if any, to be accumulated and added to the capital of the fund, which was given over after her death. The sister, who was of unsound mind, was entitled to a life interest under a settlement, of which the testator was a trustee. After the testator's death, she was found lunatic, and the allowance for her maintenance was fixed at a sum exceeding the income of the bequeathed fund:—Held, that this income was a primary fund for the maintenance, and that therefore the whole of it must be so applied. *Rudland v. Crozier*, 2 De G. & J. 143; 4 Jur., N. S., 675; 27 L. J., Ch., 261.

11. P., by his will, directed that his widow A. and second son B., who were devisees of his estates, should apply a sum not exceeding 400*l.* per annum for the maintenance and care of his son John, who was a lunatic, and that whoever should at any time be in possession of his estate should, during the life of his son, apply such sum annually for his comfortable support, care, and maintenance; and that such sum should be deemed, taken, and considered as a charge thereon:—Held, that there was no greater charge upon the estate than what was actually required and applied for the maintenance of the lunatic. *Re Pensonby*, 3 Dr. & War. 27; 2 Con. & L. 30; 5 Ir. Eq. R. 568.

After A. and B. had died, the Court fixed

the allowance of 280*l.* a year:—Held, after the lunatic's death, as between the owner of the estate charged and the administrator of the lunatic, that the owner of the estate was entitled to the difference between 280*l.* and 400*l.* a year, and not the administrator of the lunatic. *Ib.*

The committee of a lunatic is beneficially entitled to the savings out of the lunatic's allowance. *Ib.*

1. A wife was insane before and during the time of her being entitled to a separate maintenance left by the will of a testator who knew her to be insane; no commission had issued; she had an only child an infant entitled to the capital in the event of surviving his mother; upon the husband's application for an allowance out of the wife's separate maintenance for her support, a reference was directed to the Master to inquire who had maintained the wife, at what expense, how far the husband was able and willing to maintain her, and if any part of this fund was to be advanced to any one, what securities should be taken for its due application. *Brodie v. Barry*, 2 Ves. & B. 36.

2. Where there are two funds, both of them applicable to the maintenance of a lunatic, under the management of the Court of Chancery, to one of which the lunatic would be absolutely entitled as her own property, the other of which, so far as she might not benefit by it, would pass away to different persons, the Court might direct her maintenance to be provided for out of the latter fund. But where such latter fund is provided by a will which vests the fund in trustees, and gives them an absolute discretion and "uncontrollable authority" over its application, the Court will not exercise its ordinary power. The fund so specially provided will be left to the exercise, *bonâ fide*, of the discretion of the trustees. *Gisborne v. Gisborne*, 2 L. R., App. Cas., 300; 46 L. J., Ch., 556; 25 W. R. 516; 36 L. T., N. S., 564. Affirming 23 W. R. 410; 32 L. T., N. S., 46, which reversed 23 W. R. 151; 31 L. T., N. S., 472.

A husband devised real estate, and bequeathed his residuary personal estate to trustees upon trust, that they, in their discretion and of their uncontrollable authority, should pay and apply the whole or such portion only of the annual income of his real and residuary personal estate as they should think expedient to or for the maintenance of his wife (a lunatic) at such time or times and in such proportion and manner in all respects as his trustees should think most conducive to her comfort, enjoyment, and convenience, without being liable to account for such payment and application. The wife became, on her husband's death without issue, entitled under her marriage settlement to a life interest in certain funds, and absolutely to other funds therein respectively comprised. By an order of the Lords Justices in Lunacy, it was ordered that without prejudice to the question as to the primary liability of the testator's estate to provide for the maintenance of the lunatic, the sum of 696*l.* a year should be applied for that purpose:—Held, that the trustees had an absolute discretion as to whether or not they would apply any and what part of the income of the testator's estate for the maintenance of the lunatic, and that the Court was not entitled to control or interfere with such discretion. *Ib.*

3. Where a lunatic has property to which he is entitled for life under a settlement as well as property to which he is absolutely entitled, the Court will apply the life interest in the first place towards his maintenance; unless the trustees of the settled property have no absolute discretion whether to employ the whole or any part of the income for the lunatic's benefit. Therefore where property was held upon trust to pay the income in such way, at such time, and in such manner as the trustees should think fit towards the maintenance of a lunatic during her life, with power to invest any surplus not required for the purpose as capital, it was held that the trustees had no such discretion as wouldoust the jurisdiction of the Court to apply the whole of the income in the lunatic's maintenance in exoneration of her absolute property. *Gisborne v. Gisborne*, (2 L. R., App. Cas., 300) distinguished. *Re Weaver*, 21 L. R., Ch. D., 615; 48 L. T. 93; 31 W. R. 224.

The brother of a lunatic lady, not so found by inquisition, advanced money for the maintenance of his sister for several years, under circumstances which left it doubtful whether he intended it for a gift or expected to be repaid. He died, and his sister was then found to be lunatic by inquisition. His executors having brought in a claim against the lunatic's estate for repayment of the advances, the Court made an allowance to the testator's estate for past maintenance, but limited it to advances made within six years before the testator's death. *Ib.*

4. A testator gave the residue of his estate to trustees, upon the usual trusts for conversion and investment, and directed them to pay such sums for the maintenance and education of his sons M. and N. during their minorities, or for apprenticing them, as his trustees should think proper; and declared that, when his sons should have attained their ages of twenty-one years, his trustees should pay the then residue of the moneys unto his two sons, provided that they should be, in the opinion of his trustees, of competent understanding and sufficient discretion to manage and take due care thereof. M. and N. were both lunatic at the time of their attaining their majority:—Held, that the qualification as to the sons being of competent understanding did not make the gift to them conditional, and that the testator's estate vested in them absolutely. *Wright v. Wright*, 21 L. J., Ch., 775.

5. A testatrix gave real and personal estate to trustees to pay the income to E. for life, and hold the capital in trust as E. should by will appoint, and in default to pay thereout certain legacies, and hold the residue in trust for C. and W. And in case E. should become of unsound mind, to apply the income or any part of it at their discretion towards her maintenance and support:—Held, that while E. was of sound mind, she, together with C. and W., could, on providing for the legacies, dispose of the estate. *Gardiner v. Young*, 34 L. T., N. S., 348.

8. Married Women or Widows. Separate Use.

6. A testator directed his trustees to apply a legacy for the support and maintenance of

the wife of H., and for the support and education of his children. There were none at the testator's death:—Held, that the wife took absolutely for her separate use. *Cape v. Cape*, 2 Y. & Coll. 543; 1 Jur. 307.

1. Testator bequeathed his residuary estate to trustees in trust to pay the income to his wife for her life, to be by her applied for the maintenance of herself and such children as he might leave at his death:—Held, not to be a trust for the separate use of the wife. *Wardle v. Claxton*, 9 Sim. 524; 8 L. J., N. S., Ch., 119; 3 Jur. 145.

2. If an estate is given to a husband for the livelihood of his wife, he will be a trustee for her separate use, and technical words are not necessary to create a separate trust; "livelihood" is enough here to show the testator's intention. *Darley v. Darley*, 3 Atk. 399.

3. A father gave his property to trustees on trust during the life of his son to pay, apply, and dispose of the annual produce of a portion of it for the maintenance and support of his son and his present or any future wife, and the maintenance, education, and support of their children or any or either of them his son and his wife and children, in such manner and such proportions as the trustees should in their discretion think fit and proper, without being answerable or accountable to any person for the way in which they should apply the same; and, after the death of his son, to pay and apply the annual proceeds in like manner unto and for the benefit of any widow for life, and any children until they should attain twenty-one or marry, and subject to those trusts in trust for the children. The son died in 1849, leaving a wife and six children, the youngest of whom attained twenty-one in 1870. In 1851 the widow married again. The settlement made on the marriage did not comprise the above annual proceeds, and the trustees continued to pay them to the wife as part of her separate estate and on her separate receipt. The second husband, who was living apart from his wife, claimed to be entitled to the income during her life:—Held, that the trustees had a discretion to pay the wife the income for her separate use. *Austin v. Austin*, *Austin v. Boyce*, 4 L. R., Ch. D., 233; 46 L. J., Ch., 92; 36 L. T. 96; 25 W. R. 346.

4. Under a trust deed providing pensions to be paid for the maintenance of widows and children of clerks in the East India Company's service, and stipulating that any recipient of a pension who should dispose of or incur the right to lose all right to such pension, a widow became entitled to a pension. She married a second husband, who claimed to be entitled to a pension in his marital right:—Held, that the pension provided for the petitioner was intended by the trust deed to be for her separate use, and the money was ordered to be paid to her upon her sole receipt. *Re Peacock's Trusts*, 10 L. R., Ch. D., 490; 48 L. J., Ch., 265; 27 W. R. 500; 39 L. T. 661.

9. Statutory Powers (23 & 24 Vict., c. 145, and 44 & 45 Vict., c. 41).

5. Trustees may, under 23 & 24 Vict., c.

145, s. 26, apply for or towards the maintenance of an infant the income of a legacy bequeathed to an infant by a stranger contingently on attaining the age of twenty-one years. *Re Cotton*, 1 L. R., Ch. D., 232; 45 L. J., Ch., 201; 33 L. T. 720; 24 W. R. 243.

When a fund was bequeathed upon trust for all the children of A. who should attain twenty-one in equal shares, and if there should be but one such child, then for that child, and A. died leaving one infant child:—Held, that the income of the fund might be applied in the maintenance of the child. *Ib.*

6. The 23 & 24 Vict., c. 145, s. 26, empowering trustees to apply towards the maintenance of an infant the income to which such infant may be entitled in respect of a legacy payable contingently on his attaining twenty-one, does not apply to a case where the infant on attaining twenty-one would not be entitled to interest on his legacy till the time of payment. *Re George*, 5 L. R., Ch. D., 837; 47 L. J., Ch., 118; 37 L. T. 204; 26 W. R. 65. Reversing 25 W. R. 182.

A father declared that his personal estate should be held upon trust out of the annual produce to raise for every daughter who should be under age and unmarried the yearly sum of 50*l.* for their maintenance and education, and to accumulate the surplus income as part of his residuary personal estate, and he bequeathed to each of his daughters a legacy of 4,000*l.* if and when they should respectively attain twenty-one or be married, and gave his residuary personal estate to his eldest son:—Held, that the legacies to the daughters did not carry interest until the time of payment, and that the Court had no power, under s. 26 of the 23 & 24 Vict., c. 145, to apply any part of the income of the expectant legacies to the maintenance of the daughters. *Ib.*

The presumption that a legacy, given by a person *in loco parentis* to an infant on his attaining twenty-one, carries interest by way of maintenance in the meantime, is rebutted if the testator makes any other provision for such maintenance. *Ib.*

7. Trustees cannot, under s. 43 of the Conveyancing Act 1881 (44 & 45 Vict., c. 41), apply the income of an infant's contingent legacy for the benefit of the infant, unless the income will go along with the capital of the legacy if and when such capital vests. *Re Judkin's Trusts*, 25 L. R., Ch. D., 748; 58 L. J., Ch., 496.

8. A testator gave a fund to trustees, on trust for all the children of A. equally, who being sons should attain twenty-one, or being daughters should attain twenty-one or marry, with benefit of survivorship amongst them, and he directed his trustees to accumulate the income of the shares of the children, and to pay the same to them as and when their presumptive shares should become payable under the previous trust:—Held, that the will did not express a "contrary intention" within the meaning of s. 43 of the Conveyancing Act 1881 (44 & 45 Vict., c. 41), and that the children being infants and unmarried, the trustees might at their discretion apply the income of the trust fund in or towards the maintenance and education of the infants. *Re Thatcher's Trusts*, 26 L. R., Ch. D., 426; 58 L. J., Ch., 1050; 32 W. R. 679.

10. Other Cases.

1. Held, on construction of settlement that will not being duly attested, and under other circumstances, trustees had no power to allow maintenance during a certain period, but that eldest son should be put to his election to allow it, as he had other benefits under the will, and was the only person that could be benefited by withholding the maintenance. *Hume v. Rundell*, 2 Sim. & S. 174.

2. A testator bequeathed as follows: "I leave J. B. under the protection of my wife A. P., to be by her apprenticed and taken care of, and to be provided for to the best of her judgment, as long as the said A. P. remains unmarried":—Held, that J. B. was entitled to maintenance out of the testator's estate. *Batt v. Anns*, 11 L. J., N. S., Ch., 52.

3. Testator gave all his property to his wife and two other persons in trust for the under-mentioned purpose, namely, to pay the income to his wife for the education and support of his children by her, and after her death the property to be divided among his children; and he gave his furniture, plate, etc., to his wife absolutely:—Held, that the children were not entitled to the trust property on their father's death; but that their mother was entitled to the income for her life, she maintaining and educating the children out of it. *Gilbert v. Bennett*, 10 Sim. 371.

4. Money, secured by a policy, was settled to A. and B., wife and husband, successively, for life, then in trust for the children of the marriage, with powers of advancement and for maintenance with an ultimate trust; on failure of children, to the wife's appointment. There was but one child of the marriage, and the wife bequeathed all her interest under the settlement to her husband and died. There was a bonus declared on the policy, and the assurance office was willing to pay money in respect of it. The husband was in insolvent circumstances, and about to emigrate, and he and the child petitioned that the trustees might be at liberty to receive the money payable in respect of the bonus, and, by yearly payments out of it, maintain the child; and the Court granted the prayer of the petition, on the husband (the father) agreeing to give up all his life interest, not only in the bonus money, but in the principal money assured, although there was no suit in court for the administration of the trust. *Exp. Hayes*, 18 L. J., N. S., Ch., 441; 13 Jur. 762.

5. Term of years to trustees to raise money for maintenance, etc., of younger children of A. in such shares, etc., as A. should direct, and, in default of direction, to be applied for benefit of children equally, same to be paid them respectively till their respective portions provided out of other property should be paid. A., by will, appointed a certain portion for plaintiff, to be vested in her at the age of twenty-one or marriage, and directed that a certain part of the interest and dividends should be applied towards her maintenance, etc., but did not make any appointment, or give any directions relative to the sum of money raisable for that purpose under the term:—Held, on construction of settlement, that plaintiff was entitled to have her share of the money provided by the term raised for the benefit,

until her portions should become payable. *Poulett v. Poulett*, 6 Madd. 167.

6. A testator devised estates to trustees upon trust to pay certain annuities to his wife and other persons, with a direction that during the life of his wife the surplus rents should be applied in discharge of incumbrances affecting the devised property; and subject to these trusts, he declared that the trustees should stand seised of the property, in trust for various persons (not *in esse* at the testator's death) successively in tail, with remainder to the testator's niece for life, with a direction that during her minority the rents should be applied as after mentioned; and then followed a clause to the effect that, if any persons beneficially entitled to the rents should be in his or her minority, an annual sum not exceeding 300*l.* should be applied out of the rents to the maintenance of that person, and that the residue of the rents should accumulate, and the accumulations be applied in the discharge of incumbrances:—Held, upon the construction of these inconsistent clauses, and other parts of the will, that the testator's niece was not (at least during the life of the testator's widow) entitled to any part of the rents for her maintenance during minority. *Williams v. Edwards*, 2 Colly. 176.

7. Testator desired his trustees to pay the whole of the income of his property to his wife "for her own use and the use of her children"; but if she married again he gave her one-third only, the other two-thirds to be received for the benefit of the children in providing for their education and outfits in life. The wife's third to be for her life, and then to go to the children with the remainder:—Held, that during the widowhood of their mother the children were not entitled to any portion of the income, or to have any part set apart for their maintenance or advancement. *Kennedy v. Kennedy*, 2 W. R. 298.

8. W. by will gave all his real estate to trustees until his son attained twenty-five, remainder to his said son W. the younger for life, remainder to trustees to preserve, remainder to his first and other sons in tail, with remainders over. And in case his said son should leave any child other than an eldest or only son, the trustees had power, at any time after the son's death, to demise or mortgage for years to raise 5,000*l.* for portions for younger children, as W. the younger should appoint, and in default equally between them, to be vested and payable at twenty-one. W. the younger never appointed, and died leaving an infant son and three younger children. On bill filed, and application for maintenance for them:—Held, that there being a third person (the eldest son) interested, and not *sui juris*, no maintenance could be allowed. *Willow v. Brown*, 2 W. R. 153.

9. Where a testator made a special provision for the maintenance of his younger children until receipt of their portions, and stated that the maintenance given to the sons (saying nothing as to daughters), which was less than the interest on their portions, should be in lieu of interest:—Held, that the daughters were not entitled to interest as well as maintenance, although the will directed that the trustees should stand possessed of the fund appointed for payment of their portion, and of the interest, dividends,

and annual produce thereof, in trust for the daughters, on their attaining twenty-one. *Selby v. Gillum*, 2 Y. & Coll. 379.

1. Devise of real estates to testator's daughter for life, with remainder to his two sons in fee, and, in case daughter should leave any child or children living at her death, then he directed that the two sons or their heirs should pay to such child or children 200*l.*, equally between them, as they should severally attain twenty-one, and interest for the same, until the legacy should become due, for maintenance, etc. The daughter left one child, which lived several years but died an infant:—Held, that interest was due from mother's death to child's death. *Harris v. Finch*, 1 McClel. 141.

2. Where a testator bequeathed an annuity to his granddaughter for her life, and directed that if she should die during the lifetime of his widow the annuity should be paid for the maintenance of the children of the granddaughter, and that from and after the decease of his widow and granddaughter the value or the amount of the annuity (such a sum as would produce it according to the then legal rate of interest) should be paid to all and every the child and children of the granddaughter; if more than one, to be equally divided amongst them when and as they should respectively attain the age of twenty-one years, and if there should be but one then the whole to such one child, with a gift over, in case of the death of the granddaughter without issue who should attain the age of twenty-one; the children of the granddaughter are not entitled to the annuity or interest of the fund after the death of the widow and their mother until they attain the age of twenty-one years. *Festing v. Allen*, 5 Hare 575.

3. A testator, having bequeathed various legacies, and, among others, an annuity of 5*l.* to his daughter during her life, directs his son (whom he afterwards makes his executor) to take care of and provide for her, and, "subject as aforesaid," he gave to that son the residue of his real and personal estate: the daughter is entitled to a provision out of the residue in addition to her annuity, and a reference will be directed to the Master to fix the amount of such provision. *Broad v. Bevan*, 1 Russ. 511. n.

4. An hotel keeper by his will desired his wife to carry on the business after his decease for the benefit of herself and his family so long as it might be conducted with advantage; and gave the hotel, etc., to trustees, upon trust to permit his wife to receive the profits, that she might apply the same in the maintenance of herself and family and for the education of the children; and if such profits were not sufficient, a sufficient proportion of the interest, etc., of the residue of his property was to be so applied. The testator left two children. The wife in 1852, after his death, left the hotel, abandoned her children, and otherwise misconducted herself. Upon the construction of the will:—Held, that since that time she was entitled to maintenance only out of the testator's estate; and one-third of the profits of the business was allowed to her for that purpose. *Castle v. Castle*, 5 W. R. 643; 29 L. T. 243.

5. By marriage settlement a sum of stock was vested in trustees, upon trust to pay the

dividends to the husband and wife, and the survivor during life, upon the condition that they should, during the minorities of their children, find and provide them with suitable diet, clothing, and general maintenance and support, in proportion to the circumstances and condition in life of the husband and wife, and to the expectancies of the children. The husband subsequently presented a petition, under the Insolvent Debtors Protection Act, upon which an official assignee was appointed and an order for protection granted, on the terms of his paying 30*l.* a year out of the dividends of the settled estate in discharge of his debts. The husband and wife afterwards assigned all their interest in the trust fund to R. O., an assignee, for valuable consideration. The trustees having paid the fund into court, under the provisions of the Trustees Relief Act, the infant children presented a petition, asking that the dividends of the whole trust fund might be applied for their maintenance and support. This petition was opposed by R. O. The Lord Chancellor, however, made the order, holding that under the terms of the settlement the children were entitled, but without deciding what he would have done if it had been shown that the money borrowed from R. O. had been directly for the benefit of the children, and without determining what was the effect on the interest of the husband of the order for protection. *Re Dalton*, 1 De G. M. & G. 265; 21 L. J., N. S., Ch., 681; 16 Jur. 253.

6. Testator devised his real and personal estates to trustees, in trust to pay certain annual sums for the maintenance of his grandchildren till they attained twenty-five, and to accumulate the surplus income of his estates, which was to form part of his residuary personal estate; and to divide the income of his estates amongst his grandchildren when they attained twenty-five, with benefit of survivorship on any of them dying under twenty-one, without leaving a child that should attain twenty-one; and, on the death of each of them leaving such child, to convey the parent's share to such child; and he empowered his trustees, after the death of the father of his grandchildren, to convey to his grandsons, absolutely, the shares of his estates to which, under the previous trusts, they would be entitled for their lives. A petition by one of the grandsons for an increase of the maintenance provided by the testator was dismissed, the disposition of the property not being such as that the grandchildren must of necessity take the whole fund. *Turner v. Turner*, 4 Sim. 430.

7. Testator gave his wife 400*l.* a year in addition to 500*l.* a year under her settlement, in consideration of the expense and care she would incur in the maintenance of their children; she must maintain them when at home, but is not to be charged with education or maintenance at school. *Collier v. Collier*, 3 Ves. 33.

8. Upon a marriage settlement, the settlor conveyed certain lands in trust for himself for life, remainder to trustees for a term, to raise an annuity for the lives of the husband and wife, and of the survivor, and subject thereto and in the meantime to trustees for a long term, in trust, subsequently to the previous

charge, by mortgage or otherwise, to raise a sum as a portion for the children of the marriage; and with the annual proceeds, or otherwise, to provide for their maintenance from and after the decease of the settlor, as the parents should by deed appoint:—Held, that the latter term did not wait for the commencement of it until after the death of the survivor of the husband and wife, but commenced at the death of the settlor; and that the parents, after the death of the settlor, might, by deed under the powers, direct an annual sum to be raised for such maintenance. *Gough v. Andrews*, 1 Colly. 59; 8 Jur. 306.

1. A testator bequeathed to each of his six grandchildren 200*l.*, and, in case any of them should not have attained twenty-one at the death of the testator, he directed his trustees, who were also his executors and residuary legatees, to pay interest for the legacies of such children, after the rate of 5 per cent., towards their maintenance and education. Upon differences arising between the father of the children and the trustees as to the investment of the money pending minorities, the trustees file their bill to obtain the direction of the Court, and for leave to pay the amount into court:—Held, that the trustees might pay the principal money into court; and, *semble*, the trustees will not be liable to make up the difference between the dividends on the money in court and the 5*l.* per cent. *Abraham v. Holderness*, 6 Jur. 290.

Semble, if the direction in the will had been for the trustees to pay interest at 2 per cent., and the money was paid into court, the legatees would be entitled to the full amount of the dividends. *Id.*

2. The testator, standing *in loco parentis*, directed his trustees to levy and raise, for the maintenance of such of the children of his son J. and his daughter E. for whom it was his intention to provide portions; in the meantime, until such portions should become payable, such yearly sum (not exceeding what the interest of the expectant portions intended to be provided for such children would amount to at 4 per cent.) as the trustees should deem sufficient:—Held, that the legatees were not entitled to interest at 4 per cent. from the testator's death, but to maintenance only. And the trustees only having applied less than 4 per cent. on their portions for the maintenance of the children:—Held, that they were not entitled to have the difference paid to them. *Rudge v. Winnall*, 12 Beav. 357; 18 L. J., N. S., Ch., 469; 13 Jur. 737.

3. Legacy to a father, the better to enable him to provide for his younger children: he consented to secure the capital, but was held entitled to the interest. *Brown v. Casamajor*, 4 Ves. 498.

4. Gift to A. of 15*l.* per annum for bringing up B.:—Held, that a trust was created for the benefit of B., which did not fail by the death of A. *Pilcher v. Randall*, 9 W. R. 251; 4 L. T., N. S., 398.

5. Testatrix directed the interest of her residuary estate to be applied in defraying the expenses of the education of her nephews George and Charles, and the principal to be applied either in binding them apprentices at the age of fourteen, or to be reserved till they attained twenty-one, to commence business.

"In the event of George and Charles (both or either of them) being settled before this will comes in force, I provide that the next boy (James or Henry) have the benefit, and so on." George and Charles survived the testatrix, but died under twenty-one:—Held, that James and Henry were entitled to the residue. *Prestwidge v. Groombridge*, 6 Sim. 171.

6. A father, by will, gave real estate to his daughter for life, with remainders in tail, and gave her power to appoint a life estate to any husband she might marry, and he bequeathed his residuary personal estate upon corresponding trusts, but directed that the income of it should not vest in any child presumptively entitled to it, but should be applied in the maintenance of such child. The daughter married and had four children, and after appointing a life estate in the property to her husband, she and her husband appointed the whole (subject to their life estates) in trust for their children. The sum was large to which each child would be entitled on the death of the parents. The mother died, and the husband disposed of his life estate so that he derived no income from it, and the children could not be maintained in a manner consonant with their expectations. The Court sanctioned a scheme for raising 600*l.* a year for their maintenance. *De Witte v. Palm*, 14 L. B., Eq., 251; 26 L. T. 825; 20 W. R. 858.

7. Held, under the limitations of an antenuptial settlement giving *inter alia* a life interest to the wife for her separate use, without power of anticipation, with a clause of maintenance, that the maintenance clause did not enable the wife to affect her life interest by a prospective provision for the children, at all events as regarded any period beyond the minority of the sons, or the minority or marriage of the daughters. *Horlock v. Horlock*, 2 De G. M. & G. 644.

Amount allowed and Parents' Ability where Express Trusts, and where Several Funds.] See INFANT.

IX. Discretionary Trusts and Interference by the Court.

See also XXIII. *post*.

- I. *Who may Exercise*, 6942.
- II. *Control of the Court over Trustees in Exercising the Trusts*, 6942.
- III. *Exercise of by the Court where Trustees Disclaim or Refuse to Act*, 6944.
- IV. *Where pending Suit or Fund paid into Court*, 6945.
- V. *Other Cases*, 6945.
- VI. *In Exercise of Trusts for Advancement and Maintenance*. See VIII. II. 5 *ante*.
- VII. *Gifts whether Construed as a Power or as a Discretionary Trust*. See POWER, II.
- VIII. *Discretionary Powers of and Trusts for Sale*. See POWER, XXI. II.
- IX. *Exercise of by New Trustees*. See XVI. I. 5 *post*—POWER, XXI. III. 2.

I. WHO MAY EXERCISE.

1. Testator devising an estate to persons whom he names trustees for such purposes as they or the major part of them shall think fit, gives no benefit to them, but is an authority only by appointing a quorum out of them. *Cook v. Duckenfield*, 2 Atk. 568.

2. Archbishop P. devised his options to trustees, regard being had in the dispositions of them, according to their discretion, to his eldest son, Dr. P., the husbands of his daughters, his present and former chaplains, etc.:—Held, a personal trust, and, the trusteeship of C. being vacant, one of the trustees might present the other, he being within the description in the will. *Potter v. Chapman*, Amb. 98; Dick. 146.

3. A testator gave his residuary personal estate to the trustees named in his will, their executors, administrators, and assigns, upon trust to apply the same as he should appoint; and in default of appointment as to any part, he directed the trustees to settle such part at their discretion either for pious and charitable purposes, or otherwise for the benefit of the testator's sister and her children:—Held, that this was a personal trust, which a representative of the surviving trustee could not execute, and that a sum which remained at the decease of the surviving trustee, and which had not been applied to charitable purposes, or for the benefit of the testator's sister and her children, was undisposed of, and belonged to the testator's next-of-kin. *Down v. Worrall*, 1 Myl. & K. 561.

4. A bequest of 2,000*l.* to testator's executors, in trust, to build a bridge in Scotland over the River Don, "the situation to be chosen by them," was allowed by them to remain unapplied, and to accumulate for thirty years. *Sebble*, the power of selection given to the original executors ceased upon their death. *Forbes v. Forbes*, 18 Beav. 552.

5. Where lands are devised to trustees in fee upon trusts, or with powers requiring the exercise of judgment and discretion, and they disclaim, the heir-at-law cannot exercise such powers or trusts, although he may hold the estate subject to the trusts of the will. *Robson v. Flight*, 11 Jur., N. S., 147; 34 L. J., Ch., 226; 13 W. R. 393; 11 L. T., N. S., 725.

A trustee devised real estate to trustees, and directed that they should and might grant leases thereof for the term of twenty-one years. The trustees disclaimed the trusts, and the heir-at-law, who was tenant for life of a moiety, granted a lease:—Held, that the lease was invalid. *Id.*

Held, also, that the acceptance of rent from 1860, payable under the lease, by one of the plaintiffs, was not a confirmation of the lease. *Id.*

II. CONTROL OF THE COURT OVER TRUSTEES IN EXERCISING THE TRUSTS.

6. In case of personal trust under a will, the Court never interferes, unless the trust be corruptly executed. *Potter v. Chapman*, Amb. 99; Dick. 146.

7. If testator's intention is clearly manifested on will to give an unlimited discretion

to trustees, the Court will not control it; but, in general, discretion must be held to the limitations in the will. *Conley v. Hartstrong*, 1 Dow 361, 378.

8. A. makes two of his daughters his executrices, and directs them to distribute a sum of 400*l.*, and also the residue of his personal estate, among themselves and their brothers and sisters, according to their needs and necessities, as they in their discretion should think fit. The Court restrained the exercise of this power, by decreeing a double share to the eldest son and heir, looking upon him as a necessitous person. *Warburton v. Warburton*, 4 Bro. P. C. 1.

9. Where discretion of trustee is to be exercised on matters of fact, Court will substitute a Master, but not if upon matter of opinion or judgment. *Walker v. Walker*, 5 Madd. 424.

10. Where trustees are appointed to execute a trust according to discretion, they are bound to state reasons for any conclusion at which they may arrive in fulfilling the duty imposed on them; their discretion must, however, be exercised with an absence of indirect motives, with honesty of intention, and with a fair consideration of the subject; and the duty of the Court generally is to see that the discretion of the trustees has been thus exercised, and not to deal with the accuracy of the conclusion at which they may have arrived. *Re Wilkes' Charity*, 3 Macn. & G. 440; 20 L. J., Ch., 588.

If, however, in such cases, trustees think fit to state a reason for their conclusion, the Court may consider the validity of the reason thus stated, and if it sees that the reason does not justify the decision, it may correct the decision accordingly. *Id.*

Trustees of a charity were to select, out of certain parishes named, a lad to be brought up as a minister of the Church of England, his parents not being able to educate him for that situation, and in the event of no suitable candidate being found in the specified parishes, then to select a lad from any other parish. On a vacancy occurring the trustees chose C. J., a lad not of the specified parishes, and declared the election without stating any reasons for their choice. On a petition presented to set aside this election, and to obtain a decree that the trustees ought to have elected W. G., a lad of one of the specified parishes:—Held, that the trustees were right in abstaining from the statement of any reasons for the selection they had made, and that in the absence of any proof that they had exercised their discretion otherwise than fairly and honestly, the Court had no jurisdiction to interfere on the question of the correctness of their decision. *Id.*

The petition was dismissed accordingly, the petitioners paying their own costs, and the costs of the trustees being paid out of the funds of the charity. *Id.*

11. A complete miscarriage in the exercise of discretionary power on the part of trustees puts the subject-matter of the trust just as much under the cognizance of the Court as if such discretion had been fraudulently exercised. *Foltham v. Turner*, 23 L. T., N. S., 345.

12. Where a discretionary trust is vested in trustees, the Court will not interfere with the exercise of the discretion, if it be not capri-

cious or improper, though a suit is instituted for the administration of the trust funds. *Gray v. Gray*, 13 Ir. Ch. R. 404.

1. Where the disposition of a trust estate amongst certain objects is made by the author of the trust to depend upon the discretion of the trustee, the Court will, in a proper suit, inquire into the manner in which the trust has been administered, and require that such discretion shall be fairly and honestly exercised; and so long as it appears to be so exercised, the Court will not deprive the trustee of the discretionary power which he possesses, or assume itself the exercise of that power; but to avoid a repetition of suits where there is reason to apprehend that the conduct of the trustee may be liable to question, the Court may require the discretion of the trustee to be exercised under its view. *Costabadie v. Costabadie*, 6 Hare 410; 16 L. J., N. S., Ch., 259; 11 Jur. 345.

2. A testator directed his trustee "to divide an estate amongst his, the testator's, first cousins as he in his discretion might think proper, by dividing the whole equally among them, or between two or more, or giving the whole to any one, for such estates and interests, and subject to such conditions and limitations as he should think proper":—Held, that the trustee had a power of selection only, and that if he appointed to more than one, he must do so equally among them. *Ward v. Tyrrell*, 4 Jur., N. S., 779; 27 L. J., Ch., 749.

3. By marriage articles, a wife was authorised to divert the trust funds for the benefit of herself or children, provided the diversion be acceded to by the trustees:—Held, that the trustees had a discretion to consent or not, that it must be *bonâ fide* exercised, and to justify their assent, the purpose for which the money was to be applied must, in their judgment, appear to be really for the benefit of the wife or children. *Byam v. Byam*, 19 Beav. 58; 1 Jur., N. S., 79; 24 L. J., Ch., 209.

4. A testatrix devised freehold and copyhold estates to a trustee, upon trust to sell and divide the proceeds among her brothers and sisters living at her decease, equally or in other proportions, at the discretion of the trustee. She afterwards executed an unattested codicil, by which she directed that the interest of the trust property should be applied for the benefit of such of her brothers and sisters as were not otherwise provided for, and particularly towards the support of one of her brothers, P. who was of weak mind; and in case the trustee should not live to execute all the trusts, they were to be performed by such person as he should appoint. He executed a deed of appointment, naming other trustees, and giving directions as to the time for selling the trust estates and the application of the proceeds, and directed P. to be supported out of the income; and the proceeds of one estate to be divided equally among P.'s brothers and sisters who should be living at his death; and the proceeds of another estate to be divided at his death among such of his brothers and sisters as should most require it:—Held, that the appointment by the trustee, and the directions contained in it, were not altogether invalid; but the Court directed, that, after providing for the comfortable sup-

port of P., the proceeds from both estates should be divided equally among all the testatrix's brothers and sisters who were living at the death of the testatrix, except P. *Hitch v. Leemorthy*, 2 Hare 200; 15 L. J., N. S., Ch., 235.

A trustee for the government of his own discretion may have regard to the directions of an unattested codicil, even as to the proceeds of real estate, so far as he is not restrained by the effect of the will. *Id.*

5. On demurrer:—Held, that trustees to whom discretionary power was given of renewing leases, had not an arbitrary power of renewal, but must renew when most for benefit of *cetui quo trust*. *Milington v. Mulgrave*, 3 Madd. 491.

6. Direction in will, that executors shall pay annuity, unless circumstances render it unnecessary, impracticable, and inexpedient, means unless in the opinion of executors it shall become so, and Court has no control over such discretion, unless they act *malâ fide*. *Frenoh v. Davidson*, 3 Madd. 396.

7. Where absolute discretion has been given to trustees as to the exercise of a power the Court will not compel them to exercise it, but if they propose to exercise it, the Court will see that they do not exercise it improperly or unreasonably. Where the power is coupled with a trust or duty the Court will not enforce the proper and timely exercise of the power, but will not interfere with the discretion of the trustees as to the particular time or manner of their *bonâ fide* exercise of it. *Tempest v. Camoys (Lord)*, 21 L. R., Ch. D., 571; 51 L. J., Ch., 785; 48 L. T. 13; 31 W. R. 326.

A testator gave his trustees a power to be exercised at their absolute discretion of selling real estates, with a declaration that the proceeds should be applied, at the like discretion, in the purchase of other real estates. He also gave him power at their absolute discretion to raise money by mortgage for the purchase of real estates. A suit having been instituted for the execution of the trusts of the will, and a sum of money, the proceeds of the sale of real estate, having been paid into court, one of the trustees proposed to purchase a large estate and to apply the fund in court in part payment of the purchase money, and to raise the remainder of the purchase money by mortgage of the purchased estate. The other trustee refused to concur in the purchase:—Held, that the Court could not control the dissentient trustee in the exercise of his discretion in refusing to make the purchase, or in refusing to exercise his power of raising money by mortgage for the proposed purpose. *Id.*

8. L., on his marriage, gave a bond and warrant to the trustees of his settlement, upon trust, "when the trustees should think fit and expedient so to do," to levy the amount, and hold it for the uses of his settlement. No judgment on the bond was ever entered, and the amount of the bond was lost:—Held, that the discretion conferred upon the trustees was not absolute, but to be controlled by the Court; and that the circumstance that enforcing the bond might have been injurious to L.'s credit as a trader and have lost him various situations, did not justify them in omitting to enforce the bond. *Luther v. Hancock*, 10 Ir. Ch. R. 194.

1. The Court will control the discretion reposed in trustees by the provisions of a will when such discretion is dishonestly or improperly exercised. *Davey v. Ward, Re Hodge*, 26 W. B. 390; 47 L. J., Ch., 335; 7 L. R., Ch. D., 754.

2. Where a trustee has a discretionary power, the Court will not interfere with the exercise of it, except where it is mischievously, or ruinously, or fraudulently exercised. The *onus* of showing that it has been so exercised rests on those who impeach the acts of the trustee. *Re Brittlebank, Coates v. Brittlebank*, 30 W. R. 99.

3. Although the mere existence of a discretionary power in trustees over a fund affords no reason why the Court should not order payment of the fund into Court, unless such payment into Court would interfere with the exercise by the trustee of such discretion; yet where it appeared that trustees were about, in the due exercise of a discretionary power to deal with a fund, the Court refused to order payment into court, although the trustees had not actually parted with the fund. *Talbot v. Marshfield*, 2 Dr. & Sm. 285.

III. EXECUTION OF BY THE COURT WHERE TRUSTEES DISCLAIM OR REFUSE TO ACT.

4. When trustees are directed to pay a certain sum to a person for life, and are empowered, according to their discretion, to invest the trust funds out of which that sum is to arise, but decline or neglect to act, and the assistance of a court of equity is sought in order to carry into effect the purposes of the will, the Court will not, as a matter of course, exercise that discretion, but will only act on its established known rules, unless the intention of the testator plainly appears to exclude such a mode of proceeding. *Prendergast v. Prendergast*, 2 H. L. Ca. 195; 14 Jur. 989. Affirming *S. C. nom. Prendergast v. Lushington*, 5 Hare 171; 16 L. J., N. S., Ch., 125; 11 Jur. 865.

5. A testator gave his leasehold to trustees for legatees in succession, and upon trust, if the trustees "should think it proper or advantageous, as to those which were customarily or might be renewed," to endeavour to renew; and in order thereto, should, "if they, in their discretion, should think fit or expedient, but not necessarily or peremptorily," insure the lives of the *cestuis que vivent*, and apply the insurance money in renewing, and out of the rents and profits raise sufficient money to renew so often as a renewal should be advisable; and he gave a power to mortgage for the same purpose:—Held, first, that this was an imperative trust, and that the trustees were bound to renew, if they could do so on reasonable terms; secondly, that if the trustees refused, the Court would exercise it; and, thirdly, that they were bound to raise the necessary funds in such a mode as would be most beneficial to all parties interested. *Mortimer v. Watts*, 14 Beav. 616; 21 L. J., N. S., Ch., 169.

6. A. and B., for whom land had been purchased by C., with a view to its being re-sold in building lots, on the land being conveyed to them, signed a paper writing purporting to be a memorandum of an agreement between them relative to the land, by

which it was agreed that they should each advance half the purchase money, and receive interest on the same at 5 per cent., and that they were to have each one-third interest in the purchase, and to receive one-third of the profits arising therefrom for C., in lieu of his commission for purchasing, selling, surveying, valuing, and laying out the lands in lots, or any other services that might be required of him; but that it was clearly and distinctly understood that C. should have no power or authority whatsoever over the land, and that he should not be entitled to receive any compensation therefrom until the whole was sold and paid for. The land having afterwards greatly increased in value, A. and B. refused to recognise C.'s interest in the speculation, and offered him a money compensation for his services. Whereupon C., who had objected from the first to the clause in the memorandum which excluded him from all control, as inconsistent with the original terms for which he had verbally stipulated, filed his bill for an immediate sale of the land. And the Court, being of opinion that the defendants, by repudiating the trust as to C.'s share, had devolved upon the Court the discretion which they had by the memorandum reserved exclusively to themselves, as to the time of sale, declared C. entitled to one-third, and referred it to the Master to inquire whether it would be for the benefit of all parties that the land should be sold. *Dale v. Hamilton*, 2 Ph. 266; 16 L. J., N. S., Ch., 397; 11 Jur. 574. And see *S. C.* 5 Hare 369.

7. Trust deed, whereby trustees were to give the residue of A.'s estate "among all his friends and relations, where they should see most necessity, and as they should think most just;" though in other cases the Court will not interpose where trustees declining to act have a power to distribute generally, according to their discretion, without any defined object, it was:—Held, that here a rule was laid down, the word "friends" meaning "relations," and the Court could judge of the respective families' necessities and occasions by a reference to the Master. *Gower v. Mainwaring*, 2 Ves. 87.

8. Bequest of 20,000*l.* to executors, in trust to divide amongst testator's younger sons at twenty-five. Further bequest of 50*l.* to each of the sons annually, until their portions should be payable, and such a further sum as in the discretion of the trustees might seem necessary, but not to exceed 3,000*l.* These legacies were charged on the real estate. One of the executors having disclaimed on a bill filed by the other executor and the elder sons:—Held, that the whole 3,000*l.* should be raised. *Young v. Young*, 1 Jur. 840.

9. Testator directed his residuary, real, and personal estate to be divided by his trustees, in such shares and at such times as they should think proper, amongst his nephews, A., B., and C., and his other nephews and nieces, sons and daughters of his late sisters, T. and H., who should be living at his decease, and the children of any other such nephews and nieces who, having died in his lifetime, had left issue. There were several children, and children of the deceased children, both of T. and H., living at the testator's death. The trustees not being able to agree as to the division of the property, the Court ordered it

to be divided amongst the children, and the children of the deceased children of T. and H. *per capita*. *Tomlin v. Hatfield*, 12 Sim. 167.

1. Where property is vested in trustees by an instrument, in the Scotch form, and they have an absolute discretion given to them as to the distribution of it amongst a particular class, but decline to exercise that discretion, upon a suit being instituted to secure the property in this country the Court will direct the distribution of the fund equally between the members of the class, such discretion not involving the construction of the instrument or the exercise of a discretion, in the place of the trustees. *Little v. Neil*, 10 W. R. 592; 31 L. J., Ch., 627.

By a marriage settlement, trustees were empowered to apply the income and capital of the trust estate for the use and benefit of such one or more of the wife and children of P. and the issue of such children, as the trustees in the exercise of a free and unlimited discretion should select and determine; but such provision for the wife to be by annuity depending on the life of P. The trustees declined exercising their discretion, and the Court directed the fund to be divided equally between the wife and children and grandchildren, without making any provision as to an annuity to the wife. *Ib.*

2. Bequest to trustees to apply the income or principal for the benefit of J., widow, and of her three children, in such proportions as the trustees in their absolute discretion should think proper; but in case J. married again, her interest to cease. The trustees declined to act:—Held, that the fund must be divided equally between J. and her three children. *Isod v. Isod*, 32 Beav. 242; 9 L. T., N. S., 191; 1 N. R. 462; 9 Jur., N. S., 1216.

3. A testator empowered his widow, with the assistance of his trustees, to sell his estates, and the money arising therefrom "she, his said wife, should and might divide and appoint among his children, as she should think fit and proper, or as she should direct and order by any will".—Held, that this was a trust for the children, and that, no valid appointment having been made by the widow, the children were entitled equally. *Grievson v. Kiropp*, 2 Keen 653; 6 L. J., N. S., Ch., 261.

4. If trustees in whom a discretionary trust is vested do not concur, the Court will distribute the trust fund among the parties equally. *Gray v. Gray*, 13 Ir. Ch. R. 404.

Where one of two trustees in whom a discretionary trust is vested was resident in Australia, the Court would not act on a scheme for the distribution of the fund, approved of by his solicitor in the suit and the other trustee. *Ib.*

5. A husband gave his property to trustees for his wife for life, and at her death he directed his trustees to pay 1,000*l.* equally between and among such ten of the children and grandchildren and other descendants of W. B. and H. B., as his trustees should, in their uncontrolled discretion, after inquiry, judge most to require the benefit of such a bequest. The trustees died without making a selection. There were no descendants of W. B., and at the death of the testator's widow there were only six descendants of

H. B. living:—Held, that the sum was divisible amongst them. *Carthow v. Enraght*, 26 L. T., N. S., 834.

6. Variation on petition of a scheme settled on further consideration for the administration of the estate of a testator according to a discretion reposed by him in his trustee, and exercised in their stead by the Court. *Benett v. Wyndham*, 4 De G. F. & J. 259.

IV. WHERE PENDING SUIT OR FUND PAID INTO COURT.

7. A trustee having a discretionary power as to the application of a trust fund, does not necessarily abandon it by paying the trust fund into court. *Re Landon*, 40 L. J., Ch., 370.

8. After a decree in a suit for administration of trust funds the Court will not without reason control a discretionary power given to the trustees by the instrument creating the trust. *Brophy v. Bellamy*, 43 L. J., Ch., 183; 8 L. R., Ch., 798; 29 L. T., N. S., 380.

9. The Court having possession of a fund, impressed with a trust, but subject to a discretion given to trustees, will execute the trust without regarding the discretion. *Re Cow*, 4 Kay & J. 199; 4 Jur., N. S., 158.

See also EXECUTOR AND ADMINISTRATOR—POWER.

V. OTHER CASES.

10. Where a Hindoo testator made two of his sons his executors, and after directing the performance of various religious acts by them, and that when they should do them they should give notice to their brothers, and that they should all of them perform the acts; otherwise, whatever the executors might think proper they might do, and, should any one raise objections, they should be inadmissible:—Held, that the executors had not an unlimited discretion in expending the testator's fortune in religious ceremonies. *Mullick v. Mullick*, 1 Knapp 245.

11. A discretion vested in trustees of a settlement must be exercised in such a way as to preserve, not to defeat, the objects of the settlement. *Eland v. Baker*, 29 Beav. 137; 7 Jur., N. S., 956; 9 W. R. 444.

12. Trustees will not be charged with loss to the trust estate, arising from acts done by them in the honest exercise of a discretion conferred upon them by the author of the trust, though in opposition to the judgment or wish of the *cestui que trust*. *Selby v. Bowie*, 2 N. R. 2; 1 N. R. 420; 9 Jur., N. S., 432; 11 W. R. 606; 6 L. T., N. S., 372.

13. In ordinary cases it is the duty of trustees to get in the funds, but where under the terms of the instrument constituting the trust it is the duty of the trustees not to do so if in their discretion they consider it inexpedient, misconduct on their part must be proved in order to render them liable for loss, and the ordinary rules as to wilful neglect and default have little application. A *cestui que trust* sought to charge a trustee with breach of trust in not recovering moneys, which were recoverable only in equity:—Held, that as

under the circumstances the *cestui que trust* might have himself sued, he could not make the trustee liable for not doing what he could at any time have himself done. *Paddon v. Richardson*, 1 Jur. 1192; 7 De G. M. & G. 563; 3 Eq. Rep. 933.

1. By the marriage settlement of A. a sum of 8,000*l.* stock was settled upon himself and his intended wife for their joint lives and the life of the survivor, and then for the benefit of their children; and if no children, in trust for the settlor, his executors, administrators, and assigns. After the marriage A. made his will and thereby gave his real estate to P. and his heirs upon the same trusts, as near as could be, as were declared of the stock by the settlement, and after giving certain pecuniary legacies, he bequeathed all the rest of his moneys and property of any kind to P., his executors, administrators, and assigns, upon trust and for the benefit of the objects of his settlement as he might think best. A. died, leaving his widow, but no issue of the marriage. P. declined to take probate of the will:—Held, that whether the course taken by P. had or had not the effect of depriving him of the discretionary power given him by the will, he could not in the events that had happened, exercise that power so as to affect the rights of the parties interested under the will and settlement, and that the effect of these instruments was to give a life interest to the widow in the real and residuary personal estate impeachable of waste as to the real estate, with the remainder as to the real estate to the testator's heirs, and as to the residuary personal estate to his next-of-kin. *Ford v. Ruston*, 1 Colly. 403.

2. A trustee of a will, who had formally renounced that character by a deed which purported (but ineffectually) to appoint a successor, being applied to eleven years afterwards to join with his original co-trustee in a deed purporting to be an exercise of a discretionary power, which could only be exercised by the two trustees of the will for the time being, refused to do so without an indemnity, but ultimately, on being indemnified, executed the deed:—Held, that he could not resume his position as trustee for such a purpose, and that, even if he could, his execution of the deed under the circumstances stated, could be regarded only as a mere formal act, and not as an exercise of that discretion which was essential to a due execution of such a power. *Lancashire v. Lancashire*, 2 Ph. 657; 17 L. J., N. S., Ch., 270; 12 Jur. 363.

3. A settlement was made of a trust fund, in moieties, for the granddaughters of the settlor for life (subject to a prior interest in their mother), with remainder to their children as they should appoint, or in default equally. A power was interposed, that in the event of either of the granddaughters marrying with consent, the trustees might transfer to her part of the trust funds. One of the granddaughters married with consent, but the power was not executed by the trustees:—Held, that the execution of the power was discretionary with the trustees, and they not having exercised it, the granddaughter was not entitled to payment to her of any part of the capital of the trust funds. *Re Strickland's Trusts*, 1 N. R. 164.

4. Charitable gift to the use of the repara-

tion of the church of U., and to the use of the reparation of the bridge of U., and to the use of other things needful within the parish of U., at the discretion of the trustees, to be applied and distributed for ever:—Held, that the discretion applied to the third branch only, and that the three objects took equally. *Re Hall's Charity*, 14 Beav. 115; 15 Jur. 940.

5. K., by will, directed his trustees, on B., the eldest son of K., and failing him the next eldest son, attaining twenty-one, to convey certain real estates to K., but in case any of the children conducted themselves so as not to merit the approbation of the trustees, then such children were to have life estates only. K., by codicil, directed his trustees to postpone the conveyance to R. till he attained twenty-five. R. at twenty-three married, with the approbation of the trustees, though they were not parties to his marriage settlement, which settlement disposed of his interest under his father's will as if it were an estate in fee. When R. attained twenty-five, the trustees, not being satisfied with R.'s conduct, conveyed to him only a life estate in the premises:—Held, first, that the eldest son was included under the term children: secondly, that the trustees were not bound to declare their dissatisfaction until R. attained twenty-five, and that they could not by having assented to R.'s marriage preclude themselves from discharging the duty of reviewing his conduct when he attained twenty-five. *Weller v. Ure*, 15 L. T., N. S., 97.

6. A testator gave all his real and personal estate (after certain specific and pecuniary gifts) to trustees, including therein a promissory note for 3,000*l.* and interest due from J. L. C., upon trust to get in and convert, and divide among certain persons, of whom J. L. C. was one. If J. L. C. behaved to the satisfaction of the trustees in a certain business in which he was placed, the trustees were to cancel the note for the benefit of J. L. C.; but if he did not behave to their satisfaction in the said partnership for six years from the testator's decease, they were to call in the note. Within a year from the testator's decease the partnership, in which J. L. C. was, was dissolved: then J. L. C. became bankrupt: then the trustees (but long within six years after the testator's decease) gave notice to J. L. C. that he had misconducted himself, and called in the 3,000*l.* In their answer, which was also within the six years, the trustees declared that the misconduct referred to was misconduct in the partnership, and within the meaning of the will, and that it had caused the dissolution:—Held, that such notice, although after the bankruptcy, was sufficient, and that the 3,000*l.* should be deducted out of the share of J. L. C. in the residue. *Bird v. Johnson*, 18 Jur. 976.

Distinction between a trustee undertaking to make good a debt due to the estate, and actually receiving payment, in the one case being bound to invest it, *i.e.*, if the money be received; but *secus*, where the trustee merely undertakes to make it good, the debtor not being discharged. *Id.*

7. Where trustees have unlimited discretionary power to postpone, as long as they may think fit, the payments of shares of a

residuary fund; and where of the time and manner of exercising the power they are to be the sole and final judges, asserting creditors of the fund will be defeated by the trustees executing, even after action raised, a deed applying the fund as an alimentary provision for the behoof of the beneficiaries. No proceedings resorted to by creditors of the beneficiaries can in such a case abridge the powers of the trustees. *Chambers v. Smith*, 3 L. R., App. Cas. (Sc.), 795.

X. Uses.

— *Executory Uses and Interests.* See POWER—VESTED CONTINGENT AND FUTURE INTERESTS—WILL.

See also COVENANT TO STAND SEISED.

1. Though a use or trust must arise out of the original feoffment to uses, yet they need not be specifically created at the time of execution of the deed. *Wright v. Cadogan (Lord)*, 2 Eden 256.

The Statute of Frauds has only imposed a form in declaring the use; the control of the use remains, as it was before the statute, the absolute will and declared intent of the owner. *Id.* 257.

2. Natural love and affection is very sufficient to create a use, and will amount to a covenant to stand seised, though no other consideration appear. *Lloyd v. Spillet*, 2 Atk. 149.

Uses were introduced during the contests between the houses of York and Lancaster, to avoid forfeitures, and were exactly what trusts are now. *Id.*

3. Where there is an agreement to suffer a recovery, and uses are declared by it, though it is suffered at a different time, yet if there is no subsequent declaration of uses it shall enure to those so declared. *Stapilton v. Stapilton*, 1 Atk. 7.

4. The Statute (27 Hen. 8, c. 10) of Uses was made to execute and bring the estate to the use; and after the statute, the *certui que use* was seised of the estate at law as before he was of the use in equity: but the necessities of mankind, and reasonable occasions in families, obliged the judges to give way to uses notwithstanding. Contingent uses, springing uses, executory devises, and powers over uses, were foreign to the notions of the common law, and could not be let in upon the common law fees, but were let in by construction (by the judges themselves), upon uses after they became legal estates; yet the judges still adhered to the doctrine, that there could be no such thing as a use upon a use; but when the first use was declared, there it was executed, and must rest for that estate. *Hopkins v. Hopkins*, 1 Atk. 591.

Uses in equity and mere trusts stand on different foundations, and will not be governed by the same reasoning. *Id.* 592.

Upon a trust in equity, no estate can be gained by disseisin, abatement, or intrusion, while the trustee continues in possession of the land, neither will Equity suffer a merger of the trust estate; for uses and mere trusts

stand on very different foundations, and are not governed by the same reasoning. All trusts are executory, and the Court must follow the intent of the parties, as far as the rules of law will admit, howsoever improperly a will may be penned. *Id.* 593.

5. A. tenant for life and R., his son and first tenant in tail, suffered a recovery and declared the uses to N., his heirs and assigns, for and until the payment of 4,000*l.*, with interest, and then to the uses of a settlement of 1737, viz., to A. for life, remainder to his first and other sons in tail:—Held, that the declaration to the uses of the deed of 1737, though void as a limitation of the legal estate, was a good declaration of the trust estate. *Stoney v. Saunders*, Hay. & J. 519.

6. *Semble*, by analogy to a use before the statute of uses, there cannot be an occupant of a trust. *Penny v. Allen*, 3 Jur., N. S., 273.

7. No case of a springing use ever introduced in the middle of a limitation, but it always comes in afterwards, and determines the first gift in fee; and whenever it happens to arise, it displaces the first gift, and changes the uses in favour of other persons. *Carnardine v. Carnardine*, 1 Eden 34.

No instance where Equity has considered an estate as not executed, at the same time that law would have considered it as executed. *Id.*

8. Executory devise is in its nature equitable, and becomes legal estate only by application of the Statute of Uses, which executes every species of interest that a court of equity would before: and that has been extended to cases not in contemplation of the statute. *Perry v. Phelps*, 1 Ves. J. 255.

9. The Statute of Uses has executed the legal estate, and joined it to the use; the legal estate, therefore, must want to be executed by a conveyance to make it a trust in equity. *Bagshaw v. Spencer*, 2 Atk. 583.

10. If a purchaser for a valuable consideration has not the legal estate properly conveyed to him, though the consideration cannot create a use by way of covenant to stand seised, yet the vendor will be considered a trustee for the purchaser. *Polleafen v. Moor*, 3 Atk. 273.

11. On a marriage settlement, lands were conveyed to trustees and their heirs, to the use of the trustees and their heirs, to the use of the husband for life, remainder to the use of the wife for life, remainder to the first, etc., sons of the marriage: these limitations to the husband for life, etc., are trusts only, and not uses; and when the husband and wife levied a fine to a mortgagee to raise money, though the fine would have been a forfeiture of the wife's estate for her life had she had the legal estate, against which equity will not relieve, yet decreed that a trust estate was not forfeited by a fine. *Whetstone v. St. Bury*, 2 P. W. 146; Pre. Ch. 591.

12. Where an act is to be done, as a conveyance made, the estate is a trust, not a use executed. *Mott v. Buxton*, 7 Ves. 201.

13. Where a trust is limited to a man and the heirs of his body, with remainder over, the Court will not decree the trustees to convey to him an estate in fee, but an estate tail only. *Saunders v. Nevil*, 2 Vern. 428.

Lands limited to A. in trust for a feme covert, and that A. should receive the rents

and apply them as the feme whether sole or covert should direct. This is a trust, and not a use, executed by the statute. S. C. 1 Vern. 415.

1. The Statute of Uses not applying to copyholds, on a devise of freeholds and copyholds together the legal estate in the copyholds attaches that in the freeholds, and makes it vest in the first devisee. *Baker v. Parson*, 42 L. J., Ch., 228.

XI. Estate of Trustees.

See also X. ante.

- I. *When Trustees take Legal Estate*, 6948.
- II. *Quantity of Estate of Trustees*, 6950.
- III. *Other Matters*, 6955.
- IV. *Of Trustees to preserve Contingent Remainders*. See VESTED CONTINGENT AND FUTURE INTERESTS.
- V. *Whether Estate of Cestui que Trust is co-extensive with Estate of Trustees in Wills or Deeds*. See WILL.

1. When Trustees take Legal Estate.

2. Testator, by will, gives annuity to wife, and legacies to children, knowing he has not sufficient personal estate. He says nothing of his real estate, but appoints certain persons trustees of the inheritance for the execution of his will. *Semble*, the trustees took an interest in the real estate for the purposes of this will. *Trent v. Trent*, 1 Dow 102. S. C. *nom. Trent v. Hanning*, 10 Ves. 495.

3. Construction in favour of vesting the legal estate in trustees for effecting a limitation to the separate use of a married woman. *Hampkins v. Luscombe*, 2 Swans. 891.

Effect of limitation to trustees and their heirs to the use of them and their heirs in conferring the legal estate on the trustees. *Id.* 392.

4. B. desired the residue of his real and personal estate to be divided into eleven equal parts, and he devised and bequeathed to each of his eleven children, his or her heirs, executors, administrators, and assigns, one of the parts. He declared that the share or shares of his daughters should be for their separate use; and as it might probably happen that the arrangements made by his will could not be carried into effect without the sale of the whole, or at least a great portion of his real and personal estate, he recommended great caution in the sale, for he believed that his landed property was daily increasing in value, and he nominated G. and M. executors and trustees of his will for duly carrying the disposition of all the property therein alluded to into proper effect:—Held, that this was not sufficient to divest a legal estate previously devised to children, and to vest it in the trustees, although the words might give a simple power to sell, in an event which might possibly, though not certainly, happen. *London & South-Western Railway Co. v. Bridger*, 10 Jur., N. S., 650; 12 W. R. 948; 10 L. T., N. S., 689.

5. A. devised copyholds to trustees in fee, upon trusts in the will mentioned. A. afterwards executed a voluntary conveyance of the same lands to the same trustees, upon similar trusts to those declared by the will, and covenanted to surrender the copyholds to the trustees, on the trusts declared by the deed, and that until such surrender, and the trustees should be admitted to the copyholds covenanted to be surrendered, A. and her heirs would hold the lands in trust for the trustees, their heirs and assigns, and dispose of the same as they should direct and appoint. A. died without having executed any surrender:—Held, that the legal estate in the lands was in the devisees in trust under the will, and not in A.'s customary heir. *Steele v. Waller*, 6 Jur., N. S., 1004.

6. Limitation to trustees to stand seised and receive rents and profits to the use of A., is an estate executed in A. *Carnardine v. Carnardine*, 1 Eden 36.

7. Lands limited to A. in trust for a feme covert, and that A. should receive the rents and apply them as the feme, whether sole or covert, should direct. This is a trust, and not a use, executed by the statute. *Novil v. Saunders*, 1 Vern. 415.

8. Devise of freehold and copyhold surrendered to the use of the will to trustees and the survivor and his heirs, in trust to pay debts and legacies, an annuity to the testator's son, and for other purposes; then on the marriage or attaining twenty-one of his granddaughter, to convey to her for life, remainder to trustees, etc., remainder to her first and other sons in tail male, remainder to her daughters in tail general, remainder to such persons, for such estates, and subject to such charges and conditions, as he should by any deed or instrument, with two or more witnesses, appoint: the next day by deed poll, with two witnesses, reciting his will, and that he had reserved a power of disposing of his estate further, he directed his trustees, immediately after the death of his granddaughter, and failure of her issue, to convey all his real estate to the first and other sons of his son in tail male, then to his daughters in tail general, then to the right heirs of the survivor of his trustees, his heirs and assigns for ever. No conveyance was made. The granddaughter died without issue; then the son died without issue, leaving one trustee surviving. Under the will alone, the trustees have a more legal estate, and all the equitable interest beyond the express dispositions would result to the son as heir; but the deed was considered as a codicil sufficiently executed to pass copyhold, but not freehold. The last limitation is a contingent remainder to the heir of the surviving trustee, and a conveyance was directed with an insertion of trustees to support that remainder as to the copyhold; the rents and profits of the copyhold during the life of the trustee, and all the freehold, to go to the heir of the testator. *Habergham v. Vincent*, 2 Ves. J. 204; 4 Bro. C. C. 353.

9. Devise to trustees and their heirs during the life of A. B., in trust to lay out the rents and issues thereof in Government securities, until A. B. should attain twenty-one, and after that, to suffer her to receive and take the profits during her life, not subject to the debts

or control of her husband, her receipt to be a sufficient discharge; and, after her decease, to her heirs. Upon a suit for specific performance of an agreement for the purchase of part of the estates, the question was whether A. B. took the legal, or only an equitable interest for life in the property, so as to bring the title within the rule in *Shelley's case* (1 Rep. 93. b.). The Lord Chancellor C. B. would not compel the defendant to accept the title. *Playford v. Hoare*, 3 Y. & J. 175.

1. A testator devised property to A. for life, remainder to B. and C. in fee upon trusts, and appointed A., B., and C. his executors. By a codicil, he revoked the appointment of B. to be a trustee and executor, and appointed A., C., and D. trustees and executors, as fully and effectually to all intents and purposes and in all respects as if they had originally by his will been appointed to be the trustees and executors thereof:—Held, that the legal estate passed to A., C., and D. *Re Turner*, 2 De G. F. & J. 527; 7 Jur. N. S., 114; 30 L. J., Ch., 144; 9 W. R. 174; 3 L. T., N. S., 573.

2. A testator devised and bequeathed his real and personal estate to his wife and three other persons, and their heirs, executors, etc., for ever, upon trust for his wife to receive the rents for life; and after her decease, upon trust "to pay and divide the rents among his children as they attained twenty-one, and after their decease, to pay the principal of their respective shares unto their legal representatives, their executors, administrators, and assigns. He gave power to the trustees to sell, with power of maintenance out of the rents, and advancements out of the principal of their shares; and in case any of his freehold estates should not be sold by his said trustees, then, from and after the decease of his said children, he devised the same unto their respective heirs and assigns, as tenants in common. And he directed that the receipts and conveyances of his said trustees to any purchasers of any part of his estate and effects should be good discharges and assurances:—Held, that the trustees took the legal fee, and that the children were entitled to equitable estates for life, with equitable remainders to their heirs, which, united, gave them equitable estates in fee-simple. *Reynell v. Reynell*, 10 Beav. 21.

3. Real estate was assured by deed unto and to the use of a trustee, his heirs and assigns, for a married woman for life to her separate use, and from and after the determination of that estate to stand seised to such uses and upon such trusts as she should by will appoint, and in default of appointment to the use of the heirs and assigns of the married woman:—Held, that the legal fee was vested in the trustee; that all the subsequent limitations were merely equitable, and that, therefore, under the rule in *Shelley's case* (1 Rep. 93. b.) the wife took an equitable estate in fee, and could, with the concurrence of the trustee after her husband's death, make a good title in fee to the property, and one which the Court would force on an unwilling purchaser. *Cooper v. Kymoch*, 41 L. J., Ch., 296; 7 L. R., Ch., 398.

4. A testator devised and bequeathed all his estate and effects to trustees, their heirs, executors, and administrators, to convert his

personal estate, not being money, and to stand possessed of the money to arise by such sale, and of the rest and residue of his estate and effects to invest the same in Government or real securities, and to stand possessed of such investments for the benefit of his widow and children and his brothers and sisters:—Held, that the real estate passed to the trustees, but the beneficial interest therein was undisposed of by the will, and consequently resulted to the heir. *Longley v. Longley*, 13 L. R., Eq., 133; 41 L. J., Ch., 168; 20 W. R. 227; 25 L. T., N. S., 736.

5. A devised real estate to three trustees, one of whom was his heir-at-law, and he directed that during the lives of his wife, his daughters, and their husbands, the income should be applied for the benefit of those persons and their children, and when those persons should be dead the estate should be sold and divided among his grandchildren. This devise of the corpus had been held to fail for remoteness:—Held, that assuming the legal fee to have passed to the trustees, the descent was not broken so as to create a new reversion, but that the heir-at-law took the old estate; and that the character of this equitable reversion was not affected by the devise of the legal fee to the heir as trustee. *Buchanan v. Harrison*, 10 W. R. 118.

6. A testator devised a freehold to trustees for the benefit of E. for life for her separate use, and after her death upon trusts for such of the children of E., as being sons, should attain twenty-one, or being daughters, should attain that age or marry. E. died after the testator, leaving an infant daughter who did not marry before attaining twenty-one:—Held, that the legal estate was in the trustees, and the daughter of E. took the property on attaining twenty-one, but the interim rents went to the residuary devisee. *Re Eddels*, 40 L. J., Ch., 316; 11 L. R., Eq., 559; 24 L. T., N. S., 223; 19 W. R. 815.

On a petition for payment out of the interim rents which had been paid in under the Trustee Relief Acts, the Court decided that the legal estate was in the trustees. *Id.*

7. Although a devise to A. and B. upon trust to pay rent to C., or permit him to receive the same during his life, confers a legal life estate on C., a devise to A. and B. upon trust to pay the rents to A. (or B.) or permit him to receive the same during his life, only confers an equitable life estate. *Doe v. Biggs* (2 Taunt. 109) considered. *Re Tanqueray-Willarume and Landau*, 20 L. R., Ch. D., 465; 51 L. J., Ch., 434; 46 L. T. 542; 30 W. R. 801.

8. Devise of freeholds and copyholds to A. and B., to hold the same to A. and B., their heirs, executors, administrators, and assigns, upon trust during the life of J. to receive the rents and pay the same to J. for life, or otherwise to permit J. to receive them; followed by a devise after J.'s decease, to the use of the heirs of his body. The testator appointed A., B., and J. executors of his will, and declared that the receipts of his trustees and executors for any money payable under the will should be a sufficient discharge to any person paying the same:—Held, that J. took a legal estate tail in the freeholds, and an equitable estate for life in the copyholds. *Baker v. White*, 20

L. R., Eq., 166; 44 L. J., Ch., 651; 23 W. R. 670; 33 L. T., N. S., 347.

1. A testator devised all his real estate to trustees, their heirs and assigns, to hold the same unto his trustees, their heirs and assigns, for ever, "but nevertheless to the several uses, upon the several trusts, and subject to the several powers" thereafter declared, namely, to the use of his nephews and assigns during his life, and from and after the determination of that estate, to the use of such child or children of his nephew as should attain the age of twenty-one, as tenants in common in fee, with limitations over. The tenant for life was directed to repair and insure the messuages forming part of the devised estates, and in case of his default the testator authorised and empowered his trustees or trustee to receive the rents, and thereout effect such repairs and insurance. The testator also empowered his trustees or trustee to apply all or any part of the yearly income to which, under any of the devises or bequests thereinbefore contained, each or any infant devisee or legatee should be presumptively or otherwise entitled, towards the maintenance or education, or otherwise for the benefit of such devisee or legatee during his or her minority. By a codicil of even date with the will the testator devised land which he had contracted to sell to a railway company unto and to the use of his trustees, their heirs and assigns, upon trust to complete such contract. The tenant for life died, leaving issue four children, one of whom, the plaintiff, had not attained the age of twenty-one at the time of his father's death:—Held, that, having regard to the provision for maintenance, the limitation in favour of the children of the testator's nephew was equitable, and that the contingent devise to the plaintiff therefore took effect. *Re Berry, Berry v. Berry*, 47 L. J., Ch., 182; 7 L. R., Ch. D., 657; 38 L. T., N. S., 474; 26 W. R. 327.

2. Devise (after 1837) of copyholds and freeholds to trustees to hold unto them and their heirs on trust to pay unto or permit A. to receive the rents during his life, and after his death to the use of the heirs of his body, with a gift over in case he died without leaving issue:—Held, that A. took an equitable estate for life with a legal remainder to the heirs of his body in both the freeholds and copyholds. *Baker v. Parson*, 42 L. J., Ch., 228.

The Statute of Uses not applying to copyholds, on a devise of freeholds and copyholds together, the legal estate in the copyholds attracts that in the freeholds and makes it vest in the first devisee. *Id.*

3. A testator, after directing his debts to be paid, and setting apart certain sums to provide annuities for his two sons, devised and bequeathed all his real and personal estate to his four daughters, to be equally divided between them: Provided as follows—that the share of his wife should be divided after her death between his four daughters or the survivors and their children; and the testator appointed his wife and T. Davies, his executors, to act jointly in carrying out all the intentions of his will, and to invest his daughters' shares for their benefit and the benefit of their children:—Held, upon an application under the Vendor and Purchaser Act, that the legal estate in freeholds was vested in the executors who could

make a good title to a purchaser. *Davies to Jones*, 24 L. R., Ch. D., 190; 52 L. J., Ch., 720; 49 L. T. 624.

4. By the custom of the manors of Y., P., and S., the tenant of the copyhold tenement held only for life, with a power to nominate by writing one or more successors, but so that if there were more than one, they held concurrently for their lives or the life of the survivor, who had power to nominate a successor to himself. A copyhold tenant of these manors by his will devised all his copyholds to three trustees to the use of his grandson A. for life, with remainder to the use of the trustees to preserve the contingent remainders, with remainder to the use of the children of A. and their heirs as tenants in common, with remainder to the use of the plaintiff. By a codicil the testator, after reciting that he had ascertained that his "copyhold estates" were held of the manors of P. and S., directed that "all his copyhold estates within the manors of P. and S." should be held by his trustees to the uses and upon the trusts in his will declared, if and so far as the custom of the respective manors would warrant or authorise; and if the custom of the manors or either of them did not warrant or authorise the entail created by his will, then and in that case his grandson A. and his assigns, or his successor or successors, should have and hold his copyhold estates according to the custom of the manors. A. was admitted tenant for his life, and nominated the defendant as his successor, who was admitted accordingly:—Held, that the trustees took the legal estate in the copyholds held of the manor of Y., and ought to have been admitted instead of A., and that all the beneficial limitations in the will were equitable interests. *Allen v. Benney*, 7 L. R., Ch. D., 453; 37 L. T., N. S., 688.

II. QUANTITY OF ESTATE OF TRUSTEES.

1. *General Principles*, 6950.
2. *Direction to pay Debts or Legacies*, 6951.
3. *Where Power or Trust for Sale*, 6953.
4. *Other Cases*, 6954.

1. General Principles.

5. A legal fee will pass without the word "heirs," where a trust of land can be satisfied in no other way. *Villiers v. Villiers*, 2 Atk. 72.

6. The word "heirs" is not necessary to give an inheritance to trustees, if a less estate would not answer the purpose of the trust. *Gibson v. Rogers*, Amb. 95; 1 Ves. 485; 4 Ves. 288. n.

7. Devise to trustees and their heirs upon divers trusts in succession, some requiring the legal estate to remain in the trustees, and others which, in themselves, would not do so,—the whole legal fee remains in the trustees. *Brown v. Whiteway*, 8 Hare 145.

8. Where an estate is devised without any limitation of the quantity of interest to trustees in trust for a limited purpose, with remainder to persons to whom the beneficial interest is

given, the legal estate given to the trustees will cease on the satisfaction of the limited purpose, and will vest in the persons beneficially entitled in remainder. *Hearndon v. Williamson*, 1 Keen 33; 5 L. J., N. S., Ch., 165.

1. It is not a sufficient ground for restricting an estate limited in a deed to a trustee and his heirs, to an estate for life, that the estate given to the trustee seems to be larger than was essential to its purpose, or that the limitation has been unnecessarily repeated. *Colmore v. Tyndall*, 2 Y. & J. 605.

2. Copyholds are to the same extent as freeholds, subject to the rule that the legal estate in the trustee shall be construed to be the smallest estate necessary for the execution of the trust. *Baker v. Parson*, 42 L. J., Ch., 228.

2. Direction to pay Debts or Legacies.

3. Devise to two trustees and the survivor, his executors and administrators, in trust, to let and apply the rents in payment of mortgages, until the whole debt should be paid off by the rents, and afterwards to other parties. The trustees take a chattel interest only. *Hearndon v. Williamson*, 5 L. J., N. S., Ch., 165; 1 Keen 33.

4. Devise of real and personal estates to trustees, their executors, etc., out of rents and profits to pay certain annuities and legacies:—Held, a trust, not a chattel interest in the trustees. *Gibson v. Rogers*, Ambl. 93; 1 Ves. 486; 4 Ves. 288. n.

The word "heirs" is not necessary to give an inheritance to trustees, if a less estate would not answer the purpose of the trust. *Id.* 95.

5. A., seised in fee of several manors, lands, etc., by will, devised the same to W., and others, their heirs, etc., in trust, out of rents to pay debts; and after payment thereof, he devised same estates to three of trustees, their executors, etc., for five hundred years, in trust to pay legacies, and 200*l.* per annum to his sister for life; and after determination of estate for years, he devised premises to all trustees, in trust as to one moiety, to use of T. for life, *sans waste*; remainder to trustees for life of T., to preserve, etc.; remainder to use of heirs of body of T.; and for want of such issue, then to B. in like manner, as to T., with like remainders to others of his nephews; remainder to testator's own right heirs. T. died without issue, and B., after suffering recovery to use of him and his heirs, of this moiety, devised it to wife, plaintiff, in fee, and died. Defendant, as heir-at-law of A., insisted that B. had only an interest for life; that recovery did not operate to affect remainder in fee to right heirs of A., and that therefore defendant, as such heir, was entitled to estate:—Held, at Rolls, that devise in will of A. to B. was in tail, and that he took such estate moiety of premises, and, consequently, that the recovery was well suffered, and barred all remainders. But Lord Hardwicke held, that B. took only estate for life, and reversed so much of his honour's decree as directed estate tail. Held, also, that estate devised to B. was not a use executed, but a mere trust in equity,

and that the whole fee being devised to trustees, no legal fee could be limited upon it, and that he could take no legal estate. Also, that B.'s recovery was bad, for he could not make a good tenant to the *præcipe*, being before debts were paid, and fee devised to trustees was ended, and that whatever defeats recovery, defeats plaintiff's title. *Bagshaw v. Spencer*, 2 Atk. 570; 1 Ves. 142.

6. A testator, in 1825, left all his property to his executor for the purpose of paying the following bequests, first paying debts and funeral expenses. He then bequeathed lands for ever to his illegitimate son T., giving him power to will and dispose of same if he had a family, but if he shall die without issue, then to go to the use of his daughter J., also illegitimate:—Held, that the executor took the fee in the lands, and that T. took an estate tail, the limitation over being not an executory devise, but a remainder, and that this limitation conferred the fee upon J. on indefinite failure of issue of T., J. taking the entire estate remaining in the executor. *Ormsby v. Anderson*, 14 W. R. 379.

7. A testator devised his real estate to trustees and their heirs, in trust, during the life of his brother, and until payment of his debts and legacies, to apply the rents in payment of his debts and legacies, and then to pay them to his brother for life; and after the death of his brother, and such payments, he devised the estate to the heirs of the body of his brother, and in default to his own right heirs:—Held, first, that the trustees took the legal fee, determinable upon the death of his brother and payment of the debts and legacies. *Collier v. McBean*, 34 Beav. 426; 34 L. J., Ch., 555; 6 N. R. 192. S. C. on appeal, 14 W. R. 156; 13 L. T., N. S., 484.

Held, secondly, that the brother took an equitable estate for life, with a legal remainder to the heirs of his body. *Id.*

The trustees having conveyed to the brother the legal estate for his life, and he having suffered a recovery:—Held, thirdly, that the heirs of the body were not barred, because the legal estate to the brother for life, and the legal remainder to the heirs of his body, had become vested by different instruments, and also because it was the duty of the trustees to preserve the contingent estates, and therefore it was a breach of duty in them to convey the estate to the brother. *Id.*

Held, on appeal, that the title under the recovery was too doubtful to force on a purchaser. *Id.*

8. A testator, by will, subsequently to 7 Will. 4 and 1 Vict., c. 26, after directing that his debts and funeral and testamentary expenses should be paid by his executors as soon as conveniently might be after his decease, devised all his real and personal estates to trustees (whom he afterwards appointed his executors), in trust to pay the rents and proceeds thereof to his son J. for his natural life; and from and after the death of J., in trust for the right heirs of him, J., for ever:—Held, that by reason of the direction to them to pay debts, the trustees took the legal estate in fee, and therefore, inasmuch as the estate for life and the estate in remainder were both equitable estates, the rule in *Shelley's case* (1 Rep. 93. b.) applied, and J. took an equit-

able estate in fee. *Spence v. Spence*, 12 C. B., N. S., 199; 31 L. J., C. P., 189; 10 W. R. 605; 6 L. T., N. S., 538.

1. A general devise to trustees and their heirs *primâ facie* gives the fee, and it lies on the parties alleging that they take a less estate to show what less estate they take. *Collier v. Walters*, 43 L. J., Ch., 216; 17 L. R., Eq., 252; 29 L. T., N. S., 868.

A trust to set and let, and a direction to sell timber, are grounds for not cutting down the estate. *Ib.*

A testator, by will, dated in 1827, devised his estate to trustees and their heirs upon trusts that they and their heirs should stand seised of the same during the life of C., and until the whole of the testator's debts and the legacies were paid, upon trust, to set and let the same and apply rents and yearly profits and the value of whatever timber might be considered at its best growth, from time to time, in discharge of his debts and legacies until they were paid, and from thenceforth to pay the rents to C. during his life; and after his death, and payment of the debts and legacies and expenses, the testator devised the estate to the heirs of the body of C., and for default of such issue, to his own right heirs. In 1830 the trustees by deed reciting that the debts and legacies were paid, conveyed the estates to C. for his life. C. shortly afterwards suffered a common recovery, and then mortgaged the estate in fee to W. In 1861 C., the father, and W., his mortgagee, had filed a bill for a conveyance of the fee against the heir of the surviving trustee and the son (C.'s heir apparent). The son, instead of asking to be dismissed as not being heir during his father's lifetime, put in an answer disputing the plaintiff's title. In 1865 a decree was made for the conveyance of the fee to the plaintiff. The father had since died. The suit was instituted in 1873 by the son against the mortgagee:—Held, first, that the trustees took a legal fee under the will, that the rule in *Shelley's case* (1 Rep. 93. b.) therefore applied, and that the son acquired a good equitable fee by the recovery. *Ib.*

Held, secondly, that if they had only taken a life estate, their conveyance of it to the father enabled him to suffer a recovery and bar the contingent remainders at law and in equity, and was no breach of trust. *Ib.*

Held, thirdly, that the son having chosen to answer in the former suit, was bound by the decree. *Ib.*

The decision on the same will in *Collier v. McBean* (34 Beav. 426; 34 L. J., Ch., 555), that the trustees took a fee determinable when the debts were paid, disapproved of. *Ib.*

2. C., after desiring that all his just debts, etc., should be in the first place paid, devised to three trustees, and the heirs of the survivor, a copyhold estate, upon trust to pay the rents and profits thereof, in equal moieties, to his two daughters, for their separate use for life; and after the decease of either, upon trust to pay the whole of such rents, etc., to the survivor for life; and after the decease of the survivor, C. devised the estate, in equal moieties, to the heirs of the bodies of his daughters respectively; and in default of issue

of either daughter, he gave the entirety of the estate to the heirs of the body of such daughter who should leave such issue; and in default of issue of both daughters, he gave the estate to the right heirs of the surviving daughter. The trustees were appointed executors of the will, and they were duly admitted to hold to the uses of the same. Both the testator's daughters died without having ever been married. The estate was of gavelkind tenure. Both the customary co-heirs and the heir-at-law of the surviving daughter claimed the estate. On demurrer by the latter:—Held, that the general charge of debts, coupled with the legal estate devised to the trustees, made the estate of the devisee in remainder an equitable estate; and the demurrer was overruled. *Creaton v. Creaton*, 2 Jur., N. S., 1223; 3 Sm. & G. 386; 26 L. J., Ch., 266.

Where, by a will, there was a general charge of debts, and a devise to trustees upon certain trusts:—Held, that the extent of the estate vested in the trustees could not be measured by the length or continuance of the equitable interests given to two tenants for life; but *semble*, if there had been no charge of debts, the estate of the trustees would have determined with the life of the surviving tenant for life. *Ib.*

Semble, where the subject of a devise is copyhold, the right of the trustees to be reimbursed moneys paid in fees of court will not of itself prevent the determination of the estates vested in them, or affect the quality of the estates limited in remainder. *Ib.*

3. A testator, by his will made in 1838, directed his debts to be paid. And he devised specific real estate to four persons (whom he afterwards named as his executors), their heirs and assigns, upon trust and for the intents and purposes thereafter mentioned, viz., upon trust during the minority of his daughter D., to receive the rents and apply the same for her benefit till she should attain twenty-one, and, on her attaining twenty-one, to pay to or permit and suffer her to receive the rents during her life for her separate use, without the power of anticipation. And, from and after her death, upon trust for, and the testator thereby gave and devised the property to the issue, children or child, of the daughter who should live to attain the age of twenty-one, in equal shares if more than one, and to their respective heirs and assigns with remainders over. And, after making other specific devises and bequests, the testator devised and bequeathed the residue of his estate and effects (subject to and charged with the payment of his debts) to one of his trustees absolutely, for his own use and benefit. The daughter D. survived the testator, and she afterwards married and had three children, but she died before any of them had attained twenty-one:—Held, that by reason of the direction that the testator's debts should be paid, the trustees took the whole legal estate in fee-simple in the specifically devised estate, and consequently that the contingent remainder to the children of the daughter had not failed by reason of the determination of her life estate before the happening of the contingency. *Festing v. Allen* (12 M. & W. 279) distinguished. *Creaton v. Creaton* (3 Sm. & G. 386) followed. *Marshall v. Gingell*,

21 L. R.; Ch. D., 790; 51 L. J., Ch., 818; 47 L. T. 869; 31 W. R. 63.

1. A testator, in 1772, devised to trustees, and the survivor and his heirs, all his real and personal estate upon trust to pay an annuity to his daughter, Lady A.; the residue of the rents to be applied to the payment of his debts; and, after her decease, in trust to permit the second son of Lady A., by J. B., her husband, afterwards Earl Ormonde, and the heirs male of his body to receive the same in preference to her eldest son, it being testator's meaning that such second son "do take and be preferred, etc., until he shall become an eldest, and so shall each and every second and younger son or sons take place and enjoy the said estates according to seniority, etc., and the heirs male of the body of such second son." In default of such issue, the estates were to go to the use of the daughters of Lady A., as tenants in common in tail, etc., with ultimate remainder to testator's trustee in fee. Lady A. had issue four sons by J. B.—Walter, John, James, and Charles, all of whom had been born during testator's lifetime, and John was second son living at date of the will, and of testator's death. In 1793 John joined his father and mother in a recovery of the W. estates so devised by the testator, and executed a deed declaring the uses thereof to Lady A. for life; remainder to John for life, with remainder to John's sons in tail; remainder successively to James and Charles for life, and their issue respectively in tail male; and said deed contained a proviso for shifting the W. estates from John to James, and from James to Charles, in the event of the O. estates of their father coming to John or James. In 1796 John died. J. B. died in 1795, whereupon Walter became entitled and suffered recoveries of the O. estate, and died in 1822, Marquis of O. James then became Marquis. Lady A. died in 1830, and in 1834 James filed his bill against Charles, and the present plaintiff, and the heir of surviving trustee, whereby he claimed the W. estates as tenant in tail, under the will of 1772, or as tenant for life, with remainder to his eldest son in tail male, under the deed of 1793. Charles answered the bill, and issue had been joined and publication passed when the plaintiff, James, Marquis of O., died. In 1838 the present plaintiff filed his bill against Charles and his three sons, setting out all the charges contained in the former bill, and the several proceedings had thereon, and claiming to be entitled to the W. estates, either as issue in tail under the will of 1772, or as tenant in tail under the deed of 1793, and the recoveries. The bill stated that Charles and his sons claimed some interest in the said estates, and in the subject matter of this suit, and in that respect were necessary parties. The bill prayed that plaintiff might have the benefit of the said former proceedings, etc., and that the trusts of the will might be carried into execution, etc. To this bill the three sons of Charles demurred for want of equity; no grounds were assigned on the record. At the bar one of the causes of demurrer was, that the plaintiff showed no title to the W. estates:—Held, that Lady A. took no estate under the will; that the devise to the second son of Lady A., and the heirs male of his body, was

an executory devise to such son as should answer that description at the time of the death of Lady A.; and, therefore, that the recoveries suffered in 1793 and 1795 were bad for want of a tenant to the *præcipe*, so as to bar the remainders over limited by the will, even supposing that, on the death of John, James, the late marquis, took an estate tail, by way of executory devise. It was also held, that the limitation to the trustees and the survivor, and his heirs, vested in them the legal estate in fee. *Ormonde v. Wandersforde*, 1 Ir. Eq. R. 238.

2. A testator, after the 4 Will. 4, c. 22, devised freehold lands to two trustees, their heirs and assigns, to pay thereout to his widow an annuity for her life, and after her decease for A. and B., their heirs and assigns, as tenants in common:—Held, that the legal estate in the trustees was not restricted to the life of the widow. *Fenwick v. Potts*, 8 De G. M. & G. 506.

3. A devise before 1838 to trustees in trust to pay a life annuity, with power to raise it by distress or sale as for rent in arrear, gives them the legal fee. *Whittemore v. Whittemore*, 38 L. J., Ch., 17; 19 L. T., N. S., 236.

3. Where Power or Trust for Sale.

4. A devise to trustees and their "heirs" carries the whole fee in law; and a devise to sell will carry a fee, though the word "heirs" be not mentioned. *Bagshaw v. Spencer*, 2 Atk. 578; 1 Ves. 142.

Where testator's intent appears plain, Court will construe the words "heirs of the body" to be words of purchase. *S. C.* 2 Atk. 580.

"Heirs of the body" have, at law, been considered as words of purchase, even in a deed. *Id.*

5. By the will of W. S., real estate was devised unto and to the use of W. T., his heirs and assigns for ever, upon trust to pay M. S. an annuity during her life, and to apply the surplus during the life of M. S. to the testator's daughter, C. N.; and after the death of M. S., the testator directed that the premises should be and remain unto W. T., his heirs and assigns, to the use of the said C. N., and her assigns for her life, with remainder to W. T. to support contingent remainders; and after the decease of C. N., to the use of B. N. and his assigns during his life, with remainder to W. T. to support contingent remainders, and after the decease of B. N., in case he should survive C. N., to the use of all and every the child and children of C. N., with cross-remainders between them, with the ultimate remainder to the testator's cousin, M. S., in fee. The will contained a power to W. T., his heirs and assigns, to sell the trust premises at the request of B. N. and C. N., or the survivor of them, and directed the proceeds of such sale to be laid out in the purchase of other estates to be settled to the same uses as the estates sold:—Held, taking into consideration the various duties prescribed by the will to be performed by W. T., that the intention was manifest, and that the words were large enough to give to W. T. a legal estate in fee.

Rackham v. Siddall, 1 Macn. & G. 607; 2 H. & Tw. 44.

1. A testator, without expressly devising his real estate, empowered his trustees and executors to manage and to sell and invest the proceeds. He directed them, under the management of his wife, to carry on his farm for the maintenance of his family, and subject to that trust directed his real and personal estate to be held on trust for his children equally, some of whom were to bring into hotchpot property of their own:—Held, that the trustees had the legal estate in the realty, and on the death of the wife, though the children were all of age, could sell and convey. *Cooke v. Simpson*, 46 L. J., Ch., 463.

2. Effect of a private Act of Parliament declaring an estate vested in trustees and their heirs, in trust to sell discharged from the trusts of a settlement, divesting the legal fee outstanding under a prior settlement. *Bullock v. Fladgate*, 1 Ves. & B. 471.

3. U. devised lands by will to trustees. The will contained no power of sale. In 1873 a private Act was passed, reciting that it was desirable that the lands should be sold, and enacting "from and after the passing of this Act the legal estate in the lands and hereditaments devised by the will of U. shall, for the purposes of this Act, vest in W. M., J. M., and R. K." The Act went on to give the trustees power to sell all or any part of the lands:—Held, that the legal estate was vested in the trustees for all purposes, and not merely for the purpose of selling the lands, so that they could maintain an action of ejectment. *Underwood v. Pennington*, 37 L. T., N. S., 320.

In 1874 an Amendment Act was passed by which "all the trusts, powers, and authorities by the Act of 1873, vested in or conferred upon the trustees of the Act, and all matters and things incident thereto, shall be vested in the trustees and two other trustees, to be appointed as hereinafter mentioned":—Held, that the new trustees were on exactly the same footing as the others, and that the legal estate was in them all. *Id.*

4. A testator by will made in 1851, after appointing his wife executrix, and B. executor and trustee of his will, devised his real estate to his wife for life, in case she continued his widow; but in case she married again, he devised the real estate to the use and intent that his wife should receive an annuity of 20*l.*, with powers of entry and distress. After the decease of his wife, the testator directed his trustee to sell his real estate, in such manner as he should deem right, with power to execute such deeds and assurances as should be requisite for effecting the sale of his real estate:—Held, that the trustee took a contingent estate *pur autre vie* during the life of the widow, in the event of her subsequent marriage. *Re Boyce*, 10 Jur., N. S., 138; 33 L. J., Ch., 390; 12 W. R. 359; 9 L. T., N. S., 670; 4 De G. J. & S. 205.

4. Other Cases.

5. Under a devise to A. and B., and their heirs, to the use of son for life, with remainder in trust that the trustees apply the rents for

maintenance of the children of son during their minority, and after they attained twenty-one, to the use of them in fee:—Held, that the son took the legal estate for his life, with remainder to A. and B., for a chattel interest, with remainder to the children in fee. *Tucker v. Johnson*, 16 Sim. 341.

6. A devise to trustees and their heirs:—Held, to confer an estate co-extensive only with the trusts they had to perform. *Ward v. Burbury*, 18 Beav. 190.

Devise of freeholds to trustees "and their heirs," upon trust to receive the rents and pay them to E. W., a feme covert, for her separate use; and after her death, upon trust to sell and divide amongst her children; and in default, to apply the rents towards the education of J. W., until he attained twenty-one; and (continued the testator) "when J. W. shall so have attained that age," I devise to him and his heirs all my real and personal estate:—Held, on the death of E. W. without issue, that J. W. took the legal estate in fee. *Id.*

7. Devise, subject as to part, to a devise to trustees and their heirs for debts in aid of the personal estate, and, as to part, to mortgages in fee, to sons and a daughter, and their respective issue male, in strict settlement, etc., with power to the sons respectively, when in possession, to convey or appoint all or any part to trustees on trust, by the rents and profits to raise a rent-charge, as and for a jointure for any wife or wives, for each such wife's natural life only, and also to charge portions by deed and to lease for twenty-one years. Execution of the power, by conveyance to trustees and their heirs on trust, by the rents and profits to raise and pay a jointure during the wife's natural life only, and charging portions, with covenant for title, and for quiet enjoyment by the trustees during the natural life only of the wife. As to the estate of the trustees at law, *quære*, the Court of King's Bench certifying that they took an estate in fee, and the Court of Common Pleas, that they took no estate whatsoever. *Wykham v. Wykham*, 18 Ves. 395.

8. A., seised in fee, conveyed lands to B. and C., and the survivor of them, and the heirs of the survivor, to the use of A. for life, and after his death, to the use of B. and C., and the survivor, and the heirs of such survivor, upon trust to permit and suffer D. to receive a jointure, and after the death of D., to the use of the right heirs of A.:—Held, that B. and C. took a legal estate in fee in remainder. *Fowler v. Lightburn*, 11 Ir. Ch. R. 495.

9. A testator being seised of lands under leases for lives renewable for ever, in 1824 devised all his freehold leases and interest whatsoever to trustees, and the heirs of the survivor of them, in trust, after payment of the head rents, to apply the clear yearly rents to and amongst his three daughters during their respective lives, in equal shares and proportions, for their sole and separate use; and in case any or either of his daughters should happen to die leaving lawful issue, then in trust, as to the share and proportion of such daughter so dying, to and for the use of such issue, as she should by deed or will appoint, and in default of such appointment to the use of such issue equally, share and

share alike; and if any of his daughters died without issue, he directed that her share of the rents should go to, and be paid to, the survivors or survivor of them for the increase of her and their respective shares, to their separate use, and to go to their lawful issue, subject to the like power of appointment among such issue; and in case of the death of all his daughters without leaving lawful issue, then in trust to pay the rents to his nephew during his life; and after the death of his nephew, in case he should happen to die leaving lawful issue, in trust, as to one-half of his freehold and leasehold interests, to the use of the children of his sister, in equal shares, and to their lawful issue; and in case his nephew should happen to die without issue, then, as to the whole of his freehold and leasehold interests, to the use of the said children of his sister, in equal shares, and to their lawful issue; and in case they should be then dead, then, as to the whole, in trust for the issue of his nephew; and in case of the deaths of his nephew and the children of his sister without issue, in trust to assign over the freehold and leasehold interests to his own right heirs; and a power was given to the trustees to lease from time to time as they should remain seised and possessed by virtue of the trusts in the will contained, with the consent of the person or persons then entitled:—Held, first, that the legal estate was devised to the trustees during the existence of the entire series of limitations. *Sherrin v. Kenny*, 16 Ir. Ch. R. 138.

Held, secondly, that the daughters of the testator took equitable estates in quasi tail in their respective shares. *Ib.*

1. A testator, by codicil, after appointing two persons trustees, as also their heirs and assigns, to his will and codicil, desired that his sister A. should do what she pleased with his remaining property after payment of certain legacies, excepting a tenement at W. and stock, of which she should only receive the interest and rent during her life, and afterwards to his sister's eldest son, on his taking the name of M.; but should he refuse to take the name of M., or his sister depart this life without a son, then the tenement at W. and the stock should go to P. on his taking the name of M., and so on to his heirs, each taking the name of M., none of them being allowed to touch the principal; and no one should after his sister A. inherit the said property or enjoy the interest who did not take or possess the name of M.:—Held, that the trustees took an estate in fee by virtue of their appointment, and that A. was entitled to an estate for life in the tenement and stock, with a remainder in fee in the tenement, and an absolute interest in the stock, to the firstborn of A. vested in his birth and baptism by the name of M. *Bennett v. Bennett*, 2 Dr. & Sm. 266.

III. OTHER MATTERS.

2. No person can be a trustee in law unless he has a vested interest in the thing given. *Owen v. Owen*, 1 Atk. 496.

3. The necessary funds having been subscribed by certain parties, a piece of land was purchased and conveyed by deed to trustees, for a charitable purpose. Under this deed

the trustees entered into and continued in possession for several years; and, with the acquiescence of all the subscribers, including some not parties to the deed, a considerable expenditure was made, and heavy liabilities were incurred:—Held, that, even assuming the subscribers not parties to the deed had an equitable interest in the land in respect of the moneys subscribed by them, yet they would not be heard to assert a title to the land adverse to that of the trustees. *Att.-Gen. v. Munro*, 9 Jur. 461.

XII. Devolution of Trust Estates.

- I. *By Devise in General Terms*, 6955.
- II. *By Assignment or Specific Devise*, 6957.
- III. *Estate of Bare Trustee under the 37 & 38 Vict., c. 78, and the 38 & 39 Vict., c. 87*, 6958.
- IV. *Other Cases*, 6958.
- V. *Of Powers of and Trusts for Sale*. See POWER, XXI. III.
- VI. *Rights and Powers of New Trustees*. See XVI. I. 5 post.

I. BY DEVISE IN GENERAL TERMS.

4. One makes his will and says, "As to such estate as God hath blessed me with, I devise in manner following;" after which he gives part to J. S., and his heirs, etc., and devises the rest of his estate to his wife in fee: this passes a trust estate. *Marlow v. Smith*, 2 P. W. 198.

5. Trust estate will pass by a general devise. *Hamkins v. Obeon*, 2 Ves. 559.

6. A general devise by a trustee did not pass the trust estate. *Att.-Gen. v. Buller*, 5 Ves. 339.

7. Under residuary disposition by will to natural son, his heirs, executors, administrators, and assigns for ever, to and for his and their own use and behoof, a trust estate did not pass. *Exp. Brettell*, 6 Ves. 576.

8. By a devise in general terms, a trust estate will pass, unless an intention to the contrary can be collected from expressions in the will, or purposes, or objects of the testator. *Braybrooke (Lord) v. Inskip*, 8 Ves. 417.

9. Rule that trust estate will pass by a general devise is confined by objects appearing upon the will inconsistent with that intention. *Exp. Morgan*, 10 Ves. 101.

10. A testator devised all his property to his wife, her heirs, executors, administrators, and assigns, for all his estate and interest therein, for her own absolute use and benefit, and to be disposed of by deed or will as she should think fit:—Held, that a trust estate in fee passed by the devise. *Exp. Shaw*, 8 Sim. 159; 5 L. J., N. S., Ch., 378.

11. Trustee, after devising certain real estates to different persons, gave and devised all his real estates not before disposed of by his will to A. B., his heirs, executors, administrators, and assigns, according to the tenure and nature thereof respectively, to and for his and their own use and benefit:—Held,

that under this devise the trust estate passed. *Bainbridge v. Ashburton* (Lord), 2 Y. & Coll., Exch. Eq., 347; 6 L. J., N. S., Exch. Eq., 73.

1. A devise by testator "of all the lands and hereditaments vested in him as trustee or mortgage in fee:—Held, to pass trust estates vested in the testator, but not in fee. *Groomwood v. Wakeford*, 1 Beav. 576; 8 L. J., N. S., Ch., 333.

2. Testator gave all his property, whatsoever and wheresoever the same might be at his decease, to his wife for her absolute use for ever:—Held, that an estate vested in the testator as a trustee did not pass by the devise. *Lindsell v. Thacker*, 12 Sim. 178; 10 L. J., N. S., Ch., 343; 5 Jur. 603.

3. A general residuary devise and bequest of real and personal property for such estate and interest as the testator had therein, the personal estate to be subject to the testator's debts:—Held, to pass the legal estate in real property of which the testator was merely trustee, the will creating no inconsistent trust thereof. *Langford v. Auger*, 4 Hare 313.

4. Testator devised all his real estates whatsoever and wheresoever to Grace T., her heirs and assigns, charged with 50*l.* to J. W.:—Held, that estates of which the testator was a trustee did not pass by the devise. *Rackham v. Siddall*, 16 Sim. 297; 12 Jur. 640. And see S. C. 1 Macn. & G. 607; 2 H. & Tw. 44.

5. Real estate vested in a testator as a trustee:—Held, to pass by a general devise in his will to "A. B., his heirs, executors, and administrators, for his and their own use and benefit." *Sharpe v. Sharpe*, 17 L. J., N. S., Ch., 384; 12 Jur. 598.

6. A testator gave and bequeathed all his stock in trade, book debts, securities for money, money in the funds, and all his household goods, to his wife. He also gave and bequeathed whatever money he had in the bank, or vested on any security, and also all the residue of his personal and testamentary estate, goods, chattels, and credits, to his trustees, upon certain trusts therein mentioned:—Held, that the legal estate in certain messuages, which were conveyed to the testator, upon trust to pay himself a sum of 300*l.*, and to pay the surplus to the person conveying the same, did not pass by the will. *Re Gorfe's Trust*, 19 L. J., N. S., Ch., 173; 14 Jur. 53.

7. Trust estates held on the context of a will not to pass by a general devise. *Re Morley*, 1 W. R. 90.

A devise to trustees of certain copyhold estate, and all other the real estate of the testatrix, and a declaration of the trusts of the moneys to arise from the sale of such copyhold estate, and a general devise of all other her real estate to three persons as tenants in common:—Held, not to pass the legal estate of the testatrix in certain copyholds, of which she was merely trustee. S. C. 10 Hare 293.

8. A testator being seized of trust estates, by his will, after reciting that he was or might at the time of his death be seized, or possessed, or entitled to real and personal estate, devised all and singular his said real and personal estate to H., her heirs, executors, administrators, and assigns, for her and their sole and absolute use and benefit. H. was a feme sole:—Held, that the devise to H. included the

trust estates, and that the words did not create a separate estate. *Lewis v. Mathews*, 2 L. R., Eq., 177; 12 Jur., N. S., 542; 35 L. J., Ch., 638; 14 W. R. 682.

9. A devise by a testator of all his real and personal estate to his nephews and nieces, who were a numerous and unascertained class:—Held, not to pass estates vested in the testator in trust or on mortgage, but that such estates descended to his heir-at-law. *Re Finney*, 3 Giff. 465; 6 L. T., N. S., 745; 8 Jur., N. S., 965.

10. A trustee devised "all his real estates, whatsoever and wheresoever," charged with a legacy:—Held, that the trust estates did not pass. *Hope v. Liddell*, 21 Beav. 183.

11. A husband gave various pecuniary legacies, and all the rest and residue of his estate, real and personal, he gave, devised, and bequeathed to his wife, her heirs, executors, administrators, and assigns, absolutely:—Held, that the legacies were charged on the real estate, and therefore that the general devise did not pass property of which the testator was seized in fee as trustee. *Re Bellis*, 5 L. R., Ch. D., 604; 46 L. J., Ch., 353; 25 W. R. 456; 36 L. T., N. S., 644.

12. A husband, who was mortgagee in fee of an estate to secure a sum of money of which he was trustee, devised and bequeathed his residuary real and personal estate unto and to the use of his wife, her heirs, executors, administrators, and assigns, in trust, either to leave the same in existing investments, or sell and convert the same, and out of the proceeds to pay his debts, funeral and testamentary expenses, and certain legacies, and invest the residue and retain the income thereof, for her life; and subject as aforesaid, such residue to remain in trust for C. There was no express devise of trust or mortgaged estates:—Held, that the legal estate in the mortgaged property did not pass under the will. *Re Smith*, 4 L. R., Ch. D., 70; 25 W. R. 294; 35 L. T., N. S., 890.

A husband, who was trustee for sale of real estate, after giving pecuniary legacies, gave all the rest and residue of his estate, real and personal, to his widow. There was no express devise of trust estates:—Held, that the legal estate in the trust property did not pass under the will. *Id.*

13. Trust estates held to pass under a general devise notwithstanding a charge of legacies; the devise passing all the real estate vested in the testator whether on trust or beneficially, and the charge affecting only such estate as belongs to him beneficially. *Re Brown*, 3 L. R., Ch. D., 156; 24 W. R. 782; 35 L. T., N. S., 305.

14. A testator devised all his real estates (except the hereditaments thereafter particularly devised), including all estates vested in him upon trust or by way of mortgage, to trustees upon certain trusts; in a subsequent part of his will, he devised his farm in A., in the possession of T. H., to T. R. He had two farms in A., called respectively S. and M., both of which were in the possession of T. H., but at different rents. On a question being raised which of the two farms the testator intended to give to T. R.:—Held, that the devise must be taken to have been made to T. R. for his personal advantage, and not upon

trust; and if, therefore, it could be ascertained that one of the farms was subject to a trust, or that the testator supposed or treated it to be so, it must then be inferred that such farm was not the one intended to be devised, but that the other was the one referred to by the testator. In the present case, it was sufficiently established by the evidence, that during the lives of the testator and his father the proceeds of the farm S. had been regularly paid to a Roman Catholic priest, and that the testator had uniformly dealt with it in conformity with a real or supposed trust affecting it for this purpose:—Held, therefore, that he must be taken to have intended to comprise it in the general devise of trust estates, and that consequently the farm M. was the one devised to T. R. *Blundell v. Gladstone*, 3 Macn. & G. 692. Reversing 14 Sim. 83.

Constructive Trusts. Devise by Vendor.]

1. An estate which the testator had contracted to sell, held to pass by a devise of all his real and personal estate to trustees, in trust to sell. *Wall v. Bright*, 1 Jac. & Walk. 494.

2. Testator agreed to sell land to B., but died before the purchase was completed. By his will he had given the residue of his real and personal estate (which included the land agreed to be sold) to his children, equally to be divided between them as tenants in common, with a proviso that if any of them died under twenty-one without leaving issue, then, as well as to the respective estate and interest and share to which any such child so dying would otherwise have been entitled under any of the devises, bequests or dispositions therein contained, as to any accruing share, testator gave and devised the same unto the others of them; and if more than one, equally as tenants in common:—Held, that the legal estate in the property agreed to be sold, had not passed by the devise, but descended upon the heir-at-law of the testator. *Thirtle v. Vaughan*, 2 W. R. 632.

3. Where, after contracting to sell land, the vendor devises to parties, some of whom are infants at his decease, his estate must bear the costs of the suit which he has thus voluntarily rendered necessary to a completion of the contract, and a mere devise of trust estates does not in such a case avoid the necessity of a suit. *Purser v. Darby*, 4 Kay & J. 41.

Distinction in this respect between suits rendered necessary by the voluntary act of the deceased, and those caused by the mere act of God, as where the deceased has died intestate, leaving an infant heir. *Id.*

4. In 1874 the plaintiff entered into a contract for the purchase of real estate. After the title had been accepted, and before completion, the vendor died, having by his will (dated in 1873) given his personal estate to E., whom he appointed executor, and devised all his real estate to H. and M. upon trust for sale, and having also devised to H. alone all the real estate which at his death might be vested in him as trustee:—Held, that the real estate contracted to be purchased by the plaintiff passed to H. under the devise of trust estates. *Lysaght v. Edwards*, 2 L. R., Ch. D., 499; 45 L. J., Ch., 554; 24 W. R. 778; 34 L. T., N. S., 787.

5. Testator devised his estates to trustees in trust to sell, and declared their receipts to be sufficient discharges, and he directed his trustees to complete any contracts, for the sale of his estates, entered into during his lifetime, and remaining incomplete at his death:—Held, that his executor was the proper party to give receipts for the purchase moneys of the estates contracted to be sold by the testator. *Eaton v. Sanater*, 6 Sim. 517; 3 L. J., N. S., Ch., 197.

Devise of Mortgaged Estates.] See WILL.

II. BY ASSIGNMENT OR SPECIFIC DEVISE.

6. Trust of copyhold passes by unattested will. *Tuffnell v. Page*, Dick. 76; 2 Atk. 37; Barnard. 12. But see *Wagstaff v. Wagstaff*, 2 P. W. 261.

7. A devise by a sole surviving devisee in trust of all estates which at his decease might be vested in him as trustee, and which he could devise without breach of trust to A. W., her heirs and assigns, upon the trusts affecting the same respectively:—Held, to pass the trust estates to the devisee A. W. *Beasley v. Wilkinson*, 13 Jur. 649.

8. Where the surviving trustee of a will devised the trust estate upon the same trusts on which he held:—Held, that the *cestuis que trustent* were entitled to have new trustees appointed of the original will. *Ockleston v. Heap*, 1 De G. & Sm. 641.

9. *Semble*, where a trust estate is limited to trustees and the survivors and survivor, and the heirs of the survivor, the surviving trustee does not commit a breach of trust by not permitting the trust estate to descend, or by devising it to proper persons on the trusts to which it was subject. *Titley v. Wolstenholme*, 7 Beav. 426; 13 L. J., N. S., Ch., 410.

A testator devised real and personal estate upon trusts, which, as held, the testator intended to be performed by the trustees and the survivors, and the heirs and assigns or executors of the survivor. There was no power to appoint new trustees. The surviving trustee devised and bequeathed the trust estates to A., B., and C., upon the trusts of the first will:—Held, that this devise, and the appointment of A., B., and C. as trustees, were valid. *Id.*

10. The survivor of two executors and trustees bequeathed the trust property to A., upon the trusts declared by the original testator, expressing by the same instrument his wish that A. would execute the trusts with fidelity. No direction was given by the will of the original testator as to the appointment of new trustees. On a bill by the *cestuis que trustent* for that purpose:—Held, that A., though legally in the possession of the trust property, was not a trustee properly constituted, and that the *cestuis que trustent* were entitled to have new trustees appointed by the Court. *Mortimer v. Ireland*, 6 Hare 196; 16 L. J., N. S., Ch., 416; 11 Jur. 721.

11. Bequest to A. and B., their executors and administrators, upon trust. B., the surviving trustee, by his will bequeathed his trust estates to C. and D., their heirs, executors, administrators, and assigns, on the trusts; and he appointed C., D., and E. executors of his

will:—Held, that C. and D. took only the legal estate, and that neither C. and D. by themselves, nor C., D., and E. were capable of executing the trusts. *Re Burt's Estate*, 1 Drew 819.

1. *Semble*, that *Cooke v. Cranford* (13 Sim. 91) has been misunderstood; a trustee can, and it may often be his duty to devise a trust estate, to prevent the legal estate from vesting in a lunatic or a person out of the jurisdiction, or in any other person who ought not to be a trustee. *Wilson v. Bennett*, 5 De G. & Sm. 475; 16 Jur. 966; 21 L. J., Ch., 741.

2. Bill against a trustee who has assigned his trust; the assignee ought to be made a party as the decree should be first against him, and the trustee to stand as a security. *Burt v. Dennet*, 2 Bro. C. C. 225.

3. A., being impropiator of a parish, demised part of the tithes to certain parishioners as trustees for 1,900 years, who re-demised it to him for 999 years under the yearly rent of 50*l.*, payable to the trustees as a provision for a preacher, to be nominated by the trustees. The heir of A. afterwards sold the rectory to B., and the representative of the surviving trustee was prevailed upon to assign to B. the right of nominating a preacher. From the date of the original demise, and for forty years after the latter transaction, the preacher was constantly nominated by the parishioners; but upon a contest between them and B. it was held that the right of nomination was absolutely in the trustees, and that the assignment of that right was a breach of trust; and directions were given by the House of Lords for the re-establishment of the trust in trustees, to be impartially chosen. *Foley v. Att.-Gen.*, 7 Bro. P. C. 249.

4. A., seized of the manor and patronage of W., by will gives 100*l.* per annum rent-charge, and the advowson to six trustees, and those trustees, when reduced, to choose others; B., the only surviving trustee, assigns his trust to others who nominate to the church, being a donative: decreed, the assignees of the trust, though the assignment was made by one only who survived, had the right to nominate to the church, and not the owner of the manor. *Att.-Gen. v. Floyer*, 2 Vern. 748.

Of Trusts for, and Powers of Sale.] See POWER, XXI. III.

III. ESTATE OF BARE TRUSTEE UNDER THE 37 & 38 VICT., C. 78, AND THE 38 & 39 VICT., C. 87.

5. When a surviving trustee of real estate had died intestate after the passing of the Vendor and Purchaser Act 1874, 37 & 38 Vict., c. 78, and prior to the commencement of the Land Transfer Act 1875, 38 & 39 Vict., c. 87, the legal estate vested in his heir-at-law notwithstanding the provision of the Vendor and Purchaser Act 1874, s. 5. *Christie v. Ovington*, 1 L. R., Ch. D., 279; 24 W. R. 204.

6. *Semble*, a person to whose fiduciary office no duties were originally attached, or who, although such duties were originally attached to his office, would, on the requisition of his *cestui que trust*, be compellable in equity to convey the estate to them, or by their direc-

tion, is a bare trustee within the meaning of s. 48 of the Land Transfer Act 1875. *Id.*

7. A trustee with a beneficial interest in the trust estate is not a "bare trustee" within the Land Transfer Act 1875, s. 48. *Morgan v. Swansea Urban Sanitary Authority*, 9 L. R., Ch. D., 582.

8. Thus a vendor of freeholds who let the purchaser into possession before payment of the purchase money and execution of the conveyance, was, by reason of his having a lien on the property for his purchase money and not being bound to convey until payment, held, not to be a "bare trustee" within the Act, so that, upon his death, the money still remaining unpaid and the conveyance unexecuted the legal estate passed to his heir-at-law. *Id.*

IV. OTHER CASES.

9. Where trustees of a charity devise die in the life of the testator, the conduct shall go to his heir-at-law. *Att.-Gen. v. Downing*, Amb. 571.

10. Where by neglect the number of trustees in a trust to present to a living was not filled up at the time of an avoidance, the Court would not by injunction prevent the effect of a presentation under the legal title of the heir of the surviving trustee, without a special ground; but the Court will take care, as to the future, that the trust shall be properly filled up. *Att.-Gen. v. Litchfield (Bishop)*, 5 Ves. 825.

See also IX. i. ante.

XIII. Appointment of Trustees by Settlor.

11. Corporation may be trustees. *Att.-Gen. v. Laidorfield*, 9 Mod. 287.

12. Presumption against intending an infant to be a trustee. *King v. Denison*, 1 Ves. & B. 278.

13. Testator, devising an estate to persons whom he names trustees for such purposes as they or the major part of them shall think fit, gives no benefit to them; but is an authority only by appointing a quorum out of them. *Cook v. Duckenfield*, 2 Atk. 568.

14. Where a testator constitutes a person "trustee and executor of his will," that does not authorise the person to act as a trustee jointly with other persons to whom property has been given by the will on particular trusts. *Siddebotham v. Watson*, 1 W. R. 229, 303.

Testator gave his property to C. and D. upon various trusts, and among others upon trust for sale, and empowered C. and D., and the survivor of them, his heirs, executors, etc., to give receipts for the purchase money, and concluded by appointing his wife and C. and D. "trustees and executors" of his will:—Held, that this appointment conferred on his wife only the general powers and duties of an executrix, and did not make her a trustee with C. and D. under the specific trusts of the will. S. C. 11 Hare 170.

15. A testatrix bequeathed funds standing in

the name of A. her trustee to B., C., and D. (her executors), upon certain trusts, and she directed A., within six months after her death, to execute a deed, declaring that he, his executors, etc., would "thenceforth stand and be possessed" of the funds upon the trusts declared by her will:—Held, that A. was a co-trustee of the funds under the will, and could not safely transfer them to B., C., and D. without the sanction of the Court. *Iredell v. Iredell*, 18 Beav. 202.

Revocation of Appointment See WILL.

XIV. Acceptance or Disclaimer by Trustees.

- I. *Acceptance*, 6959.
- II. *Disclaimer*, 6960.

I. ACCEPTANCE.

1. *What amounts to*, 6959.
2. *Effect of*, 6959.

1. What amounts to.

1. Where personal property is bequeathed to the executors, as trustees, the probate of the will is an acceptance of the trusts. *Mucklow v. Fuller*, Jac. 198.

2. A person to whom, with others, a term of years had, in the year 1810, been bequeathed in trust, and who was appointed, with the other trustee, an executor of the will, was in 1844 presumed to have accepted the trust, though he had never acted in it, the will having been proved by the other trustees, saving his right, and he never having disclaimed. *Re Needham*, 1 J. & L. 34; 6 Ir. Eq. R. 557.

3. A testator gave a legacy of 1,100*l.* to two persons, upon certain trusts, for the benefit of his daughter and her children; he then gave a message to the same persons, upon trust for his widow for her life, and after her decease to apply the rents for his grandson H. during his minority, and to convey the message to H. at twenty-one; and he appointed his widow sole executrix. At the time of the widow's death, H. had attained twenty-one; and afterwards, by deed reciting the death of the widow, and that, in her lifetime, H. attained twenty-one, "whereby it became unnecessary for them to act in the trusts declared by the will, and in fact they never intermeddled therein; but, inasmuch as the legal estate in the said message was still outstanding in them by virtue of the recited will, they had consented, at the request of H., to convey such estate to him," the two persons named in the deed conveyed the devised message to H.:—Held, that the execution of this deed was of itself sufficient evidence that the persons who executed it had accepted and acted in the trusts of the will. *Urch v. Walker*, 3 Myl. & C. 702; 7 L. J., N.S., Ch., 292; 2 Jur. 487.

4. A trustee who has duly executed a trust deed must, in the absence of special circumstances, be bound by that indication of his acceptance of the trust, and will not afterwards

be heard to say that he thought he was merely signing as a witness. *Jones v. Higgins*, 2 L. R., Eq., 538; 35 L. J., Ch., 403; 14 W. R. 448; 14 L. T., N. S., 126.

2. Effect of.

5. A trustee, with notice of his appointment as such, interfering with the subject-matter, cannot repudiate the trust, and say he acted merely as factor or agent. *Conyngham v. Conyngham*, 1 Ves. 522.

6. A person who has accepted property as a trustee, and held it as such, is not at liberty to dispute the title to his *cestui que trust*, though that title may be doubtful. *Neligan v. Roohe*, 7 Ir. R. Eq., 332.

7. Where a trustee accepts the trust of a fund with the knowledge that it is doubtful whether it ought to be held upon such trust, he is nevertheless entitled to come to the Court, for its direction, whether the trusts ought to be executed:—Held, by Lord Justice Turner; Lord Justice Knight Bruce entirely dissenting. *Neale v. Davies*, 23 L. J., Ch., 744.

By deed certain trust funds were settled upon certain trusts, and the defendants were appointed trustees of the deed by an indenture executed by them, and containing a declaration that they should stand possessed of the trust funds on the trusts declared by that indenture. It was doubtful whether these trust funds were not withdrawn improperly from trust funds the trusts whereof had been declared by a separate indenture. In a suit instituted by some of the *cestuis que trustent* of the first indenture for transfer of their share of the settled funds:—Held, that no such transfer could be ordered except in a suit so constituted as to parties that the question of the validity of the settlement could be decided. S. C. 2 W. R. 358; 2 Eq. Rep. 530.

8. In 1823 E., by his consent, was with X. and Z. named a trustee of a marriage settlement, which comprised various sums. The deed was executed by the co-trustees of, but not by, E. X. died in 1826 insolvent. In 1829 an account was rendered which showed the sums subject to the trusts of the settlement, and that Z. had received a sum belonging to the trusts. Z. afterwards, as administrator of his father, became possessed of a large sum of residue, not administered by the executrix, and trust funds, part of this residue, he applied to his own use; but in 1830 he, by request, invested a portion of the residue in the names of himself and E., upon the trusts of the settlement, of such trustees thereof, and indorsed a memorandum thereon to the effect that it was so much of the within-mentioned and assigned sums as were subject to the trusts thereof. The memorandum Z. signed previously to 1842. In 1845 E. made inquiries of one of the *cestuis que trustent* relating to the trusts vested in him, and required to be satisfied as to the property comprised in the settlement. He was then informed that he was a trustee thereof, and a receipt of the stock bought in his and Z.'s names was inclosed. This receipt E. retained; and in March 1847 he for the first time saw the settlement, and on that occasion he signed the memorandum

indorsed thereon. Z. died in 1852 insolvent. E. received the dividends on the stock, and regularly paid them over to the tenant for life. In 1854 inquiries were made which resulted in a bill being filed, praying that an account might be taken of all sums which had been received by E., either alone or jointly with his co-trustees, or which, without his wilful neglect and default, might have been received; and that E. might be decreed to make good all losses which had been sustained, particularly so much of the property as was subject to the trusts of the settlement:—Held, that E.'s liability must be confined to the amount comprised in the memorandum signed by him; and that, so far as the bill sought to make him liable for more than that amount, it must be dismissed. *Malzy v. Edge*, 2 Jur., N. S., 80; 4 W. R. 213.

II. DISCLAIMER.

- *Under Trustee Act.* See TRUSTEE ACTS, III. 1. 3 and IV. III. 2.
- *Exercise of Powers of Sale where Trustee Disclaims.* See POWER, XXI. III. 5.
- *Costs of.* See XXXI. IX., and XXI., 1 (b) *post*.

1. As to disclaimer of office of trustee by simple instrument, and disclaimer by conveying to other trustees. *Nicolson v. Wordsworth*, 2 Swan. 369.

2. Trustee named may disclaim by parol, and then he need not be a party in any conveyance of the legal estate. *Bingham v. Glamorris (Lord)*, 2 Moll. 253.

3. A trustee named without his sanction, being called on to disclaim:—Held, authorised to take the opinion of counsel as to the necessity of executing a disclaimer. *Re Tryon*, 7 Beav. 496.

4. If one of two persons named trustees and executors disclaims and renounces, and afterwards possesses himself of assets as the agent of the other, who has accepted the trust and proved the will, he does not thereby become accountable as a trustee and executor, and ought not to be made a party to a suit for the administration of the estate. *Dove v. Everard*, 1 Russ. & M. 231; Taml. 376.

5. A trustee in a will, who released and never acted, ought not to be made a party in a suit to set aside the will on the ground of fraud, and therefore need not answer as to the fraud alleged. *Richardson v. Hulbert*, 1 Anstr. 65.

6. Testatrix bequeathed a chattel property to her daughter on attaining twenty-one, or on day of marriage, "provided that if such marriage be had without the consent of her executors after named, or the survivor of them," then that the property should be vested in the said executors, in trust for her daughter for life, and afterwards for her children, with a limitation over to C. D. The testatrix appointed H. H., P. V., and J. C. her executors. P. V. alone proved the will. The daughter married while under age, with the assent of P. V., and J. C. executed her marriage settlement as a trustee:—Held, that the assent of H. H., who never acted in the trusts of the will, was unnecessary, the power to consent

being vested in him in right of his office of executor only. *Boyce v. Corbally*, L.L. & G. temp. Plunk. 102.

7. Land was demised by A. to B. and C. for twenty-one years, with an agreement, that in case B. and C., or either of them, their executors, administrators, and assigns, should, at any time within the term, wish to purchase the reversion at a stipulated price and should give to A., his heirs or assigns, six months' notice in writing, they should be entitled to be the purchasers of the premises at the price mentioned. A. died within the term, and devised his real estates to trustees. The trustees disclaimed the trusts; and the estates descended upon D., an infant heir-at-law of A. Notice was served upon D. and his guardian by the lessees of their desire to purchase the property pursuant to the option reserved in the lease:—Held, that as A.'s assigns had disclaimed, the notice to purchase was properly served upon the heir, and that a valid contract was thereby constituted. *Woods v. Hyde*, 31 L. J., Ch., 295; 10 W. R. 339.

8. If a party having a derivative interest under a trustee refuses to execute a formal disclaimer to the trust property upon the appointment of a new trustee, he will be made to pay the costs of an application to the Court. *Exp. Primrose*, 3 Jur., N. S., 899; 26 L. J., Ch., 666.

XV. Retirement or Removal of Trustees.

- I. *Retiring Trustees*, 6960.
- II. *Liability of Deceased Trustees*, 6963.
- III. *Removal*, 6964.

I. RETIRING TRUSTEES.

- 1. *In General*, 6960.
- 2. *Liabilities of*, 6962.

1. In General.

9. Bill by trustee to be removed filed against *cestui que trust*. In England a trustee after he has acted is never removed at his own desire. It is done in Ireland, but trustee must do it at his own expense. He must pay the costs of the suit. *Hamilton v. Fry*, 2 Moll. 458.

10. Can a trustee who has accepted the trust, and committed no breach by filing a bill, get discharged if no other fit person can be found to act, and *cestui que trust* will not consent to his discharge, *quere*. *Ardill v. Savage*, 1 Ir. Eq. R. 79.

11. A trustee who is entitled to be discharged from his trust is bound to show that there is some other person ready to accept the trust. If no person will accept the trust, the Court may be obliged to keep the trustee before it, and not discharge him; but it will take care that the trustee shall not suffer thereby. *Courtenay v. Courtenay*, 3 J. & L. 519; 9 Ir. Eq. R. 329.

12. Money in the funds belonging to wards

of the Court cannot be transferred into the name of the accountant-general, to the credit of the cause, until the account is taken by a master, and his report made. This does not mean that such a transfer cannot be made, but that it could not operate as an acquittance and discharge of the trustees until they had passed their accounts. *Benocrat v. Rich*, 1 Bro. C. C. 56, and note there.

1. Trustees are not entitled as against the trust estate capriciously to refuse to continue; but if they find the trust estate involved in complicated questions, not in contemplation when they undertook the trust, they have a right to come to the Court to be relieved from it. *Greenwood v. Wakeford*, 1 Beav. 576; 8 L. J., N. S., Ch., 333.

2. Trustee cannot, by any act of his own, denude himself of that character till he has performed his trust. *Chalmers v. Bradley*, 1 Jac. & Walk. 68.

3. A trustee cannot, from mere caprice, retire from the performance of his trust without paying the costs occasioned. But circumstances arising in the administration of a trust which have altered the nature of his duties, justify him in leaving it, and entitle him to his costs. *Forshaw v. Higginson*, 20 Beav. 485.

The want of confidence in a co-trustee is a ground for asking to be relieved from the administration of trusts. *Ib.*

A trustee was desirous of retiring, and was justified in so doing, though from private circumstances; his *cestuis que trustent* having prevented him retiring, he instituted a suit to administer the trusts. He was allowed his costs. *Ib.*

The costs of evidence arising out of personal transactions between trustees will not be allowed to them, or charged on the trust fund. *Ib.*

The personal costs of the *cestuis que trustent* in respect of this evidence must be borne by themselves; but in a case where no one objected, they were allowed out of the trust fund. *Ib.*

A trustee desirous of retiring, by reason of his want of confidence in his co-trustee, cannot safely effect his object by getting such co-trustee to appoint a new trustee in his place, under a power vested in him for that purpose. *Ib.*

4. A trustee cannot withdraw from his trust unless under a provision to that effect. *Manson v. Bailie*, 2 Macq. H. L. Ca. 80.

5. A trustee thirty years after his appointment, when one of his colleagues, the acting trustee, had died, was, upon a bill filed by him:—Held, entitled to be relieved from the trusts of the settlement. *Gardiner v. Downes*, 2 Jur., N. S., 847; 25 L. J., Ch., 881; 22 Beav. 395; 4 W. R. 621.

Held, also, that he was, as trustee, entitled to the costs of the suit, as between solicitor and client, and also to his costs, charges, and expenses. *Ib.*

6. The trustees of a marriage settlement being desirous of retiring from the trusts in consequence of the responsibility to which they were exposed by the acts of the tenant for life, in repeatedly charging the trust estates and funds with annuities and other incumbrances, filed a bill to be discharged from

the trusts, and for the appointment of new trustees under direction of the Court. The Court granted the relief sought by the bill, and ordered the costs to be paid out of the interest of the tenant for life. *Coventry v. Coventry*, 1 Keen 758; 6 L. J., N. S., Ch., 275.

7. A trustee of a marriage settlement (which contained the usual power for the appointment of new trustees in place of any desiring to be discharged, etc.) applied, on account of his failing health, to the donee of the power to appoint a new trustee in his place. He neglected to do so for sixteen months, alleging that no person willing to act could be found. No embarrassment had arisen in the execution of the trusts:—Held, that he was entitled to be discharged, but that failing health alone, where the trusts were of a formal character, was not a sufficient reason for his seeking to resign so as to entitle him to costs:—Held, also, that he must pay the costs of being released from his trusteeship and of the petition. *Richardson v. Grubb*, 16 W. R. 176.

8. By deed, a mortgage debt, being money invested by the settlor upon the security of the estate of his nephew, was assigned to the plaintiff and two other persons, who were a brother and a brother-in-law of the mortgagor, upon trust for the settlor for life, and then for the children of the mortgagor. The settlement contained a power of appointing new trustees in the place of any desiring to be discharged. The plaintiff claimed to be discharged by the Court, and that a new trustee should be appointed in his place. His co-trustees had refused to exercise the power, and now appeared by counsel, and refused to act with any other trustee in the plaintiff's stead, and if he retired, desired to retire also:—Held, that the plaintiff and his co-trustees were entitled to be discharged, but as the plaintiff had shown no reason, in the circumstances of the trust, for his resignation, no costs of his application were given to him. Costs of the other trustees out of the estate. *Porter v. Watts*, 16 Jur. 757; 21 L. J., Ch., 211.

9. When a trustee retires, and new trustees are appointed by the Court, the retiring trustee is entitled to have the accounts taken. *Nott v. Foster*, 15 Jur. 3.

10. A retiring trustee is not entitled to an attested copy of the settlement under which he was a trustee, or to a duplicate of the deed of appointment of new trustees (except at his own expense). The defendant in this case was the executor of the surviving trustee of a settlement of 1821. The plaintiffs were by a deed of 1851 duly appointed new trustees. The defendant refused to transfer the settled funds to the new trustees, unless an attested copy of the original settlement and a duplicate of the deed of 1851 were given him at the expense of the estate, though he had had a copy of the latter deed, which he had compared with the original:—Held, that he was not entitled to make the demand, and he was refused his costs. *Warter v. Anderson*, 1 W. R. 493; 1 Eq. Rep. 266; 11 Hare 301.

Quere, whether if the trustee offered to pay for the duplicate copy, and the means of furnishing it existed, but the request was refused, the Court would not say the request was reasonable. *Ib.*

11. Where executors and trustees have made

an assignment on the appointment of a new trustee, they lose their character of executors, and become trustees only. *Smith v. Smith*, 1 Dr. & Sm. 384; 7 Jur., N. S., 652; 9 W. R. 406; 4 L. T., N. S., 44.

2. Liabilities of.

1. The existence of a suit in which an appointment of trust funds made in execution of a power is before the Court, and directions consequential thereto are obtained, and the trustees retire and are succeeded by others, but in which material facts connected with such appointment of the trust funds are not brought to the knowledge of the Court, does not protect the retiring trustees from the liabilities which result from such facts if they involve a breach of trust, but, on the contrary, renders such breach of trust less excusable. *Harrison v. Randall*, 9 Hare 397; 21 L. J., N. S., Ch., 294; 16 Jur. 72.

2. Where a settlement requires that a retiring trustee should assign the trust property to the continuing trustee, and that a new trustee should be chosen in the place of the retiring trustee, and there is no power to appoint a sole trustee, then, if a retiring trustee assign the trust property to a continuing trustee, and he, in abuse of his trust, dispose of it, the retiring trustee is answerable. *Wilkinson v. Parry*, 4 Russ. 272.

3. A trustee must effectually divest himself of his trusteeship, or he will retain his liability. *Pearce v. Pearce*, 22 Beav. 248; 2 Jur., N. S., 843; 26 L. J., Ch., 893.

A retiring trustee executed a power of attorney for transfer of trust stock to a proposed new trustee before the appointment of the new trustee had been completed. The trust stock was misapplied by the new trustee and lost:—Held, that the retiring trustee was liable for a breach of trust. *Id.*

A. and B. were trustees. A deed was prepared appointing C. a new trustee in the place of B. It was executed by C., but not by the other parties, so that the appointment was invalid. At the same time the trust fund was transferred by A. and B. to A. and C. Afterwards A. and C. authorised the husband of the tenant for life to receive the fund, and it was lost:—Held, that both C. (who had not been appointed a trustee, though she had acted as such) and B. were liable for the loss. *Id.*

4. The Court will only allow trustees to release themselves from responsibility by transferring trust funds into the hands of new trustees if they have reasonable grounds for believing that the funds will be secure in the hands of those to whom they commit them; and in the event of a breach of trust being committed by such new trustees, the Court will protect the retiring trustees from liability, unless clearly shown by incontrovertible evidence to have been guilty of negligence, misconduct, or fraud in relation to the transfer to the new trustees. *Webster v. Le Hunt, Le Hunt v. Webster*, 9 W. R. 918; 4 L. T., N. S., 723; 8 Jur., N. S., 345.

Trustees of a settlement commit a breach of trust by advancing part of the trust fund to the tenant for life upon various securities,

some of which are realised. The tenant for life urges the appointment of new trustees, on the ground that he has been treated unjustly by retention of income to recoup the trust fund and the realisation of the securities; and the trustees express their willingness to resign if others can be found who would put him to less inconvenience. Certain persons being proposed, the old trustees insist upon knowing who they are, and make objections, but eventually transfer the residue of the trust fund and the other securities to the new trustees, one of whom advances sufficient to reinstate the trust fund; but not only that sum, but the whole of the trust fund, is sold out within a few days, and appropriated by the tenant for life. Upon a bill filed by the children of the marriage against the tenant for life and the new and old trustees, it is deposed that the old trustees had been solemnly cautioned that the tenant for life had concocted a scheme with the intended new trustees, and the tenant for life swears that he communicated as much to them. By their answer the old trustees deny the caution, but do not contradict the affidavit of the tenant for life, although at the bar they state that they would have done so, but were ignorant of its existence. Subsequently to this bill, the plaintiffs purchase the real estate settled and the life interest of the tenant for life; and a cross-bill is filed by the old trustees, on the ground that this was a condonation. The tenant for life dies, and a policy on his life, part of the security taken by the old trustees, is paid into court by the office, and a third suit is instituted to recover that sum, the old trustees disclaiming. *Kindersley, V.-Ch.*, made a decree (8 W. R. 534) holding the retiring trustees responsible for the loss of the fund. On appeal, however:—Held, that there was no evidence to corroborate the testimony of the tenant for life, and as he was a party to the fraud, no reliance ought to be placed on his unsupported statement. *Id.*

5. By a marriage settlement the husband assigned a policy of assurance on his life to the two trustees of the settlement, and covenanted to pay the premiums. One trustee disclaimed, and the other, by assigning the policy to a single new trustee, enabled the husband to mortgage and dispose of the policy and a bonus thereon:—Held, that such breach of trust being an act of commission and not of omission only, the trustee so assigning to the new trustee was liable to pay to the trust estate the money actually received for the policy. *Kingdon v. Castleman*, 46 L. J., Ch., 448; 36 L. T., N. S., 141; 25 W. R. 345.

6. H. W., as trustee of a marriage settlement, held a bond to secure 1,200*l.* W., his brother, who was a specialty creditor of the obligor, obtained possession of the obligor's assets, and applied them in payment of his own debt and of simple contract debts before administration, which was afterwards granted to the obligor's widow, the sister of W., who was entirely guided by his advice and under his control. Subsequently W. represented to H. W. that only the sum of 600*l.* was forthcoming on foot of the bond. H. W., acting on this statement, retired from the trust, and a memorandum was endorsed on the

trust deed, signed by the administratrix and the tenant for life of the trust fund, stating that the sum of 600*l.* only was available to pay the bond, and W. was appointed trustee of the marriage settlement in place of H. W. The assets of the obligor would have been, if properly administered, sufficient to pay the bond in full:—Held, that W. and H. W. were both liable to the full amount of the bond, but that W.'s assets (he having died) were primarily answerable, as he had received the trust fund. *Fetherstone v. West*, 6 Ir. Eq. R. 86.

Held, also, that in such a state of facts it was not necessary to take an account of the assets of the obligor. *Id.*

1. D. gave his estates real and personal to A., B., and C., upon trust to hold the proceeds after conversion as to one-fourth part of the net residue for his daughter Ann, afterwards the wife of B., for her separate, inalienable use during her life, remainder for her children as she should appoint, and failing appointment among the children equally, and as to another one-fourth part of the residue for the testator's daughter Susan, afterwards the wife of A., for her separate use during her life, remainder for her children as she should appoint, and failing appointment among such last-mentioned children equally. B. and C. having died, A. became sole trustee of the residuary trust funds of the will, and being importuned and frightened by B., in affected exercise of a power of appointing new trustees contained in the testator's will, constituted B. sole trustee of his wife Ann's share, for his wife Ann and her children, and remained sole trustee of his own wife Susan's share for the like trusts for Susan and her children. The transfer of Ann's share into her husband's name was effected on the 31st March 1857, and the fund representing that share being a sum of 2,000*l.* stock and odds, was, only one day afterwards, sold by B., and the proceeds employed by him in his business and lost. D. had acted from 1851 for A. in his private affairs, and strongly dissuaded A. from seeking to effect the appointment of Ann's husband as her trustee, but ultimately deferred to the determined commands of his client, and prepared a draft deed of appointment, and one of indemnity, and was even present at the transfer of the funds from A. to B., the husband of Ann. P. had approved the deed of appointment on behalf of B. and wife, but was not otherwise acquainted with the trust. On a bill filed by Ann's children against A., D., and P.:—Held, that P. was not liable, that D. was not liable, but that A. was liable to replace the principal. *Barnes v. Addy*, 21 W. R. 324; 28 L. T., N. S., 398. Affirmed 9 L. R., Ch., 244; 43 L. J., Ch., 513; 22 W. R. 505; 30 L. T., N. S., 4.

The bill was framed in such manner as to obtain costs as incident only to the principal relief:—Held, that the principal relief having failed against D. and P., both were entitled to receive their costs of suit. *Id.*

Neither B. nor his assignees in bankruptcy, nor his wife Ann were parties to the suit; A. had died pending the suit, and his personal representative was made a party by order of revivor:—Held, that a decree might be made against A.'s estate, notwithstanding a decree

for the replacement of the principal sum lost in case the representative of A. admitted assets, and one for a general administration of A.'s estate, in case his representative did not admit assets, with further consideration reserved. *Id.*

2. In order to fix a trustee with the consequences of a breach of trust on the ground that, though himself refusing to be a party to it, he has retired in order to enable it to be committed, the particular improper act which was in contemplation at the date of his retirement must be committed, and he will not be held liable for another analogous breach of trust which the parties in whose favour he retires may immediately on his retirement commit or sanction. *Clark v. Hoskins*, 19 L. T., N. S., 331; 16 W. R. 1159; 37 L. J., Ch., 561. Varying 15 W. R. 1161; 36 L. J., Ch., 689; 16 L. T., N. S., 730.

Therefore, where trustees of a settlement which contained a power to raise money on the security of the settled estates for repairs refused a request of the tenant for life to exercise the power on the ground that the money was wanted, not for the repairs, but for the general purposes of the tenant for life, but retired in favour of more accommodating trustees, who did not raise any money under the settlement, but delivered the title-deeds to the tenant for life in order that she might deal with the estate as her own, and suppress the settlement, and she borrowed money accordingly of the plaintiff:—Held, that the retiring trustees were not liable to make good the advances of the plaintiff, and a bill to make them liable was, as against them, dismissed with costs. But a decree was made against the tenant for life and the new trustees, and also against the solicitor of the tenant for life, who had advised and participated in what had been done, though avowedly aware throughout of the fraudulent nature of the transaction. *Id.*

II. LIABILITY OF DECEASED TRUSTEES.

3. Breach of trust can fall only on the personal estate of a trustee. *Vernon v. Vandy*, 2 Atk. 119.

4. The executors of a deceased trustee, having admitted the receipt of assets, which would have been sufficient to satisfy a particular breach of trust committed by their testator, besides his other debts, held chargeable with the loss occasioned by such breach of trust, although they had paid all his debts of which they had any knowledge out of the assets, and had distributed the whole surplus among his residuary legatees many years before, and at a time when they had no notice of the breach of trust, or of any claim in respect of it. *Knatchbull v. Fearnhead*, 3 Myl. & C. 122; 1 Jur. 687. See 6 L. J., N. S., Ch., 13. n.

5. Defendants, executors to their father, who was guardian in socage to plaintiff, ordered to answer for profits taken by him. *Burgh v. Wentworth*, 1 Vern. 54.

6. Two trustees allowed funds which ought to have been invested on real or Government security to remain for several years in a bank to their joint account. After the death of one of the trustees the survivor appropriated the balance of the fund, and afterwards became

insolvent:—Held, that the estate of the deceased trustee was liable to make good the amount. *Gibbins v. Taylor*, 4 W. R. 432.

1. Where one of several trustees has died, the *cestui que trust* may generally sue the surviving trustees for an account without making the representatives of the deceased trustee a party, it being the duty of the surviving trustees to place the fund in a proper position, and recover from the estate of the deceased any portion of the trust money that may have remained in his hands, *semble*. *Beattie v. Johnstone*, 8 Hare 169.

2. Where one of several trustees dies pending a suit which does not seek to charge them personally in that character, his representatives are not necessary parties; for the trusteeship survives. *London Gas Light Co. v. Spottiswoode*, 14 Beav. 264.

3. A testator devised his residuary real and personal estate to A. and B., on trusts in which B. was beneficially interested. B. received part of the assets, and died:—Held, that a bill could not be maintained by the surviving trustee against the representatives of B. alone to recover the trust fund received by him, but that the bill ought to seek the general administration of the testator's estate. *Chancellor v. Morecraft*, 11 Beav. 262; 17 L. J., N. S., Ch., 11.

4. One trustee of a deed of settlement was dead, and a bill for an account was filed against the surviving trustees, but no allegation was made against the deceased trustee, whose legal personal representatives were never parties to the suit, and no account was prayed with regard to him. The surviving trustees, however, alleged in their answer, that he had taken an active part with them in the execution of the trusts:—Held, that the decree must go against the estate of the deceased trustee. *Elwes v. Barnard*, 11 Jur., N. S., 1035; 13 L. T., N. S., 426.

5. Where one of two trustees commits a breach of trust, the representatives of such trustee are liable. *Jenkins v. Robertson*, 1 Eq. Rep. 123; 1 W. R. 298.

6. Trustees of stock sold it, and lent the money to the tenant for life on improper security. One of them died, and the survivor received the money lent, and invested it in a different security, and shortly afterwards sold it out and again lent it to the tenant for life. The fund was lost:—Held, that the original breach of trust was not cured, and the estate of the deceased trustee was liable for the whole fund. *Lander v. Weston*, 3 Drew. 389; 2 Jur., N. S., 58; 25 L. J., Ch., 235.

7. D. appointed her bankers, A., B., and C., who were partners, to be her executors. They then owed her 20,400*l.*, without any agreement as to any particular rate of interest. Six weeks afterwards A. died, before probate of D.'s will or collecting any of her assets. He appointed B. and C. his executors. B. and C. continued in trade, and ultimately died, without having ever paid the 20,400*l.*:—Held, that the estate of A. was only chargeable, in aid of the estates of B. and C., with simple interest at 4*l.* per cent. on the principal sum unpaid. *Penny v. Avison*, 3 Jur., N. S., 62.

8. One of two trustees of a deed of settlement had, with the advice of the other, who was a solicitor, and who had acted as the legal adviser of the trustees, concurred in the investment

of trust funds on unauthorised securities. The solicitor died, and a suit was instituted against the surviving trustee and the representative of the deceased trustee to have the loss made good occasioned by the breach of trust. Another suit was instituted for the administration of the estate of the deceased trustee. In the latter suit proof was made in respect of the loss as a speciality debt, and the amount of the assets payable in respect of the proof was ordered to be transferred to the credit of the other suit. In that suit the unauthorised securities were realised, and were not sufficient to make good the breach of trust; and after it had been made good out of the proceeds, and out of the money transferred from the administration suit, there remained a surplus:—Held, first, that the surviving trustee was not, independently of the 19 & 20 Vict., c. 97, s. 5, a speciality creditor of the deceased trustee in respect of costs which he had paid under the decree in the settlement suit. *Lockhart v. Reilly*, 1 De G. & J. 464; 27 L. J., Ch., 54.

Held, secondly, that that Act is applicable to contracts made before it passed, and applied to the amount which the surviving trustee had paid since the passing of the Act. *Id.*

Held, thirdly, that the surviving trustee was not entitled to have the fund transferred from the administration suit applied in the first instance to make good the breach of trust, and to have the proceeds of the unauthorised securities treated as part of the trust fund out of which his costs were primarily to be paid, but that those proceeds were to be first applied, and the deficiency made up out of the fund transferred from the administration suit, leaving the balance of that fund to be transferred back to the credit of the administration suit, and applied ratably towards payment of the costs of the surviving trustee and the general simple contract debts of the deceased trustee. *Id.*

9. The representative of a deceased trustee, who is called upon to transfer the trust property to new trustees, is not entitled to be furnished at the expense of the fund with a duplicate of the instrument appointing such new trustees, nor is he entitled at the expense of the fund to an attested copy of the deed creating the trust. *Warter v. Anderson*, 11 Hare 301; 1 W. R. 493; 1 Eq. Rep. 266.

10. Where a breach of trust is committed by a trustee holding property upon an express trust, his assets in the hands of his personal representatives continue liable to the *cestui que trust* even after a lapse of six years from his death. *Obee v. Bishop*, 6 Jur., N. S., 132; 29 L. J., Ch., 148.

Liability of Estate of by Way of Speciality Debt.] See XXIV. VIII. post.

III. REMOVAL.

1. *Under Trustee Acts*, 6965.
2. *Of Solicitor Trustee. Summary Jurisdiction*, 6965.
3. *Under the General Jurisdiction of the Court*, 6965.
4. *Of Bankrupt Trustees*. See BANKRUPTCY, XIV. iv.
5. *Of Charity Trustees*. See CHARITY, II.—III.—VII.

1. Under Trustee Acts.

1. Where A. was nominated trustee and executor of a will, upon a petition presented for his removal under 1 Will. 4, c. 60, s. 22, stating that the will had been produced and shown to A., and read by him previously to its having been executed by the testator in his lifetime; and that A. had thereupon approved thereof and consented to act as such trustee, but that, subsequently to the testator's death, he had declined to interfere in the trusts of the will, the Court made an order for his removal, and referred it to the remembrancer to approve of a proper person to be appointed trustee in his place. *Crook v. Ingoldsby*, 2 Ir. Eq. R. 375.

2. The Court has not power, under the 13 & 14 Vict., c. 60, s. 32, to remove a trustee. *Re Garty*, 10 L. T., N. S., 331; 3 N. R. 636.

3. The 13 & 14 Vict., c. 60, does not, by s. 32, give power to the Court of Chancery to remove a trustee who is unwilling to retire; but such a trustee is entitled to have his accounts taken in the presence of all parties interested, so that they may be bound, and to have any balance due to him ascertained and paid in the same manner as before the Act. *Re Blanchard*, 7 Jur., N. S., 505; 30 L. J., Ch., 516; 9 W. R. 647; 4 L. T., N. S., 426.

4. The Court will not under the Trustee Act order the removal of a trustee merely on the ground of his having gone out of the jurisdiction. *Re Mais*, 16 Jur. 608; 21 L. J., Ch., 875.

2. Of Solicitor Trustee. Summary Jurisdiction.

5. A trustee who is a solicitor cannot be removed under the jurisdiction of the Court of Chancery over solicitors, that jurisdiction being exercised only in respect of acts done by a solicitor in that character, or in some relation immediately arising out of it. *Re Blanchard* and *Re Le Doucet*, 30 L. J., Ch., 516; 9 W. R. 647; 4 L. T., N. S., 426.

3. Under the General Jurisdiction of the Court.

(a) *Grounds for and Costs*, 6965.

(b) *Practice*, 6966.

(a) *Grounds for and Costs*.

6. In a bill for removal of trustee, it is not scandalous or impertinent to challenge every act of trustee's misconduct. *Portsmouth v. Fellows*, 5 Madd. 450.

Nor to impute to him any corrupt or improper motive in execution of trust. *Ib.*

Nor to allege that his conduct is the vindictive consequence of some act on the part of the *cestui que trust*, or of some change in his situation. *Ib.*

But it is impertinent, and may be scandalous, to state any circumstances as evidence of general malice or personal hostility. *Ib.*

7. Failure of duty from misunderstanding not a ground of removal. *Att.-Gen. v. Coopers' Co.*, 19 Ves. 492.

8. If trustee of lunatic renews lease for his

own benefit, it is breach of trust, and he will be discharged. *Exp. Phelps*, 9 Mod. 357.

9. The Court will not, upon petition, remove a trustee who has accepted the trust, but refuses to continue to act. A bill must be filed for the purpose, the costs of which will be cast on the trustee if it appear that he has improperly refused to act. *Anon.*, 4 Ir. Eq. R. 700.

10. Charges of vexatious conduct, as a ground for the removal of a trustee, must be made by bill, and not by petition. *Re Bridgman*, 1 Dr. & Sm. 164.

11. The mere fact of there being a dissension between one of several *cestuis que trustent* and the trustee is not a sufficient ground for removing the trustee from the trust. *Forster v. Davies*, 8 Jur., N. S., 65; 31 L. J., Ch., 276; 10 W. R. 180; 5 L. T., N. S., 532; 4 De G. F. & J. 133.

12. Decree discharging from a trust to a woman who had married a foreigner, though the answer denied any intention of quitting the kingdom, and stating her desire of continuing the trust. *Lake v. De Lambert*, 5 Ves. 592.

13. The defendant was one of two trustees for sale of an estate, the produce of which was divisible amongst persons *sui juris*. He refused to concur in a sale agreed upon by his *cestuis que trustent* until he had been furnished with deeds, etc., relating to another and an independent trust, and to which the Court held he was not entitled. He also refused to retire from the trusts to facilitate the sale. Upon a bill by the other trustees and the persons beneficially interested, he was removed from the trusts and ordered to pay the costs of the suit. *Palairer v. Carem*, 32 Beav. 564; 9 Jur., N. S., 426; 32 L. J., Ch., 508; 11 W. R. 449; 8 L. T., N. S., 139.

14. A testator appointed two trustees and executors of his will, but by a codicil he excluded them, and appointed two other persons. One of these retired in consideration of 75*l.* paid to him by one of the excluded trustees, and executed a deed appointing the excluded trustee in his room. The Court directed the new trustee to be removed and the deed to be cancelled, declared the conveyance to be void, and directed the 75*l.* to form part of the assets. *Sudgen v. Crossland*, 3 Sm. & G. 192; 3 Jur., N. S., 318; 25 L. J., Ch., 563.

15. The expression attributed to the Lord Chancellor, in *Att.-Gen. v. Hardy* (1 Sm., N. S., 338) with respect to the removal of dissentient trustees observed upon. *Att.-Gen. v. Clapham*, 4 De G. M. & G. 591; 1 Jur., N. S., 505; 24 L. J., Ch., 177.

A reason for not appointing a person to be a trustee may not be a ground to remove him if already appointed. 8 C. 10 Hare 613; 23 L. J., Ch., 70.

16. Where the representative of a deceased trustee made a suit necessary by a wanton refusal to act in the trust, and to receive the dividends of the trust fund:—Held, she was entitled to the costs of a bill filed to remove her and appoint other trustees. *Legg v. Mackrell*, 2 De G. F. & J. 551; 4 L. T., N. S., 568. Reversing 1 Giff. 165; 5 Jur., N. S. 1154.

See also CHARITY, VII. III.

(b) *Practice.*

1. In an action to remove a trustee, the defendant having failed to file an affidavit of documents, his defence was struck out, and an order was afterwards made on motion for judgment as to default of pleading, removing him from the office of trustee, and vesting his estate in the other trustees. *Fisher v. Hughes*, 25 W. R. 528.

2. No prayer for the removal of trustees is necessary to give the Court authority to remove them. *Att.-Gen. v. Drummond*, 3 Dr. & War. 162; 2 Con. & L. 98.

XVI. New Trustees. Appointment of, and Rights and Liabilities.

- I. *Appointment of by the Court*, 6966.
- II. *Appointment of under Powers*, 6970.
- III. *Appointment of under Statutory Powers*, 6977.
- IV. *Appointment of and Vesting Orders under Trustee Acts*. See TRUSTEE ACTS, III. and IV.
- V. *Appointment of Trustees under Settled Estates Acts and Settled Land Act*. See SETTLED ESTATES ACTS.
- VI. *Where Trustee Bankrupt*. See BANKRUPTCY, XIV. iv.
- VII. *Charity Trustees*. See CHARITY, II.—III., IV.—VII.

I. APPOINTMENT OF BY THE COURT.

1. *By Bill. In General*, 6966.
2. *Who Appointed*, 6967.
3. *Number*, 6968.
4. *Insertion of Power to appoint toties quoties*, 6969.
5. *Powers of New Trustees appointed by the Court*, 6969.
6. *Costs*, 6970.
7. *Grounds for Appointment*. See TRUSTEE ACTS, III. i. and IV. III.
8. *Reference to Master*. See TRUSTEE ACTS, III. II.
9. *Parties to Bill for*. See PRACTICE (PARTIES).

1. By Bill. In General.

3. Although the proper course is to proceed under the Trustee Act for the appointment of new trustees, a bill may be resorted to for the same purpose. *Legg v. Mackrell*, 4 L. T. N. S., 568.

4. A suit for the removal of the trustee of a settlement and the appointment of new trustees, and for the payment of certain moneys comprised in the settlement, and which had been lent to the husband to such new trustees, out of a sum of money belonging to the husband, which had been paid into court under the Trustee Relief Act, and for general administration of the trusts of the settlement, may be sustained. *Thorp v. Thorp*, 1 Kay & J. 438.

5. How parties beneficially interested, where one executor and trustee has disclaimed, and the other is dead, are to obtain an appointment of new trustees for the purpose of

executing the trusts of will. *Wood v. Stane*, 8 Price 613.

6. When the interest of a money fund, vested in two trustees, was payable to H. and his wife for their lives, remainder, as to the principal sum, to F. and his wife, and the deed contained a power of appointing a new trustee in case of the death of one of the present trustees, and one of the trustees had died:—Held, that a bill to appoint a new trustee by F. and his wife was maintainable, although there was no proof that the other parties had refused to appoint under the power. *Finlay v. Howard*, 2 Dr. & War. 490.

7. The representatives of a surviving trustee who had concurred with his co-trustee in a breach of trust by lending to the tenant for life on his promissory note, were held entitled to file a bill against such tenant for life, and the other *cestuis que trustent*, for replacing the funds, and the appointment of new trustees, with costs against the tenant for life, or out of the fund. *Greenwood v. Wakeford*, 1 Beav. 576; 8 L. J., N. S., Ch., 333.

8. Where the surviving trustee of a will devised the trust estate upon the same trusts on which he held:—Held, that the *cestuis que trustent* were entitled to have new trustees appointed of the original will. *Ockleston v. Heap*, 1 De G. & Sm. 641.

9. The survivor of two executors and trustees bequeathed the trust property to A., upon the trusts declared by the original testator, expressing by the same instrument his wish that A. would execute the trusts with fidelity. No direction was given by the will of the original testator as to the appointment of new trustees. On a bill by the *cestuis que trustent* for that purpose:—Held, that A., though legally in the possession of the trust property, was not a trustee properly constituted, and that the *cestuis que trustent* were entitled to have new trustees appointed by the Court. *Mortimer v. Ireland*, 6 Hare 196; 16 L. J., N. S., Ch., 416; 11 Jur. 721.

10. A testator gave a legacy to a trustee in trust to invest it for the benefit of E. S., independent of the control of her husband. On a bill by the husband and wife against the trustee to have it declared that the wife was absolutely entitled to the fund, and to have the same transferred to her or to her husband by her direction or in her right, it was held, that the wife was entitled to the entire disposal of the fund, but that the husband could not obtain it in that suit; and it was referred to the Master to approve of a trustee, to whom the fund might be transferred, upon the trust declared in the will, and to approve of a deed declaring that trust. *Simons v. Hornwood*, 1 Keen 7.

11. A trustee, by his answer, declined to act, and on the hearing it was referred to the Master to appoint new trustees; the original trustee afterwards agreed to act: and, on application to the Court that the trustee might be at liberty to amend his answer in this respect, so as to enable the Court, on a re-hearing, to vary that part of the decree, the Court refused to do this, but thought the Master was at liberty, on statement of these circumstances, to decline the appointment of new trustees. *Miles v. Neale*, 1 Cox, 159.

12. On a bill filed by one director of a com-

pany on behalf of the company, praying a transfer of the fund to new trustees, the Court will, without having the new trustees before the Court, direct the transfer. *Wilson v. Parker*, 10 Jur. 979.

1. *Semble*, it has never been the practice of the Court on appointing new trustees of funds to inquire whether the old trustees have received notices of incumbrances. *Phipps v. Lovegrove*, *Prosser v. Phipps*, 16 L. R., Eq., 80; 42 L. J., Ch., 892; 21 W. R., 590; 28 L. T., N. S., 584.

See also Cross References *supra* to
TRUSTEE ACTS.

2. Who Appointed.

2. A trust deed between father and son contained a power for the appointment of new trustees; this power was given, in the first instance, to the father and son during their joint lives, and after the death of either of them to the survivor. A suit was instituted after the death of the son by the father against the representative of the trustee for a conveyance of the legal estate in the trust premises to new trustees nominated by the father. A reference having been made to the Master to appoint a proper person to be trustee, he instituted an inquiry as to the relative fitness of the persons proposed by the father and the party representing the interest of the son, and reported against the nominee of the father:—Held, upon exceptions to this report, that the right of nomination rested with the father, and that the Master ought to have selected his nominee, except he was objectionable. *Kennedy v. Turnley*, Dr. 415; 6 Ir. Eq. R. 399.

Principles upon which the Court acts in the appointment of trustees in such cases. *Ib.*

3. In the appointment of new trustees by the Court, it is governed by the following rules and principles:—First, the Court will have regard to the wishes of the person by whom the trust has been created if expressed in the instrument creating the trust, or clearly to be collected from it; secondly, the Court will not appoint a person to be trustee, with a view to the interests of some of the persons interested under the trust, in opposition either to the wishes of the testator, or to the interests of others of the *cestuis que trustent*; thirdly, the Court, in appointing a trustee, will have regard to the question whether his appointment will promote or impede the execution of the trusts, for the very purpose of the appointment is that the trusts may be better carried into execution. *Re Tempest*, 1 L. R., Ch., 485; 12 Jur., N. S., 539; 35 L. J., Ch., 632; 14 W. R. 850; 14 L. T., N. S., 688.

4. Where the trusts of a settlement were of a complicated nature, and no stranger could be found willing to accept the office of trustee, the Court, departing from its usual practice, appointed as trustees two of the parties beneficially interested. *Re Clissold*, 10 L. T., N. S., 642.

5. Where the trusts are onerous, and other persons cannot be found to undertake them, the Court will appoint one of the *cestuis que trustent* to be trustee. *Earp. Clutton*, 17 Jur. 988.

6. Under special circumstances, the Court

will appoint one of the *cestuis que trustent* as trustee of an estate. *Earp. Conybeare's Settlement*, 1 W. R. 458.

7. The Master of the Rolls will not appoint a near relative of the *cestuis que trustent* a trustee unless he finds it absolutely impossible to get some one unconnected with the family to undertake the office. *Wilding v. Bolder*, 21 Beav. 222.

8. The Court declined making an order allowing a feme sole to propose herself to be trustee, on the ground that, on her marriage, her husband might interfere with the trust. *Brook v. Brook*, 1 Beav. 531.

9. Where it was not possible to get another person, the Court, with the consent of a lady who was interested under a will for her separate use, appointed her husband one of two new trustees of the will, the order containing a direction that if he became sole trustee there should be a new trustee appointed. *Re Parrott*, 30 W. R. 97.

10. The husband of a *cestui que trust* being appointed a trustee by the Court, was required to undertake to apply for the appointment of an additional trustee as soon as he became a sole trustee. *Re Hattatt*, 18 W. R. 416; 21 L. T., N. S., 781.

11. An unmarried lady of education and position, and having independent means, was appointed a co-trustee of a will. *Re Campbell*, 31 Beav. 176; 8 Jur., N. S., 1199; 31 L. J., Ch., 821; 10 W. R. 640.

12. The Court appointed an unmarried lady, aged twenty-seven, who was a relation of the *cestuis que trustent* under a will, to be a trustee, there being a difficulty in finding any other suitable person to accept the office. *Re Berkley, Berkley v. Berkley*, 9 L. R., Ch., 720; 43 L. J., Ch., 703; 31 L. T., N. S., 365.

Part of a testator's estate consisted of shares upon which there was an unlimited liability. Upon a petition to appoint a new trustee, an order was made that one of the continuing trustees, in whose name the shares stood, should sell them, and invest the proceeds in the names of himself and the other trustees. *Ib.*

Persons out of the Jurisdiction.] 13. A father gave six separate sums in trust for six daughters respectively for life, with remainder for the benefit of their children respectively at twenty-one or marriage, with ultimate gifts over for the benefit of all his children in certain contingencies. He gave a general power of appointment of new trustees. One of the six daughters married a Canadian; her children were Canadians, and had attained twenty-one or married, and the investments of the sum of money for her benefit were mostly Canadian. One of the trustees of the will retiring as far as regarded that sum, the Court appointed a Canadian trustee of the same jointly with the other trustee of the will. *Re Cunard*, 27 W. R. 52; 48 L. J., Ch., 192.

14. Consols stood settled upon a trust for a married woman for life to her separate use, without power of anticipation, with remainder as she should by will appoint, with remainder to her executors or administrators. She and all her family resided in Ireland:—Held, that the Court would appoint two persons residing in Ireland, though out of the jurisdiction. *Re Austen*, 38 L. T., N. S., 601.

1. Where all the *cestuis que trustent* are resident out of the jurisdiction, the Court will appoint new trustees resident out of the jurisdiction. *Re Liddiard*, 14 L.R., Ch. D. 310; 49 L. J., Ch., 373; 42 L. T. 621; 28 W. R. 574.

2. By a deed poll, declaring the trusts of certain sums of stock, power was reserved to the trustees to invest the trust moneys in the French funds. The trustees, although applied to by the tenant for life to make such investment, refused to do so, and paid the trust funds into court under the Trustee Relief Act. Upon a petition presented by the tenant for life, praying for the appointment of three foreigners resident in Paris as trustees in the room of the old ones, and the transfer of the trust funds to them accordingly, the Court refused to make the order. *Re Guibert's Trust*, 16 Jur. 852.

3. Trustees having a power of advancement for the benefit of children, were authorised by the Court to make an advancement for the passage and outfit of the children with their parents to New Zealand, for the sake of their health, each child's share contributing equally to the passage and outfit of their parents. *Re Long*, 38 L. J., Ch., 125; 17 W. R. 218; 19 L. T., N. S., 672.

The Court declined to sanction the transfer of the trust funds to new trustees resident in New Zealand. *Id.*

3. Number.

4. Several trustees appointed on petition, under the Act 1 Will. 4, c. 60, in the stead of a sole surviving lunatic trustee. *Re Welch*, 3 Myl. & C. 292; 7 L. J., N. S., Ch., 169.

5. It is not contrary to the practice of the Court to appoint three trustees in the place of two nominated in a will containing a power to appoint new trustees. *Birch v. Cropper*, 2 De G. & Sm. 255.

6. One sole trustee appointed in place of a lunatic trustee, where the trust was shortly to be wound up, and there had been but one trustee originally. *Re Reynault*, 16 Jur. 233.

7. When there are three trustees, and one dies, another disappears, and the third is desirous of retiring, the Court will appoint two in the place of the three. *Re Marriott*, 16 W. R. 749.

8. Where a suit was instituted for the administration of the trusts of a will, for an account of the funds, and for the removal of the surviving trustee, and, at the hearing of all parties, waived all the prayer, except the appointment of new trustees, and stated that all parties interested were before the Court, a petition was directed to be presented, supported by a proper affidavit of the fitness of the intended new trustees, and an order to be made for the appointment of the same number as were appointed by the will, without a reference. *Buckley v. Buckley*, 14 Jur. 189.

9. A., B., and C. were trustees under a will. A. died; B. and C. became bankrupt. Three new trustees were appointed by the Court in the place of A., B., and C. *Exp. Vaughan*, 13 L. J., Bk., 22.

10. The Court can appoint two or more new trustees in place of one becoming bankrupt. *Exp. Wilkinson*, 3 Mont. & A. 145.

11. A testator having devised to two trustees upon trust to sell, and one of the trustees named being an infant, the Court declined to make an order vesting the whole estate in the other trustee, being adult, but appointed a person to be trustee in the room of the infant, and vested the whole estate in such new trustee with the original adult trustee jointly. *Re Porter*, 2 Jur., N. S., 349; 25 L. J., Ch., 688.

12. A testator by his will devised his real estate to one trustee upon certain trusts. The trustee died intestate. Under the stat. 13 & 14 Vict., c. 60, the Court appointed two trustees, and made a vesting order. As the property was very small, the appointment was made without a reference on affidavit of fitness of the new trustees. *Exp. Tunstall*, 15 Jur. 645, 981; 4 De G. & Sm. 426.

13. One sole trustee appointed in the place of a lunatic trustee where the trust was shortly to be wound up, and there had been but one trustee originally. *Re Reynault*, 16 Jur. 233.

14. Where a testator had bequeathed a large fund to a single trustee, the Court, at the instance of the tenant for life of the fund, appointed an additional trustee at the cost of the corpus of the trust property. *Grant v. Grant*, 11 Jur., N. S., 787; 34 L. J., Ch., 641; 13 W. R. 1057; 13 L. T., N. S., 721; 6 N. R. 347.

15. The Court will never place a trust fund belonging to persons not *sui juris* in the power of a sole trustee. *Re Dickinson's Trusts*, 1 Jur., N. S., 724.

16. The Court will not appoint one new trustee to supply the place of more than one originally constituted. *Re Ellison*, 2 Jur., N. S., 62.

17. Under special circumstances two trustees will be appointed where the original number was three. *Bulkeley v. Eglington (Earl)*, 1 Jur., N. S., 994.

Where the property settled was very considerable, and the original settlor had nominated three trustees, the Court required clear proof of the alleged impossibility to find a third person to act with two new proposed trustees. *Id.*

18. In appointing new trustees, the Court is not limited to the number originally nominated. *Plenty v. West*, 16 Beav. 356.

19. Two trustees appointed, in addition to two existing trustees, in a case where only two trustees were originally appointed, but where the trust property had been very much increased. *Re Boycott's Settlement Trusts*, 5 W. R. 15.

20. When a trustee wishes to retire, and a successor cannot be found, the Court can appoint the continuing trustees to be sole trustees in the place of the continuing and retiring trustees. *Re Stokes*, 13 L. R., Eq., 338; 41 L. J., Ch., 290; 20 W. R. 396; 26 L. T., N. S., 181.

21. One of four trustees of a will desiring to retire:—Held, that the Court had jurisdiction, under s. 32 of the Trustees Act, 1850, to appoint the remaining three as trustees in the place of themselves and the fourth. *Re Shipperdon's Trust*, 49 L. J., Ch., 619.

22. One of the four trustees of a will having absconded:—Held, that the Court had jurisdiction, under s. 32 of the Trustee Act 1850, to

appoint the remaining three as sole trustees in place of themselves and the fourth. *Re Harford's Trusts*, 13 L. R., Ch. D., 135; 28 W. R. 239; 41 L. T. 382.

1. Where one of several trustees is of unsound mind, the Court will not re-appoint the other trustees as trustees in the place of themselves and the lunatic trustee, for the purpose of excluding the lunatic trustee from the trust; but a new trustee must be appointed in his place. *Re Harford's Trusts* (13 L. R., Ch. D., 135), not followed. *Re Aston*, 23 L. R., Ch. D., 217; 48 L. T. 195; 31 W. R. 801.

2. The Court will not, on petition, on the lunacy of one of several trustees, appoint the other trustees to be new trustees in the place of themselves and the lunatic trustee. *Re Colyer*, 50 L. J., Ch., 79; 43 L. T. 454.

3. A testator appointed A. B. (the tenant for life) and C. D. trustees. The will contained no power to appoint new trustees. C. D. having disclaimed, A. B. (under the powers of the 23 & 24 Vict., c. 145, s. 27) appointed a single trustee in his place:—Held, that the *cestuis que trustent* were entitled to have a third trustee appointed, and that the statute did not take away the jurisdiction of the Court to increase the original number of trustees. *D'Adhemar (Viscountess) v. Bertrand*, 35 Beav. 19.

4. Form of order appointing two continuing trustees to be trustees of real and personal estate settled by will, in place of themselves and one retiring trustee. *Re Northrop, Taylor v. Northrop*, 29 W. R. 134.

4. Insertion of Power to Appoint *toties quoties*.

5. The power of appointing new trustees in a settlement provided that the new trustees so to be appointed from time to time should have the same power as the trustees named in the settlement. The power was incapable of being exercised in consequence of neither of the trustees acting. On new trustees being appointed in the suit:—Held, that the Court could not give them the power of appointing new trustees. Specified persons were appointed by the Court new trustees without a reference. *Oglander v. Oglander*, 2 De G. & Sm. 381; 17 L. J., N. S., Ch., 439; 12 Jur. 786.

6. Power was given to trustees and their successors to appoint new trustees. The Court, being called on to appoint new trustees, declined to enable such new trustees to appoint successors. *Holder v. Durbin*, 11 Beav. 594; 18 L. J., N. S., Ch., 479.

7. The Court, in decreeing the appointment of new trustees, will not direct a power to be inserted in the deed for appointing new trustees *toties quoties*. *Bowles v. Weeks*, 14 Sim. 291.

8. It will not be directed by the Court, that, in a deed appointing new trustees under the Court, a power to appoint new trustees, when required, shall be inserted. *Att.-Gen. v. Madden*, 2 Con. & L. 519.

9. On a petition for the appointment of new trustees of a charity, the Court directed that, in the deed appointing the trustees, a power should be inserted for appointing new trustees in future. *Re 52 Geo. 3, c. 101*, 12 Sim. 262.

10. Trustees appointed by the Court in the place of others whose appointments had failed by their deaths in the lifetime of the testator authorised to appoint future trustees in the manner and under the circumstances mentioned in the will. *White v. White*, 5 Beav. 221; 6 Jur. 160.

11. In a suit to appoint new trustees, the Court refused to insert in the will a clause authorising such new trustees to appoint others in their stead. *Brown v. Brown*, 3 Y. & Coll. 395.

12. Where deed does not provide for appointment of new trustee, Court will not add such a power. *Southwell v. Ward*, Taml. 314.

13. On bill for appointment of new trustee, the decree directed, although not prayed, a proviso to be inserted in the deed authorising the parties from time to time thereafter to appoint new trustees. *Joyce v. Joyce*, 2 Moll. 276.

5. Powers of New Trustees appointed by the Court.

14. By deed, power was given to the trustees or trustee for the time being, at their or his entire discretion, to pay certain rents for the benefit of one, two, or more of the children of A. B., the tenant for life, and there was a power to the surviving or continuing trustee to appoint new trustees. The trustees all died without appointing new trustees, and new trustees were appointed by the Court:—Held, that they had the discretionary power given to the original trustees. *Bartley v. Bartley*, 3 Drew. 384.

15. Marriage articles authorised the tenant for life to withdraw the fund from the settlement, with the assent of the "undersigned trustees":—Held, that the power of assent was annexed to the office, and might therefore be exercised by new trustees appointed by the Court. *Byam v. Byam*, 19 Beav. 58; 1 Jur., N. S., 79; 24 L. J., Ch., 209.

16. Under a power to the survivor to appoint new trustees:—Held, upon the terms of the power, that surviving trustees, appointed by the Court and not under the power, had no authority to exercise it. *Cooper v. Macdonald*, 35 Beav. 504; 14 W. R. 755.

17. A testator bequeathed the residue of his personal estate to three persons, their executors, administrators, and assigns, in trust that they or the survivor of them, or the executors, administrators, or assigns of such survivor, should invest it in the purchase of estates in England or Scotland, such estates, if in England, to be settled according to the limitations of the same will as to his own English estates, which were thereby limited to one for life, with remainder to his first and other sons in tail, and, if in Scotland, according to the limitations of a Scotch deed of strict entail, to which his own Scotch estates were then subject, and until such purchase could be found, should pay the income of the residuary fund to the person who would be entitled to the rents of the English estates so to be purchased in case the same were actually purchased. And the will contained a power to such person, or, in case of his minority, to his guardian, to appoint new trustees, who were to have all the

powers and capacities of those in whose room they should be substituted. The three trustees invested the greater part of the residue in Scotch estates; and all died during the lifetime of the tenant for life. On his death, his son, who was entitled under the Scotch deed to the Scotch estates, as well as under the will to the English estates, conceiving himself entitled absolutely to what remained of the residuary fund, executed disentailing deeds both of the money and of the English estates, and obtained payment of the fund to himself; but his right to do so being disputed on his death by the next Scotch heir of entail.—Held, that he had no such right; but that he was entitled only to the income of the fund during his life, and that upon his death, there being then no one by whom new trustees could be appointed under the power in the will, and the Court being of opinion that the discretionary power of selecting between English and Scotch investment would not extend to trustees appointed by the Court, the fund became divisible in equal moieties, one half belonging to the personal representatives of the deceased, and the other half to be invested in Scotch estates to the uses of the Scotch deed. *Fordyce v. Bridges*, 2 Ph. 497; 2 Coop. C. C. 326; 17 L. J., N. S., Ch., 185. Varying 10 Beav. 90; 16 L. J., N. S., Ch., 81; 10 Jur. 1020.

1. One by will gives annuities, and directs residue of her estate to be disposed of in charity to such persons and in such manner as her executors or survivor may think fit. On death of them new trustees were appointed to sustain the annuities, but they could not dispose of the residue, it being a trust confined to executors personally. *Hibbard v. Lamb*, Amb. 309.

2. The effect of an order made by a court of equity under the Trustee Act 1850, substituting new trustees for those named in the will, is to transfer to the new trustees all the rights and power of the old ones. The Court, therefore, granted administration (with will annexed) to the substituted trustees, without requiring the execution of a deed of conveyance to them by the old trustees. *Woodfall, In goods of*, 42 L. J., P. C., 64; 29 L. T., N. S., 248; 21 W. R. 933.

6. Costs.

3. A person named a trustee without his knowledge, and in that character a party to the suit, having never accepted the trust, is entitled to his costs as between solicitor and client. *Sherratt v. Bentley*, 1 Russ. & M. 655.

4. A person named a trustee in a deed, who declines to accept the office, is in the situation of any other defendant against whom a bill is dismissed, and can only have his costs as between party and party. *Normay v. Normay*, 2 Myl. & K. 278; 4 L. J., N. S., Ch., 111, 163.

5. On petition to have a new trustee appointed in the place of the bankrupt, who had misappropriated the trust fund, the Court will give the assignees their costs only out of the general estate. *Exp. Heelis, Re Atkinson*, 7 Jur. 684.

6. The trustees of a meeting-house, having by a change of their religious opinions become

disqualified for the trust and refused to retire, ordered to pay the costs of the appointment of new trustees incurred in a suit instituted for that purpose on the information of the attorney-general. *Att.-Gen. v. Murdoch*, 2 Kay & J. 571; 27 L. T. 118.

7. The survivor of two trustees being guilty of misconduct, the *cestui que trustent* filed a bill to remove him, and to appoint a trustee in his place. After the bill was filed, he appointed a new trustee under a power in the settlement, in the place of the deceased trustee, without the consent of the *cestui que trustent*. The new trustee, who had no notice of the filing of the bill, was made a party by supplemental bill. The Court made him pay his own costs of the supplemental bill, but not those of the other parties. *Peatfield v. Bonn*, 2 W. R. 68; 23 L. J., Ch., 497.

8. Bill having been filed for the appointment of new trustees in a case where it was proper to have recourse to the mode provided by the provisions of the Act of Parliament, costs directed to be paid to the plaintiff. *Thomas v. Walker*, 18 Beav. 521.

9. An executrix of a deceased and sole trustee having declined to receive and pay the dividends on stock standing in the name of the trustee, the *cestui que trust* filed a bill against her for the appointment of new trustees, a transfer of the trust fund, and payment of a dividend.—Held, that the executrix was entitled to her costs out of the fund. *Legg v. Mackrell*, 2 De G. F. & J. 551.

[Of Removal.] See III. 3 (a) *supra*.

[Of Applications for by Petition.] See TRUSTEE ACTS, IV. VI.

II. APPOINTMENT OF UNDER POWERS.

1. *Who may be Appointed*, 6970.
2. *Number*, 6971.
3. *Who may Appoint*, 6972.
4. *On Bankruptcy*, 6974.
5. *On Death before Testator*, 6974.
6. *On Refusal to Act*, 6974.
7. *On Lunacy*, 6974.
8. *Where Trustee out of the Jurisdiction or Absconding*, 6974.
9. *Construction and Due Exercise of Power in Other Cases*, 6975.
10. *Exercise of Power pending Suit*, 6976.
11. *Duty in Exercise of Power and Control of Court*, 6976.
12. *Other Matters*, 6977.
13. *By Court where Power Exists but Insufficient, or Donee Incapacitated*. See TRUSTEE ACTS, III. I. 6 and IV. III. 6 and 7.
14. *Under Executory Trusts*. See V. IX. 2 *ante*.

1. Who may be Appointed.

10. Where trustees for sale have taken various steps with a view to the execution of their trust, and, one of them retiring shortly before the sale, a new trustee is, under a power contained in the trust deed, appointed in his stead, the new trustee must be a person who can and will exercise his discretion fairly and

beneficially for all persons, and as fairly and beneficially as the retiring trustee could have done. *Roberts v. Bozen*, 3 L. J., Ch., 113.

1. Upon the marriage of an English woman with a citizen of the United States, who was temporarily resident in England, the fortune of the wife, consisting of stock in the British funds, was assigned to trustees, who were Englishmen and relatives of the wife, upon certain trusts for the husband and wife and the issue of the marriage. By the settlement, power was given to the trustees, with the consent of the husband and wife, to invest the trust property in the names of the trustees or trustee for the time being in the public funds of Great Britain or America, or upon real securities in England, Wales, or America; and power was also given to the husband and wife or the survivor, in case the existing trustees should be desirous of being discharged from the trusts, to appoint new trustees. After the marriage, the husband and wife lived for about five years in England, and then went to reside permanently in America, having, previously to their departure, appointed three Americans to act as trustees in the room of the original trustees, the trust property being at the same time transferred by the English trustees into the American funds in the names of the three American trustees:—Held, that this appointment of American trustees, though not expressly authorised by the settlement, was valid. *Meinertzhagen v. Davis*, 1 Colly. 353; 13 L. J., N. S., Ch., 457; 1 Jur. 973.

2. Number.

- (a) *Single Trustee*, 6971.
- (b) *Reduction of*, 6971.
- (c) *Increase of*, 6972.

(a) *Single Trustee*.

2. Where, by the terms of a settlement, it appears to be the intention of the parties that there should at all times be two trustees of the property comprised in the settlement, the appointment of a single trustee in the place of two original trustees, and the transfer by them of the trust property to such single trustee, is a breach of trust, and the original trustees are responsible accordingly. *Hulme v. Hulme*, 2 Myl. & K. 682.

3. By a settlement, lands were assured to A. and B. upon certain trusts, with a power, in case they or either of them, or any trustee or trustees to be appointed under the power, should die or become unwilling to act for the settlor during his life, and after his decease, for the acting trustees or trustee for the time being, or for the executors or administrators of any surviving trustee, to nominate any fit persons or persons to supply the place of the trustees or trustee so dying or becoming unwilling to act. A. never executed the deed, nor acted. After A.'s death, B., being desirous of retiring, nominated C. to be a new trustee, and conveyed to C. all the trust estate. Afterwards, on account of doubts as to the validity of this appointment, the executor of B. executed a deed, appointing C. and D. to be trustees of the settlement in the place of the

original trustees; and by the same deed C. conveyed the property to the use of himself and D. They then sold the trust estate under a power of sale in the settlement:—Held, that the survivor of the original trustees had not been guilty of a breach of trust in appointing only one new trustee, and that the two new trustees were well appointed, and had validly exercised the power of sale, so as to exonerate the purchasers from responsibility. *Miller v. Priddon*, 1 De G. M. & G. 335; 21 L. J., Ch., 421.

The bill contained an allegation that the new trustee was, when the sales were made, the sole trustee of the settlement. *Semble*, that this allegation would not have precluded the plaintiff from insisting upon the invalidity of the appointment of that trustee, if the appointment had been invalid. *Id.*

4. By a will, three trustees were appointed; and in the power of appointing new trustees, it was provided that, if the trustees thereby appointed, or to be appointed under the power, or any of them, should die, or be desirous of being discharged, etc., it should be lawful for the surviving and continuing trustees or trustee, or the executors or administrators of the last surviving or continuing trustee, to appoint any other person or persons in the stead of the trustee or trustees so dying, etc., either solely or jointly with the other trustee or trustees. And that thereupon the trust estates should be conveyed so as to vest in the surviving or continuing trustees or trustee and the new trustee or trustees, or if there should be no such surviving or continuing trustee, in such new trustees only. One of the persons named trustees died in the testator's lifetime. The survivor of the two trustees being desirous of retiring, appointed one new trustee in his own place:—Held, that the appointment was invalid, and that the Court would not, under the power, appoint two trustees only, without being satisfied that such a course was for the benefit of the *cestuis que trustent*. *Lonsdale (Earl) v. Beckett*, 4 De G. & Sm. 73; 19 L. J., Ch., 342.

(b) *Reduction of*.

5. By an indenture of settlement three trustees were appointed. The settlement contained a power for the *cestuis que trustent*, in case the trustees therein named, or either of them, should die, or be desirous of being discharged from the trusts, to appoint any other person or persons to be a trustee or trustees in the place of any such trustee or trustees so dying, or being desirous to be discharged. One trustee died, and the other two were desirous of being discharged, upon which two new trustees only were substituted. The two continuing trustees refused to transfer the fund to the new trustees, upon the ground that the appointment was not properly executed, and paid the trust fund into court under the Trustee Act:—Held, upon petition for payment of the money into court, that it was competent for the *cestuis que trustent* to appoint two trustees only, and that the old trustees were not justified in paying the money into court, and they were ordered to pay costs

thereby occasioned, and their costs of the petition. *Re Fagg's Trust*, 19 L. J., N. S., Ch., 175.

1. Where three trustees were named in a settlement, with a power to the *cestuis que trustent*, to nominate, substitute, or appoint any person or persons in the place of the said present or other trustee or trustees who should die, etc.:—Held, that an appointment of two persons only in the room of the three original trustees, was a valid appointment. *Re Bathurst's Estate*, 2 Sm. & G. 169; 18 Jur. 568.

2. Trustees of a deed had a discretionary power of distribution over a fund amongst a class of children, who in default took equally. There were originally five trustees, one of whom was a member of the class. After the death of the surviving trustee, three new trustees were appointed under a power, one of whom (A.) was a member of the class. These three apportioned the fund, except a minute portion, amongst the three survivors of the children, equally, including A.:—Held, that the appointment of three trustees, instead of five, was not void; and, secondly, that the appointment of the fund was good. *Reid v. Reid*, 30 Beav. 388.

3. A testator appointed A., B., and C. to be trustees of his will, and declared that if the trustees thereby appointed or any of them should happen to die, it should be lawful for the surviving trustee or trustees to appoint any other person or persons to be a trustee or trustees, in the place of the trustees or trustee so dying; and that, on such appointment, the trust premises should be conveyed, so that the same should be vested in the surviving trustees and such new trustees, or in such new trustees solely, on the same trusts. A. died in the lifetime of the testator:—Held, that it was the intention of the testator that there should be three trustees of his will, and that a new trustee might be appointed in the place of A. *Lonsdale (Earl) v. Beckett*, 19 L. J., N. S., Ch., 342; 4 De G. & Sm. 73.

(c) Increase of.

4. Where, by a settlement, a certain number of persons are appointed trustees, and power is given, upon the death or retirement of a trustee or trustees, to appoint any person or other persons to be a trustee or trustees in his or their room, an appointment of a greater than the original number of trustees is not a valid exercise of the power. *Exp. Davis, Re Clark*, 2 Y. & Coll. C. C. 46; 3 M. D. & De G. 304; 12 L. J., N. S., Bk., 38; 7 Jur. 430.

5. Upon the construction of the power for appointing new trustees contained in a marriage settlement:—Held, that the appointment of three new trustees in the room of the two original trustees of the settlement, was valid. *Meinertzhagen v. Davis*, 1 Colly. 353; 13 L. J., N. S., Ch., 457; 8 Jur. 973.

6. *Semble*, that the appointment of more than one trustee in the place of one dead or retiring trustee, cannot be justified without express words indicating the intention of the settlor. *Stones v. Romton*, 1 W. R. 499; 17 Jur., N. S., 750; 22 L. J., Ch., 975; 1 Eq. Rep. 427; 17 Beav. 308.

3. Who may Appoint.

7. Under a power enabling a surviving or continuing trustee to appoint a new trustee in the place of a trustee dying, going to reside abroad, becoming incapable of acting, etc., the surviving trustee, although himself residing abroad, may appoint another trustee in the place of the one deceased. *O'Reilly v. Alderson*, 8 Hare 101.

8. Two retiring trustees, held not authorised to appoint two new trustees, under a power given to surviving or continuing trustees. *Stones v. Romton*, 17 Beav. 308; 17 Jur. 750; 22 L. J., Ch., 975; 1 Eq. Rep. 427; 1 W. R. 499.

By a settlement two trustees were appointed, and it was provided that "if the said trustees, or either of them, should die, or be desirous of being discharged, or refuse or become incapable to act, the settlor during his life, and after his decease the surviving or continuing trustees or trustee, or the executors or administrators of the last acting trustee, might appoint any other person or persons to be a trustee or trustees in the stead of the trustee or trustees so dying, or desiring to be discharged, or refusing or becoming incapable to act; and upon every such appointment the trust premises should be so transferred that the same might become vested in the new trustee or trustees jointly with the surviving or continuing trustee or trustees, or solely, as the case might require." The settlor died without appointing new trustees, and the two original trustees (being desirous of being discharged from the trusts) afterwards appointed by the same deed two other persons to be trustees in their places:—Held, that this was not a valid appointment of new trustees under the power. *Id.*

9. A testator, after devising real estate to two trustees, and bequeathing his personal estate to his wife, and the same two trustees, declared that if any of the trustees thereby appointed, to be appointed as thereafter mentioned, should depart this life, or decline or become incapable to act, it should be lawful for the surviving or continuing trustee for the time being, or the executors, etc., of such survivor, but with the consent of his (the testator's) said wife, during her widowhood, to appoint one or more person or persons to be a trustee or trustees in the room of the trustee or trustees so dying, or declining or becoming incapable to act; and thereupon the said trust estates, moneys, and premises should be vested in the same trustee or trustees, solely or jointly with the continuing trustee or trustees, as occasion should require; and that such new trustee should have the same powers, etc., as if he or they had been originally nominated a trustee or trustees. A new trustee having been appointed in the place of one who died, and having survived the widow and the other original trustee:—Held, that he was authorised, under the power, to appoint two new trustees. *Hillman v. Westwood*, 24 L. J., Ch., 57; 3 W. R. 41; 3 Eq. Rep. 142.

10. A lady being entitled to a sum, payable at a future time, out of her father's estates, it was agreed, by articles on her marriage, that in the settlement to be made in pursuance thereof a power should be inserted for her father in his

lifetime, or his executors within six months after the sum should be payable, to invest that sum in the names of the trustees to be appointed for the purpose, and for the trustees, with the consent of the husband and wife, or the survivor, or of their own authority, as the case should happen, to change the securities, the trusts of the fund being for the husband for his life, then to the wife for her life, then to the children. No settlement was executed, and the father and the husband died before the fund was invested, leaving the wife surviving and four children:—Held, that the wife had no power to appoint a trustee to receive the funds. *Brasier v. Hudson*, 9 Sim. 11.

1. A power for the surviving or continuing trustees to appoint new trustees in the stead of any trustees dying or declining to act, does not authorise declining trustees to appoint new ones in their own stead. *Nicholson v. Wright*, 3 Jur., N. S., 313; 26 L. J., Ch., 312.

2. The testator appointed A., B., and C. executors and trustees of his will, providing that if either of them, or any succeeding trustee or trustees, should die, or refuse or neglect or become incapable to act in the trust, it should be lawful to and for the survivor of them, the said A., B., and C., and such new trustee or trustees to be nominated in their or either of their stead, to appoint a new trustee or new trustees instead of the said A., B., and C.; or either of them, or any future trustee or trustees so dying or desiring to be discharged, or refusing or neglecting or becoming incapable to act as aforesaid. A. having disclaimed the trust, and B. having died, C. alone, though not the survivor of A., B., and C., appointed new trustees under the power:—Held, that the new trustees were well appointed. *Cafe v. Bent*, 5 Hare 24; 9 Jur. 653.

3. A power in a settlement to a party, his executors, etc., to appoint new trustees, may, on the renunciation of one executor, be exercised by the remaining acting ones. *Granville (Earl) v. McNeile*, 7 Hare 156; 18 L. J., N. S., Ch., 164; 13 Jur. 252.

4. E. M. N. and his wife, under a power in their marriage settlement, directed the trustees, after the decease of the survivor of them, to receive a sum of 3,000*l.*, and pay it to their three daughters equally. F. M. N., one of the daughters, upon her marriage with S. D., assigned all her interest in the appointed fund, by way of settlement, to C. R. and T. L. Upon C. R. requiring to be discharged from being a trustee, T. L., who had never accepted the trusts, executed a deed of disclaimer, upon which B. W. N. and J. N. were appointed trustees in the place of C. R. and T. L., and C. R. assigned the trust fund to them; but the trustees of the original settlement alleged that T. L. had accepted the trusts, and that B. W. N. and J. N. were not trustees, and they refused to pay the share of F. M. N. to them:—Held, upon a bill filed by B. W. N. and J. N., that they were duly appointed trustees; and upon an objection for want of parties, that the *cestuis que trustent* and T. L. were not necessary parties to the suit; that the capital and dividends of F. M. N.'s share ought to be transferred to the trustees; that the costs of the suit ought to be paid out of the trust funds; and that the defendant was

not entitled to any costs of the objection for want of parties, but that the plaintiffs were entitled to their costs out of the trust funds. *Noble v. Meymott*, 14 Beav. 471; 20 L. J., N. S., Ch., 612.

5. Where the testator gave 300*l.* to each of three trustees who should prove and act, but if any one should die without having acted, or should refuse to act, the legacy should go to such trustees as, under the powers of the will, should be appointed in their place, two died in the testator's lifetime, and, under a decree in a suit for the administration, two others having been proposed by the survivor and appointed by the Master:—Held, that they were not entitled to the legacies, the power of appointing new trustees by the will being in the surviving trustee or trustees, who were to nominate, etc., and that thereupon the estate, etc., vested in the trustee dying or refusing to act, should become vested in the new trustee, etc. *Quare*, whether the estate, never having vested in the trustees dying in the testator's lifetime, new trustees could be appointed by the survivor under the power. *Walsh v. Gladstone*, 14 Sim. 2; 8 Jur. 51.

6. A testatrix gave real and personal property to trustees, with a proviso, that if the trustees thereby appointed or to be appointed should die or decline to act, it should be lawful for the then surviving or continuing trustee, or if there should be no surviving or continuing trustee then for the trustee so declining to act, by deed to substitute or appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying or declining to act. One of the two trustees died in the lifetime of the testatrix: the other survived her, and by deed disclaimed the trust, except the power of nominating other persons to be trustees; and by the same deed he appointed two persons to be trustees in the place of the trustee who had died before the testatrix and of himself:—Held, that the power had been properly executed. *Exp. & Re Hadley*, 5 De G. & Sm. 67; 21 L. J., N. S., Ch., 109; 16 Jur. 98.

7. Power for "the surviving or continuing or other trustee or trustees" to appoint new trustees:—Held, that under the words "other trustee or trustees" new trustees were well appointed by the sole surviving trustee, although he was himself retiring at the same time. *Camoy's (Lord) v. Best*, 19 Beav. 414.

8. A testator appointed three trustees, and empowered "the surviving or continuing trustee or trustees" to appoint new trustees. Two of the trustees disclaimed; the third acted, and by deed, reciting that he "now declined to act," appointed new trustees:—Held, that such retiring trustee was not a surviving or continuing trustee within the power, and that the appointment was invalid. *Travis v. Illingworth*, 2 Dr. & Sm. 344; 11 Jur., N. S., 215; 34 L. J., Ch., 481; 13 W. R. 489; 12 L. T., N. S., 134; 5 N. R. 427.

Two trustees were originally appointed by a settlement, which contained a power that if the trustees or either of them should be desirous of being discharged, the tenant for life, "and after his decease, the surviving or continuing trustees or trustee," might appoint

any other person or persons to be a trustee or trustees, in the stead of the trustee or trustees so desiring to be discharged:—Held, that this did not authorise the two original trustees, after the death of the tenant for life, to retire together and appoint two new trustees in their stead. *Ib.*

4. On Bankruptcy.

1. When there was a power in a settlement to appoint new trustees, in case any of the trustees therein "should become incapable, or unfit to act in the trust thereof":—Held, that by the bankruptcy of a trustee he became "unfit to act" within the meaning of the power. *Re Roche*, 2 Dr. & War. 287; 1 Con. & L. 306.

2. A power to appoint a new trustee in the place of a trustee who should become incapable to act, contemplates the personal incapacity of such trustee; and, therefore, a trustee who had become bankrupt, and been indicted for not surrendering to the fiat, and had absconded, was held not thereby to have become "incapable" of acting in the trust within the meaning of the power. *Re Watt's Settlement*, 9 Hare 106; 20 L. J., N. S., Ch., 337; 15 Jur. 459.

5. On Death before Testator.

3. A new trustee cannot be appointed under the usual powers, in the place of one appointed by the will, who died in the lifetime of the testator. *Winter v. Rudge*, 15 Sim. 596.

A testator empowered his wife (who was a *cestui que trust* under his will) during her life, and after her death the then surviving or continuing trustee of his will, to appoint any new trustee or trustees as often as any of his first or future trustees should die, etc. One of the trustees named in the will died before the testator:—Held, that the power did not authorise the widow to appoint a new trustee in the place of the deceased. *Ib.*

4. A testator appointed A., B., and C. to be trustees of his will, and declared that if the trustees thereby appointed, or any of them, should happen to die, it should be lawful for the surviving trustee or trustees to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, and that, on such appointment, the trust premises should be conveyed, so that the same should be vested in the surviving trustees and such new trustees, or in such new trustees solely, on the same trusts. A. died in the lifetime of the testator:—Held, that it was the intention of the testator that there should be three trustees of his will, and that a new trustee might be appointed in the place of A. *Lonsdale (Earl) v. Beckett*, 19 L. J., N. S., Ch., 342; 4 De G. & Sm. 73.

5. Where the testator gave 300*l.* to each of three trustees who should prove and act, but if any one should die without having acted, or should refuse to act, the legacy should go to such trustees as, under the powers in the will, should be appointed in their place, two died in the testator's lifetime, and, under a decree in a suit for the administration, two others having been proposed by the survivor and appointed by the Master:—Held, that they

were not entitled to the legacies, the power of appointing new trustees by the will being in the surviving trustee or trustees, who were to nominate, etc., and that thereupon the estate, etc., vested in the trustee dying or refusing to act, should become vested in the new trustee, etc. *Quære*, whether the estate never having vested in the trustees dying in the testator's lifetime, new trustees could be appointed by the survivor under the power. *Walsh v. Gladstone*, 14 Sim. 2; 8 Jur. 51.

6. On Refusal to Act.

6. A trustee who had paid money into court under the 10 & 11 Vict., c. 96:—Held, to have retired from his trust, and a new trustee held to have been duly appointed in his stead, under a power for that purpose to arise in the event of a trustee "refusing or declining to act in the trusts of the settlement." *Re Williams*, 4 Kay & J. 87.

7. On Lunacy.

7. A power of appointing new trustees provided that if any trustees or trustee should die, or become unwilling or unable to act, the trustees or trustee for the time being, whether continuing or declining to act, might appoint a new trustee or trustees. One of the three trustees became of unsound mind, but was not so found by inquisition, and the other two appointed a new trustee in his room:—Held, that the power was well exercised. *Re East, Re Bellwood's Trusts*, 8 L. R., Ch., 735; 42 L. J., Ch., 480.

A petition for an order vesting the trust estate in the continuing trustees and the new trustee having been presented:—Held, that service on the trustee of unsound mind was not necessary. *Ib.*

8. Where Trustee out of the Jurisdiction or Absconding.

8. A power to appoint a new trustee on an existing one becoming incapable to act, does not apply to the case of a trustee going to reside abroad. *Withington v. Withington*, 16 Sim. 104.

9. A trustee going out of the jurisdiction is not thereby incapable, unwilling, or unable to act within the terms of the power to appoint new trustees, and an application to the Court is proper. But if a breach of trust has been committed, this Court, though it sanctions the appointment of a new trustee, will make no order as to the trust property. *Re Harrison's Trusts*, 22 L. J., Ch., 69.

10. In a deed of settlement of property in the city of London, it being declared, that if either of the trustees should die, or decline or become incapable to act, it should be lawful to appoint a trustee in his room. One trustee having for several years been domiciled in New York, as a bookseller:—Held, he was incapable of acting within the meaning of the deed. *Meenard v. Welford*, 1 Sm. & G. 426; 17 Jur. 815; 22 L. J., Ch., 1053.

11. A power to appoint a new trustee in

the place of a trustee who should become incapable to act, contemplates the personal incapacity of such trustee; and therefore a trustee who had become bankrupt, and been indicted for not surrendering to the fiat, and had absconded, was held not thereby to have become "incapable" of acting in the trust, within the meaning of the power. *Re Watts's Settlement*, 9 Hare 106; 20 L. J., N. S., Ch., 337; 15 Jur. 459.

1. *Semble*, that a power in a settlement to appoint a new trustee in the place of a trustee incapable to act applies to personal incapacity, and not to simple residence abroad. *Re Bignold*, 7 L. R., Ch., 223; 41 L. J., Ch., 235; 26 L. T. 176; 20 W. R. 345.

2. New trustees of a charity were to be appointed in lieu of those who should depart the United Kingdom, from whatever cause or motive, or under whatsoever circumstances; and every such trustee so departing the United Kingdom was immediately upon his departure to be, and be considered to be, discharged from the trusts of the charity. A temporary departure from the United Kingdom held insufficient to vacate the office of trustee. *Re Moravian Society*, 4 Jur., N. S., 703; 6 W. R. 861; 26 Beav. 101.

9. Construction and Due Exercise of Power in Other Cases.

3. A settlement contained a proviso that in case either of the trustees should die or become unwilling to act in the trusts, it should be lawful for the acting trustees or trustee for the time being, or the executors or administrators of any surviving trustee, to nominate any fit person to supply the place or places of the trustee or trustees respectively so dying or becoming unwilling to act. On the death of one trustee, the survivor executed a deed reciting that he was desirous of retiring from the trust, and that he had appointed another person to be a trustee in his place, and conveying the trust property to such new trustee:—Held, that the surviving trustee had power to nominate a sole trustee to act in his place, and that the appointment by recital was good. *Miller v. Priddon*, 18 L. J., N. S., Ch., 226; 1 De G. M. & G., 335; 21 L. J., Ch., 421.

4. By a marriage settlement, a policy and moneys thereby assured were assigned to four trustees on the trusts of the settlement, with power to the husband and wife, on and after the death of the survivor, or the continuing trustee, or, in case there should be no continuing trustee, for the retiring trustee, in case the trustees should die or desire to be discharged, to appoint new trustees; and the estate should thereon be assigned, so as to vest in such trustee jointly with the former trustees; and in case there should be no former continuing trustee, then in such new trustee or trustees only. Two of the trustees being dead and two desirous of retiring, three new trustees were appointed, of whom one being afterwards desirous of retiring, a new trustee was appointed:—Held, a valid exercise of the power. *Emmet v. Clark*, 3 Giff. 32; 7 Jur., N. S., 404; 30 L. J., Ch., 472; 9 W. R. 515; 4 L. T., N. S., 319.

5. By deed of trust of 1682 for the appoint-

ment of a vicar, it was declared that upon the death of any of the trustees the survivors should from time to time, when and as often as they should think fit, before the number of trustees should be reduced to the number of five, or within three months after they should be reduced to the number of four, appoint new trustees, and convey the premises to them, so as to complete the number of nine trustees. It appeared that from the date of the deed to the election of a clerk in 1840 this clause had never been strictly acted upon, though the number of trustees had generally been kept up to nine:—Held, that the informality in the appointment of the trustees did not vitiate the election. *Att.-Gen. v. Cumming*, 2 Y. & Coll. C. C. 139; 7 Jur. 187.

6. On an original trustee joining with a new trustee, but the deed not duly executed in appointing a trustee in the stead of one retiring, and afterwards, on receiving an indemnity, joining with the latter, the deed purporting to be an execution of the power was not a proper execution of it. *Lancashire v. Lancashire*, 1 De G. & Sm. 288; 11 Jur. 1024. Affirmed 2 Ph. 657.

7. The power to appoint new trustees directed that upon such appointment being exercised, the trust estate should be vested in the newly appointed trustee jointly with the surviving or continuing trustee:—Held, that the meaning of such a power was to appoint new trustees whenever the event requiring such a change should arise, and that a valid appointment of and a transfer of the estate to new trustees might be made under the power, notwithstanding the removal of the surviving trustees. *Re Roche*, 2 Dr. & War. 287; 1 Con. & L. 306.

8. A testator by his will appointed S. and C. trustees of certain property therein comprised, which appointment he afterwards revoked by codicil, substituting H. and B. in their room. The will contained the ordinary clauses authorising the appointment by the continuing trustees or trustee of a new trustee or new trustees in the place of any dying or desiring to be discharged. Shortly after the death of the testator, C., one of the excluded trustees, paid 75*l.* to H., upon the understanding that H. should retire and that he, C., should be appointed a new trustee in his place. This arrangement was assumed to be carried into effect by an indenture made between H., B., and C., in which the pecuniary consideration was not disclosed:—Held, that this attempted execution of the power of appointment was fraudulent and void. The deed was directed to be cancelled, and the sum of 75*l.* to be paid over by H. to the *cestui que trust*. *Sugden v. Crosland*, 4 W. R. 343; 20 Jur. 318.

9. Estates were vested by a settlement, in the Scotch form, in two trustees, each of whom was empowered to nominate any other person to succeed him in the trust after his decease. One trustee disclaimed; the other trustee appointed by his will three persons to succeed him:—Held, that they were duly appointed. *Sands v. Nugee*, 8 Sim. 130; 5 L. J., N. S., Ch., 329.

10. A settlement contained a power for the tenant for life during his life, and after his decease for the surviving or continuing

trustees or trustee, or the executors or administrators of the last acting trustee, to appoint any other person or persons to be a trustee or trustees, in the stead of any trustee or trustees dying, or desiring to be discharged, etc. There were two trustees named in the will, both of whom were desirous of being discharged after the death of the tenant for life. They accordingly executed an indenture whereby they appointed two new trustees in their place, and conveyed the trust property to them accordingly:—Held, that the power had not been properly executed. *Stones v. Rowton*, 1 W. R. 499; 1 Eq. Rep. 427; 17 Jur. 750; 22 L. J., Ch., 975; 17 Beav. 308.

10. Exercise of Power Pending Suit.

1. The institution of a suit against trustees for the administration of the trust estate under the direction of the Court, does not preclude the exercise of the discretion given to the trustees by the will of the testator, as to the appointment of new trustees, or the management of the trust; but the trustees are required, after the institution of the suit, to act under the control of the Court. *Cafe v. Bent*, 3 Hare 245; 13 L. J., N. S., Ch., 169; 8 Jur. 141.

2. The appointment of a new trustee under a power, pending a suit for administration, is not necessarily invalid. *Graham v. Graham*, 16 Beav. 550; 17 Jur. 569; 22 L. J., Ch., 937.

3. In a suit for the appointment of new trustees, occasioned by the refusal of the surviving trustees to exercise a power of appointment, reference was made to the Master to approve of proper persons. Exceptions to his report on the ground that he had not regarded the right of nomination given to the surviving trustee by the instrument creating the power, but not raising any objections to the fitness of the persons nominated by the Master, were overruled. *Middleton v. Reay*, 7 Hare 106; 18 L. J., N. S., Ch., 153; 13 Jur. 116; 18 L. J., N. S., Ch., 153.

If the party's right of nomination is to be preserved, there should be special directions to the Master, *semble*. *Id*.

4. A decree for the administration of the trusts of a will directed "that some proper person be appointed" a trustee of the will in the place of a deceased trustee. The power of appointing new trustees was given by the will to the surviving trustee, who was the defendant. The plaintiff took out a summons to have A. B. appointed trustee, and the defendant a summons to have C. D. appointed. The summonses were adjourned into court, and Bacon, V.-Ch., appointed the nominee of the plaintiff:—Held, on appeal, that the decree did not take away from the defendant the power of appointing new trustees, though after decree he could only exercise it subject to the supervision of the Court; that if he nominated a fit and proper person, such person must be appointed, and the Court would not appoint some one else on the ground that such other person was, in the opinion of the Court, more eligible; and that if he nominated a person whom the Court did not approve, the Court would not itself make the choice, but would call on him to make a fresh nomination:—Held, therefore, that the appointment of A. B. must be discharged. *Middleton v. Reay* (7

Hare 106) distinguished. *Re Gadd, Eastwood v. Clark*, 23 L. R., Ch. D., 134; 52 L. J., Ch., 396; 48 L. T. 395; 31 W. R. 417.

5. Real estate was settled by will on D. for life, with remainders over, and the will appointed two trustees, and empowered them to sell at the request and by the direction of the person entitled to the actual freehold, with the usual provisions for re-investment in land and interim investment in other securities. The will also gave a power to appoint new trustees vested in the same person. One of the trustees was dead. D., who was over eighty years of age, proposed to sell the estate. The remaindermen brought this action for the appointment of a new trustee, and to restrain the sale as improper, adducing evidence to show that the estate would sell to better advantage at a future date, owing to the existence of minerals at present unworked, and a projected railway which would pass through the estate. D. had no re-investment in land in view, and proposed to invest in consols. After action brought, the Settled Land Act 1882 came into operation; and shortly before the action came on for trial, D., under the power in the will, appointed a new trustee without referring the appointment to the Court. The trustees consented to the proposed sale:—Held, that D. was entitled to sell the estate as well under the power in the will as under the Settled Land Act. *Thomas v. Williams*, 24 L. R., Ch. D., 558; 52 L. J., Ch., 603; 49 L. T. 111; 31 W. R. 943.

Held, also, that the new trustee was properly appointed, notwithstanding the pending action. *Id*.

11. Duty in Exercise of Power and Control of Court.

6. Court controls trustee in the exercise of power to appoint new trustees, though given in very large words. *Webb v. Shaftesbury (Earl)*, 7 Ves. 480.

7. Trustees ought not to exercise a power of selecting new trustees for the mere purpose of continuing the trust property under the management of a particular solicitor. *Marshall v. Sladden*, 7 Hare 428; 19 L. J., N. S., Ch., 57; 14 Jur. 106.

Circumstances in which it is improper for a retiring trustee to appoint a new trustee, with communication with the *cestuis que trustent*. *Id*.

8. It is the duty of trustees having power to appoint new trustees, to make such appointment impartially, as between the *cestuis que trustent*, and not without communication with them. *O'Reilly v. Alderson*, 8 Hare 101.

9. S., in 1852, appointed B. and C. trustees of his will, which contained a power of appointing new trustees. By a codicil made in the same year he revoked the appointment of B. and C., and appointed D. and E. in their place as trustees. After the death of the testator, C., in consideration of 75*l*. paid by him to D., who retired from the office of trustee, was by deed, purporting to be an appointment under the power, appointed in his place:—Held, that the deed was fraudulent and void, and that no estate passed to C. under it. The Court ordered the deed to be delivered up to be cancelled, and the 75*l*. to be repaid by D. for the benefit of the parties beneficially

interested under the will. *Sugden v. Crosland*, 2 Jur. N. S., 318; 25 L. J., Ch., 563.

1. When a person having a special power of appointment over a fund of personality appoints trustees for the objects of the power, the Court, though recognising the validity of such an appointment, will not, as a matter of right, transfer the fund to the trustees appointed by the donee of the power. *Busk v. Aldam*, 19 L. R., Eq., 16; 44 L. J., Ch., 119; 31 L. T. 370; 23 W. R. 21.

12. Other Matters.

2. When, in the inception of a trust, the funds are vested in two trustees, and one of them dies, the survivor is entitled to have the advice and co-operation of a new trustee before dealing with the principal of the trust funds in any way which involves a question of discretion. *Livesey v. O'Hara*, 14 Ir. Ch. Rep. 12.

3. An executrix, by a deed reciting that she intended to appropriate a part of her testator's assets in payment of a debt due from him to her, declared trusts of the fund intended to be thus appropriated. She died without making the appropriation, which was made after her decease by her executors. New trustees of the deed, subsequently appointed, executed a declaration of trust (contained in the deed appointing them) whereby they declared that they would hold the fund upon the trusts. On inquiring, before their appointment, for evidence in verification of the recital as to the existence of the debt from the testator to the executrix, none could be discovered:—Held, that the trustees could not be compelled to execute these trusts without further evidence of the settlor's title to appropriate the fund. *Neale v. Davies*, 5 De G. M. & G. 258.

4. Where there is a joint power of appointing new trustees in a settlement, and the parties are separated and cannot agree, and the husband refuses to appoint or approve of a person nominated by the wife merely for that reason, a claim by him dismissed with costs. *Fry v. Watson*, 1 W. R. 282.

5. By a marriage settlement, certain policies of assurance affected by the husband upon his life were assigned to trustees upon trust to pay the proceeds to the wife for life, and then to divide the capital between the children of the marriage. The settlement also contained a covenant on the part of the husband to pay the premiums, and hand over the receipts to the trustees. There was also a power for the husband and wife jointly to appoint new trustees, with a proviso that on such appointment the old trustees should convey to the new trustees. The husband and wife jointly executed the power of appointing new trustees; the old trustees refused to execute a conveyance of the trust property, upon which a bill was filed to compel them to do so:—Held, that there was nothing vested in the trustees; consequently there was nothing for them to do, and nothing for the Court to direct them to do: and the bill was dismissed with costs. *Dodson v. Powell*, 18 L. J., N. S., Ch., 237.

6. When the power to appoint new trustees directs the property to be vested in the new trustees jointly with the surviving or con-

tinuing trustee, and the surviving trustee had become bankrupt:—Held, that, notwithstanding, a valid appointment of and transfer of the estate to the new trustee might be made under the power. *Re Roche*, 2 Dr. & War. 287; 1 Con. & L. 306.

7. *Seemle*, that is the duty of a trustee parting with a fund to a new trustee to inform him of all notices he has received affecting the fund. *Re Booth's Settlement Trusts*, 1 W. R. 444; 16 Jur. 965.

8. *Seemle*, that new trustees of trust funds in settlement are not bound to inquire of the old trustees whether they have received notice of any incumbrance. *Phipps v. Lovegrove, Prosser v. Phipps*, 16 L. R., Eq., 80; 42 L. J., Ch., 892; 21 W. R. 590; 28 L. T., N. S., 584.

9. As to liability of new trustees for breaches of trust. See *Exp. Geaves, Re Strahan*, 8 De G. M. & G. 291; 2 Jur., N. S., 651; 25 L. J., Bk., 53; 4 W. R. 356.

III. APPOINTMENT OF UNDER STATUTORY POWERS.

1. *Who may Appoint*, 6977.

2. *Number Appointed*, 6977.

3. *Effect of Conveyancing Act 1881*, s. 31, 6978.

1. Who may Appoint.

8. When an express power contained in a will for the appointment of new trustees by the surviving or continuing trustees had not been acted on, the Court refused to compel the legatees to acquiesce in an appointment by the executor of the last surviving trustees, under 23 & 24 Vict., c. 145, s. 27. *Re Jackson*, 16 W. R. 572; 18 L. T., N. S., 80.

9. One of the trustees of a deed of separation which contained no power of appointment of new trustees having died:—Held, that the power was vested in the surviving trustee by 23 & 24 Vict., c. 145, s. 27, and a petition by the husband claiming the right of selection was dismissed. *Re Southby*, 21 W. R. 256.

10. A settlement executed in 1878 contained no express power to appoint new trustees, but there was a declaration that the husband and wife during their joint lives, and the survivor of them during his or her life, "shall have power to appoint new trustees or a new trustee for this settlement." There was no express reference to the power of appointing new trustees conferred by a 27 of Lord Cranworth's Act, which was then in force:—Held, that, after the commencement of the Conveyancing Act 1881, the husband and wife were the proper persons to exercise the power conferred by s. 31 of that Act of appointing a new trustee in place of one of the trustees who had remained out of the United Kingdom for more than twelve months, though s. 27 of Lord Cranworth's Act did not provide for, and the parties when they executed the settlement probably did not contemplate, the occurrence of a vacancy in that event. *Re Walker, and Hughes' Contract*, 24 L. R., Ch. D., 698; 49 L. T. 597.

2. Number Appointed.

11. A testator appointed A. (the tenant for life) and B. trustees. The will contained no

power to appoint new trustees. B. having disclaimed, A., under 23 & 24 Vict., c. 145, s. 27, appointed a single trustee in his place:—Held, that the other *cestuis que trustent* were entitled to have a third trustee appointed, and that the statute did not take away the jurisdiction of the Court to increase the original number of trustees. *D'Adhemar v. Bertrand*, 35 Beav. 19.

1. The power of appointing new trustees given by s. 27 of the Act 23 & 24 Vict., c. 145, authorises a retiring trustee, one of two originally appointed, to appoint a single trustee in place of himself, the other original trustee having previously disclaimed without acting. *West of England & South Wales District Bank v. Murch, Re Booker*, 23 L. R., Ch. D., 8; 52 L. J., Ch., 784; 48 L. T. 417; 31 W. R. 467.

3. Effect of Conveyancing Act 1881, s. 31.

2. Sect. 31 of the Conveyancing Act 1881 having given a power to appoint new trustees in every case where a trust is subsisting, it is now improper to apply to the Court for the appointment of new trustees under the Trustee Act 1850, s. 32, unless there is some reason to make it "difficult, inexpedient, or impracticable to appoint them without the assistance of the Court" other than the mere absence of a power to do so in the instrument creating the trust. *Re Gibbon's Trusts*, 45 L. T. 756; 30 W. R. 287.

XVII. General Rights of Trustee and Cestui que Trust.

- I. *General Position of Trustee*, 6978.
- II. *Trustee de facto*, 6979.
- III. *Possession of Cestui que Trust*, 6979.
- IV. *Right of Cestui que Trust to Alienate*, 6980.
- V. *Duty of Trustee to convey Legal Estate or to transfer Fund to Cestui que Trust*, 6980.

I. GENERAL POSITION OF TRUSTEE.

3. Mere trustee has no right to traverse inquisition. *Re Sadler*, 1 Madd. 581.

4. Trustees not to take advantage of their own laches. *Kentish v. Newman*, 1 P. W. 236.

5. The Court will not take a trust deed out of the possession of the bankrupt's trustees. *Esp. Holder*, 3 Dea. & Ch., 276; 2 L. J., N. S., Bk., 64.

6. A trustee is bound to preserve evidence of his acts. *Aspland v. Watts*, 25 L. J., Ch., 53; 3 W. R. 526.

7. It is the duty of trustees to obtain information of the disposition of the trust fund. *Walker v. Symonds*, 3 Swan. 58.

8. No trustee of property having a right, the exercise of which conflicts with his duties as a trustee, can, even with the consent of his *cestuis que trustent*, enforce his own right to their detriment. *Cook v. Addison*, 38 L. J., Ch., 322; 7 L. R., Eq., 466; 17 W. R. 480; 20 L. T., N. S., 212.

9. Trustees cannot set up, as against their *cestuis que trustent*, the adverse title of third parties. *Newsome v. Flowers*, 30 Beav. 461.

10. A person who has accepted property as a trustee, and held it as such, is not at liberty to dispute the title of his *cestui que trust*, though that title may be doubtful. *Neligan v. Rooke*, 7 Ir. R., Eq., 332.

11. It would be dangerous where a person enters on the foot of a trust, and never makes a declaration of his having performed the trust, in pursuance of the will, to construe this such an entry, as that a fine and non-claim would bar the right of plaintiff, a remainderman. *Shields v. Atkins*, 3 Atk. 560.

12. Upon a trust in equity, no estate can be gained by disseisin, abatement, or intrusion while the trustee continues in possession of the land, neither will Equity suffer a merger of the trust estate. *Hopkins v. Hopkins*, 1 Atk. 591.

13. It is not competent to a trustee to dispute the title of his *cestui que trust*; neither does the Court listen to imputations of imbecility against a grantor in the absence of those beneficially interested. *Pearson v. Lindley*, 2 Jur. 758.

14. A seceding congregation of a chapel attempted to obtain possession of it by procuring some of their body to be appointed new trustees. In a suit to set aside the appointment:—Held, that the new trustees could not raise as a defence, that the congregation had departed from the original form of worship, and that such an objection could only be made available on an information filed by them and raising the question. *Newsome v. Flowers*, 30 Beav. 461.

15. Position, duty, and liability of a trustee for infants of an estate created by an invalid deed or a deed of doubtful validity, and which is impeached by other parties. *Elsey v. Lutyens*, 8 Hare 159.

16. A trustee will be restrained from using the legal powers that have been conferred upon him otherwise than for the legitimate purposes of his trust, and therefore a demurrer for want of equity cannot be sustained to a bill seeking such relief, although the plaintiff may have a remedy at law. *Balls v. Strutt*, 1 Hare 146; 5 Jur. 1035.

Where the plaintiff, as a drawer of a bill, indorsed it in trust for himself, and it was again indorsed by the defendant on the like trust, to a person who commenced an action on the bill against the plaintiff:—Held, that the Court would restrain a trustee from using the powers conferred on him otherwise than for the real purposes of the trust, and a demurrer to a bill (to restrain the defendant from negotiating, and for having the bill delivered up), for want of equity, overruled, notwithstanding the plaintiff might also have a remedy at law. *Id.*

17. A trustee is entitled to act on his own judgment, and is not bound to follow the opinions of the *cestuis que trustent*. *Selby v. Bowie*, 9 Jur., N. S., 432; 11 W. R. 606; 8 L. T., N. S., 372; 1 N. R. 420; 2 N. R. 2.

18. Trustees with power to change stocks, cannot thereby change *cestui que trust's* interests. *Lord v. Godfrey*, 4 Madd. 455.

19. No act of the trustee can vary the right of the *cestui que trust*, but his situation may; as where the *cestui que trust* is his heir, and the right to dower depends upon which dies first. *Selby v. Alston*, 3 Ves. 341.

20. A trustee who is in possession of land

so on behalf of his *cestuis que trustent*, and his making a mistake as to the persons who really are his *cestuis que trustent* cannot affect the rights of the *cestuis que trustent inter se*. *Lister v. Pickford*, 34 Beav. 576.

A. was equitable tenant for life of the Whiteacre estate, with a legal remainder to B. in tail. The trustee of the life estate had a power of entering during the minority of a tenant in tail. When A. entered into possession of the Whiteacre estate, he also wrongfully took possession of a piece of land vested in the trustees, in trust for C., and such wrongful possession continued till his death, eight years after. At that time B. was an infant, and the trustees entered upon this piece of land, believing that it formed part of the Whiteacre estate, and they dealt with the rents accordingly:—Held, that the trustees' possession enured for the benefit of C., their real *cestui que trust*. S. C. 6 N. R. 243.

1. The necessary funds having been subscribed by certain parties, a piece of land was purchased and conveyed by deed to trustees, for a charitable purpose. Under this deed the trustees entered into and continued in possession for several years; and with the acquiescence of all the subscribers, including some not parties to the deed, a considerable expenditure was made, and heavy liabilities were incurred:—Held, that, even assuming the subscribers not parties to the deed had an equitable interest in the land in respect of the moneys subscribed by them, yet they would not be heard to assert a title to the land adverse to that of the trustees. *Att.-Gen. v. Munro*, 9 Jur. 461.

2. A trustee has as much the benefit of the pleading of this court, as he that has the equitable interest; and a *cestui que trust* is entitled to have the privilege maintained by the trustee. *Suffolk (Earl) v. Green*, 1 Atk. 450.

3. A trustee cannot, upon receiving a proper indemnity, refuse the use of his name to his *cestui que trust* for the purpose of prosecuting an appeal in the House of Lords, on the ground that he thinks such appeal unreasonable, and that he is the solicitor of the party in whose favour the decree appealed from was made. *Pakington v. Benbow*, 5 W. R. 670; 29 L. T. 194.

4. The non-interference of the trustees for a long period does not preclude them or their representatives from sustaining a suit for carrying the trust into effect, so long as the trust subsists. But, *semble*, on the contrary it is the duty of the trustees or their representatives to take steps for enforcing the trust. *Hughes v. Wells*, 9 Hare 749; 16 Jur. 927.

5. A *cestui que trust* is entitled to inspection of the deed creating the trust, notwithstanding that the trustee alleges that by the exercise of a power contained in the deed the *cestui que trust's* interest under it has ceased. *Bugden v. Tylee*, 21 Beav. 545.

6. *Quære*, whether a *cestui que trust* can have an injunction to restrain his trustees from assenting to a bill in Parliament. *Parker v. River Dunn Navigation Co.*, 1 De G. & Sm. 192; 11 Jur. 624.

Adverse Possession of Trustee. See LIMITATIONS. STATUTE OF, X. XIV.

VOL. VII.

II. TRUSTEE DE FACTO.

7. A person who assumes the character of a trustee incurs the responsibility of a trustee. *Rackham v. Siddall*, 16 Sim. 297; 12 Jur. 640.

A party assuming to act as heir or devisee of a trustee, and committing an act which, if done by the trustee, would have been a breach of trust, cannot relieve himself of liability by asserting that he was not acting as trustee. S. C. 1 Macn. & G. 607; 2 H. & Tw. 44.

8. Although the responsibility of trustees may be extended in equity to persons who are not properly trustees, if they are found either making themselves trustees *de son tort*, or actively participating in any fraudulent conduct of the trustee, to the injury of the *cestui que trust*, yet strangers are not to be made constructive trustees, merely because they act as agents of trustees in transactions within their legal power, even though such transactions may be such as the Court would not approve of. *Barnes v. Addy*, 9 L. R., Ch., 244; 43 L. J., Ch., 513; 22 W. R. 505; 30 L. T., N. S., 4. Affirming 21 W. R. 324; 28 L. T., N. S., 398.

9. A person taking upon himself to act as trustee cannot set up as an excuse for a breach of trust that he did not know what the trusts were, or what were the legal consequences of the acts done by him in relation to the trust estate. *Pearce v. Pearce*, 25 L. J., Ch., 893; 2 Jur., N. S., 843; 22 Beav. 248.

See also VI. *ante*, and Cross References there.

III. POSSESSION OF CESTUI QUE TRUST.

10. It is not of course to let a *cestui que trust* under a will into possession of estate; it must depend on the testator's intention. *Tidd v. Lister*, 5 Madd. 429.

11. Equity will never permit the trustee to evict his *cestui que trust*. *Shine v. Gough*, 1 Ball & B. 445.

12. Trustees, who joined with remainderman to eject *cestui que trust* for life, not excused from making good the whole rent reserved by subsequent accidental deficiencies. Inquiry directed as to the interference of remainderman. *Kaye v. Powell*, 1 Ves. J. 408.

13. A trustee allowed one of his *cestuis que trustent* to have the trust fund, with a view to its investment in the foreign funds. The *cestui que trust* went to America, and invested it in his own name; he afterwards sold out a part, and, remitting the money to agents in London, came home. The trustee impounded the money so remitted, in the Lord Mayor's Court, and this Court granted an injunction, restraining proceedings on the part of the *cestui que trust* to get it out. *Hopkins v. Newton*, 9 L. J., Ch., 227.

14. Tenant for life subject to a trust term, not let in possession before account, till the trust is executed; unless on paying into court a sum sufficient to answer it, or where the best way of performing the trust appears to be by letting him into possession. *Blake v. Bunbury*, 1 Ves. J. 194.

Tenant for life let into possession on consent and giving security to pay charges, payable out of rents and profits, and to keep down interest of the fund to answer contingent charges. S. C. 1 Ves. J. 514; 4 Bro. C. C. 21.

1. Upon the construction of a devise of real property:—Held, that an equitable tenant for life was entitled to the personal enjoyment of the property upon giving security for the due fulfilment of the objects of testator's will. *Baylies v. Baylies*, 1 Colly. 587.

2. Where a testator bequeaths a life interest in freeholds, by way either of legal or of equitable estate, and the freehold is dilapidated, and extensive repairs are required, the Court will not withhold possession from the devisee for life, in order to impose upon him terms as to the execution of the repairs. *Warren v. Rudall*, 1 John. & H. 1.

3. Where a trustee of a term of years, upon the usual trusts for securing annuities, has taken possession of the estates under the trusts, the Court, although all arrears of the annuities may afterwards be paid, will not order possession to be given up to the grantor, except upon such terms as will enable the trustee to resume it, and to receive the rents, the moment the annuities are again in arrear. *Jenkins v. Milford*, 1 Jac. & Walk. 629.

4. The possession of the *cestui que trust* under the trusts of a settlement is the possession of the trustee, and gives the trustee a seisin of the estate, which is not interrupted by the death of the *cestui que trust*, but immediately enures for the benefit of the person next entitled to the equitable interest; and notwithstanding the adverse possession of another party soon afterwards commenced, the Court cannot presume such adverse possession to have commenced so instantaneously on the death of the first *cestui que trust* as wholly to exclude the equitable seisin of the parties next entitled to the beneficial interest. *Parker v. Carter*, 4 Hare 400.

5. W. devised estates in trust to pay the rents, issues, and profits unto, or permit the same to be received and taken by, his daughter S. H., the wife of T. H., during her life, for her sole and separate use, free from the control of her husband, her receipt alone being a sufficient discharge for the same; and after the decease of S. H., to convert the estates into money, and to pay and divide such money unto and equally amongst her children as she should appoint. The trustees having, as alleged, refused to account for the rents and profits received, a bill was filed for the administration of W.'s estate. The Court, on motion for that purpose by S. H., ordered that she should be permitted to enter into the possession of the receipt of the rents and profits of the estates devised in trust for her separate use. *Horner v. Wheelwright*, 2 Jur., N. S., 367.

6. A dissenting minister, placed in possession of a chapel and dwelling-house by persons in whom the legal estate is vested in trust to suffer the chapel to be used for the purpose of religious worship, is, at law, tenant at will to those persons. *Perry v. Shipway*, 1 Giff. 1; 5 Jur., N. S., 535; 7 W. R. 406; 33 L. T. 1023. Affirmed 5 Jur., N. S., 1015; 28 L. J., Ch., 660; 7 W. R. 574; 33 L. T. 251.

7. The fact that the Court in its discretion might upon terms put an equitable tenant for life into possession, or take the receipt of the rents from the trustees and give them to him, does not make him a person "entitled to the possession, or to the receipt of the rents and profits," within s. 32 of the Sales of Settled

Estates Act, 19 & 20 Vict., c. 120. *Taylor v. Taylor, Exp. Taylor*, 44 L. J., Ch., 727; 20 L. R., Eq., 297; 23 W. R. 947; 33 L. T., N. S., 89.

8. A. being entitled under a will to the use of certain articles of plate for her life, pawned them with B., who kept an open pawnbroker's shop. Bill was filed by the representatives of the testator, after the death of A., against B., for a discovery of the different articles pawned, in order to enable the plaintiffs to proceed in an action at law, for the recovery of them. To this discovery the defendant pleaded, that certain articles of plate were deposited with him, for certain sums of money *bond fide* lent and advanced thereon to A.; but he did not by his plea (though he did by his answers aver, that he had no other articles of plate in his possession). For this defect in point of form the plea was overruled. The defendant then insisted on the same point by his answer in bar to the discovery, but the Court thought, that where a plea to a bill of discovery was overruled, the defendant could never insist on the same thing by answer. *Hoare v. Parker*, 1 Cox 224; 1 Bro. C. C. 578. And see 2 T. R. 376.

9. The wife is not debarred of her paraphernalia, by a bequest of the use of all household goods, furniture, plate, jewels, linen, etc., for life. *Marshall v. Blen*, 2 Atk. 217.

Such a bequest entitles her to use the goods anywhere, or even to let them out to hire. *Ib.*

As to Heirlooms.] See SETTLEMENT.

Under Statute of Limitations.] See LIMITATIONS. STATUTE OF, X. XIV.

IV. RIGHT OF CESTUI QUE TRUST TO ALIENATE.

10. Courts of equity have given the same power to *cestui que trust*, as to alienation, as if it were a use executed. *Hopkins v. Hopkins*, 1 Atk. 591.

11. A trustee cannot prevent his *cestui que trust* from making an effectual gift of his interest in the trust property or any part of it. *Kekewich v. Manning*, 1 De G. M. & G. 176; 21 L. J., N. S., Ch., 577; 16 Jur. 625.

See also Next Subdivision.

V. DUTY OF TRUSTEE TO CONVEY LEGAL ESTATE OR TO TRANSFER FUNDS TO CESTUI QUE TRUST.

12. A *cestui que trust* in tail brings a bill against the trustees to the intent they should join in a recovery; this not proper; but it is proper to pray that the trustees may convey the premises to the *cestui que trust* in tail, who may then suffer a recovery, though, if the trustees are also trustees for any annuities subsisting, they are not compellable to part with the legal estate out of them, to the *cestui que trust* in tail. *Carteret v. Carteret*, 2 P. W. 133.

13. One buys an estate in the name of a trustee, who gives a bond in 200l. penalty to assign the estate as the *cestui que trust* or his executor shall direct; *cestui que trust* dies, and his executor brings debt on the bond and recovers judgment, and has the money paid him, after which he brings a bill to have a conveyance of the estate; trustee to convey to

the plaintiff, and to account for the profits, but in account is to be allowed the 200*l.* and interest which he paid. *Moorecroft v. Downing*, 2 P. W. 314; 2 Eq., Ca. Abr., 746; pl. 3.

1. The trustee of a mortgage holds same in trust to the extent of the mortgage for the mortgagee, subject thereto for the mortgagors, and he cannot do anything to prejudice the mortgagors. The trust of a mortgage, as between mortgagor and mortgagee, differs from that of an outstanding term in a third person unconnected with either of the parties seeking the legal estate, the only question there being, which had the better equity to call for the legal estate. *Blennerhasset v. Day*, 2 Ball & B. 133.

2. In a clear case of a fee simple interest, the limitation being to the heir male of the tenant for life and the heirs of such heirs male, a conveyance was decreed, with costs, against the trustee of the will, who set up a title derived from the tenant for life, supposing her to have an estate of inheritance by virtue of the rule, and also a clause in testator's will, which was clearly void for perpetuity, under which it was alleged plaintiff had forfeited his interest. *Willis v. Hiscox*, 4 Myl. & C. 197; 4 Jur. 738.

3. Where a trust estate descended to one who refused to execute a conveyance to the *cestui que trust*, after it had been approved by his solicitor, unless he were paid a sum of money, the Court ordered the conveyance, with costs against the defendant. *Watts v. Turner*, 1 Russ. & M. 634.

4. Trustee of a term in trust for securing to a mortgagee in fee (with a power of sale) his mortgage money, and subject thereto in trust for the mortgagor, his heirs, etc., decreed, in a plain case, to pay the costs of a suit brought against him to compel him to execute a deed for surrendering the term to a purchaser from the mortgagee. *Hampshire v. Bradley*, 2 Colly. 34.

5. Infant died seised of equitable estate descended *ex parte maternâ*. His incapacity to call for conveyance of legal estate (whereby course of descent might be changed) is not reason for it to be considered as actually done, it being trustee's duty not to convey till called upon. *Langley v. Sneyd*, 1 Sim. & S. 45; 1 L. J., Ch., 14.

6. Where *cestui que trust* of a term had put an end to the trusts thereof:—Held, that though the purchaser had a right to an assignment of it, yet the trustees not having received full information as to the determination of the trust, they were justified in refusing to execute an assignment, without the sanction of the Court, and were allowed their costs. *Holford v. Phipps*, 3 Beav. 434; 10 L. J., N. S., Ch., 209. And see S. C. 4 Beav. 475; 5 Jur. 31.

7. By an indenture made in contemplation of marriage, certain leasehold property belonging to the intended wife was conveyed to trustees on certain trusts; and the trusts of a sum of stock, also belonging to the intended wife, which had been transferred into the names of the trustees, were declared. The marriage did not take effect; and soon after the date of the indenture, the lady married another person. In a suit instituted by the husband and wife against the trustees, it was ordered that the leasehold property should be conveyed to the husband, and the stock transferred into his

name. *Thomas v. Brennan*, 15 L. J., N. S., Ch., 420; 11 Jur. 95.

8. Certain copyhold lands having been devised to trustees for the benefit of a charity, and the copyholds having been enfranchised, the Court directed the trustees to convey the legal estate to the company. *Att.-Gen. v. Clothworkers' Co.*, 17 L. J., N. S., Ch., 456.

9. Where a fund is vested by a settlement in trustees for A. for life and over, and the reversion has been subsequently settled, the person entitled to the life interest and the trustees of the subsequent settlement are entitled to call for a transfer of the trust fund, and can give the original trustees an effectual discharge although the settlement does not provide for a transfer or payment by anticipation. *Anson v. Potter*, 13 L. R., Ch. D., 141; 41 L. T. 582.

10. The relation of father and daughter does not of itself render the validity of an arrangement between persons thus related, respecting a reversionary interest of the daughter, so doubtful as to justify a trustee in refusing to transfer a fund, in pursuance of the arrangement, without the indemnity of the Court. A trustee so refusing, and who did not show that he had endeavoured to ascertain the real nature of the transaction, was decreed to pay costs. *Firmin v. Pullham*, 2 De G. & Sm. 99; 12 Jur. 410.

11. A bare trustee who, under s. 31 of the 3 & 4 Will. 4, c. 74, is protector of a settlement, can insist on retaining the legal estate, only so long as the purposes of the trust exist, that is, so long as, according to the rules of the Court of Equity, he is required to be a trustee. *Buttansham v. Martin*, 1 John. 89; 5 Jur., N. S., 647.

Therefore, where there was a devise of lands to trustees upon trusts for the testator's daughter during her life, for her separate use without power of anticipation, with remainder to the use of her children as tenants in common in tail, with remainders over:—Held, that the testator's daughter, having become *discoverte* and being *sui juris*, could compel a conveyance by the trustees of the legal estate. *Id.*

12. When a purchaser of a mere equitable interest in property, after a conveyance of it to him, files a bill to obtain from the trustees the legal estate, the vendors may, without filing a cross-bill, set up the invalidity of the purchase. *Hannah v. Hodgson*, 30 Beav. 19; 7 Jur., N. S., 1092.

Real estates, devised for sale, were vested in trust for parents for life, with remainder for their children. In 1839 the parents and children sold and conveyed their interests to the plaintiff, who remained in undisturbed possession until the death of the tenants for life. In 1858 the purchaser filed a bill against the trustee and the vendors, to obtain the legal estate. The Court, on the ground of the unfairness of the transaction, as regarded the children, dismissed the bill, but refused to grant any active relief to the defendants. *Id.*

Where a *'Series of Equitable Interests Exists.'* 13. The owner of an equitable estate conveyed it to trustees upon trust for sale, and by a deed of even date with the conveyance, declared the trusts upon which the produce of the sale were to be applied. The party who had the mere legal estate and no beneficial

interest, refused to convey it to the equitable trustee unless the persons interested as *cestui que trust* under deed of even date were made parties to the conveyance:—Held, that he was not justified in that refusal, but as he acted *bona fide*, under the advice of a conveyancer of character, the Court made the decree against him without costs. *Angier v. Stannard*, 3 Myl. & K. 566; 3 L. J., N. S., Ch., 216.

1. If the trustees of a term and the *cestui que trust* are before the Court, an intermediate trustee of the equitable interest need not be the party to a bill filed to carry the trusts of the term into execution. *Head v. Teynham*, 1 Cox 57.

2. A trustee under a deed held freehold premises in trust for L. S., her heirs and assigns, for her and their own use and benefit. L. S., by her will, devised these premises, among others, to trustees, in trust to sell, and out of the proceeds to pay debts and legacies, the legacies being specified in a certain paper marked A. This paper not being forthcoming, the trustee of the deed, offering to pay the debts, claimed to be entitled to retain the trust premises for his own benefit. On a bill filed, however, by the trustees of the will, a conveyance to them was directed, the Lord Chancellor holding that the will gave them a title as against the trustee of the deed, who had nothing to do with the question how the premises would be disposed of in consequence of the trustees of the will not being able to carry the trusts into full effect. *Onslow v. Wallis*, 1 Macn. & G. 506; 1 H. & Tw. 513; 19 L. J., N. S., Ch., 27; 13 Jur. 1085. Affirming 16 Sim. 485.

3. If A., for valuable consideration, undertakes to surrender a copyhold to B., and B., on borrowing money from C., enters into a written agreement with C. that he, B., will surrender the same copyhold to C., by way of mortgage security; A. is not justified in refusing to surrender the copyhold to B., because he, A., has received notice from C. of the agreement between him and B. The surrender by A. to B. does not prejudice, but promotes that agreement. — *v. Walford*, 4 Russ. 372.

4. Real estates were devised to a trustee upon trust, on a given event, to convey them to certain parties, upon one of them electing which he would take. A party, in whom, as satisfied mortgagee at the date of the will and death of the testator, a satisfied mortgage term in one of the estates was held bound to execute a deed of surrender of the term to the trustee, and the *cestui que trust* were held not to be necessary parties thereto. *Pooler v. Pass*, 1 Beav. 600; 8 L. J., N. S., Ch., 323.

5. A married woman having a general power of appointment by will over a fund vested in trustees, appointed the fund in favour of specific persons, and nominated executors of her will:—Held, that the administration of the fund was vested in the executors, and not in the original trustees. *Re Philbrick*, 11 Jur., N. S., 558; 34 L. J., Ch., 368; 13 W. R. 570; 12 L. T., N. S., 261.

6. When a person having a special power of appointment over a fund of personalty appoints trustees for the objects of the power, the Court, though recognising the validity of such an

appointment, will not, as a matter of right, transfer the fund to the trustees appointed by the donee of the power. *Busk v. Aldam*, 19 L. R., Eq., 16.

7. Under a settlement a sum of 10,000*l.*, secured by mortgage, was vested in trustees for the wife of S. for her life, and after her death, for S. for his life, and subject as aforesaid, for such persons as the wife should by deed or will appoint, and in default of appointment for S. The wife made a will, by which she directed that her husband should enjoy the income of the fund during his life, subject to payment of two annuities; and she directed certain pecuniary legacies to be paid, after his death, out of one moiety of the fund, and she gave the other moiety of the fund and the residue of her property to her husband, whom she appointed executor. The trustees of the settlement paid over the whole trust fund to the husband; and part of the 5,000*l.* applicable to the payment of the pecuniary legacies was lost by him:—Held, that the payment to him was proper, and that the trustees were not answerable for the loss. *Hayes v. Oatley*, 14 L. R., Eq., 1; 26 L. T., N. S., 26; 41 L. J., Ch., 510.

Refusal to pay Trust Money to Cestui que Trust.] 8. A trustee who, on untenable grounds, withholds trust money from his *cestui que trust* may commit what in equity may be considered a fraud, without being chargeable with personal fraud. *Thompson v. Eastwood*, 2 L. R., App. Cas., 215.

A legacy was given on an express trust in 1807; it was not paid to the original legatee. He became insolvent, released the legacy, and died. His only child came of age in 1849. Litigation on matters connected with the legacy, but not upon a direct claim to it, was going on in 1865. A. took an assignment of the legacy, and also became the administrator of the original legatee's estate, and the assignee under his insolvency; in 1872 he filed a bill to enforce payment of the legacy with interest. He was held entitled to the assistance of a court of equity in respect of it. *Ib.*

9. A trustee is always justified in refusing to pay over a wife's fund to the husband, even at her request, and insisting on affording her an opportunity of asserting her equity to a settlement. *Re Swan*, 3 Hem. & M. 34; 12 W. R. 738.

10. By a marriage settlement, the income of funds, part of which had previously been the property of the husband, was settled on the wife for her separate use. She was also entitled to the separate use under the same settlement of an annuity covenanted by the husband's father to be paid to her during his life. After having been married some years, the wife had eloped and was living in adultery. No proceedings had been taken in the divorce court. The trustees of the settlement having refused to pay to the wife since her elopement the income accruing to her from that part of the fund which was formerly her husband's, and the proceeds of the annuity, upon a bill by the wife to enforce the trusts of the settlement:—Ordered, that the trusts be performed, with costs to be paid by the husband and the trustees. *Goldsmid v. Heathcote*, 10 L. T., N. S., 811.

The Court of Chancery does not undertake to vindicate the laws of morality, nor can the Court interfere with the laws of property, and the adultery of the wife (in the absence of any clause of forfeiture in the settlement) furnishes no ground why the Court should not compel trustees to fulfil the trusts of the settlement. *Id.*

1. A testator left all his property to trustees on trust for his wife for life, and all the residue to A. H., daughter of his brother W., absolutely. The testator's brother W. had three daughters, E., M., and M. A., the plaintiff, who had long prior to the will been Mrs. S., and on the ground of the doubt of identity the trustees refused to pay over the residue:—Held, that the refusal was not warranted by the circumstances; that the plaintiff's second name being A., and she being a daughter of the testator's brother W., was sufficient. *Southwell v. Martin*, 21 L. T., N. S., 135.

See also XII. III. ante—XXXI. VIII. post.

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I. IN GENERAL.

2. Trustee cannot change the nature of the estate, by turning money into land, or a lease for years into a freehold, *et c. conerso*. *Witter v. Witter*, 3 P. W. 100.

3. A trustee, for a particular purpose, must not intermix the trust fund with other trust funds and apply the whole in the manner he thinks fit. *Att.-Gen. v. Goldsmith's Co.*, C. P. C. 292.

4. It is not of course to let the *cestui que trust* under a will into possession of an estate; it must depend on the testator's intention. *Tidd v. Lister*, 5 Madd. 429.

5. Power to trustees to lay out money on

securities, includes power to give discharges to borrowers. *Wood v. Harman*, 5 Madd. 368.

6. Trustees may render the property of their beneficiaries liable to third persons for an act done by them in the exercise of their trust. *Morsey Dock Trustees v. Gibbs*, 11 H. L. Ca. 686.

7. *Quere*, whether the trustee of leaseholds settled to separate use of married woman, is bound to see that head rents are paid, or liable as for wilful default, if the premises are evicted for non-payment of rent. *Booth v. Purser*, 1 Ir. Eq. R. 40.

8. Where a manor is conveyed to trustees upon trust, to divide the profits of it amongst the tenants of the manor, it is the duty of the trustees not to let the right of sporting to any of the tenants, upon terms advantageous to them as tenants; but to make the best profit they can by letting the right of sporting to all eligible persons, whether tenants or otherwise, and to divide the profit so made ratably amongst the *cestui que trustent*. *Hutchinson v. Morritt*, 3 Y. & Coll. 547.

9. A trustee letting a farm originally at a proper rent will not be held personally liable for the difference between that rent and the rent which, at a subsequent period of the tenancy, might have been obtained, merely because he neglected to give notice to quit a few months after there appeared to be a probability that the price of agricultural produce would enable him, with propriety as between landlord and tenant, to obtain a higher rent. And, *semble*, that rule would be applicable even to a case in which the tenant was a near relation to the trustee, unless there were some other circumstances to confirm the suspicion of personal favour which that relationship is calculated to excite. *Ferraby v. Hobson*, 2 Ph. 255; 16 L. J., N. S., Ch., 499.

10. Under a devise of manors, lands, etc., to A., his executors, etc., for a term of eleven years, in trust to receive the rents, issues, and profits of the premises that should from time to time accrue and become due, and dispose of the same for the benefit of a certain *cestui que trust*; A. may, by the directions of the *cestui que trust*, and for his benefit, assign the advowson of a rectory appendant to a manor, to a purchaser for the said term of eleven years, to intent that purchaser may present for the next turn, in case of an avoidance before the expiration of term, and in case of such avoidance, the purchaser may present accordingly. *Albemarle (Lord) v. Rogers*, 7 Bro. P. C. 522.

11. In taking accounts against a trustee when he is to be fixed with a personal liability, his good faith is to be considered, and every fair allowance is to be made in his favour, especially if the demand against him is one which arose many years ago, and the beneficiary was at the time cognisant of all the matters connected with it. *McDonnell v. White*, 11 H. L. Ca. 271.

A., being greatly in debt, executed a deed of trust for the benefit of creditors; and among the property assigned under the trust deed was a lease for lives renewable for ever, on which the rent reserved was really a high rack-rent; the tenant complained, and the trustee, with the knowledge of A., though without his consent, but with the full assent of

A.'s brother, to whom A. had committed the management of his affairs, received from the tenant an abated rent. A. complained of the abatement, but he took no steps to put an end to it:—Held, that the estate of the trustee could not after the expiration of the trust be called on to make up the deficiency. *Ib.*

1. By a marriage settlement a lunatic asylum was assigned to trustees on trust at the request of the husband and wife to sell and to stand possessed of the proceeds of the sale for the benefit of the wife and children; but the trustees were to allow the husband to carry on the business of the asylum without paying any rent, but paying certain premiums and other moneys. The husband became bankrupt, and thereupon the surviving trustee of the settlement entered into possession of the asylum, and carried on the business until the asylum was sold for a large sum of money. A tradesman had supplied the trustee with goods for the use of the asylum, and brought an action claiming payment out of the trust funds of the settlement:—Held, that on the construction of the settlement the trustee would not have been entitled to recover moneys advanced by him for the purposes of the asylum, and that consequently the tradesman who had no better right could not recover. *Strickland v. Symons*, 22 L. R., Ch. D., 666; 52 L. J., Ch., 423; 48 L. T. 188; 31 W. R. 888.

2. An agent of a foreign railway company deposited with the plaintiffs, who were bankers in England, certain bonds of the company, and a sum of 5,000*l.* to guarantee the payment of the interest on the same bonds, which was payable at the plaintiff's bank; and in case of non-payment of the interest the 5,000*l.* was to be forfeited, and divided among the bondholders. The interest was not duly paid:—Held, that the plaintiffs were trustees of the money for an unascertained class of individuals, and that they could not be called upon to ascertain, at their own risk and expense, who was included in that class; and therefore one who claimed to be an unsatisfied bondholder, and had in that character commenced an action against the plaintiffs for part of the 5,000*l.*, was restrained by injunction. *Hankey v. Morley*, 4 Jur., N. S., 234.

II. PAYMENTS AND ADVANCES. ALLOWANCE OF.

3. Upon marriage, certain stock was settled in trust for the husband for life, remainder to the wife for life, with remainder to the children of the marriage. After the death of the husband, A. and B. became trustees of the fund; and an account was opened between B. and the widow, in respect of certain receipts and payments and bills of costs, upon which account there was an apparent balance due to B. B., as trustee, received the dividends of the trust funds, to which the widow was entitled to for life:—Held, that B. was entitled to retain, out of such dividends, the balance due to him from the widow. *Russell v. Buchanan*, 9 L. J., N. S., Ch., 129.

4. A., who was a trustee for B. of 1,000*l.* South Sea stock, at the desire of B. borrows 1,000*l.* on this stock of the company, and B.

receives the money; A. pays the 10 per cent., on 7 Geo. 1, sess. 2, s. 7, to be discharged of the loan: though B. forbade the payment, yet he is liable. *Baleh v. Hykam*, 2 P. W. 453.

5. A testator, after devising lands on trust to constitute a grammar school, directed that the trustees should have the management of it, and should appoint a master and usher, and pay to them respectively 50*l.* a year, and 30*l.* a year; the trustees established a school, which, however, from mistake was not conducted as a free grammar school, and the rents of the charity lands having increased, an augmentation was made to the salaries of the master and usher:—Held, that the trustees were entitled to have the sums paid in receipt of this augmentation allowed them in their accounts, notwithstanding their error in the application of the charity, and the mention of salaries of a specified amount in the will. *Att. Gen. v. Christchurch (Dean)*, 2 Russ. 321.

6. West India estates were devised upon trust for sale, and distribution of the proceeds among the testator's children absolutely. In a suit for the administration of the trusts consignees were appointed, and pending the suit settlements were made of the children's shares, by which interests for life and in reversion were limited. In making payments which had been sanctioned by the Court, the consignees became in advance to the trust estate:—Held, that these advances were a charge upon the corpus of the trust estate. *Morison v. Morison*, 7 De G. M. & G. 214.

7. A husband being held liable at the suit of the children of his wife's first marriage, to replace the trust funds received by him, claimed a large sum expended in maintaining the children after the second marriage. The claim was disallowed. *Grove v. Price*, 26 Beav. 106.

8. A trustee, who, acting in the *bona fide* exercise of his discretion, makes a payment which, though not authorised by the terms of the trust, is in his opinion necessary to enable him to execute the trust, will be allowed such payment in passing his accounts; though he does not act prudently in assuming the responsibility of such a payment without the sanction of the Court. *Forsham v. Higginson*, 3 Jur., N. S., 476; 26 L. J., Ch., 342; 8 De G. M. & G. 827. Reversing 26 L. J., Ch., 174.

A., by will, charged his real estate with debts, and gave a legacy to B. in terms which made it an arguable question whether it was not charged on the real estate. Afterwards the estate was conveyed to trustees for sale by a deed to which the legatee was not a party. The trustees entered into a contract for sale of part of the estate on very advantageous terms. The purchaser required evidence that the legacy had been paid, but no such evidence could be found, and it appeared probable that it never had been paid. The purchaser insisting on the objection, the trustees, acting under legal advice, and considering the most advantageous course for the trust estate, paid the legacy:—Held, that the amount so paid must be allowed them in passing their accounts. *Ib.*

9. Infant fraudulently concealing his age, and obtaining from trustees part of stock which he was entitled to on coming of age; and when of age, a few months afterwards,

applying for and receiving the residue of such stock:—Held, a fraud in infant, and that neither himself nor his assignees could enforce re-payment by trustees of stock paid during infancy, and that applying for residue of stock when of age was a recognition of first payment. *Cory v. Gertchken*, 2 Madd. 40.

1. The trustees of a mixed fund of realty and personalty laid out 1,600*l.*, part of the personalty, upon the erection of a house on the real estate, for the *bona fide* purpose of increasing the value of the whole as building land:—Held, that the trustees should not be entirely disallowed the sum so expended, but if the *cestui que trust* desired it, they should be ordered to take the house themselves at the price of 1,600*l.*, and the value of the site as unbuilt upon. *Vyse v. Foster*, 42 L. J., Ch., 245; 8 L. R., Ch., 309; 21 W. R. 207; 27 L. T., N. S., 774.

2. A father devised his real estate to trustees to pay an annuity of 6,000*l.* a year to his daughter, and subject thereto upon trust to accumulate the rents for twenty-one years, and out of the accumulated fund from time to time to pay his debts, legacies, and the incumbrances on the estates, and invest the residue in the purchase of lands to be held on the same trusts; and he directed the estates, on the expiration of the trust for accumulation, to be settled in strict settlement. He directed that as soon as the incumbrances were paid off, the annuity should be increased to 8,000*l.* He gave his residuary personal estate to his trustees to pay off the incumbrances, and apply the surplus in the same way as the accumulated rents and profits. He died leaving personalty which, within a month after his death, was ascertained to be amply sufficient to pay off his debts, legacies, and incumbrances. The trustees, however, retained a considerable part of the personal estate, as it was producing a high rate of interest; and they did not for several years pay off all the incumbrances:—Held, that the trustees were right in paying the annuity at the rate of 8,000*l.* a year from the testator's death, and must be allowed it in their accounts. *Astley v. Essex (Earl)*, 6 L. R., Ch., 898; 25 L. T., N. S., 470.

3. Trustee and executor, although taking under will a commission as a satisfaction for trouble, is entitled to allowances under a general trust to set and manage as he should think proper, and out of the rents and profits to pay all rates and taxes, charges of repairs, stewards', bailiffs', and gamekeepers' salaries and expenses, and all other charges and expenses he should think proper; but he was not allowed to appoint an establishment, gamekeepers, etc., except as the due management required. *Webb v. Shaftesbury (Earl)*, 7 Ves. 480.

4. Where persons entrusted with the administration of a fund have incurred legitimate and proper expenses in performing duties thrown upon them by their fiduciary situation, they have a right, both at law and in equity, to reimburse themselves out of the funds in their hands, without any special provision to that effect. *Att.-Gen. v. Norrieh (Mayor)*, 2 Myl. & C. 407. Affirming 1 Keen 700; 1 Jur. 398.

5. Trustee, or next friend of infant, is entitled to fair expenses beyond taxed costs,

under the head of just allowances. *Fearn v. Young*, 10 Ves. 184.

6. An executor or trustee is not to be allowed, without question, the amount of bills of costs which he has paid *bona fide* to the solicitor to the trust; and the Master, without regularly taxing the bills, will moderate their amount. *Johnson v. Telford*, 3 Russ. 477.

Fund set Apart for Payment of Expenses.]

7. As to what expenses relating to real estate are properly payable out of a fund set apart to pay, amongst other things, the expenses of executing the trusts of the will. *Brougham (Lord) v. Poulett (Lord)*, 19 Beav. 119; 1 Jur., N. S., 151; 24 L. J., Ch., 233.

A testator declared trusts relating to his real and personal estate, and gave his personal estate to trustees, in trust to set apart and invest a sufficient fund to pay his debts, legacies, funeral expenses, expenses of providing his will, "and the execution of the trusts thereof":—Held, that the "expenses in the execution of the trusts of the will" were limited to those properly payable by the executors, in their character of executors alone, and therefore that the costs of executing the trusts of the various real estates fell on the *cestuis que trustent*. *Id.*

8. A trustee will be allowed interest upon money advanced by him, and applied in payment of his testator's debts, or otherwise on account of his personal estate. *Finch v. Prescott*, 23 W. R. 437; 30 L. T., N. S., 156.

Costs and Expenses. In General.] See XXXI. post.

Liability in Respect of Payment of Trust Funds to Persons not Entitled.] See XXIV. II. 4 post.

See also Next Subdivision.

III. REPAIRS, BUILDINGS, AND IMPROVEMENTS.

9. Where a testator directed his trustees to lay out money for the improvement of his estates and the erection of farmhouses and out-buildings, the Court sanctioned the building of labourers' cottages. *Rivers (Lord) v. Fba*, 2 Eq. Rep. 776.

10. A testator directs his trustees out of the rents and profits of his estate, to keep the mansion-house and messuages in good repair, and, if necessary, to re-build any farm building from time to time. The buildings being in a dilapidated state at the testator's death, a question arises between the tenants for life and those in remainder, as to the construction of the will in this respect:—Held, that the mansion-house and messuages must be repaired out of the annual rents and profits. That the re-building applies to farmhouses, and then only in case of their being incapable of repair, or in case of the expense of re-building being no greater—regard being had to the nature, age, dimension, and structure—than the cost of putting them into good repair. *Cooke v. Cholmondeley*, 6 W. R. 802; 4 Drew. 326; 4 Jur., N. S., 827; 27 L. J., Ch., 826.

11. A testator, after devising a mansion-house and farm at W., directed that all persons who should come into possession of W.

should take the name of K., it being his wish that the family of K. should be re-established there, and empowered his trustees to deduct sufficient to keep all the premises in repair, and to make such improvements, by draining, walling, building, liming, or manuring the land, at the expense of his estate, as they might think proper, or by planting for shelter or ornament. The mansion-house at W. was at the decease of the testator, and still continued, in such a want of repair as to necessitate re-building:—Held, that the power did not extend to authorise re-building against the consent of the *cestuis que trustent*, being of full age; and that the word "building" must be confined to building for agricultural purposes. *Bleazard v. Whalley*, 18 Jur. 869; 2 W. R. 608; 2 Eq., Rep. 1093.

1. A testator directed his trustees to erect a mansion-house, and suitable offices fit for the residence of the owner of his estates (which were worth about 15,000*l.* per annum), on some convenient spot:—Held, that under this direction the trustees were empowered to lay out a garden and pleasure grounds around the mansion, in addition to the houses and offices, in such a manner as the Master should direct. *Lombe v. Stoughton*, 17 Sim. 84; 18 L. J., N. S., Ch., 400.

2. Trustees under a will of real estates, the surplus rents and profits of which, during minority, etc., were to be invested in the purchase of other real estates, to go as the devised estates, expended very large sums of the surplus rents and profits in repairing houses, building houses, draining and fencing farms, and other similar improvements:—Held, that they were entitled to be allowed those sums in their discharge; the will containing this general direction, "that, during minority, etc., the said trustees or trustee, for the time being, of the said term, do and shall, generally, superintend the management of the same manors, hereditaments, and premises, and appoint such stewards, bailiffs, agents, and collectors, and with such salaries as they shall think proper," etc. *Bowes v. Strathmore*, 8 Jur. 92.

3. A trustee to whom real property is devised in trust for one for life, cannot interfere with the possession of the equitable tenant for life, because he neglects to keep the property in repair; but if the tenant for life is committing active waste, it seems that the trustee may, and probably ought to interfere, at least if the persons entitled in remainder are under disability; therefore such a trustee is not liable to the remainderman for the neglect of the tenant for life to repair. *Powys v. Blagrave*, 1 Kay 495; 18 Jur. 462.

4. A power to apply the rents of real estate in repairing does not imply a power to borrow money for repairing on the security of the estate. *Fazakerley v. Culshaw*, 19 W. R. 793; 24 L. T., N. S., 773.

The trustee of real estate, on which a dwelling-house was situate, who was empowered to lay out the rents in repairing the house, but was not empowered to borrow money for the purpose, pulled down and re-built the house, and borrowed money at interest for the purpose, which he afterwards re-paid out of the rents:—Held, that his claim for interest on the sum borrowed must be disallowed. *Id.*

5. Part of the property of a testator consisted of a cotton mill which he directed his trustees not to sell, nor to work themselves, but to let. The will also contained a direction to the trustees not to lend any of the personal estate on mortgage, and prescribed strict modes of investment. The cotton mill being out of repair could not be let as it then stood; the trustees, therefore, entered into a provisional agreement with a firm of cotton spinners, by which the latter agreed to take a lease of the mill for twenty-one years, and to spend large sums of money in machinery and repairs, provided the trustees advanced to them, on the security of the machinery, rather more than half the sum required for such machinery and repairs, and also spent a considerable sum in the erection of steam boilers and other landlord's fixtures. Under the terms of the will the trustees could not comply with such proposals; but, upon it being clearly proved that such an arrangement would be highly beneficial to the trust estate, and was one which it was not unusual for lessors in similar cases to enter into, the Court sanctioned the agreement, and directed the costs of all parties to the application to come out of the testator's residuary personal estate. *Re Lee*, 32 L. T., N. S., 298.

6. Charges by trustees for money laid out in luxuries under colour of maintenance, and for money unnecessarily expended in pulling down and re-building a house, disallowed. *Bridge v. Brown*, 2 Y. & Coll. C. C. 181.

7. Circumstances under which allowances will be made for maintenance, repairing, and furnishing considered. *Griggs v. Gibson*, 21 W. R. 818.

8. A residential estate of small extent was settled in strict settlement upon the settlor, his wife and family, and power was given to trustees, during the minority of any person entitled to the rents and profits, to re-build or repair the mansion-house, and to pay for the cost out of the rents and profits; and they also had power, with the consent of the tenant for life, to lease the property for ninety-nine years. The value of the estate to the settlor and his family depended chiefly upon the residence. Since the death of the settlor, his widow being tenant for life in possession, the house had become ruinous from the foundation having given way, and could only be rendered habitable by re-building on a new site. The Court authorised the trustees to raise by mortgage of the settled property 5,000*l.*, to be spent in re-building the residence, on being satisfied that the value of the estate, with the house, and subject to the mortgage, would not be less than if the house had been removed and the materials sold. *Frith v. Cameron*, 12 L. R., Eq., 169; 24 L. T., N. S., 791; 40 L. J., Ch., 778.

9. Trustees having power, during the minorities of tenants for life or in tail, to superintend the management of an estate, cut timber, erect, pull down, and repair houses, and do various other things of a more or less similar character, "and generally to deal with the premises as they or he might do if they or he were the absolute beneficial owners or owner, without being answerable for any loss or damage which might happen thereby," deposited with a bank the title deeds of the

estate to secure an advance of money to be employed in the erection of buildings under the power:—Held, that the bank had no valid title under the power. *Broom v. Sheffield & Rotherham Bank*, 24 W. R. 948.

1. Trustees for building a chapel, having expended thereon money, borrowed on their own security with a deposit of the chapel deeds made on their own authority, and having been compelled to re-pay the amount:—Held, to have a lien on the deeds, but not to be entitled to a sale of the property to re-imburse the outlay. *Darke v. Williamson*, 6 W. R. 824; 4 Jur., N. S., 1009. S. C. *nom. Drake v. Williamson*, 25 Beav. 624.

2. When under a will real and personal estate was settled upon a person as tenant for life, with remainder to his children, but the will contained no power for investing the personal property in improving the realty, the Court, on its being shown to be beneficial for all parties, sanctioned the investment of part of the personalty in re-building the house, which was in an uninhabitable condition. *Re Pearson*, 21 W. R. 401; 28 L. T., N. S., 57.

3. Trustees of a term with power to apply surplus income in building and improvement were allowed to apply money standing to real estate capital account in building and improvements, including drainage. *Re Leslie*, 2 L. R., Ch. D., 185; 45 L. J., Ch., 668; 34 L. T. 239; 24 W. R. 546.

Trustees of real estate for a term of 1,000 years from the day of the death of the settlor, had powers, during a period of certain lives in being and twenty-one years, to manage the estates, and out of the income to keep down charges and incumbrances, and subject thereto to repair, erect new or additional buildings, and generally to make such outlay for the improvement of the estates as they should think fit or conducive to the general benefit of the estates or the tenants thereof, and hold the surplus as capital, which was to be laid out in the purchase of lands to be settled to the like uses. The settlor having died in 1870, the first tenant for life being in possession, and the income being insufficient, after keeping down charges and incumbrances, to pay for repairs, for the cost of new buildings, and generally for improvement of the property, out of capital, the Court allowed payments in draining upon which the tenants paid 5l. per cent., and in erecting new buildings. *Id.*

4. Certain property, comprising freeholds and leaseholds, was settled on trust for a married woman for life for her separate use without power of anticipation, with power of appointment by deed with the consent of the trustees. The settlement also provided that the trustees should at her discretion *inter alia* direct repairs to be done to the property, and that all expenses properly incurred by the trustees in carrying out the trusts or powers of the settlement should constitute a charge on the premises in their favour. The plaintiff, at the direction of the tenant for life, did certain repairs to the property:—Held, that the trustees were bound to carry out any repairs directed by the tenant for life, provided the cost of them did not exceed the value of the property. *Skinner v. Todd*, 61 L. J., Ch., 198; 46 L. T. 131; 30 W. R. 267.

Held, also, that the tenant for life herself

directing the repairs to be done was in substance an exercise of her power to direct the trustees to do them. *Id.*

Held, also, that the trustees must raise the amount to the plaintiffs' bill for the repairs, by way of charge on the property, and pay it to him. *Id.*

5. When leasehold houses are vested in trustees in behalf of a tenant for life and remaindermen, it is the duty of the trustees to keep the property free from the risk of forfeiture by a breach of the covenants of the lease, and they are entitled to have the rents applied in keeping the houses in a proper state of repair. The trustees are not bound to be content with the setting apart of a sum of money in the joint names of themselves and the tenant for life as an indemnity against the consequences of a breach of the covenants of the lease, but are entitled to require the covenants to be specifically performed. When a tenant for life of leasehold houses is allowed by the trustees to receive the rents, and the houses are not kept in a proper state of repair according to the covenants of the lease, the Court will, at the instance of one of the trustees, appoint a receiver of the rents, for the purpose of enforcing the proper repair of the houses. *Re Fowler, Fowler v. Odell*, 16 L. R., Ch. D., 723; 44 L. T. 99; 29 W. R. 891.

6. A testator devised his mansion-house and other real estate to trustees for the term of 1,000 years, upon certain trusts, and, subject thereto, he devised the same upon legal limitations, under which the plaintiff was tenant for life. Shortly after the testator's death the mansion-house was burnt down. The sole acting trustee had expended, in addition to insurance moneys, the sum of 2,000l. in rebuilding the mansion-house, which amount he had borrowed on his own personal security and on a charge of the estate. It was admitted that this expenditure was very beneficial to the estate, and that the value thereof was increased. There were in court sums of consols, arising from the sale of part of the estate, and such funds were liable to be re-invested in land. By the decree in the action an inquiry had been directed as to what sum was necessary to complete the restoration of the mansion-house, and how the same ought to be raised, but no formal order was made sanctioning the raising of a loan for the purpose. A petition was presented by the personal representative of the trustee, asking that the funds in court might be sold, and that such further sum as, with the proceeds of such sale, would make up the 2,000l. borrowed by the trustee, might be raised by mortgage or sale of the settled estate, in order to enable such loan to be re-paid:—Held, that the Court had no jurisdiction to order a mortgage or sale of the settled estate, or to authorise the expenditure for the proposed purpose, even of moneys which were subject to a trust for re-investment in land; but it appearing that the estate had been benefited by the outlay of the trustee to the full amount of the funds in court, and that the outlay had been *bonâ fide* made under the impression that it would be re-paid out of the estate, the Court would, although considering the conduct of the trustee irregular, order that he should be recouped his outlay to the

extent of the funds in court but no further. *Jesse v. Lloyd*, 48 L. T. 656.

1. Trustees of a charity having in carrying into effect a scheme for building exceeded the amount of the estimate which had been sanctioned by the Court, were made to pay their own costs of the inquiry before the Master as to the propriety and beneficial nature of the additional expenditure. *Att.-Gen. v. Armistead*, 19 Beav. 584.

Where Trusts to Purchase Real Estate.] See XXIII. VI. post.

When Allowed by Court out of Purchase Money paid under Compulsory Powers.] See LANDS CLAUSES ACT, XIII. IX.

See also LIFE. ESTATE FOR, III. IV.

IV. MORTGAGES BY.

2. Trustees, to pay debts, may fairly raise by sale or mortgage, without waiting for a decree. *Bath (Earl) v. Bradford (Earl)*, 2 Ves. 590.

3. Where a term for years was by settlement vested in trustees to raise, by sale or mortgage, money to discharge the debts of the tenant for life, who soon after with his own money pays the debts, without taking assignments of the securities; a mortgage of it by the trustees, several years after, by direction of the tenant for life, is a due execution of the trust. Tenant for life has, during his own life, a right to call for an execution of the trust, and to stand in the place of creditors. After an express declaration of the tenant for life to charge, it cannot, from the debts being paid by him, from no assignment of the securities being taken, or from length of time, be presumed he intended to exonerate the estate. *Redington v. Redington*, 1 Ball & B. 131.

4. A. directed his trustees to raise by mortgage of all or any part of his devised estate, any sum or sums of money, not exceeding 20,000*l.*, and to apply the same in liquidation of such of the debts of M., as to them should seem expedient or proper. The trustees having refused to raise the money without the sanction of the Court, suits were instituted by the creditors and trustees for the purpose of obtaining the benefit of the trust, and obtaining the sanction of the Court to the raising of the money:—Held, first, that the trustees had not, by their refusal to raise the money without the sanction of the Court, abandoned their power of selection among the creditors. *Joel v. Mills, Hervey v. Mills*, 7 Jur., N. S., 389; 30 L. J., Ch., 354.

Held, secondly, that the power of selection among the creditors was not confined to debts in existence at the death of the testator. *Ib.*

Held, thirdly, that debts which at the time of his death were barred by the Statute of Limitations, were excluded from the benefit of the trust. *Ib.*

5. A. devised his estates at Blackacre to trustees for a term of 1,000 years, upon trust to pay off all incumbrances for the time being secured on his "settled and unsettled estates." At the date of his will amongst his settled estates was a renewable leasehold property at

Whiteacre, which was settled upon him for life, remainder to his eldest son absolutely. Subsequently to the date of his will he purchased the reversion expectant upon the determination of the lease of Whiteacre, and he and his eldest son joined in a mortgage to secure a part of the purchase money. The equity of redemption in the mortgage was limited to A. and his eldest son as joint tenants, and the surplus moneys, in case the mortgagee sold under his power of sale contained in the deed, were directed to be paid to the testator and his son, according to their interests:—Held, that the subsequent dealings, by way of mortgage, with Whiteacre did not amount to a re-settlement, but that the same was, at the death of the testator, to be considered as one of his settled estates, and that the mortgage upon it was raisable by the trustees out of Blackacre, under the 1,000 years' term. *Hastings (Lord) v. Astley*, 10 W. R. 73.

6. The Court will, on motion *ex parte*, restrain trustees of a chapel from mortgaging it for a small sum where there appears no necessity for such mortgage to be created; the plaintiff undertaking to abide by such order as the Court might think fit in respect of payment of the debts then due. *Rigall v. Foster*, 18 Jur. 89.

7. Devise of real estate to trustees in fee, upon trust, "out of the rents, issues, and profits" thereof, to pay to annuities; "and by the same ways and means, or by such other ways and means (except a sale) as they may think proper, to levy and raise" sufficient to pay off the charges on the estate, and, subject to the trusts aforesaid, to A. for life, with remainders over:—Held, that the trustees could not raise the charges, either by sale, by mortgage, or by leases on fines, but that they must be raised out of the rents and profits of timber and mines, the trustees exercising a discretion, so as not to exhaust the whole income, and leave nothing for the tenant for life. *Bennett v. Wyndham*, 23 Beav. 521; 3 Jur., N. S., 1148.

8. By a marriage settlement, the father of the intended husband agreed to settle a money bond and certain real estates on the intended husband and wife, during their joint lives, and after the death of the husband, if the wife should survive, on her for life, and after her decease or second marriage, upon the children; and it was agreed, that if the husband should die before his wife, three trustees should be appointed to take care of the property for the child or children of the marriage. The marriage was solemnised, and there was issue of it. The husband's father died, leaving his son, the husband, the sole executor, who thereupon took possession of the bond, and deposited it with his bankers, who had no notice of the settlement, to secure a loan from them. The husband then died insolvent, leaving his wife surviving. In a suit concerning the trust property, trustees thereof having been appointed by the Court:—Held, that they might redeem the bond by raising money for that purpose out of other parts of the property included in the settlement. *Sharshaw v. Gibbs*, 1 Kay 333; 18 Jur. 330; 23 L. J., Ch., 451.

9. Personal liability of the trustees of a turnpike road who exceed the powers given them by their act in borrowing money on the

credit of future or expected tolls. *Wilson v. Goodman*, 4 Hare 62.

1. The trust deeds of certain Wesleyan Methodist chapels contained powers of raising money by mortgage for the purposes of the trusts:—Held, that any of the trustees of the chapels might be mortgagees under this power, and that, if they were such mortgagees, they might exercise all the rights of mortgagees, although in opposition to the trusts. *Att.-Gen. v. Hardy*, 1 Sim., N. S., 838; 20 L. J., N. S., Ch., 450; 15 Jur. 441.

2. Limitation of estates to successive tenants for life, with remainders in tail, subject to a term vested in trustees, the trusts of which were, in the first place, by cutting and selling timber of full growth, or by demising, mortgaging, or selling the estate (except the mansion-house), for all or any part of the term, or by all or any of the said ways, or any other reasonable ways, to raise 30,000*l.*, and pay the same to the parties therein mentioned:—Held, that, as between the tenants for life not impeachable for waste and the remaindermen, the corpus of the estate must bear the charge; and that the interest of the charge must be paid by the tenant for life in possession, who, in the meantime, was entitled (as part of the profits of the estate) to the timber, which, as such tenant for life, he had a right to cut. *Marker v. Kokenich*, 8 Hare 291; 14 Jur. 544; 19 L. J., Ch., 492.

The trustees of the term in such a case have not an unlimited discretion to raise the charge in such a manner as they may think fit; and it does not follow that, because their discretion in a mode of raising the charge has been honestly exercised, the charge will be left to be finally borne by those parties upon whom their act might chance to throw it. *Ib.*

3. In a suit for foreclosure of a mortgage created by trustees, demurrer allowed on the ground that they had no power to mortgage, but the plaintiff allowed to amend for the purpose of claiming a lien on the interest of a *cœtui que trust* who was a party to the deed. *Page v. Cooper*, 1 W. R. 136.

4. Where absolute discretion has been given to trustees as to the exercise of a power the Court will not compel them to exercise it, but if they propose to exercise it, the Court will see that they do not exercise it improperly or unreasonably. Where the power is coupled with a trust or duty the Court will enforce the proper and timely exercise of the power, but will not interfere with the discretion of the trustees as to the particular time or manner of their *bonâ fide* exercise of it. *Tempest v. Camoys (Lord)*, 21 L. R., Ch. D., 571; 51 L. J., Ch., 785.

A testator gave his trustees a power to be exercised at their absolute discretion of selling real estates, with a declaration that the proceeds should be applied, at the like discretion, in the purchase of other real estates. He also gave them power at their absolute discretion to raise money by mortgage for the purchase of real estates. A suit having been instituted for the execution of the trusts of the will, and a sum of money, the proceeds of the sale of real estate, having been paid into court, one of the trustees proposed to purchase a large estate and to apply the fund in court in part payment of the purchase money, and to raise the re-

mainder of the purchase money by mortgage of the purchased estate. The other trustees refused to concur in the purchase:—Held, that the Court could not control the dissentient trustee in the exercise of his discretion in refusing to make the purchase, or in refusing to exercise his power of raising money by mortgage for the proposed purpose. *Ib.*

5. Where lands are vested in trustees by Act of Parliament, to be mortgaged for a particular purpose, it is incumbent on the mortgagee to see the money applied accordingly. *Cottrell v. Hampson*, 2 Vern. 5.

Mortgages under Powers or Trusts for Sale.] See POWER, XXI. VIII. 7.

By Executors.] See EXECUTOR AND ADMINISTRATOR, XXI. II.—XXII. II.

Power to Charge.] See POWER, XIX.

See also III. *supra*.

V. SALE TO TENANT FOR LIFE.

6. A power of sale and exchange vested in the trustees of a settlement, may be exercised by the trustees upon a sale to, or an exchange with, the tenant for life of the settled estates. Where, upon the exercise of such a power, it is declared, that the estate shall be vested in the purchaser, the purchase being made in the name of a trustee, an appointment to the trustee, in trust for the purchaser, is a valid execution of the power. *Howard v. Ducane*, T. & R. 81; 1 L. J., Ch., 85.

7. It is a well-settled rule that where trustees of a settlement have a power of sale and exchange over the settled estates, to be exercised at the request, or with the consent, of the tenant for life, they may sell to the tenant for life just as they may to any other person. *Dickinson v. Talbot*, 19 W. R. 138; 6 L. R., Ch., 32; 24 L. T. 49.

The reason for that rule is that the consent of the tenant for life to the exercise of the power is required for his own benefit, and does not place him in any fiduciary relation to the persons entitled in remainder. *Ib.*

Provided a sale by trustees to a tenant for life is *bonâ fide* and at a fair price, it is immaterial what was the object for which he made the purchase. *Ib.*

VI. PAYMENTS TO AND RECEIPTS BY TRUSTEES.

8. Payment of money to a trustee, with notice of the trust, is a mis-payment, though the trustee had judgment and execution against the person that paid the money. *Pritchard v. Langher*, 2 Vern. 197.

9. A. and B., being trustees of money for the separate use of a feme covert, lend to C., who gives bond to the trustees, and the trust is declared in the condition. The bond is kept by the feme, and, B. having received money for C., they settle an account, and B. gives C. a receipt for 100*l.* as received for the use of the feme. B. becomes insolvent: whether C. is well discharged of this 100*l.*, *quære*. *Baldwin v. Billingsley*, 2 Vern. 589.

10. A., on her marriage, assigned a debt due

to her from B. to three trustees, upon trust, when requested by her to call it in and invest it, and hold in trust for A., her husband, and children. B., with full notice, but without such request, paid part of the money to the husband by order of the trustees, and other part to the trustees for the express purpose of being advanced to the husband in breach of trust. The money was lost:—Held, that B., as well as the trustees, was responsible for the breach of trust. *Andrews v. Boufield*, 10 Beav. 511.

1. The obligor of a bond, which had been afterwards assigned to a trustee, of which assignment the obligor of the bond had notice, but not of the particular terms of the trust, was held not liable for payments not warranted by the trust made by him under the direction of the trustee, but only for such payments as he had made without such direction. *Roberts v. Lloyd*, 2 Beav. 376.

2. A mortgage was made for securing the re-transfer of stock to the trustees of a will. The third share of a *cestui que trust* in the stock was afterwards, by his marriage settlement, vested in trustees, who had power to give receipts, to invest in Government or real security, and to vary investments. Part of the mortgaged estate was afterwards sold for less than the value of the stock lent, and one-third of the price was paid in cash to the trustees of the marriage settlement:—Held, that the estate was not discharged, there being no evidence to show that the cash had been only invested, or that the trustees received cash instead of stock, in order to invest on real security. *Pell v. De Winton*, 2 De G. & J. 13; 4 Jur., N. S., 225; 27 L. J., Ch., 230; 6 W. R. 179.

Semble, that if the purchase deed had contained a recital that the trustees of the settlement had determined to invest money on real security, they need not have received it in stock, but their receipt for it in cash would have a good discharge. *Id.*

3. A firm of solicitors having been employed by the trustees of a will to receive the proceeds of the testator's real estate which had been taken by a railway company, paid over the money to one of such trustees without the receipt or authority of the other. The money having been lost to the estate by the insolvency and death of the trustee to whom it was paid:—Held, that the receipt of one trustee only (though also an executor) was not a sufficient discharge to the solicitors for the money which they had received by the authority of the two, and that they were personally liable to make good the loss which had resulted to the trust estate from such improper payment. *Lee v. Sankey*, or *Ginger v. Sankey*, 15 L. R., Eq., 204; 21 W. R. 286; 27 L. T., N. S., 809.

4. Trustees, with a power to sell and to invest the proceeds in Government or real securities, sold the estate, and received only part of the purchase money, but executed a conveyance to the purchaser, on the back of which was endorsed a receipt for the whole sum, which was signed by them all. This deed and the other deeds they retained as a security for the unpaid purchase money, with interest, and they entered into a written agreement with the purchaser that the deeds should remain with them as such security,

and that he should, if required, execute a proper mortgage. This agreement was signed by the purchaser, and by the trustee in whose custody the deeds were placed. Eight years afterwards the purchaser paid the principal and interest of his debt to this trustee, and received from him the deeds, including the conveyance, with the receipt indorsed:—Held, that by such payment the purchaser did not discharge himself of his liability incurred by participation in the breach of trust, and the trustee who received the money, having misapplied it and absconded, the purchaser was made to pay it over again. *Webb v. Ledsam*, 1 Kay & J. 385; 1 Jur., N. S., 775.

5. Legacy to a chapel directed to be paid to the trustees of the chapel. *De Windt v. De Windt*, 2 W. R. 648; 23 L. J., Ch., 776; 2 Eq. Rep. 1007.

Application of Purchase Money and Power to give Receipts.] See EXECUTOR AND ADMINISTRATOR, XXII. III.—POWER, XXII.—VENDOR AND PURCHASER, XIV. VII.

Receipts by Executors.] See EXECUTOR AND ADMINISTRATOR, X. VIII. 8.

Receipts by Co-Executor, or Co-Trustee.] See XXI. IV. *post*—EXECUTOR AND ADMINISTRATOR, X. XII. 2.

VII. REMUNERATION.

6. Trustee is of course entitled to all reasonable expenses of trust, but not for personal trouble and loss of time, unless he makes out a special case therefor, before acceptance of trust. *Brooksopp v. Barnes*, 5 Madd. 90.

7. Settled rule, that, in all matters of trust or in the nature of trust, a trustee is not allowed any compensation for his trouble in the business entrusted to him. *Re Ormsby*, 1 Ball & B. 189.

8. Two persons, in whom were vested, under an Act of Parliament, the right to the tolls and profits arising from a certain road, for a term of fifty years, conveyed, by deed of the 27th May 1827, the same, and all their estate and interest therein, to A., B., and C. (the defendant), upon certain trusts therein mentioned; and subject thereto, in trust for the said A., B., and C., their executors, administrators, and assigns, as tenants in common, for their own use and benefit, for the residue of said term of fifty years; and the deed contained a provision, that in case any of the said trustees should be unable to join in the direction and superintendence of the said road, it should be lawful for any two of the said trustees to act of themselves in the management of the said road, and in all other things relating to the execution of the said trusts. The interests to which the said A. and B. were entitled under the said deed having become subsequently vested in the plaintiff, and C. (the defendant) having taken upon himself the exclusive control and management of the road, and insisted upon his right thereto, and also upon being paid a salary for his trouble and supervision:—Held, upon a bill filed by the plaintiff, disputing such right, that the defendant C. was entitled to have the sole management of the road, but that

his claim for salary could not be maintained. *Taylor v. Taylor*, 4 Dr. & War. 124.

1. Mortgagor conveyed all his real and personal estate to the mortgagees in trust for creditors:—Held, that one of the mortgagees was not entitled to a commission on the rents received by him under an appointment as receiver by himself and his co-trustees. *Nicholson v. Tutin*, 3 Jur., N. S., 235.

2. *Quere*, how far the principle of English law, that a trustee cannot hold an office of profit under the trust (except with the express sanction of the Court), has been established in Scotland. *Quere*, also, as to the soundness of the principle. *Home v. Pringle*, 8 Cl. & F. 264.

A trustee does not, by being cashier to the trust estate, incur any additional liability in respect of its management, beyond what he was subject to as trustee. *Ib.*

3. A trustee has no right to exact or charge any remuneration or bonus in respect of great advantages accrued to the *cestui que trustent* from services incident to the performance of the duties imposed by the deed of trust. *Barrett v. Hartley*, 2 L. R., Eq., 789; 12 Jur., N. S., 426; 14 L. T., N. S., 474.

A settled account by a *cestui que trust*, allowing a bonus to the trustee, was set aside. *Ib.*

4. A trustee paid into court the balance of the trust fund, having first deducted the amount which he claimed for costs, charges, and personal expenses, which amount he knew was objected to by his *cestui que trustent*, as being excessive:—Held, that the trustee ought to have paid into court the whole of the trust fund, leaving it to the Court to decide the amount to which he might be entitled. *Beaty v. Curson*, 17 W. R. 132.

Liability for Profits.] See XXV. *post*.

See also MORTGAGE, VI.

XIX. Application for Advice or Opinion of the Court.

See also XVIII. III. *ante*.

- I. *Under the General Jurisdiction of the Court*, 6991.
- II. *Under the 22 & 23 Vict., c. 35, s. 30*.
See TRUSTEE RELIEF ACTS, IV.

I. UNDER THE GENERAL JURISDICTION OF THE COURT.

1. *In General*, 6991.
2. *Indemnity to Trustees*, 6992.

1. In General.

5. Upon a bill filed by trustees for the directions of the Court in execution of the trusts of a will, if the trustees have notice of any doubt as to the title of the testator to a part of the estate devised, the person who

may be benefited by that doubt is properly made a defendant to the suit, and the Court will not proceed to the execution of the trusts of the will, until that doubt is removed, either by a proceeding at law, or by such other course of inquiry as the Court may think proper to direct. *Talbot v. Radnor (Earl)*, 3 Myl. & K. 252.

6. Where trustees of a settlement, having a power of purchasing lands on the request of tenants for life, desired the opinion of the Court as to the propriety of applying 1,200*l.* on such request, in repairs and permanent improvement, no answer was given on the petition; but it was intimated that, on a bill filed, there would be no objection on principle to the course proposed to be taken, and subsequently the order was made in a suit instituted for the purpose. *Re Barrington*, 1 John. & H. 142; 6 Jur., N. S., 1073; 29 L. J., Ch., 807; 8 W. R. 577.

7. On application by trustees for the advice of the Court, where an important and difficult question is involved, the proper course is, to file a bill instead of presenting a petition. *Re Mockett*, Johns. 628; 29 L. J., Ch., 294; 6 Jur., N. S., 142; 8 W. R. 235.

8. Trustees of an under lease of church property authorised to take steps to obtain a clause for compensation for their tenant right of renewal, inserted in an Act pending in Parliament, to make a new street, which would require part of the property. *Jones v. Powell*, 4 Beav. 96.

9. Where a trustee accepts the trust of a fund with the knowledge that it is doubtful whether it ought to be held upon such trust, he is nevertheless entitled to come to the Court for its direction, whether the trusts ought to be executed:—Held, by Lord Justice Turner; Lord Justice Knight Bruce entirely dissenting. *Neale v. Davies*, 23 L. J., Ch., 744.

Where trustees accept such a trust, with knowledge of the doubt, and with the same and no more knowledge, are called upon to part with the fund by the *cestui que trust*, they are bound in morality to do so; and an adverse claimant would have no claim against them personally after they had parted with the fund in conformity with the trusts on which they accepted it, per Lord Justice Knight Bruce. *Ib.*

The question having been raised in a suit between the trustees and *cestui que trust* of the deed, one of the Vice-Chancellors refused to pronounce a decree, but ordered the cause to stand over, with liberty to the plaintiff, the *cestui que trust*, to amend by adding parties; and their lordships differing in opinion, the order of the Court below was affirmed. *Ib.*

10. A testator bequeathed to each of his six grandchildren 200*l.*, and, in case any of them should not have attained twenty-one at the death of the testator, he directed his trustees, who were also his executors and residuary legatees, to pay interest for the legacies of such children, after the rate of 5 per cent., towards their maintenance and education. Upon differences arising between the father of the children and the trustees as to the investment of the money pending minorities, the trustees file their bill to obtain the direction of the Court, and for leave to pay the amount

into court :—Held, that the trustees might pay the principal money into court ; and, *semble*, the trustees will not be liable to make up the difference between the dividends on the money in court and the 5*l.* per cent. *Abraham v. Holderness*, 6 Jur. 290.

Semble, if the direction in the will had been for the trustees to pay interest at 2 per cent., and the money was paid into court, the legatees would be entitled to the full amount of the dividends. *Ib.*

1. That trustees have invoked the aid of the Court in administering an estate, and a decree has been made, they cannot act in the matter of the administration except under the sanction of the Court. *Minors v. Battison*, 1 L. R., App. Cas., 428 ; 35 L. T., N. S., 1 ; 25 W. R. 27.

2. Indemnity to Trustees.

2. Though trustees are protected in acting under the decision of a competent tribunal, the protection does not extend to persons receiving payments out of a fund for themselves ; and though the decision has been long acted on, it is no protection to such persons against the claims of others not bound by it. *Foster v. M'Mahon*, 11 Ir. Eq. R. 287.

3. Where the Court administers the assets, the trustees are protected against all claims on the testator's estate, but legatees still remain liable in respect of the beneficial interest. *Underwood v. Hatton*, 5 Beav. 36.

4. Where trustees distribute a fund under the direction of the Court, they require no indemnity. *Smith v. Smith*, 1 Dr. & Sm. 384 ; 7 Jur., N. S., 652 ; 9 W. R. 406 ; 4 L. T., N. S., 44.

A lessor of a testator has not a right to require the Court to retain part of the testator's assets by way of indemnity against future breaches of covenant in the lease. *Ib.*

See also EXECUTOR AND ADMINISTRATOR, XV. III.—XVIII. III.

XX. Renewal of Leases and Right to Renewed Leases.

- I. *Right to Leases on Renewal by Particular Persons (Constructive Trust)*, 6992.
- II. *Purchase of Reversion by Trustees of Lease*, 6998.
- III. *Duty of Trustees to Renew*, 6999.
- IV. *Duty of Tenant for Life to Renew and Apportionment and Contribution for Renewal Fines*. See LIFE ESTATE FOR, IV.
- V. *Rights as between Lessor and Lessee*. See LANDLORD AND TENANT, VIII.

RIGHT TO LEASES ON RENEWAL BY PARTICULAR PERSONS (CONSTRUCTIVE TRUST).

1. *By Co-Lessees*, 6992.
2. *By Partners*, 6992.
3. *By Tenant for Life*, 6993.
4. *By Trustees, Executors, or Mortgagees*, 6995.
5. *By Other Persons*, 6997.

1. By Co-Lessees.

5. Three lessees of a church lease ; one renews in his own name ; it shall be a trust for all. *Palmer v. Young*, 1 Vern. 376.

6. Parties interested, jointly with others, in a lease, cannot take to themselves the benefit of a renewal to the exclusion of the others so jointly interested with them. *Clegg v. Ashwick*, 1 Macn. & G. 294 ; 1 H. & Tw. 396 ; 19 L. J., N. S., Ch., 49 ; 13 Jur. 993.

2. By Partners.

7. Lease of premises where a partnership trade was carried on, renewed by one partner in his own name clandestinely, is a trust for the partnership, to be accounted for as joint property. *Featherstonhaugh v. Fenwick*, 17 Ves. 298.

8. A person employed on behalf of himself and his co-partners, in negotiating the term of a lease, is not entitled to stipulate clandestinely with the lessors for any private advantage to himself ; where, therefore, a sum of 12,000*l.* was paid in pursuance of such a stipulation, the party receiving it was declared to hold it in trust for the partnership. Before the transaction was discovered, one of the partners withdrew, and subsequently another partner assigned a share in the stock, and in his proportion of this claim to persons then admitted into the concern :—Held, that the retired, the continuing, and the new partners were properly joined as co-plaintiffs in a suit to have the trust declared. *Faneott v. Whitehouse*, 1 Russ. & M. 132 ; 4 L. J., Ch., 64 ; 8 L. J., Ch., 50.

9. A deceased partner, having contracted in his own name for a lease of premises to be employed in the partnership trade, the Court refused to restrain the landlord from granting a lease to his representatives, but restrained the representatives from disposing of the lease when granted, except for partnership purposes, and with the assent of the surviving partner. *Alder v. Fouracre*, 3 Swan. 489.

10. Several persons were engaged as partners in working coal mines. The partnership was at will. The mines were worked by some of the partners, who, before the expiration of the last lease, agreed among themselves to conduct the whole for their own benefit. They thereupon gave notice to the other partners to dissolve the partnership, and entered into an agreement with the landlord for renewal to themselves only. They gave public notice of the sale by auction of the plant and stock, and informed the other partners that they might bid, and that they themselves intended to do so, and told them that the landlord had agreed to a renewal. Accounts were made up, and such of the excluded partners as assented and executed releases were paid their shares, but others refused their assent, and claimed the benefit of the renewed lease, besides their shares of the partnership assets. The new lease was granted in 1846, and in 1855 some of the excluded partners filed a bill to have the benefit of the renewed lease, and an account of the profits of the old and new partnership :—Held, that the renewal was a constructive trust for the benefit of all the partners, but that these excluded partners,

having taken no active steps for such a length of time to assert their rights, could not have relief, for that mere words were not sufficient without active proceedings. *Clegg v. Edmonson*, 3 Jur., N. S., 299; 26 L. J., Ch., 673; 8 De G. M. & G. 787.

The circumstance that the partnership was dissoluble at will would not alone have disentitled the plaintiffs to relief, for that the principle on which the Court holds each partner entitled to the benefit of a renewal effected by one is the confidential relation which exists between partners, and which exists whatever be the duration of the partnership. *Semble. Id.*

It is difficult, though perhaps not impossible, for a managing partner to contract, during the continuance of the partnership, for a new lease of the partnership property, and to secure for himself the exclusive benefit of such renewed lease. To give validity to such a transaction, the partners must all be placed upon an equal footing; and a mere notice by the managing partner to the others of his intention to apply for a new lease for his own benefit is not enough. *Semble. Id.*

1. If partnership property consists in part of leaseholds, the representative of a deceased partner may treat the surviving partner as trustee, and if the latter renews the lease, he is considered to do so for the benefit of the estate of the partner; but where the trade is one of a speculative character, requiring outlay, with an uncertain return, then, if the surviving partner continues the trade in his own name and renews the lease, the Court will not consider that the representative of the deceased partner has any interest unless he contributes a due proportion of capital. *Clements v. Hall*, 2 De G. & J. 173; 4 Jur., N. S., 494; 27 L. J., Ch., 349; 6 W. R. 358. Reversing 24 Beav. 333.

A. and B. were partners in lead mines held under a lease, which expired in 1845; after that time they continued to work the mines as tenants from year to year, until the death of A. in 1847, when B. worked them, so far only as was necessary to keep the mines in operation, until 1850. In that year he received notice to quit, but before the expiration of such notice he obtained an agreement for a new lease, on the understanding that he would employ a larger amount of capital in working the mines. He continued to work the mines under the new lease until 1853, when he died intestate. On a bill filed by the assignee of C., who was entitled under the will of A. to an annuity charged on the testator's interest in the mines, against D., the legal personal representative of both A. and B., claiming that the estate of the testator had an interest in the mines after his death:—Held, that the testator's interest did not cease on his death, but continued in the partnership for the benefit of his estate. *Id.*

2. In 1853, articles of partnership were entered into between the plaintiff and J. H., whereby, after reciting the partnership previously existing, and that the effects consisted of a leasehold dwelling-house, workshop, and land at N., and that the plaintiff and J. H. were jointly entitled to another dwelling-house at M. A., it was agreed that J. H. should stand possessed of the property at N., as to

the dwelling-house and one-half of the land, for his own absolute use and benefit, and as to the workshop and other part of the land, in trust to assign the same to the plaintiff; that the property at M. A. should be assigned to the plaintiff, and that when and so soon as the plaintiff and J. H. should erect a dwelling-house at M. A. of equal value with the dwelling-house at N., the same should be assigned to the plaintiff, who should thereupon re-assign the workshop to J. H. It was also agreed that an equal division should be made of the partnership effects, and that neither of the partners should apply any part of the co-partnership moneys or effects for his own private use until such divisions as aforesaid. A renewed lease of the property at N. was afterwards obtained from the lessor by J. H. to himself alone. The partnership continued for some time, but no assignment was made, nor was any dwelling-house built, as contemplated by the agreement of 1853. J. H. afterwards assigned to G. M. the dwelling-house and half of the land at N., of which the plaintiff was then in possession, and G. M. commenced proceedings by ejectment in the County Court against the plaintiff, in order to obtain possession of the premises. On a bill filed by the plaintiff against J. H. and G. M., praying for a partnership account, and for an injunction against G. M.:—Held, that, from the circumstances which had arisen, J. H. was not entitled to hold the dwelling-house and half of the land at N. in severalty, but that the plaintiff had sufficient interest in the property to maintain his right to an injunction against G. M., J. H.'s assignee, from bringing ejectment; and an injunction was granted accordingly. *Hawkins v. Hawkins*, 4 Jur., N. S., 1044.

3. By Tenant for Life.

3. Tenant for life, under the settlement of a Crown lease, gets a renewal in reversion, it shall go to the uses of the settlement. *Taster v. Marriott*, Ambl. 668.

4. One bequeaths several leasehold estates, held for years under the duchy of Cornwall, to his wife, during so many years of the term as she shall live, and after her decease, if the terms of the several leases be then in being, unto and amongst, etc. The wife got an additional term, and:—Held, it shall not be for her own benefit, but should go to the uses of the will. *Rave v. Chichester*, Ambl. 715.

5. When a tenant for life of leaseholds, under a marriage settlement, suffered the lease to expire, and obtained another lease, and died, it was held that the renewed lease must be held upon the trusts of the settlement, and not enure for the benefit of his representatives. *Pickering v. Voakes*, 1 Bro. C. C. 197.

6. Bequest of leaseholds for years determinable upon lives, for life, with remainder over, for all the residue of the testator's term and interest to come therein at his decease: the term expired in the life of the testator, who continued to hold, and paid half a year's rent before his death as tenant by the year; upon the general words unrestrained, comprising the interest from year to year, and the intention upon the whole will, and subsequent lease obtained by the executrix, the widow

and tenant for life under the will was held subject to the uses of the will, as the residue of the term at his death, if any, however short, would have been. *James v. Dean*, 11 Ves. 383. Affirmed 15 Ves. 236. And see *Kempton v. Packman*, cited 7 Ves. 176.

1. A tenant for life of a leasehold interest, the subject of settlement, surrendering the lease, and taking a new one for his own benefit, is a trustee for those entitled to estate in remainder, under the settlement; and an accumulation of rent from the death of the tenant for life, to the expiration of the new lease, belongs not to his devisee, but to the person next entitled under the settlement. *Eyre v. Dolphin*, 2 Ball & B. 290.

2. Testator seized in fee of a moiety of an estate at L., and in possession of the other moiety, as tenant from year to year, to St. J. College (this lease from the college having expired), gives to his wife, *durante viduitate*, all this his messuage or tenement, with the farm and lands at L., all his estate and interest therein, she paying the rent reserved to St. J. College, etc. The widow after his death obtains a new lease, and subsequently purchases the reversion of one to whom it had been conveyed by the college under an Act of Parliament:—Held, that the renewed lease was taken subject to the trusts of the will, and those in remainder to contribute to the fine paid by the widow in proportion to be settled by the Master:—Held, that the purchase of the reversion, not from the college, but from the person to whom it had been conveyed by the college, was not, under the circumstances, to be taken subject to the trusts of the will. *Randall v. Russell*, 3 Meriv. 190. And see *Hardman v. Johnson*, *id.* 347.

3. Tenant for life, with remainders over, of a Crown lease for years applies for a further term; a powerful opponent applies for a grant, the tenant for life gives up her pretensions for a sum of money; the money shall be settled to the same uses as the estate was. *Owen v. Williams*, Amb. 734.

4. A., on the marriage of B. his son, settles a lease on B. for life, to the wife for life, and then to the issue of the marriage; and B. covenants from time to time to renew the lease and assign it on the same trusts. B. renews the lease, but does not assign it, and dies indebted. This lease is bound by the marriage articles, and is not assets for the payment of debts. *Plowman v. Plowman*, 2 Vern. 289.

5. R., the last life in a bishop's lease, agrees with C. to surrender this lease on a promise of the bishop to grant a new one for the lives of C. and the son of C., and in consideration of C. surrendering the old lease, it was agreed the new one should be in trust for the infant son of C. The whole purchase money was paid by C. to the bishop, but the legal estate was granted in the new lease to R. and his heirs during his own life, and the lives of C. and his son. C., after the death of R., took upon him to dispose of it. R., by a deed poll, dated the day after the lease, declares his intention to be, that C. and his son should, after his decease, hold to them and their heirs during the remainder of the term:—Held, that R. had a valuable share in the consideration of the new lease, having given

up his interest in the old, and that, having a right to declare the trust, C. had his life only in the lease. *Crop v. Norton*, 2 Atk. 74; 9 Mod. 233; Barnard. 179.

6. A renewal taken by tenant for life of a lease for lives, is a trust for the benefit of those in remainder, and a fine levied by the heir of such tenant for life keeping possession of the title deeds, will not bar those in remainder, nor will any length of time during such a suppression of deeds. *Bowles v. Stewart*, 1 Sch. & Lef. 209.

7. Where the tenant for life of leaseholds in settlement, being under no obligation to renew, obtains an extension of the term, he is a trustee for those claiming under the settlement; and the fact of the settlement containing a special provision that a particular renewal shall enure to the benefit of the trust, does not prevent the application of this general rule. *Tanner v. Blivorthy*, 4 Beav. 487; 5 Jur. 1099.

8. Renewal of a college lease by tenant for life, with a power of appointment, in her own name and at her expense, has not the effect of an appointment in her own favour; and, therefore, by the death of the appointee in the life of the tenant, there will be a resulting trust by lapse for the representative of the author of the power. *Brookman v. Hales*, 2 Ves. & B. 45.

9. A., under a voluntary settlement, of which it did not appear that she had notice, was entitled to certain leaseholds held for lives for her life, with remainder to B. Under a subsequent voluntary settlement, she took a life interest in the same leaseholds, with an absolute power of appointment over the residue of the leasehold interest. While in possession of the property, she took a renewed lease of it, and died, having appointed all her interest to C.:—Held, that the renewal enured to the benefit of B. *Waters v. Bailey*, 2 Y. & Coll. C. C. 219.

10. If a tenant for life of an under-lease for eighteen years, granted by a person who himself holds the premises so under-let along with other property under a lease for twenty-one years, purchases the interest of his immediate lessor, and obtains from the superior lessor a renewal of the lease thus purchased, the renewed lease is subject, so far as regards the premises which were comprised in the under-lease, to the same trusts, as would have affected the under-lease if it had not been merged or had not expired by the effluxion of time. The same rule holds, though the lease at the time of the purchase was vested in a trustee upon trusts, under which he could not have granted a renewal of the under-lease, and though the tenant for life outlived by twenty-five years the time at which the under-lease would have expired by effluxion of time. *Giddings v. Giddings*, 3 Russ. 241.

A., being tenant for life of a leasehold for years, with remainder to B., after devising one estate to B. in tail, bequeathed to him the leasehold during his life, with remainder over, and gave him all the residue of his real and personal property. B. took possession of the residuary estate; suffered a recovery of the lands devised to him in tail; acted as the absolute owner of the leasehold estate; and outlived the term for which the lease was granted, having previously acquired a new interest in the demised premises:—Held, that B. elected to take under the will, and was bound to give effect to the devise of the

leasehold in favour of the remainderman.
Id.

1. J. B. being entitled, by virtue of a lease of 1735, to the lands of C., held under M. for three lives, devised the same to his son, John, for life, with remainders over. John, upon the death of his father, entered into possession under the will, and, in 1796 (one only of the *cestui que vient* in the lease of 1735 being in existence), obtained from G. and B. (the then head landlords) a new lease reciting the lease of 1735, for the lives of the surviving *cestui que vie* in that lease, and two other persons, with a covenant for perpetual renewal, at an increased rent and fine:—Held, that the lease of 1796 was a graft upon the original lease of 1735, and subject to the trusts of the will. *Duckley v. Llanauze*, L.L. & G. temp. Plunk. 327.

2. Renewable leaseholds were settled by a registered deed on B. for life, with remainders over. B. being in possession apparently as absolute owner, new leases were obtained under circumstances which against him would have made them grafts on the old interest, and at the same time the lands were sold by him to a purchaser for value without notice:—Held, that the equitable claim of a remainderman under the settlement was, under the Registry Act, preserved against the purchaser. *Hill v. Mill*, 12 Ir. Eq. R. 107.

3. A leasehold interest was subject to the trusts of a settlement under which A. was tenant for life, with a leasing power. A. made a lease of the premises to B., and at the same time entered into an agreement with B. to sell to him the absolute interest of the leasehold, and to make title at a future period. The agreement contained notice of the settlement. B. assigned the underlease, and the benefit of the agreement, to C., who entered into possession, and paid the head rent to the landlord. He subsequently entered into an arrangement with the landlord for a reduction of the head rent, to carry out which he suffered the lessee to be evicted by ejectment, and took a new lease from the landlord, at the reduced rent:—Held, that the new lease was a graft, and bound by the trusts of the settlement. *Stratton v. Murphy*, 1 Ir. R., Eq., 345.

4. A., being in possession of encroachments on Crown lands, devised the same by will to his wife B. for life, remainder to such of his sons as should survive her, as tenants in common in fee, and died. At the date of his death, the title of A. to such encroachments was clearly and immediately voidable by the Crown, under the 20 Car. 2, c. 8. But after the death of A., the 1 & 2 Vict., c. 42 passed, by which commissioners were empowered to grant leases of such encroachments for three lives, at low rents, to the then holders thereof, and the persons entitled to claim such leases were also declared to be entitled within a limited time to demand a conveyance in fee of the freehold, on payment of twenty-five years' purchase for the rent reserved. B., being in possession, applied for and obtained a conveyance of the lands to herself in fee, paying the consideration out of her own moneys:—Held, that notwithstanding A. had no good title to make, and therefore could not, strictly speaking, have made, any valid

settlement of such encroachments, yet B. must be taken to have acquired the fee for the benefit of all parties claiming under the same title as that under which she herself held the lands at the time of the Act; and the remaindermen under the will of A. were therefore declared to be entitled as against the devisees of B., such remaindermen repaying to the representatives of B. the consideration which she had advanced for the conveyance, without interest. *Yem v. Edwards*, 3 Kay & J. 564; 3 Jur., N. S., 462; 26 L. J., Ch., 590. Affirming 27 L. J., Ch., 23.

By Husband of Tenant for Life. 5. By a will, a renewable lease was devised to A. for life, remainder to B. for life, or so long as the said lease should continue, remainder to trustees for sale and division of the produce amongst various persons. C., the husband of A., purchased the life-interest of B., and then obtained a renewal of the lease to himself, for three lives; and died. The personal representative of C. was held, by the Court, to be a trustee for those claiming under the will of the original lessee; and was decreed to convey as they should direct, on payment of their respective due portions of the expenses of the renewal; but the price given by C. for the life interest of B. was not allowed to be considered as a portion of those expenses, although B. was himself the last surviving *cestui que vie* of the original lease, and therefore was not likely to have renewed. *Cridland v. Luxton*, 9 L. J., Ch., 99.

6. Previously to marriage the fortune of the wife is so settled as, in the event of her surviving her husband, to belong to her absolutely, and by other deeds of the same date, the husband makes a settlement of his property, under which certain interests are given to the wife; he dies in her lifetime, having by his will bequeathed to her considerable benefits, which he directs shall be in satisfaction of all her claims or demands against his estate, or executors, under the settlement made by him, or on any other account whatsoever; the acceptance of the benefit given to her by the will does not preclude the wife from claiming a leasehold, part of her own fortune, which the husband was bound, by deed settling her fortune, to renew in the name of trustees, and upon the trusts of that settlement, but which he had renewed in his own name. *Coleman v. Jones*, 3 Russ. 312; 6 L. J., Ch., 16.

4. By Trustees, Executors, or Mortgagees.

7. A. being possessed of a lease of a market, bequeathed it to B. in trust for an infant. B., before the expiration of the lease, applied to the lessor for a renewal for the benefit of the infant. The lessor refused to grant such renewal, whereupon B. got a lease made to himself:—Held, that B. was a trustee of the lease for the infant, and must assign the same to him, and account for the profits, but he was entitled to be indemnified from the covenants in the lease. *Keoch v. Sandford*, Sel. Ca., Ch., 61.

8. If an executor renews a lease, he shall account for the new lease as well as the old

one for the benefit of the creditors. *Anon.*, 2 Ch. Ca. 208.

1. If trustees or mortgagee renew, the new lease is always subject to the trust and limitations of the old lease. *Rame v. Chichester*, Amb. 719.

2. The word "advantages" is sufficient to take in all the benefits belonging to the trust of an estate for years, not to the profits only, but the renewals which are consequential. *Carte v. Carte*, 3 Atk. 178.

3. An executor to a tenant by sufferance or at will obtaining a larger interest, is a trustee for the residuary legatee, like the case of general occupancy. *James v. Dean*, 11 Ves. 382. Affirmed 15 Ves. 236.

4. Renewal of a lease taken by a trustee, shall accrue to the benefit of the *cestui que trust*. *Griffin v. Griffin*, 1 Sch. & Lef. 352.

5. Trustee of lease, renewing for his own benefit, is considered as still holding for his *cestui que trust*, though it is clear that the lessor would not have renewed for *cestui que trust*. *Flaggibon v. Scanlan*, 1 Dow 269.

6. Renewable leaseholds having been devised by testator upon trusts, one of the trustees obtained a renewal of the lease of the devised lands, and a new lease of additional lands, in one lease, at a bulk rent:—Held, that, *quoad* the additional land, the renewal was not a graft upon the old lease. *Acheson v. Fair*, 2 Con. & L. 208; 3 Dr. & War. 512.

7. A., by his will, bequeathed a term of years to his two sons, R. and F., subject to debts and legacies, and appointed his widow executrix during her widowhood, and died during the same year; the widow, having married, ceased to be executrix, and thereupon administration *de bonis non* was taken out by R. in 1789, but previously, in 1786, R. had procured a new lease for himself for three lives:—Held, that the new lease was a graft on the original interest, and subject to the trusts of the will, although it did not appear that the original term was unexpired at the date of the new lease. *Jackson v. Welsh*, Ll. & G. temp. Plunk. 346.

8. A bishop's lease was granted after the expiration of a former one at a less fine, because the lessee was son of the old tenant, who died without assets to pay the fine; another person was his administrator, but the son had made himself executor *de son tort*; the new lease was held a graft, and the lessee bound to renew to a sub-lessee without contribution. The sub-lessee, having been evicted on the expiration of the term granted by his lease, sued on a covenant to grant an additional term, but the term covenanted to be granted having nearly expired at the time of the decree, instead of a specific performance, an account in the nature of an inquiry *quantum damnificatus* was directed. *McNulty v. Hamill*, Beat. 544.

9. Lease obtained by a person interfering with the assets, and compelling the surrender by executors of a leasehold interest, bequeathed to minors, a graft on the former lease so surrendered. *Mulvany v. Dillon*, 1 Ball. & B. 400.

10. In a suit against a trustee of a church lease, who had expended considerable sums in obtaining renewals and a perpetuity grant, and had made an arrangement for the purchase of

the lands in consideration of an annuity to the *cestui que trust*, under an award, in obtaining which there was some concealment, and which was never completed, though acted on for fourteen years:—Held, that the new interest was a graft, and the trustee bound to account for the entire period. The cases where accounts against defendants are limited in point of time, and where not, considered. *Lovatt v. Knipe*, 12 Ir. Eq. R. 124.

11. A testatrix by will gave her executor all her interest in a farming lease upon trust to carry on the farm for the benefit of the plaintiff. The executor accordingly carried on the farm until the expiration of the lease, and then obtained a new lease. Under the circumstances, held by the Court below that the defendant was a trustee for the plaintiff, and an account was ordered of all moneys expended or received by the defendant in carrying on the farm. Upon appeal by the plaintiff against so much of the order as directed accounts:—Held, his having elected to claim the profits of the farm, he could not resist the taking of such an account. *Kendall v. Martens*, 8 W. R. 747; 2 L. T., N. S., 709; 2 De G. F. & J. 200.

12. An executor, six years after the death of the testator, surrendered a lease belonging to the testator, and took a renewal lease, including additional property, and at an increased rent, in his own name. He afterwards deposited the lease as security for money advanced to him, which he applied to his own purposes. The renewed lease contained no mention of the surrender, and the mortgagee did not know that the borrower was an executor, or that he was not the beneficial owner of the lease. He did not, however, make any inquiry into the title. An action was afterwards brought to administer the testator's estate, and a consent order was made for the sale of the leasehold property, without prejudice to any right, the mortgagee giving up the lease to facilitate the sale. He claimed to be paid the amount due to him by the executor out of the proceeds of sale:—Held, that the lease was in equity part of the testator's estate, and that the equity of the estate being prior to the equity of the mortgagee, must prevail against it. *Re Morgan, Pillgrem v. Pillgrem*, 18 L. R., Ch. D., 93; 50 L. J., Ch., 834; 45 L. T. 183. Affirming 50 L. J., Ch., 654; 44 L. T. 793; 39 W. R. 733.

Held, also, that the equitable mortgagee was not injured by the order to give up the indenture of lease, and did not thereby acquire any claim upon the proceeds of the sale. *Id.*

13. A new lease obtained by a mortgagee of a leasehold interest which had been evicted for non-payment of rent, taken after the expiration of six and nine months, allowed to the lessee and mortgagee to redeem by 3 Geo. 4, c. 2, s. 4, but in pursuance of a contract entered into in the period between the six and nine months, if the parties interested did not redeem, is not a graft on the former lease, nor a trust for the lessee, the mortgagee not being in possession nor procuring the lease behind the back of the lessee. The principles on which courts of equity act in considering renewed interests obtained by mortgagees, trustees, etc., to be grafts are, that the advan-

tage was procured either by being in possession, or, when out of it, by a contrivance to oust the lessee of the benefit of renewal. *Nesbitt v. Tredennick*, 1 Ball & B. 29.

1. In 1822 a lease of lands was made for twenty-one years. The lands were afterwards mortgaged, and a renewal was granted to a mortgagee in 1829. In 1830, by deed reciting the lease of 1822 and the mortgage, but not the renewal, the mortgagee conveyed the lands, and all his estate, title, interest, use, trust, property, profit, claim, challenge, and demand, both at law and in equity, therein, and also the mortgage debt and interest, to hold during the residue of the term granted by the lease of 1822. The deed contained covenants, against acts by the mortgagee, for good title and further assurance:—Held, on exceptions to the Master's report of bad title, that the legal estate, under the renewal of 1829, passed by the deed of 1830. *Reynolds v. Reynolds*, 12 Ir. Eq. R. 172.

By Mortgagee. 2. The defendants, who were entitled to the equity of redemption of leaseholds charged with a mortgage, attempted to get rid of it by fraudulently incurring a forfeiture, which they induced the lessor to take advantage of. They afterwards obtained a new lease from him, which they sold:—Held, that the new lease was subject to the mortgage, notwithstanding the 15 & 16 Vict., c. 76, ss. 2, 10, and a decree was made for payment by the defendants of the mortgage, with costs. *Hughes v. Howard*, 25 Beav. 575.

5. By Other Persons.

3. Renewal obtained by a party having a rent-charge on leasehold interest, evicted for non-payment of rent, is a trust for the original lessee, and a graft on the former lease. *Fitzgerald v. Rainsford*, 1 Ball. & B. 37. n.

4. Where a party is in possession of premises as the assignee of a lease, subject to an annuity, amongst other charges, and, pending an eviction for non-payment of rent, enters into a new agreement, whereby, subject to the right of redemption, he is in consideration of a sum of 750*l.* to get a lease at a less rent, to commence from the termination of the nine months allowed for redemption there, though the ejectment proceeding has been perfected, and the eviction actually had, yet the new interest is a graft upon the old, and as such subject to the annuity. *Jones v. Kedrney*, 1 Dr. & War. 134; 1 Con. & L. 34; 4 Ir. Eq. R. 74.

5. One lease for lives is to the "lessee and her heirs," and another, to "lessee and her executors;" as to the effect in equity of a declaration of trust for A. simply, *quare*. But if the leases were merely renewals by a guardian, the trust must follow the actual interest of the infant; viz., in one estate to the heir, in the other to the executor. *Milner v. Harewood (Lord)*, 18 Ves. 274.

6. A., possessed of a church lease for three lives, devised it to trustees for certain purposes till his son, R., should attain twenty-one; and when his said son should attain that age, he directed his trustees to stand seised of it to the use of his said son, and the heirs of his body; and, by a codicil, he directed, that if

his son, R., should die without issue, his son, P., should inherit the estate in the same manner as R. was to inherit it. R. being *quasi* tenant in tail, if he surrender his lease, and take a new one to himself and his heirs for three new lives, there is no equity on behalf of P., to make R. or his devisees trustees of the new lease for P. *Blake v. Blake*, 1 Cox 266.

7. In the case of leases from colleges and ecclesiastical bodies, if the lessee in the new lease takes in the right of him who had the old one, he must be subject to all the equity to which the original lessee was liable. *Edwards v. Lewis*, 3 Atk. 538.

8. S. was entitled, with her brother and four sisters, to a lease for thirty-one years, as one of the next of kin to her mother, one of whose personal representatives she also was. The landlord made a lease for fifty-one years, which was expressed to be made in consideration of the surrender of the former lease, and described the lands as late in the possession of the mother, and then in the possession of S., and one of her sisters, who was her co-administratrix. There was an indorsement on the lease, stating that it was made in trust for herself and her brothers and sisters. S. married, and the landlord made a lease to her husband of the same lands for forty years, to commence after the expiration of the fifty-one years:—Held, that the new lease was a graft. *McAlister v. Walsh*, 8 Ir. Eq. R. 250.

9. Lands were subject to a lease of a way-leave at a certain rent for sixty-three years, which the lessee had the power of determining. The land and rent were sold separately by auction in two lots, and were purchased by two different persons. After some time, the purchaser of the land entered into an arrangement with the lessee to put an end to the lease, and entered into a different one, in order to defeat the right of the purchaser of the rent:—Held, that this was contrary to equity, and the right of the purchaser of the rent was made good out of the new contract. *Wood v. Londonderry (Marquis)*, 10 Beav. 465; 16 L. J., N. S., Ch., 460; 12 Jur. 735.

10. A. being entitled to a leasehold interest in 1814, assigns the same by way of mortgage to B. In 1824 A. obtains from the landlord a lease of lives renewable for ever in lieu of the former interest, and in 1835, deposits this new lease with his solicitor in England, to whom he was considerably indebted for the costs at the time. By the decree pronounced at the original hearing, the new lease was declared to be a graft upon the old one, and that the mortgagee was entitled to the benefit of it:—Held that the solicitor's lien upon the new lease, could not prevail against the mortgagee. *Smith v. Chichester*, 2 Dr. & War. 393; 1 Con. & L. 486; 4 Ir. Eq. R. 580.

11. Whoever has a lease has an interest in the renewal; and when an additional term has been granted, the old term may be said to be still in existence. *Winslow v. Tighe*, 2 Ball. & B. 205.

The tenant's right of renewal is a part of his interest in the lease. *Id.*

12. A. demises lands to B. for ninety-nine years; B. demises same to C., reserving a reversion of two years. C. demises the premises to occupying tenants, and afterwards, without notice to B., applies for and obtains a rever-

sionary lease of the premises from A.; such lease is not a graft upon the original lease nor a trust for B. *Munnell v. O'Brien*, 1 Jones 176.

Semble, if C. had obtained the reversion lease, by representations made by him to A., that he was entitled to the entire interest in the lease made by A. to B., such misrepresentation would not be a ground for decreeing that lease a trust for B. *Ib.*

The reservation of a reversion by the intermediate landlord does not create an implied contract between him and the sub-lessee, that the latter shall not seek to obtain for his own benefit a reversionary lease of the premises from the head landlord. *Ib.*

1. In May 1835, a lease (to commence in December, 1833, and to continue for twenty-one years and thirty-three days) of certain lead mines in Yorkshire, was granted by the Crown to four lessees, of whom F. M. was one. In June 1848, F. M. conveyed and assigned to J. H., *inter alia*, the property of which he was possessed for any term of years, etc., upon the trusts mentioned; and in July 1848, F. M. granted and assigned to J. H. all his personal estate, and the surplus, if any, which might arise on the sale of his freehold and leasehold estates, upon trusts, after paying costs, etc., for the benefit of creditors, as therein mentioned. The plaintiffs, who were creditors of F. M., executed the deed in 1849, but no other creditor executed the deed until 1855. J. H. did not dispose of F. M.'s share in the mines. In May 1854, the Crown granted a lease of the said lead-mines to seven lessees (two of whom were F. M. and J. H.) for a term of twenty-one years, to commence on the 5th January 1855. F. M. died intestate in August 1854. G. B., in August 1848, recovered a judgment on two bonds against F. M., which was duly entered up; and in July 1848, J. C. and others also recovered judgment against F. M., which was duly entered up in August following. Subsequently these judgments were assigned to J. B. S., and were duly registered in the county of York, and in the Common Pleas, which was afterwards renewed:—Held, that the plaintiffs had, by virtue of the assignment of June 1848, and of the declaration of trust of July 1848, they having executed the latter deed in 1849, acquired a beneficial interest in the renewed lease. *Langhorne v. Harland*, 2 Jur., N. S., 872.

2. A testator, being seised in fee of a farm in the parish of A., and being also possessed of a lease for lives of the rectorial tithes of that parish, devised the farm to his nephews in tail male, and the lease to his brother J., his executors, administrators, and assigns, upon conditions that his said brother J., his executors, administrators, and assigns, owners or occupiers of the said parsonage, tithes, and premises, should, at all times after his decease, free and discharge his said farm from all manner of tithes, which should be payable out of the same to the said owner or occupier of the parsonage and tithes aforesaid. J. survived the testator, and devised his interest in the lease to his four sons, who took several renewals, and in 1782 assigned the existing lease for a valuable consideration to A. B., with notice of the trusts of the will:—Held, that a party to whom the tithes were be-

queathed by the will of A. B., and who took a renewal of the lease in 1817, held the renewed lease upon the trusts of the will, and consequently he had no title to the tithes of the farm, and that the owner of the farm was not bound to contribute to the renewal fines. *Webb v. Lugar*, 2 Y. & Coll. 247; 6 L. J., N. S., Exch. Eq., 49.

3. Testator gave leasehold premises to his daughter for life, if his term or terms and interest should therein for so long subsist, for her sole and separate use, notwithstanding her present or future coverture, and after her decease to her children equally, their executors, etc., during all the remainder of the estate, term or terms, and interest therein which should be then to come and unexpired. No trustees being interposed, the husband, having possession, was held accountable according to the uses of the will, both as to the original leases, and also as to reversionary leases granted to him, as the person entitled under the will of the former tenant upon favourable terms, and the equity was established against a purchaser from him with notice. *Parker v. Brooke*, 9 Ves. 583.

II. PURCHASE OF REVERSION BY TRUSTEE OF LEASE.

4. Trustee of term to pay debts purchased the inheritance from tenant for life; and had it conveyed to him by fine and feoffment; remainderman is not entitled to account of rents, except from his entry to avoid the fine, and, if he neglects to claim for five years, he is barred. *Reynolds v. Jones*, 2 Sim. & S. 206.

5. Testator seised in fee of a moiety of an estate at L., and in possession of the other moiety as tenant from year to year to St. J. College (his lease from the college having expired), gives to his wife *durante viduitate*, "all that his messuage or tenement" with the farm and lands at L., and all his estate and interest therein, she paying the rent reserved to St. J. College, etc. The widow, after his death, obtained new lease, and subsequently purchases the reversion of one to whom it had been conveyed by the college under an Act of Parliament:—Held, that the renewed lease was taken, subject to the trusts of the will, and those in remainder to contribute to the fine paid by the widow in proportions to be settled by the Master:—Held, that the purchase of the reversion, not from the college, but from the person to whom it had been conveyed by the college, was not, under the circumstances, to be taken subject to the trusts of the will. *Randall v. Russell*, 3 Meriv. 160. And see the case of *Hardman v. Johnson*, *id.* 847.

6. A. became entitled, as administrator of an intestate, to certain lands held under a lease from the Commissioners of Church Temporalities in Ireland for twenty-one years, customarily renewable, and being so entitled he, as such administrator, obtained from the commissioners a renewal of the lease for twenty-one years. The commissioners subsequently, under s. 34 of the Irish Church Act 1869, offered to sell the reversion in fee in the lands in question to A., as their immediate tenant, at a certain price. A. declined

to buy at the price named, and the commissioners thereupon set up the reversion in fee for sale by auction, and A. purchased it at the auction, and obtained a conveyance from the commissioners, which was made expressly subject to the lease and to the right of renewal thereunder:—Held, that A. became a constructive trustee of the reversion so purchased for the persons beneficially entitled to the personal estate of the intestate, and that it formed portion of such personal estate, the persons claiming it to pay the purchase money and all expenses incurred by A. in the purchase. *Randall v. Russell* (3 Meriv. 190) distinguished. *Gabbett v. Lander*, 11 L. R., Ir., 295.

1. A. was beneficially entitled to renewable leaseholds for three lives held on trust to renew, and subject to certain charges. All the *cestuis que vivent* had died. It being disputed whether the right to renew was lost, the reversioners granted a lease to A. for three new lives, without prejudice to the disputed question. A. subsequently bought the reversion:—Held, that the fee became subject to the charges. *Trumper v. Trumper*, 41 L. J., Ch., 673; 14 L. R., Eq., 295. Affirmed 8 L. R., Ch., 870.

III. DUTY OF TRUSTEES TO RENEW.

2. Where a renewable lease is vested in trustees, upon trust, to pay the rent and renewal fines, they are guilty of a breach of trust if they permit the tenant for life to take and use the rents, and neglect to take out renewals as the lives fall in. *Townley v. Bond*, 2 Con. & L. 393; 4 Dr. & War. 240.

When, under the provisions of a settlement, the trustees were to renew, and to pay the renewal fines out of the rents and profits, and they neglect to renew, and the tenant for life takes the rents, he will be liable to answer to the trustees for any damages they might sustain in consequence of their breach of trust. *Id.*

3. Trustee of lunatic renewing lease for his own benefit, declared guilty of breach of trust, and discharged. *Exp. Phelps*, 9 Mod. 357.

4. A testator gave his leasehold to trustees for legatees in succession, and upon trust, if the trustees "should think it proper or advantageous, as to those which were customarily or might be renewed," to endeavour to renew. And in order thereto should, "if they in their discretion should think fit or expedient, but not necessarily or peremptorily," insure the lives of the *cestuis que vivent*, and apply the insurance money in renewing, and out of the rents and profits raise sufficient money to renew so often as a renewal should be advisable, and he gave a power to mortgage for the same purpose:—Held, first, that this was an imperative trust, and that the trustees were bound to renew, if they could do so on reasonable terms; secondly, that if the trustees refused, the Court would exercise it; and, thirdly, that they were bound to raise the necessary funds in such a mode as would be most beneficial to all parties interested. *Mortimer v. Watts*, 14 Beav. 616; 21 L. J., Ch., 169.

5. A renewable lease not inconsistent with a covenant to let and manage to the best ad-

vantage; with reference to the subject, the trust for creditors. *Kirkham v. Chadwick*, 13 Ves. 547.

6. On demurrer:—Held, that trustees to whom discretionary power was given of renewing leases, had not an arbitrary power of renewal, but must renew when most for benefit of *cestui que trust*. *Milington v. Mulgrave*, 3 Madd. 491.

7. Testator bequeathed a leasehold for years upon certain trusts, and gave a sum of money to his executor to extend the interest in the lands, if same could be accomplished. The executor did not make any attempt, during the continuance of the term, to obtain an extension of the lease. After it had expired, the Master reported that an extension of the interest could have been obtained:—Held, that the money should go according to the trusts of the term. *O'Shea v. Howley*, 1 J. & L. 391; 7 Ir. Eq. R. 56.

8. Settlement of a renewable lease in trust out of the rents and profits to pay the fines and charges of renewing, and subject thereto for husband and wife successively for life; remainder to the first son at twenty-one. The trustees, not having renewed in the lives of the tenants for life, answerable as for a breach of trust, though not deriving any benefit from it. *Montford (Lord) v. Cadogan (Lord)*, 17 Ves. 485. Affirmed 19 Ves. 635. See also 2 Meriv. 3.

Leases Settled on Persons in Succession.
See LIFE. ESTATE FOR, VI.

XXI. Rights and Liabilities of Co-Trustees.

See also EXECUTOR AND ADMINISTRATOR, X. x.

- I. *In General*, 6999.
- II. *Trust Funds Left under Sole Control of Co-trustee*, 7001.
- III. *Fraud by One Trustee*, 7003.
- IV. *Joining in Receipts*, 7004.
- V. *Remedies of Co-trustees Inter Se*, 7004.
- VI. *Effect of Indemnity Clause*. See XXVII. I. *post*.
- VII. *Liability for Wilful Default*. See XXVI. II. *post*.
- VIII. *Costs*. See XXXI. XIV. *post*.

I. IN GENERAL.

9. There are three modes in which a trustee may become liable, according to the ordinary rules of the Court; first, where one trustee receives trust money, and hands it over to a co-trustee without securing its due application; secondly, where he permits a co-trustee to receive trust money without making due inquiry as to his dealing with it; thirdly, where he becomes aware of a breach of trust, either committed or meditated, and abstains from taking the necessary steps to obtain restitution. *Wilkins v. Hogg*, 8 Jur., N. S., 25; 31 L. J., Ch., 41; 10 W. R. 47; 5 L. T.

N. S., 467. Affirming 3 Giff. 116; 7 Jur., N. S., 566; 30 L. J., Ch., 492; 9 W. R. 688; 4 L. T., N. S., 434.

1. One trustee knowing and concealing his co-trustee's having sold out the trust fund, equally liable with the trustee who actually sold. *Boardman v. Moorman*, 1 Bro. C. C. 68.

2. A trustee who stands by and sees a breach of trust committed by his co-trustee becomes responsible for that breach of trust. A testator bequeathed to his partner and to B. his personal estate, upon trust, to invest the same for the benefit of his wife and children. Both the executors proved the will, and the surviving partner retained the testator's moneys in the trade, which were lost. B. took no active part in the trusts, but was cognisant of the breach of trust, and took no proceedings to prevent it:—Held, that B. was responsible for the consequences of the breach of trust. *Booth v. Booth*, 1 Beav. 125; 8 L. J., N. S., Ch., 39; 2 Jur. 938.

3. Where some of the members of a firm are trustees of funds which they misapply, by making use of them for partnership purposes; if such misapplication be with the knowledge of the other members of the firm, the *cestuis que trustent* may prove against the joint estate. *Exp. Heaton*, Buck 386.

4. K. and S., being trustees of money in the funds, sell it for the benefit of S., who dies insolvent, and K. becomes bankrupt. The persons interested in the funds may prove against the estate of K. the value of the funds at the bankruptcy, though S.'s estate be first liable. *Exp. Shakeshaft*, 3 Bro. C. C. 197.

5. A man cannot take upon himself the character of trustee, and act partially as such, or deny his liability to replace trust property if, through his negligence or want of attention, a sum of money which he has told his *cestuis que trustent* or induced them to believe has been retained and invested by him, has, in fact, been squandered by his co-trustees. *Horton v. Brookhurst*, 29 Beav. 504.

A., one of two trustees, rendered accounts in the name of the two, which stated that one-third of the income had been retained and invested, but, in fact, no such investment had been made, and A. alone had received and misapplied these moneys, which were lost by his bankruptcy. The other trustee, however, having at a meeting of the *cestuis que trustent* so acted as to sanction and adopt the accounts:—Held, liable for A.'s default. *Id.*

6. One of three trustees who was alleged to have participated in a breach of trust, clearly committed by the others, being also executor of a *cestui que trust*:—Held, that a legatee of the *cestui que trust* was entitled to maintain a bill against the three trustees to recover the funds lost by the breach of trust. *Sandford v. Jodrell*, 2 Sm. & G. 176.

7. If trustees will bind themselves to be liable for the acts of each other, the Court will not relieve them, especially in a case of a composition of debts. *Leigh v. Barry*, 3 Atk. 583.

In the case of trustees, though there are not negative words in a deed that they shall not be liable for the acts of one another, yet the Court will not make them so for more than each has received. *Id.* 584.

8. On a marriage, two of the wife's debtors, one of them the bankrupt, were appointed

trustees of a fund, to be made up of their several debts:—Held, that the debts not being got in and invested, each trustee was liable only for his own default. *Exp. Woodward, Re Turner*, 3 Mont. & A. 232; 2 Dea. 401; 6 L. J., N. S., Bk., 60; 1 Jur. 385.

9. Where the estate of a trustee is secondarily liable, in consequence of a breach of trust by a co-trustee, the *cestui que trust* is bound to pursue his demand against the former estate with due diligence. *Newham v. Newham*, 1 L. J., Ch., 22.

10. A testator, resident in India, directed his trustees and executors to invest his residue in Government or other good securities, and then declared trusts of it for the benefit of his children and other persons, all of whom were resident either in England or Ireland, and were mentioned so to be in the will. The residue was allowed to remain in the hands of the testator's bankers and agents in India, who ultimately failed:—Held, that the acting executor and trustee was responsible for the loss thereby occasioned to the estate. *Lowry v. Fulton*, 9 Sim. 104; 7 L. J., N. S., Ch., 158.

11. P., by will, gave a legacy to Mrs. W., defendant, which legacy was on her marriage settled in the usual way, being then still unpaid, the testator's estate being very deficient. Afterwards Mrs. P., the widow of the testator, by her will directed her trustees to pay and make good, out of her assets, all the legacies given by her husband, "upon condition that all parties concerned should abstain from requiring any claim against her husband's estate, and should also execute any releases which her husband's executors might require in respect thereof." Mrs. P.'s estate being ample, the legacy was ready to be paid, but the executors required the discharge of three trustees of Mrs. W.'s settlement. There was at that time but one trustee. Mr. W. procured A. and another person to be trustees; and the legacy having been paid to the solicitor of all three trustees, he paid it over to A., who immediately misapplied it, by suffering W. to convert it to his own use. On a bill filed by the other two trustees against A. and Mr. and Mrs. W. to have the fund brought back:—Held, first, that the legacy under Mrs. P.'s will was bound by the trusts of the settlement. *Gray v. Addison*, 2 Jur., N. S., 662.

Held, secondly, that the two trustees had been guilty of no conduct, by laches or otherwise, to deprive them of their right to relief. *Id.*

Held, thirdly, that they had a right to have the whole fund replaced by A., and not for contribution only. *Id.*

12. A marriage settlement empowered the two trustees to vary the investment of the trust funds, "with the consent in writing of the husband and wife." Part of the trust funds consisted of 1,000l., which was paid in cash to the two trustees, who, in breach of trust, invested it in ordinary railway shares. Thereby a loss was sustained; and the trustees, in further breach of trust, transferred these shares to the N. Bank, to secure the private debt of the husband, the tenant for life. Subsequently O., one of the trustees (without the knowledge of his co-trustee), procured an assignment (for a nominal consideration) of those shares to two persons, who became

trustees thereof for the R. bank, which had made to the husband large advances, the full amount of which was secured by the guarantee of O. A week after this assignment, the amount of the husband's debt to the N. Bank was paid by a cheque on the R. Bank, which, before the transfer of the shares was lodged with it, cashed that cheque out of the original credit given to the husband. These shares were sold, without the other trustee's knowledge, for 592*l.* 10*s.*, which sum was applied in reducing the debt due by the husband to the R. Bank. O. obtained from the husband mortgages of the hotel, furniture, etc., to the amount which covered the whole sum guaranteed by him to the R. Bank:—Held, that O. was, as between him and his co-trustee, primarily bound to replace the 592*l.* 10*s.* *Costello v. O'Rorke*, 3 Ir. R., Eq., 172.

1. Right of a *cestui que trust* to proceed separately against one trustee implicated in a joint breach of trust. *Walker v. Symonds*, 3 Swan. 75.

2. A bill by a widow and children (who were infants) against A., B., C., and D., to have the trusts of two deeds and of a will, under which they were interested, carried into execution, is not multifarious, though A. and B. were the trustees of one of the deeds, C. and D. of the other, and A., B., and C. of the will. *Campbell v. Mackay*, 7 Sim. 564; 1 Myl. & C. 603.

3. Two classes of trustees had committed a breach of trust:—Held, that the *cestui que trust* might proceed against the one class, without making the other class parties. *McGaughen v. Dew*, 15 Beav. 84.

II. TRUST FUNDS LEFT UNDER SOLE CONTROL OF CO-TRUSTEE.

4. A trustee, having placed the trust fund under the sole control of his co-trustee, without any sufficient reason, was:—Held, to have committed a breach of trust, and if the money should be lost by such co-trustee's bankruptcy is liable to make it good. *Broadhurst v. Balguy*, 1 Y. & Coll. C. C. 17.

Early in 1818 a *cestui que trust*, with power of directing the variation of the trust securities, requested B., who was one of his trustees, to sell out trust stock then standing in the 5 per cents. and invest it in the 3 per cents. In April of the same year the trustees, B. and H., sold out the stock by power of attorney, and soon afterwards H., at the request of B., joined in a cheque on the bankers who acted in the sale, requesting them to pay the amount to themselves or bearer. In the letter of B. requesting H. to sign the cheque, he stated, as a reason for expedition, that the money was to be paid on Thursday to the gentlemen to whom it was engaged; B. afterwards applied the money to his own use. On a bill filed in 1838 by the *cestui que trust* to compel H. to replace the money:—Held, that H. was *primâ facie* liable, for that neither of the trustees contemplated an investment pursuant to the direction of the plaintiff, and, even if H. had so contemplated, the course taken by him was not required by necessity or convenience. *Id.* 16.

5. Two trustees having properly sold out trust money, one of them handed the cheque

for the proceeds to the other, who misapplied it:—Held, that they were both liable. *Trutch v. Lamprell*, 20 Beav. 116.

It is a contradiction in terms to say, that a trustee who acts is not an active trustee, and a defence by a trustee that he only acted for conformity's sake, is unavailing. *Id.*

6. Two trustees, having power to alter and vary a trust fund, sold it out for that purpose, but allowed the produce to be received by one alone:—Held, that the other, who failed to show that the fund was properly invested, was bound to pay the amount into court. *Wiglesworth v. Wiglesworth*, 16 Beav. 269.

7. Trustees of stock signed a power of attorney to sell it out, and the proceeds were received from the broker by one of the trustees, who afterwards became insolvent:—Decree, that the other trustees account for and pay the amount. *Marriott v. Kinnersley*, Tam. 470.

8. One trustee suffering the other to have trust money under a note of hand, held liable. *Kable v. Thompson*, 3 Bro. C. C. 112.

9. Where a trust fund standing in the name of two trustees had been sold out, and the money had been received by one of them, who was to pay it to the *cestui que trust*, but failed to do so and afterwards became insolvent, and the money was lost:—Held, that the other trustee was not exonerated from personal liability to make good the fund, on the ground that all the acts which he had done were required for convenience of conformity. *Curtis v. Mason*, 12 L. J., N. S., Ch., 442.

10. Two trustees executed a release for trust money, but one alone obtained possession of it, and he invested it on improper security:—Held, that the other was liable, for it was his duty to see that it was properly invested. *Thompson v. Finch*, 22 Beav. 316; 25 L. J., Ch., 681.

11. A box containing securities of the Spanish Government, the property in which passed by delivery, was deposited at a bank in the names of three trustees. The Spanish Government having afterwards made proposals for a change in the securities, one of the three trustees, who was a stockbroker, was allowed to take the securities out of the box for the purpose of such conversion. He effected the conversion, but appropriated a part of the converted securities to his own use, and placed the rest in a box, which he returned to the bank. The fraud was not discovered for several years. The trustee kept the key of the box, being allowed to have access to the box for the purpose of from time to time tearing off coupons and obtaining the dividends, and from time to time took out others of the securities, which he converted to his own use, until at last the box was empty:—Held, that the co-trustees were liable for the first breach of trust, it being their duty after the conversion to see that the securities were all deposited in the box, but that they were not liable in respect of the subsequent misappropriation. *Mendes v. Guedalla*, 2 John. & H. 259; 8 Jur., N. S., 878; 31 L. J., Ch., 561; 10 W. R. 482; 6 L. T., N. S., 746.

12. Each of two trustees retained possession of a moiety of bonds held in trust, and which passed by delivery, and one trustee committed a breach of trust:—Held, that the other trustee

was liable to make good the loss sustained. *Lewis v. Nobbs*, 8 L. R., Ch. D., 591; 47 L. J., Ch. D., 662.

1. A., by his will, gave the residue of his property to three trustees, whom he appointed executors, upon trust to sell and invest the same, and to pay the income thereof to his widow for life, and after her decease, to his children, who were all infants at the time of his death. The eldest child attained twenty-one in 1839, and the youngest in 1846. The three executors proved the will, but one of them almost exclusively acted. The money which was the proceeds of the estate was suffered by two of the executors to remain in the hands of the third, who ultimately became insolvent. On the youngest child attaining twenty-one, he, on behalf of himself and his brothers and sister, attempted to obtain payment from the acting executor, and in 1848 wrote to him a letter consenting to receive payment of the amount then admitted to be due by annual instalments. In 1849, and shortly before the insolvency of the acting trustee, a bill was filed by all the children against the trustees for the purpose of making them each responsible:—Held, that inasmuch as it was the duty of the three trustees to have explained to their *cestuis que trustent* what their rights were, and as they had not done so, there was nothing in the conduct of the children to deprive them of their remedy against the three trustees, who were accordingly declared to be jointly and severally liable to make good the deficiency. *Burrows v. Walls*, 5 De G. M. & G. 233; 3 W. R. 327.

2. An order of dividend found that a certain balance was in the hands of one of the assignees, and directed that assignee to divide the same among the creditors:—Held, that the other assignee, having never interfered with the control and application of the trust fund, was not liable to the creditors for the payment of the dividends. *Exp. Dawson*, 4 Dea. & Ch. 130; 2 Mont. & A. 94; 4 L. J., N. S., Bky., 42.

3. On a marriage a sum of stock was settled for the separate use of the wife for life, remainder to the husband for life, remainder for their children, with power to change securities with consent of the wife. The dividends on the stock being reduced, one of the trustees, in whom the husband and wife principally confided, and who, with his partners, was their solicitor, informed his co-trustees that he had an opportunity of investing the property in a mortgage at 5 per cent., and, with the consent of the husband and wife, requested his co-trustees to execute a power of attorney to enable him to sell the stock. The co-trustees, without inquiring into the matter, complied; the trustee sold the stock and absconded:—Held, that the co-trustees were liable. *Handbury v. Kirkland*, 3 Sim. 265.

4. The trustees of estates in Scotland appointed one of themselves to be factor, with a salary; and he, though of undoubted responsibility at that time, afterwards retained large balances at the annual settlements of accounts; whereon one of the trustees, who was cashier, urged him to pay up; but the balances against him increasing, both trustees, after failing in their exertions to obtain payment, revoked his appointment as factor, and he became bankrupt, owing a large debt to the

trust estate:—Held, by the Lords (affirming decrees of the Court of Session in Scotland, in an action raised by the first heir of entail, to whom the trustees were bound to account for their management), first, that the appointment of one of the trustees to be factor, even though it gave him no right to charge as factor, was not of itself such a breach of trust as subjected the other trustees to all the consequences of it; secondly, that there was not such gross negligence, in the two trustees permitting the factor to retain balances, as to subject them to liability for the ultimate balance due from him to the trust estate, the Lord Chancellor observing, as to the first point, that the rule was the same in Scotland as in England. *Horne v. Pringle*, 8 Cl. & F. 234.

5. Slaves in the West Indies were bequeathed to executors, upon trusts for a niece of the testator for her life with remainder to her children. The executors having renounced and disclaimed, administration with the will annexed was granted to the niece, who afterwards married a minor. Before her husband had attained twenty-one the husband and wife executed a settlement, reciting that the husband was, in right of the wife, possessed of the slaves, theretofore the property of her late uncle; but not in any manner referring to the will. The settlement purported to assign the slaves to trustees, in trust to sell and invest the proceeds and pay the income for the separate use of the wife for life, without power of anticipation, with trusts by way of remainder to the children of the marriage. Before the husband came of age, the husband and wife sold the slaves without noticing the settlement in the contract, but paid part of the purchase money to one of the trustees of the settlement, the other trustees not concurring in or being in fact aware of the sale or payment. An amicable bill was then filed on behalf of the infant children of the marriage, to have the trusts of the settlement carried into execution, or a new settlement made in conformity with an offer of the husband to execute such settlement on receiving 3,500*l.* out of the wife's fortune. This bill contained an allegation that the proceeds of the slaves had been invested in the names of the trustees. The trustees by their answer admitted the truth of this allegation. The husband and wife, answering separately, disputed the validity of the settlement, and refused to be bound by it; but the husband offered to execute a settlement on the terms above mentioned. The decree declared the settlement void, and directed a new settlement to be made upon the footing of the offer made by the husband. A settlement was accordingly executed, and the 3,500*l.* paid to the husband. Afterwards it was discovered that the admission in the trustees' answer was incorrect, the trustee who received the proceeds of the slaves having applied the money to his own use, and having by false statements induced his co-trustees to believe and admit upon the answer that the investment in their names and his had been made as there stated. His circumstances were such that any attempt to recover the amount at any period would have been hopeless. More than twenty years after the wife was aware of these circumstances she instituted a suit against the co-trustees to

make them personally liable for the breach of trust:—Held, first, that the above facts, independently of the admission of the co-trustees in their answer, did not render them personally liable in respect of the proceeds of the sale of the slaves, the title of the settlors not having been such as to enable the trustees legally to possess themselves of the fund: and, secondly, that in the circumstances of the case that admission did not create any such liability. *Derbishire v. Home*, 3 De G. M. & G. 80.

Sembla, that a clause restraining a married woman from anticipation does not exempt her from the ordinary consequences of lapse of time and acquiescence; also, that in the circumstances above stated, the administratrix committed a breach of trust by marrying without providing for the security of the trust property; also, that having by her separate answer in the first suit refused to be bound by the first settlement, she could not afterwards sue the trustees for non-performance of the trusts of it; also, that her having concealed from them the nature of her title when she assumed to settle the funds, would of itself have been a defence to such a suit. *Ib.*

1. An appointment of new trustees recited that certain stock and shares had been transferred into the names of the new trustees, and that by an indenture of even date a mortgage debt and the premises subject thereto had been assigned and conveyed to the new trustees. The trust property having been sold and the proceeds received by one of the trustees and lost, the Court on the hearing decided that the co-trustee, not having inquired what had been done with the proceeds, was liable for all sums actually received by him, jointly with his co-trustee, and which had been lost, and referred it to the chief clerk to find what had been jointly received. The chief clerk by his certificate found that all the trust property had been jointly received:—Held, that the chief clerk had rightly found by his certificate. *Hale v. Adams*, 21 W. R. 400.

2. A., B., C., and D. were co-trustees of a charity, under a will, which directed that one trustee in rotation should be acting trustee for the current year, and keep the accounts. A., being the acting trustee in a particular year, applied some of the funds to his own use, without the knowledge of the other trustees. A. was succeeded by, and delivered his accounts to B., who delivered his accounts in like manner to C., the next acting trustee. The Court held that D. was not liable for the breach of trust committed by A. *Att.-Gen. v. Holland*, 2 Y. & Coll. 683; 7 L. J., N. S., Exch. Eq., 51.

3. Under a trust to lend trust money to one of the trustees on his personal security until the trustees should deem it advantageous to invest the money in the funds:—Held, that the omission to call in the money, which had been accordingly lent to the trustee, and its consequent loss did not, in the absence of any proof of misconduct on the part of his co-trustee, create any liability on the part of such co-trustee. *Paddon v. Richardson*, 7 De G. M. & G. 563; 1 Jur., N. S., 1192; 3 Eq. Rep. 933.

Held, also, that as payment of the debt was only enforceable in equity, and the *cestui que trust* might have enforced it himself, this circumstance was an answer to a suit by him seeking to render the co-trustee personally liable. *Ib.*

4. There are three modes in which a trustee may become liable, according to the ordinary rules of the Court; first, where one trustee receives trust money, and hands it over to a co-trustee without securing its due application; secondly, where he permits a co-trustee to receive trust money without making due inquiry as to his dealing with it; thirdly, where he becomes aware of a breach of trust, either committed or meditated, and abstains from taking the necessary steps to obtain restitution; but the operation of these rules was excluded by the indemnity clauses contained in the will. *Wilkins v. Hogg*, 8 Jur., N. S., 25; 31 L. J., Ch., 41; 10 W. R. 47; 5 L. T., N. S., 467. Affirming 3 Giff. 116; 7 Jur., N. S., 566; 30 L. J., Ch., 492; 9 W. R. 688; 4 L. T., N. S., 434.

5. When one of two trustees allows the trust fund to be under the sole control of the other, both trustees are liable to make good to the trust estate any money misapplied. *Rodbard v. Cooke*, 36 L. T., N. S., 504; 25 W. R. 555.

L. appointed G. C. and L. A. C. executors and trustees of his will. They kept at their banker's an account relating to the estate, separately from their own. Cheques were drawn against that account with the knowledge of G. C., but signed by L. A. C. alone. In 1867 a sum of 4,000*l.* was received by L. A. C. on account of the estate, and handed by him to accountants, through whose hands all money transactions relating to the trust passed, and paid by them into the bank to the account of the trust estate. Shortly after a sum of 3,645*l.* 2*s.* 7*d.* was drawn out by cheques signed by L. A. C. alone. Of that amount a sum of 628*l.* was applied by L. A. C. to his own use, without the knowledge of G. C. L. A. C. had since died:—Held, that G. C. having allowed the fund to be under the sole control of L. A. C., the estates of L. A. C. and G. C. were jointly and severally liable to make good the loss to the estate. *Ib.*

Accountants employed by trustees, through whose hands the accounts of the trust estate passed, are in the nature of servants, and bound to accept as correct statements made by one or other of the trustees with regard to the intended application of the trust fund, and are not liable for the misapplication of the trust fund by their employers, on the ground of negligence, by not seeing that the fund was applied properly. *Ib.*

III. FRAUD BY ONE TRUSTEE.

6. Trustees are not liable to the *cestui que trust* for money belonging to the trust which their co-trustee gets into his possession without their consent or knowledge, and by a fraud upon them. *Barnard v. Bagshaw*, 3 De G. J. & S. 355; 9 Jur., N. S., 220; 7 L. T., N. S., 544.

If joint trustees draw a cheque for the trust moneys upon the bankers in whose hands such moneys are, and cross that cheque with the

name of certain other bankers, and having so crossed it deliver it to one of their number for the purpose of paying it into the bank of the bankers with whose name the cheque is crossed, the co-trustees are not liable for the misapplication of the money by the trustee to whom the cheque is delivered, if he strikes out the crossing from the cheque, and then receives and misapplies the money. *Ib.*

1. A box containing the securities of the Spanish Government, the property in which passed by delivery, was deposited at a bank in the names of three trustees. The Spanish Government having afterwards made proposals for a change in the securities, one of the three trustees, who was a stockbroker, was allowed to take the securities out of the box for the purpose of conversion. He effected the conversion, but appropriated a part of the converted securities to his own use, and placed the rest in a box, which he returned to the bank. The fraud was not discovered for several years. The trustee kept the key of the box, being allowed to have access to the box for the purpose of from time to time tearing off coupons and obtaining the dividends, and from time to time took out others of the securities, which he converted to his own use, until at last the box was empty:—Held, that the co-trustees were liable for the first breach of trust, it being their duty after the conversion to see that the securities were all deposited in the box, but that they were not liable in respect of the subsequent misappropriation. *Mendes v. Guedalla*, 2 John. & H. 259; 8 Jur., N. S., 878; 31 L. J., Ch., 561; 10 W. R. 482; 6 L. T., N. S., 746; 5 L. T., N. S., 308.

IV. JOINING IN RECEIPTS.

2. Each trustee shall be charged for no more than he actually receives. Otherwise, if the trustees join in receipts. *Spalding v. Shamlor*, 1 Vern. 303.

3. Two trustees join in a receipt, and one receives the money: only the receiving trustee shall be charged. *Sed quere.* *Churchill v. Hobson*, 1 P. W. 241; 3 Ark. 318.

4. Two trustees in a mortgage join in an assignment of the term, and in a receipt for the whole, each receiving a moiety only of the mortgage money, are to be answerable only for what they respectively receive. *Fellows v. Mitchell*, 1 P. W. 81; 2 Vern. 504, 515.

5. A trustee joining in a receipt and reconveyance of a mortgaged estate, though he does not receive the money, is liable, and, the receipt being in evidence, no inquiry can be directed as to the fact. *Scurfield v. Howes*, 3 Bro. C. C. 90.

6. Co-trustee held liable for acts of other, though he merely joined in receipt for conformity's sake, and never meddled in trust beyond that. *Bradwell v. Catchpole*, cited 3 Swan. 78.

7. Trustees joining in receipt are not chargeable unless they also receive the money. *Chambers v. Minchin*, 7 Ves. 198.

8. A trustee charged, though he did not receive the money, under the circumstances, having joined in the receipt; the sale unnecessary; and permitting his co-trustee to

keep and act with the money contrary to the trust; not charged in the respect of the interest of one of the *cestuis que trustent* having notice of the breach of trust, and acquiescing. *Brice v. Stokes*, 11 Ves. 319. And see *Griffiths v. Porter*, 25 Beav. 236.

9. Trustee joining in receipt, though only for conformity, is accountable. *Westly v. Clarke*, Dick. 330.

10. One of three trustees for sale was also the solicitor employed in the matter, and he alone received the purchase money, and neglected to apply it. The conveyance was executed, and the receipt signed by all three trustees:—Held, that the solicitor was not the agent of the other trustees, so as to make the receipt by him the receipt of all; and the other trustees, having joined merely for the sake of conformity, were not chargeable. *Re Fryer*, 3 Kay & J. 317; 3 Jur., N. S., 485; 26 L. J., Ch., 338.

V. REMEDIES OF CO-TRUSTEES INTER SE.

11. Contribution enforced among assignees in bankruptcy, to reimburse a payment by one under an order for a loss occasioned by their joint act; and the objection that the defendants acted only for conformity upon the representation and advice of the plaintiff, did not prevail. *Lingard v. Bromley*, 1 Ves. & B. 114.

12. Contributions between trustees cannot be enforced in a suit instituted against them to repair a breach of trust for which they are all liable. *Fletcher v. Green*, 33 Beav. 513.

As to the right of co-trustees, who had committed a breach of trust, to contribution in a suit to make them replace the trust fund. *Ib.*

13. When a decree has been made against an executor, and the estate of a deceased executor, to make good a breach of trust, payment by the surviving executor of the whole amount due is a complete discharge of the deceased executor's estate, and it is not competent for the Court to enforce payment against the deceased executor's estate in order to establish contribution. *Micklethwait v. Winstanley*, 5 N. B. 204; 34 L. J., Ch., 281; 11 L. T., N. S., 582.

14. By a settlement made in contemplation of marriage, a lady assigned a certain sum of money and interest, due to her from a trading firm, to one of the partners in the firm and the plaintiff, as trustees, upon trust, to permit the fund to remain in the hands of the firm until the trustees should be requested by the settlor, in writing, to call it in, and upon such request to call in and compel payment of the same, and invest it, and to hold such sum and the investment upon the trusts therein mentioned; and it was provided, that it should be lawful for the trustees, with the consent of the settlor, after giving to the partner trustee, or any other member of the firm, three months' notice in writing, to call in the said fund; but that, so long as it remained in the hands of the firm with the consent of the settlor, the trustees were not to be answerable for any insufficiency thereof. The firm suspended payment, and made a composition with their creditors; and after such suspension, the settlor, for the first time, requested the trustees to call in the fund. The plaintiff thereupon

requested his co-trustee to pay the money. Upon his refusal to do so, the plaintiff filed his bill against his co-trustee and the *cestuis que trustent*, to have the trust executed by the Court, and himself indemnified:—Held, that the partner trustee must be considered as having the fund in his hands from the expiration of three months after the notice requiring him to pay it; and that, therefore, a decree or payment of the debt might be made against him, although the other partner in the firm was not a party to the suit. *Norton v. Steinkopf*, 1 Kay 45.

If adult *cestuis que trustent* insist upon their strict rights, the Court will not exercise any discretion for the benefit of other *cestuis que trustent* who are infants. *Ib.*

1. If A. and B., two trustees, have committed a breach of trust and are equally liable, but B. received the produce, A. may sustain a bill against B. alone to recover the amount for the benefit of the trust. *Baynard v. Woolley*, 20 Beav. 583.

H. assigned property to B. and W. to be invested in the public funds or other securities upon trust for himself for life, remainder to his wife for life, remainder to his son. After H.'s death the trustees, having received 400*l.* of the trust money, lent it to W., who already owed H. 100*l.*, and who thereupon signed an informal memorandum, stating that the title-deeds of his house, etc., were held as a collateral security. These deeds were in B.'s possession in respect of a debt due to another person, and secured by a term of 500 years. The widow was informed of this transaction, and received interest on the 500*l.* at 4 per cent., subsequently, at her request, raised to 5*l.* per cent. W., having conveyed all his real and personal estate to L. for the benefit of his creditors, and having afterwards ceased to pay interest on the 500*l.*, a bill was filed against him by B. (the widow and the son of H. and L. being also made defendants) for the recovery of the 500*l.*, etc.:—Held (1) that B. was entitled to file such bill against his co-trustee, notwithstanding that he had himself been guilty of a breach of trust; (2) that he was himself liable to replace the whole trust fund, if it could not be recovered from W.; (3) that the acknowledgment signed by W. constituted an equitable mortgage; (4) that the legal estate in the hereditaments therein comprised being vested in B., the subsequent assignment to L. did not affect the term of 500 years; (5) that the widow was liable to account to the trust fund for interest received by her in excess of 4*l.* per cent. *Ib.*

2. P., by will, gave a legacy to Mrs. W., defendant, which legacy was on her marriage settled in the usual way, being then still unpaid, the testator's estate being very deficient. Afterwards Mrs. P., the widow of the testator, by her will directed her trustees to pay and make good, out of her assets, all the legacies given by her husband, "upon condition that all parties concerned should abstain from requiring any claim against her husband's estate, and should also execute any releases which her husband's executors might require in respect thereof." Mrs. P.'s estate being ample, the legacy was ready to be paid, but the executors required the discharge of three trustees of Mrs. W.'s settlement. There was at that time

but one trustee. Mr. W. procured A. and another person to be trustees; and the legacy having been paid to the solicitor of all three trustees, he paid it over to A., who immediately misapplied it, by suffering W. to convert it to his own use. On a bill filed by the other two trustees against A. and Mr. and Mrs. W. to have the fund brought back:—Held, first, that the legacy under Mrs. P.'s will was bound by the trusts of the settlement. *Gray v. Addison*, 2 Jur., N. S., 662.

Held, secondly, that the two trustees had been guilty of no conduct, by laches or otherwise, to deprive them of their right to relief. *Ib.*

Held, thirdly, that they had a right to have the whole fund replaced by A., and not for contribution only. *Ib.*

3. G. and H., trustees of a settlement, on the solicitation of D., the tenant for life of the settlement, lent the trust funds on a security which totally failed. G. was a solicitor, and in the transaction of the loan, no other solicitor was employed for the lenders, and no sufficient investigation of title was made:—Held, that the trustees were compellable to replace the trust fund. *French v. Graham*, 10 Ir. Ch. R. 522.

Held, also, that both being solvent, H. was bound to replace one moiety, and G. the other moiety, that G. was not entitled to be indemnified by the tenant for life, the onus of investigating the title having been cast upon him, but that H. was entitled to be recouped, by the tenant for life, the amount of his moiety. *Ib.*

4. Two trustees advanced to a builder money on mortgage of land and houses thereon. The land had belonged to one of the trustees, and part of the money advanced was applied by the builder in payment of the price of the land and of other money due by him to that trustee. The other trustee filed a bill against him, alleging that the security was insufficient, and asking that the security should be realised, and that he should make good any deficiency:—Held, that under such circumstances one trustee had no equity to make the other trustee primarily liable. *Butler v. Butler*, 5 L. R., Ch. D., 554; 46 L. J., Ch., 548; 37 L. T., N. S., 33. Affirmed 26 W. R. 85; 37 L. T., N. S., 518; 47 L. J., Ch., 77; 7 L. J., Ch. D., 116.

Held, also, that the Court would not direct a sale in the absence of the *cestuis que trustent*, and merely to ascertain the deficiency, if any. *Ib.*

XXII. Agents and Solicitors Employed by Trustees.

See also EXECUTOR AND ADMINISTRATOR, X. XI. 2, 3, and 4.

- I. *Liability of Trustees for Acts of or Breaches of Trust by*, 7006.
- II. *Personal Liability of*, 7009.
- III. *Duty to Employ. When Appointed by Person Creating the Trust*, 7013.
- IV. *Other Matters*, 7014.
- V. *Following Trust Property into Hands of*. See XXIV. vi. 2 post.

I. LIABILITY OF TRUSTEES FOR ACTS OF OR BREACHES OF TRUST BY.

1. *In General*, 7006.
2. *Bankers*, 7006.
3. *Brokers*, 7007.
4. *Solicitors*, 7008.

1. In General.

1. As to losses by agents of trustees, see *Re Lithfield*, 1 Atk. 87. *Exp. Belcher and Exp. Parsons*, Ambl. 218; 1 Ken. Ch. 38.

2. Though the appointment by trustees of a co-trustee as factor of estates would not make them liable for his defaults, by making him their agent they would be liable for his defaults, the same as of any other agent. The principle is the same in Scotland as in England. *Horne v. Pringle*, 8 Cl. & F. 264.

3. A., B., C., D., and E. (the two latter being married women) take out administration to an intestate, and afterwards appoint C. to be the acting administrator, and direct the creditors to pay their debts to him. C. becomes insolvent:—Held, that A., B., and C., and the husbands of D. and E., are responsible for C.'s receipts. *Lees v. Sanderson*, 4 Sim. 28.

4. It being the duty of A., under the trusts of a settlement, to remit a sum of 1,000*l.* from India to B., C., and D., in England, he permitted it to remain in the hands of private traders, in whose hands it was lost:—Held, that A. was responsible for it, though it had been properly invested by those parties, and been sold out at the request of the *cestui que trustent*, and the loss was occasioned by their subsequent bankruptcy, and the bankruptcy of their correspondents in London, on whom they had drawn bills for the amount. *Bacon v. Clark*, 3 Myl. & C. 294.

2. Bankers.

5. Trustee incautiously leaving trust fund in banker's hands without security, held liable to loss on banker's failure. *Anon.*, Loft. 492.

6. If trustee pay rents to a banker, in credit, who fails, the trustee is not liable. *Exp. Belchier, Exp. Parsons*, Ambl. 219; 1 Ken. Ch. 38.

7. Trustees having contracted to purchase land, sell out stock, and deposit the produce at a banker's when the purchase seems to be near completion; they are not liable to make good the money if the bankers fail. *Franco v. Woods*, Taml. 172.

8. Trustee depositing a trust fund with his bankers, accompanied by an order in writing to invest the money in consols, answerable for the omission of the bankers to make the investment, where he made no subsequent inquiry respecting it until about five months afterwards, when the bankers became bankrupt. *Challen v. Shippam*, 4 Hare 555.

9. A receiver, in order to obtain sureties, agrees with them that A., the partner of one of the sureties, shall attend upon the receipt of the rents of the estates, and that they shall be paid into a bank at L., in the name of the sureties, and that all moneys to be applied for

the purposes of the receivership shall be drawn for by checks prepared and written by D., and signed by the receiver. This agreement having been acted upon, the bank at L. failed, and a loss was sustained. The account was then transferred to another bank, under the same agreement, when another loss ensued by failure of the bankers:—Held, on petition, that receiver was responsible for amount of losses, etc. *White v. Baugh*, 9 Bl. N. S. 181; 3 Cl. & F. 44.

10. Trustees and executors who, for upwards of a year after their testator's death, allowed a considerable portion of the assets to be unproductive in the hands of banker, who failed, were under the circumstances charged with the loss. *Moyle v. Moyle*, 2 Russ. & M. 710.

11. Trustee not charged with a loss by failure of banker to agent in whose hands money was deposited, pending transaction for change of trustee. *Adams v. Claxton*, 6 Ves. 226.

12. Preparatory to the final winding up of a trust, the agent and solicitor of the trustee paid the trust money to his bankers, to the credit of his general account with them, and informed the *cestui que trust* that the money was lying idle at his bankers. The *cestui que trust* took no notice of the information, and more than a month afterwards the bankers failed:—Held, that as the agent did not inform the *cestui que trust* that the money had been paid to the credit of his general account, and as the payment to the bankers was not necessary to the winding up of the trust, the agent and the trustee were jointly liable for the money. *Macdonnell v. Harding*, 7 Sim. 178; 4 L. J., N. S., Ch., 70.

13. The trustee of a legacy which had been invested in stock, authorises the sale of the stock, and permits B. to receive the proceeds; B. retains the money in his hands, and, during many years, the legatee, who was not aware that the legacy had ever been invested in stock, or that stock, in which it once was vested, had been sold, deals with B., as the only person accountable to her for the money; notwithstanding these dealings on the part of the legatee, the trustees continue to be accountable for the stock. *Adams v. Clifton*, 1 Russ. 297.

14. A testator died in March 1823. In January 1824 and January 1825, the executors and trustees deposited part of the assets in the hands of bankers, on their notes carrying interest. The bankers failed in November 1825, and, no necessity having been shown for such deposit, the trustees were held personally responsible for the loss. *Darke v. Martyn*, 1 Beav. 525.

15. Bankers of trustees wrongfully sold out stock, and applied it to their own purposes:—Held, that the measure of their liability was the amount paid in replacing the stock. *Sadler v. Lee*, 6 Beav. 324; 12 L. J., N. S., Ch., 407; 7 Jur. 476.

16. A trustee of certain estates received the proceeds and paid them into a bank, where they were left for many years. A suit was instituted, and a receiver appointed of the rents and interest. The bank having failed, it was held that the *cestui que trustent*, who were infants, must not be prejudiced by the neglect of the trustee to place the fund in

safety, and that the trustee was liable to refund the money lost. *Dreuer v. Mardesley*, 16 Sim. 511; 18 L. J., N. S., Ch., 273; 13 Jur. 330. And see S. C. 13 L. J., N. S., Ch., 433; 8 Jur. 547.

1. Trustee, allowing moneys appropriated by him for a particular purpose to remain in the hands of bankers in India, after he had quitted that country, the bankers becoming insolvent before the moneys were paid over by them:—Held, liable for the loss. *Brown v. Clark*, 1 Jur. 838.

2. A trustee was ordered to pay the balance of moneys in his hands belonging to his testator's estate to new trustees, and was discharged from his trusteeship. He kept the trust money in his name at a bank, but to a separate account, for some time after the costs had been taxed and the balance ascertained. The bank shortly afterwards failed:—Held, that he was personally liable to make good the loss which had accrued to the trust estate by reason of the failure of the bank. *Lunham v. Blundell*, 4 Jur., N. S., 3; 27 L. J., Ch., 179; 6 W. R. 49.

3. Trustees included in their account brought into chambers certain sums which they had received, and which stood in their names in a bank. They were ordered to pay the amount found due into court, and ultimately did so partly out of subsequent receipts, leaving the sum in question still in the bank. On the failure of the bank:—Held, that the trustees were liable for the loss of the sums included in the amount passed, but not for sums subsequently paid in. *Wilkinson v. Bewick*, 6 W. R. 849; 4 Jur., N. S., 1010.

4. Trustees made personally liable for loss arising from placing trust money with bankers on a deposit account, which was not authorised by the will, and that, notwithstanding a trustee indemnity clause against losses by a banker of money deposited for safe custody. *Rehden v. Wesley*, 29 Beav. 213.

5. An administratrix, plaintiff in a suit for administration of the estate, received the purchase money of property sold under a contract directed by the decree of the Court to be carried into effect. The decree also directed sales of mortgaged property, and that the mortgagees should be paid out of the produce of the sales; it gave no direction about the purchase money of the property sold by the administratrix. With the advice of the solicitors of the principal, but not all, of the beneficiaries, she paid the money into a private bank to a separate account, and left it there for many months. The administratrix applied by petition, and thereon obtained money out of court to pay off the mortgagees while she had the purchase money lying at the bankers. The bank failed:—Held, that she was not liable for a breach of trust. *Wilks v. Groom*, 3 Drew. 584; 2 Jur., N. S., 681; 25 L. J., Ch., 724.

6. G., being entitled to a share of an estate, went abroad, leaving a power of attorney to receive such share. The estate was sold, but the purchaser requiring his confirmation, his share was deposited in the names of E. & P. in a bank on a declaration of trust. On the confirmation arriving, E. was repeatedly applied to for more than four months, but neglected to hand the fund over, alleging a difficulty in

making out the account; the bank failed, and the money was lost:—Held, that E. was liable to restore the money with interest and pay the costs, P. being always ready to hand over. *Gough v. Etty*, 20 L. T., N. S., 368.

3. Brokers.

7. Assignee of bankrupt employs a broker to sell a quantity of tobacco, the broker receives the money, and at the end of ten days fails, before he paid it over. The assignee not bound to make it good. *Exp. Belochier, Exp. Parsons*, Amb. 218.

8. A trustee is bound to conduct the business of the trust in the same way in which an ordinary prudent man of business conducts his own, and has no further obligation. He may employ brokers and agents in cases in which they are employed in the ordinary course of business. *Re Speight, Speight v. Gaunt*, 22 L. R., Ch. D., 727; 52 L. J., Ch., 503; 48 L. T. 279; 31 W. R. 401. Affirmed 9 L. R., App. Cas., 1; 53 L. J., Ch., 419; 50 L. T. 330; 32 W. R. 435. Reversing 51 L. J., Ch., 715; 46 L. T. 726; 30 W. R. 785.

G., a sole acting trustee and executor, having under his control a trust fund of about 15,000*l.*, determined, with the assent of the *cestuis que trustent*, to invest the same in the securities of the Municipal Corporations of Leeds, Huddersfield, and Halifax. For this purpose he employed (as alleged, at the express desire and request of the *cestuis que trustent*) C., a broker, then in good repute, to act for him. There was no necessity for the employment of a broker, as the securities were obtainable from the corporations respectively by application direct to them. G. received from C. what purported to be a bought-note, in the words and figures following: "Bradford, February 24th 1881. To the executors of the late John Speight. We have this day bought for you, as per your order, subject to the rules of the London Stock Exchange, 5,000*l.* Leeds Corporation Debenture Stock, at 105*½*, commission, net, 5,275*l.*; 5,000*l.* Huddersfield Corporation ditto ditto, at 100, commission, net, 5,000*l.*; 5,000*l.* Halifax Corporation ditto ditto, at 100, commission, net, 5,000*l.*—Total, 15,275*l.*—Account. (Signed) John Cooke and Son." Neither the corporation of Huddersfield nor of Halifax issued debenture stocks, although they borrowed on debenture bonds. On receipt of the bought-note, G. drew three cheques for 5,275*l.*, 5,000*l.*, and 5,000*l.* respectively, in favour of "John Cooke and Son," and handed them to C. G. applied several times during a period of nearly five weeks to C. for the securities, but received various excuses, with which, although wholly unfounded, he remained satisfied, and took no steps to ascertain what had actually been done in the matter, or to have the purchase completed by obtaining transfers of the securities. Subsequently it appeared that C. had, in fact, never bought or contracted to buy any securities, but had appropriated the three cheques to his own use, and, having been adjudicated a bankrupt, absconded. There was evidence that about a fortnight was generally required to get corporation bonds completed when obtained direct, the broker holding in the meantime a banker's

receipt for the money. Evidence was given that the form of the bought-note would indicate to brokers, though probably not to others, that the bonds were to be procured from the corporation direct:—Held, that the trustee, having acted in the ordinary course of business, was not liable to make good the loss occasioned by the embezzlement of the trust moneys by the broker. *Bostock v. Floyer* (1 L. R., Eq., 26) explained; *Hopgood v. Parkin* (11 L. R., Eq., 74) questioned. *Ib.*

Whether the trustees would have been justified in paying the money to the broker if he had had notice that the bonds were to be procured direct from the corporation, *quære. Ib.*

4. Solicitors.

1. A sum of 3,000*l.* was vested in A. and B. on certain trusts. The *cestui que trust* mortgaged it to C. for 1,200*l.*, and C. transferred the mortgage to E. and F. on family trusts, with power to E. and F. to give receipts. The solicitor of A. and B., having notice of the secondary trusts, paid the 1,200*l.* to F. alone:—Held, that A. and B. were personally liable to repay the money, with interest and costs. *Hall v. Franck*, 11 Beav. 519; 18 L. J., N. S., Ch., 362; 13 Jur. 222.

2. Where a trustee for sale executed the conveyance, and placed the same, with the receipt indorsed, in the hands of an attorney, who misapplied the purchase money, and became bankrupt:—Held, to constitute a breach of trust, and trustee liable. *Ghost v. Waller*, 9 Beav. 497.

3. A trustee to uses, with power of sale, which uses, in the event, became executed in A. for an absolute estate in fee, was held not liable to A. for the purchase money of part of the estates, where the sale was conducted and the money received by the solicitor of the trustee, although the evidence was conflicting, whether he acted in the matter by the direction of the trustee, or by the direction of A., the conveyance being executed by A. alone. *Waugh v. Wyche*, 2 Drew. 318; 23 L. J., Ch., 833; 2 W. R. 485.

A trustee of the legal estate in a mortgage in trust for A. absolutely, executed a reconveyance, and signed a receipt for the mortgage money, and handed it to one of A.'s executors, who was also his own solicitor, and who afterwards misapplied the money:—Held, that the money having got into the hands of the executor, the trustee was not liable. *Ib.*

4. Trustees of stock sold it out, and committed the proceeds to their solicitor for investment, by whom it was misapplied, and lost:—Held, that the trustees were liable for a breach of trust, and that the *cestui que trust* were entitled to relief against both the trustees and solicitor, and that they might sue either the trustees alone or the trustees jointly with the solicitor. *Romland v. Witherden*, 3 Macn. & G. 568; 21 L. J., N. S., Ch., 480.

5. Preparatory to the final winding up of a trust, the agent and solicitor of the trustee paid the trust money to his bankers to the credit of his general account with them, and informed the *cestui que trust* that the money

was lying idle at his bankers. The *cestui que trust* took no notice of the information, and more than a month afterwards the bankers failed:—Held, that as the agent did not inform the *cestui que trust* that the money had been paid to the credit of his general account, and as the payment to the bankers was not necessary to the winding up of the trust, the agent and trustee were jointly liable for the money. *Macdonnell v. Harding*, 7 Sim. 178; 4 L. J., N. S., Ch., 70.

6. Assignee of a bankrupt, employing an attorney to sue for and recover debts due to the estate, is answerable for his receipts, and if he misapplies the money must make it good, although no proof or allegation of fraud or negligence. But there are two modes by which the assignee may relieve himself from this responsibility; by obtaining the assent of the creditors, or by having the approval of the Master in respect to the person appointed agent. Account passed by the commissioners, ordered to be reviewed before a Master. *Ecp. Townsend*, 1 Moll. 139.

7. A., one of two trustees and executors of a will, and resident in London, authorised a person to get in three mortgages (part of the estate). The solicitor forwarded the deeds of conveyance to B., the other trustee, in the country, who executed and returned them. The solicitor received the money and paid it to A. alone, who misapplied it:—Held, that B. was liable for the amount. *Cornell v. Gatoombe*, 27 Beav. 568.

8. A trustee will be liable to make good to the trust estate a loss which has been occasioned by the fraud and forgery of the solicitor whom he employed, although in employing such solicitor he may have exercised ordinary care and discretion. *Bostock v. Flower*, 11 Jur., N. S., 962; 35 L. J., Ch., 23; 14 W. R. 120; 13 L. T., N. S., 489; 1 L. R., Eq., 26.

A trustee employed a solicitor to invest trust money; the solicitor, who was steward of the manor, sent the trustee some title deeds and a copy of a surrender of copyholds to secure the trust money, but misapplying the trust money; the pretended surrender had really no existence:—Held, that the trustee was liable to make good the loss. S. C. 35 Beav. 603.

9. Trustees are bound to employ competent solicitors and agents; and therefore, where trustees lent trust funds upon mortgage, and their solicitor accepted without inquiry an abstract and a valuation made for the purpose of a previous mortgage, and it afterwards turned out that the solicitor for the mortgagor had concealed the fact that since the date of the mortgage and valuation two other mortgages had been effected, and loss resulted to the trust estate in consequence:—Held, that the trustees were liable to make good the loss to their *cestui que trust*. *Hopgood v. Parkin*, 18 W. R. 908; 22 L. T., N. S., 772; 11 L. R., Eq. 74.

10. Upon the occasion of the investment of a trust fund on mortgage, the trustee employed the same solicitor as the mortgagor. Subsequently he had reason to suspect the sufficiency of the security, but took no steps to inquire into the matter. It afterwards turned out that the solicitor had practised a fraud on the trustee, and that the security was insufficient:—Held, that the trustee was liable for the

loss occasioned to the trust estate. *Sutton v. Wilders*, 12 L. R., Eq., 373; 25 L. T., N. S., 292; 19 W. R. 1021.

II. PERSONAL LIABILITY OF.

1. *In General*, 7009.
2. *Bankers*, 7010.
3. *Solicitors*, 7010.
4. *Following Trust Property into Hands of*. See XXIV. vi. 2 post.

1. In General.

1. A mere agent of the trustee may not be accountable to the *cestui que trust*, but otherwise with respect to a substituted trustee, who accounts to nobody else. *Myler v. Fitzpatrick*, 6 Madd. 360.

2. Agent of an administrator keeping money of the intestate's in his hands which he had proposed to his principal to lay out in the funds, ordered to pay interest with annual rests. *Brown v. Southouse*, 3 Bro. C. C. 107.

3. If one of two persons named trustees and executors disclaims and renounces and afterwards possesses himself of assets as the agent of the other, who has accepted the trust and proved the will, he does not thereby become accountable as a trustee and executor, and ought not to be made a party to a suit for the administration of the estate. *Dove v. Everard*, 1 Russ. & M. 231; Tam. 376.

4. The commercial correspondents of executors, acting under a power of attorney:—Held, to be responsible to the testator's estate for the amount of the produce of stock, part of such estate, sold by them and applied by the direction of the executors in payment of a balance due from the latter, as partners in a commercial concern, to their correspondents, with full knowledge on the part of the correspondents, that the stock was part of the testator's assets. There is no primary liability in respect of breaches of trust, all parties to a breach of trust being equally liable; and it is no objection to a suit brought by parties seeking relief against a breach of trust, that one of the defendants against whom no relief is prayed, may have been a party to such breach of trust. *Wilson v. Moore*, 1 Myl. & K. 127.

5. An agent assisting in a breach of trust is personally responsible. *Att.-Gen. v. Leicester (Corporation)*, 7 Beav. 176.

6. A trustee, without authority from the *cestui que trust*, agreed with his agent that the latter should pay him 100*l.* a year from the trust property, and retain the residue (180*l.*) for himself. No fraud was proved by the agent (who denied knowledge of the trust), but no explanation was given. In a suit for account by a *cestui que trust* after the trustee's death:—Held, that, notwithstanding the general rule that a trustee's agent is accountable to the trustee only, an inquiry should be had of the circumstances of the agent's appointment and his knowledge of the trusts affecting the property. *Aroher v. Lavender*, 9 Ir. R., Eq., 220.

7. A trustee, one of a firm of stockbrokers, misapplied the trust securities. His partners were, under the circumstances, made respon-

sible. *De Ribeyre v. Barolay*, 23 Beav. 107; 26 L. J., Ch., 747.

A., who was in partnership with B., C., and D., as stockbrokers, was one of the trustees of the plaintiff's marriage settlement. Some Portuguese bonds belonging to her, which were in A.'s custody, were included in the settlement. After the marriage, the firm bought some Brazilian bonds on account of the trust. The Court, from the course of dealing, considered the bonds to be in the custody of the firm, and A., the trustee, having applied them to his own use:—Held, that his co-partners were (as custodians) liable to replace them. *Id.*

8. A trustee empowered S. to manage a trust estate. S. accounted to him. The trustee died, yet S. was decreed to account again to *cestui que trust*. *Pollard v. Downes*, 2 Ch. Ca. 121.

9. A bill will lie against directors, committee-men, and other officers of a corporation, for relief against a breach of trust, fraud, and mismanagement; for they are agents to those who entrust them to superintend the affairs of the company, and a gross non-attendance makes them guilty of the breaches of trust in others. So a supine negligence, by which a great loss arises, makes them all equally guilty in the second degree, and liable; for they must not neglect to exercise the powers vested in them, to prevent the ill consequences arising from a confederacy. *Charitable Corporation v. Sutton*, 2 Atk. 405; 9 Mod. 349.

10. A testator named A. a trustee of part of her personal estate, and appointed him, her son, and X.'s husband executors; the son and X.'s husband alone proved the will, but A. did not disclaim. The son and X. took life interest in the trust fund, to a part of which the plaintiff became, by X.'s appointment, entitled. A. had been the testator's agent, and acted in the management of the assets, under power of attorney from the executors who proved and X.; and, after the son's death, from the surviving executor and X., which authorised him to receive the assets for the uses and purposes of the will. On A.'s death, the defendant, his son and executor, acted under a similar power, and continued to do so after the death of X.'s husband. X. and her husband get possession of the entire assets:—Held, that A. and the defendant were responsible as trustees, and could not protect themselves as being agents only. *Montgomery v. Johnson*, 11 Ir. Eq. R. 476.

11. Four executors holding stock in their name directed their solicitor to sell the stock. The solicitor, in the name of his firm, gave to a stockbroker, whom the solicitor had employed in Stock Exchange speculations, directions to sell the stock. The stock was sold by the broker, and the solicitor returned to the stockbroker transfers of the stock, with receipts endorsed, signed by the four executors. The sale was completed, and the stockbroker sent to the solicitor a cheque for part of the purchase money for the shares, and carried the balance on the transaction to the credit of the solicitor in the account between them, which account was afterwards settled by a payment made to the stockbroker:—Held, that, under the circumstances, the stockbroker must be held to have had notice that the shares were not the property of the solicitor, and that,

though the solicitors had from the executors authority to receive the purchase money, payment to him by giving him credit in an account between them, that was not sufficient to discharge the stockbroker, who remained liable to the executors for the balance. *Pearson v. Scott*, 9 L. R., Ch. D., 198; 38 L. T., N. S., 747; 26 W. R. 796.

1. Accountants employed by trustees, through whose hands the accounts of the trust estate passed, are in the nature of servants, and bound to accept as correct statements made by one or other of the trustees with regard to the intended application of the trust fund, and are not liable for the misapplication of the trust fund by their employers, on the ground of negligence, by not seeing that the fund was applied properly. *Rodbard v. Cooke*, 36 L. T., N. S., 504; 25 W. R. 555.

2. Bankers.

2. Bankers, under the circumstances of the case, decreed to refund moneys which had been drawn by a trustee from a trust account standing in their books, and placed to the credit of the trustees' private account at the bank, upon the balance of which latter account the bankers were creditors. *Pannell v. Hurley*, 2 Colly. 241.

3. Bankers, the agents of executors, authorised by them to receive certain assets, but prior to receiving them advancing the amount to executors in the course of their duty as agents, and afterwards applying the assets when received in payment of the amount of such advances, are not responsible, in respect to the misapplication by the executor's agents, not being privy to any intention of such misapplication. *Keane v. Roberts*, 4 Madd. 332.

4. P., being receiver of the rents of the R. estate, had a private account with certain bankers; he asked leave to overdraw that account, to which the bankers assented; and, at the same time, he promised to introduce the R. estate account to the bankers. He accordingly overdraw his private account, and opened a separate account called the "R. estate account." Afterwards the bankers, by his direction, transferred the balance of the R. estate account to the private account, which was then overdrawn. P. became insolvent:—Held, that the bankers were liable to the owner of the R. estate for the balance. *Bodenhams v. Hoskins*, 2 De G. M. & G. 903; 21 L. J., N. S., Ch., 864; 16 Jur. 721.

5. In order to hold a banker justified in refusing to pay a cheque of his customer, the customer being an executor, and drawing a cheque as executor, there must be a misapplication of the money intended by the executor so as to constitute a breach of trust, and the banker must be cognisant of that intention. *Gray v. Johnston*, 3 L. R., H. L., 1; 16 W. R. 842.

The existence of a personal benefit to the banker, designed or stipulated for, as a consequence of the payment, would be strong evidence that the banker was privy to the breach of trust. *Id.*

Bankers had acted as such to J., who carried on business with his son-in-law under

the style of J. & M., but whose accounts with them were kept in his own name alone, and were unsettled at his death. He left a will, bequeathing all his property to the use of his wife for life, and after her death to be divided among their children as she might think fit; part of the property consisted of life policies which were put into the hands of the bankers, together with the probate of J.'s will, and they received the amount of the policies, made up their accounts, and, after deducting their own unsettled claims, declared a certain sum to remain due from themselves to the executrix. She continued her husband's business with his late partner under the style of J. & M., and a new account was opened with the bankers in the name of the new firm, and she, as executrix, drew a cheque for the amount stated to be due to her, and paid it in to the bankers to be credited to the firm of J. & M., and it was so credited and paid out, with other money, on account of cheques drawn by the new firm:—Held, that these circumstances were not in themselves sufficient to show that a breach of trust had been committed, and that the bankers knew of the intention to commit it so as to render them liable to replace the money. *Id.*

6. When a bank, with knowledge of the relative position of the parties, places the proceeds of a promissory note, which has been made in its favour by A. (a person just come of age), unreservedly in the power of B. (a person who stands in loco parentis to A.), knowing at the time that B. claims to be a creditor of A. to a large amount for necessities supplied, and B. afterwards misappropriates the money, the bank will be restrained from suing on the note. *Dettmar v. Metropolitan and Provincial Bank*, 1 Hem. & M. 641; 10 L. T., N. S., 63.

7. B., a trustee, laid out the trust money, together with other money in his hands, upon mortgage in his own name, and executed a declaration of trust as to so much of the mortgage debt as represented the trust money. He afterwards deposited the mortgage deed with his bankers as security for money advanced to him, and absconded:—Held, in the absence of negligence on the part of the *cestui que trust*, that the deposit of the deed passed no interest in the trust fund to the bankers. *Stackhouse v. Jersey (Countess)*, 30 L. J., Ch., 421.

3. Solicitors.

(a) *In General*, 7010.

(b) *Liability of Firm for Acts of Partner*, 7012.

(c) *Striking off the Rolls for Breach of Trust*. See SOLICITOR, VIII. I.

(d) *General Duties of Solicitors Acting for Trustees*. See SOLICITOR, VI. III.

(a) *In General*.

8. Preparatory to the final winding up of a trust, the agent and solicitor of the trustee paid the trust-money to his bankers, to the credit of his general account with them, and informed the *cestui que trust* that the money was lying idle at his bankers'. The *cestui que trust* took no notice of the information, and

more than a month afterwards the bankers failed:—Held, that as the agent did not inform the *cestui que trust* that the money had been paid to the credit of his general account, and as the payment to the bankers was not necessary to the winding up of the trust, the agent and the trustee were jointly liable for the money. *Macdonnell v. Harding*, 7 Sim. 178; 4 L. J., N. S., Ch., 70.

1. Trustees of stock sold it out, and committed the proceeds to their solicitor for investment, by whom it was misapplied and lost:—Held, that the trustees were liable for a breach of trust, and that the *cestuis que trustent* were entitled to relief against both the trustees and the solicitor, and that they might sue either the trustees alone or the trustees jointly with the solicitor. *Rowland v. Witherden*, 3 Macn. & G. 568; 21 L. J., Ch., 480.

2. Where an agent is authorised by trustees to receive trust money and receives it accordingly, the receipt of that money by the agent binds the trustees, and discharges the person who paid it. *Robertson v. Armstrong*, 28 Beav. 123.

Trustees authorised their solicitors to receive trust money. The solicitors received it and handed it over to the tenant for life, whereby it was lost:—Held, that a bill by a *cestui que trust* seeking to charge the solicitors only, and not the trustees, could not be maintained, for that it was only through the trustees that the solicitors could be made liable. *Id.*

3. A party advising a loan unauthorised by the trust, for the purpose of deriving a benefit from, as by obtaining payment out of the money lent of a debt to him by the borrower, is liable for any loss consequent on the breach of trust. But where the solicitors who were concerned for the borrower acted also usually, and to some extent in this case, as the solicitors of the trustee, but another solicitor who was called in on behalf of the trustee, and one of the *cestuis que trustent*, assented to the loan, and the loss did not take place upon the original security, which was ample in point of value, but upon a security substituted for it in pursuance of a provision in the original mortgage deed, and it was not a proof, though it was alleged that the solicitors had applied part of the money lent in payment of a debt due to them by the borrower; the bill of the *cestuis que trustent* was dismissed as against the solicitors, but without costs. *Fyler v. Fyler*, 3 Beav. 550; 5 Jur. 187.

4. An agent employed by a trustee is not accountable so long as his acts are merely acts of agency; but where a solicitor got possession of the trust moneys, and allowed the executrix, who was entitled to the income only, to misapply the principal, the Court directed an account against him as if he were a trustee. *Morgan v. Stephens*, 3 Giff. 226.

A testator, having bequeathed his furniture and farming stock to his wife absolutely, gave the residue of his personal estate upon trust to invest and apply the interest and proceeds of one moiety to the maintenance and education of the plaintiff, his son, until twenty-one, and then in trust for him absolutely. The testator's widow became his sole acting trustee and executrix. The defendant, who was admitted as a solicitor two years after the testator's death in 1833, was employed by the

executrix as her solicitor. He received moneys from her and invested them at interest at her request, and in her name. He also called in other moneys owing to the estate and invested them. He received the proceeds of the investments and paid the debts and legacies; and the surplus remained invested on the same securities at the request of the executrix. The defendant made in respect of the moneys placed by the executrix in his hands certain payments, both of principal and interest, and continued to do so during her life. She died in 1844. Subsequently in 1846, when 800*l.* became payable on the securities, the defendants alleged that, upon an account being taken between him and the estate of the executrix, there was no balance in her favour, or a small balance in his favour. He thereupon renewed the securities in his own name. He admitted knowledge of the trusts, but submitted that, during the lifetime of the executrix, he acted under her instructions as solicitor, and was not called upon to take cognisance or notice of any breach of trust committed by her in respect of the plaintiff, or any other *cestui que trust*:—Held, that the acts of the defendant were more than the acts of a mere agent; that he had assumed the character of trustee, and that a breach of trust having been apparently committed, he must be held accountable on that footing. *S. C.* 4 L. T., N. S., 614.

5. A voluntary settlement of leaseholds was suppressed by the settlor with the privity of the trustees and under the advice of a solicitor, in order to enable money to be raised on mortgage of the trust estate. Two existing trustees had retired, knowing of the proposed dealing with the trust property, and with a view to the carrying out of the mortgage:—Held, that the mortgagee was entitled to a decree for payment of his advances and costs against the solicitor, the old and new trustee and the settlor, although he might when he discovered the defect in title have had an opportunity of obtaining further security for his money; and notwithstanding nine years had elapsed from such discovery to the filing of the bill. *Clark v. Hoskins*, 36 L. J., Ch., 689; 16 L. T., N. S., 730; 15 W. R. 1161.

6. In 1855 a bill was filed for the administration of an estate, and in February 1857 a decree was made, which directed the personal representative V. to get in the outstanding estate, and to pay the moneys so received into court from time to time within two months after their receipt respectively. After this decree was made, an estate, which was mortgaged to the testator, was sold, and the purchase money was received by the solicitors of V., who, instead of paying it into court, retained a part of it in payment of some costs due to themselves, and allowed V. to receive the rest. V. having become a defaulter, a bill was filed by the beneficiaries against the solicitors:—Held, that the solicitors were liable to make good the whole sum thus received by them, less the costs of actually realising it, together with interest. *Harries v. Rees*, 16 W. R. 91; 17 L. T., N. S., 418.

Two other sums were also received after the decree of February 1857, in respect of two bonds, upon which, before that decree, part of the testator's estate had been invested by V. These investments had been disallowed

in the administration suit:—Held, that these sums must be taken to have been throughout in the hands of V., and that the solicitors could not be held responsible for them. *Ib.*

1. A firm of solicitors, acting for two trustees, and receiving trust moneys from them, and paying over a portion of such moneys to one only of the trustees, who afterwards dies insolvent, is liable to the trust estate for the whole amount of moneys received from the two trustees. *Lee v. Sankey, or Ginger v. Sankey*, 21 W. R. 286; 27 L. T., N. S., 809; 15 L. R., Eq., 204.

2. A., the surviving trustee of a fund, one moiety of which was settled upon his wife and children, and the other moiety upon the wife and children of B., in exercise of a power in the settlement, appointed B. sole trustee of half the fund, taking an indemnity from him, and retained the other half in his own name. B. sold out and misapplied the moiety of the fund transferred to him, and became bankrupt. A.'s solicitor advised him against the appointment of B. as sole trustee, but prepared the deeds of appointment and of indemnity, and introduced him to a broker for the purpose of selling out some of the stock to pay costs to which it was liable, and the same broker afterwards transferred a moiety of the residue to B. B. employed another solicitor, who warned B.'s wife of the risk attending the proposed transaction, but settled the deed of indemnity on her behalf:—Held, in a suit by B.'s children, seeking to make A. and the two solicitors responsible for the fund which was lost, that, as neither of the solicitors had any knowledge of, nor any reason to suspect, a dishonest design in the transaction, and as the fund had not passed into their hands, the bill must be dismissed against them both with costs. *Barnes v. Addy*, 9 L. R., Ch., 244; 43 L. J., Ch., 513; 22 W. R. 505; 30 L. T., N. S., 4. Affirming 21 W. R. 324; 28 L. T., N. S., 398.

Although the responsibility of trustees may be extended in equity to persons who are not properly trustees, if they are found either making themselves trustees *de son tort*, or actively participating in any fraudulent conduct of the trustee, to the injury of the *cestui que trust*, yet strangers are not to be made constructive trustees, merely because they act as agents of trustees in transactions within their legal power, even though such transactions may be such as the Court would not approve of. *Ib.*

The Court disapproves of the practice of making solicitors or others, who are properly witnesses, and who are not primarily chargeable with any part of the relief prayed, parties to suits with a view of charging them with costs alone. *Ib.*

3. A settlement of land in Wales, the property of the husband, was executed shortly after a marriage, which took place in India. The husband and wife went to reside in Wales, and the husband employed a solicitor there to make his will and sell part of the land, the solicitor concluding from the statements of the husband that there had not been any marriage settlement. The husband died, leaving his widow trustee and executrix, and directing his debts to be paid out of his estate. The widow employed the same solicitor to

sell other parts of the land, and the solicitor received the purchase moneys and applied them in payment of the debts of the husband. The deed of settlement had been in the possession of the wife, but had been by her given to the husband. There was no evidence as to what had become of it, but after the sales had been made a copy was found. The solicitor had concluded from what he was told by the husband that there had been no settlement, and though, before all the sales were completed, his clerk had been told by the wife that there had been a settlement, the solicitor continued to believe that there had been none. An action was brought by the children of the marriage, entitled under the settlement, claiming to recover from the solicitor the money which had so passed through his hands:—Held, that under the circumstances, although the solicitor might have been negligent in that character, he could not be held to have had such notice of the settlement as to be treated as constructively a trustee, and therefore liable for the money which had passed through his hands. Notice to raise a constructive trust is different from notice to an actual trustee. *Cothay v. Sydenham* (2 Bro. C. C. 391) discussed. *Williams v. Williams*, 17 L. R., Ch. D., 437; 44 L. T. 573.

(b) Liability of Firm for Acts of Partner.

4. Trust money was sent to A. (one of a firm of solicitors, who was himself one of two trustees) for investment on mortgage. The money was paid into the bankers to the account of the firm, and was afterwards drawn out by A., and never invested:—Held, that the other member of the firm was liable. *Eager v. Barnes*, 31 Beav. 579.

A. and B., solicitors, in partnership, jointly attended to the management of certain settled funds, of which A. and E. were trustees, who had executed the settlement. E. was the client of A., who represented to E. that he had a good mortgage security on which to invest a portion of the trust moneys; and E., accordingly, assented to his making such investment. A. did not, however, invest the money on the mortgage, but paid it into the bank of his firm, to their partnership account there; the proceeds being applied, with the knowledge of B., to the use of the firm. A. died in insolvent circumstances, leaving B. him surviving:—Held, that B. was personally liable to E. for the money; and that E. was (*pro tanto*) a specialty creditor of A.'s estate. *S. C. 7 L. T., N. S., 408.*

5. Under a will 2,910*l.* stock was vested in the testator's three unmarried nieces, who were his executrices, in trust for themselves for life, then for children, with ulterior trusts. Their confidential solicitors were a firm of two persons of whom the senior, under his own advice, was associated as their co-trustee, and a declaration of trust, prepared by the firm, was executed by the four persons in 1822. Subsequently, on the advice of the senior solicitor, the fund was sold out, and paid to him alone; but he, on the same day, paid the precise amount to the credit of the banking account of the firm. In 1824 the senior

partner untruly represented that the money had been laid out on specified freehold security; but in 1825 a sufficient freehold mortgage was taken by the senior partner to himself alone, and was treated by him as the security for the trust fund, less a very small balance, which was divided among the three ladies. The interest was duly paid to the ladies until 1828, when the senior partner realised that security without their privity, and again untruly alleged that he had laid out the amount on another specified security. The firm dissolved partnership in 1834, and each partner practised separately; the senior partner continued regularly to pay sums as the interest to the ladies until 1844, when he became bankrupt, and afterwards died abroad uncertificated. In a suit by the three ladies against the junior partner, charging him as liable to make good the amount:—Held, that a sufficient investment having been made in the name of the senior partner, and communicated to the parties, and adopted, the duty of the firm was discharged, and the subsequent loss was a breach of duty by the senior partner alone, and not by the partnership, and the suit was dismissed, with costs. *Coomer v. Bromley*, 5 De G. & Sm. 532; 16 Jur. 609.

1. Lands devised to three trustees, upon trust for sale, were sold, and the purchase money paid to one of them, who was a solicitor, and acted in the matter of the sale as solicitor for himself and the other trustees. The money having been retained by him and lost:—Held, after his decease, that it must be taken to have been received by him not in his capacity of solicitor, it being no part of his duty in that capacity to receive it, but in his capacity of trustee; and that the survivor of the three could not, upon a common decree for an account, be held liable for its loss. *Re Fryer*, 3 Kay & J. 317.

2. Trustees deposited with a solicitor certain bonds payable to bearer. His partner had no actual knowledge of this, but letters referring to the bonds were charged for in bills of costs delivered by the firm; letters referring to the bonds were also copied into the letter book of the firm; and cheques for money received as interest on the bonds were drawn on the account of the firm. The solicitor made away with the bonds:—Held, that under the circumstances his partner was liable. *Cleather v. Twisden*, 24 L. R., Ch. D., 781; 53 L. J., Ch., 365; 49 L. T. 633; 32 W. R. 198. Reversed 28 L. R., Ch. D., 340.

III. DUTY TO EMPLOY. WHEN APPOINTED BY PERSON CREATING THE TRUST.

3. A direction that a particular individual shall be employed as the agent in the management of the testator's estates, where the trustees may have occasion for such a party, does not create a trust which he can enforce. *Finden v. Stephens*, 2 Ph. 142; C. P. C. 318; 17 L. J., N. S., Ch., 342; 11 Jur. 1019; 12 *id.* 319. Reversing 16 L. J., N. S., Ch., 526; 11 Jur. 898.

A testator expressed a "wish and desire that F., in whose judgment and integrity he placed great confidence," should be appointed agent,

receiver, etc., by his trustees for all purposes for which they might have occasion for an agent, etc.:—Held, that F. could not compel the trustees to appoint him agent, etc. 1*b.*

4. A. S., being seised in fee of certain lands, devised the same to W. S. for life, with remainders over, and expressed it to be his particular desire, that his executors, whilst acting in the management of his affairs, and W. S. when he should enter into the receipt and management of the rents, should continue B. E. L. in the receipt and management thereof, and should likewise employ and retain him in the receipt, agency, and management of the rents of such other lands as should be purchased in pursuance of the directions of his will, at the usual fees allowed to agents:—Held, not a trust for B. E. L., and that the devisees were not bound to retain him as agent at the usual fees. *Shaw v. Lawless*, 5 Cl. & F. 129; 1 Dr. & Wal. 512; 1 L. & G. temp. Plunk. 558. Reversing on this point *Lawless v. Shaw*, 1 L. & G. temp. Sugd. 154.

5. A testator devised and bequeathed real and personal estate, which produced a considerable annual income, to trustees, on certain trusts, which would necessarily continue during several years; and he appointed A. auditor of his real estate during the continuance of the trusts, and directed his trustees to pay to A. a proper annual remuneration, with power to the trustees, in case of A. refusing or becoming unable to act as auditor, to appoint another auditor; and he directed the trustees to submit their accounts to the auditor once in every year. A bill was filed by the auditor to have the benefit of this appointment:—Held, that A., being able and willing to perform the duties of auditor, and not having been guilty of any misconduct, could not be removed by the trustees; and a reference was ordered to the Master to fix the amount of his remuneration. *Williams v. Corbet*, 8 Sim. 349; 6 L. J., N. S., Ch., 182.

6. Testator directs "that A. be appointed receiver of his real and personal estate," and dies seised of no real estate except an estate in the West Indies, having by his will directed a sum of money to be invested in the purchase of lands in England. A. appointed manager of the West India estate, upon entering into a personal recognisance to account for the produce. *Hibbert v. Hibbert*, 3 Meriv. 681.

7. A codicil contained the following clause: "I appoint C. my agent at a salary of 140*l.* a year and to be paid by quarterly payments, to live in my house called the Henblas, with the garden belonging to it, for which salary he must do my business and the business of my executors and trustees, and not be employed in the service of any other person or persons; and to live rent free as long as he continues to be my agent, that is, as long as he does my business honestly and to the satisfaction of my executors and trustees or any one of them." Pursuant to the powers of the will, trustees were appointed, and B., one of them, appointed H., an attorney, to act in all matters relating to the will and codicil. H. directed A. to make an inspection of certain real estate for which C. was agent. C. refused to assist in making the inspection, and refused to deliver up the documents relating to the estate. He was thereupon dismissed from the agency by

H., pursuant to the express authority of B. An action of ejectment was brought to recover possession of Henblas:—Held, that even if C. had an estate for life in Henblas, it was defeasible upon the trustees being dissatisfied with his conduct; and that, even if the Court had power to inquire whether the trustees were acting reasonably, he had misconducted himself, and the trustees had good grounds for their dissatisfaction. *Belaney v. Kelly*, 19 W. R. 1171; 24 L. T., N. S., 738.

1. A direction in a will appointing a particular person solicitor to the trust estate, imposes no trust or duty on the trustees of the will to continue such person as their solicitor in the management and affairs of the estate. *Foster v. Bisle*, 19 L. R., Ch. D., 518; 51 L. J., Ch., 275; 30 W. R. 596.

IV. OTHER MATTERS.

2. *Semble*, that a trustee resident in England, appointed under an English will, can by the English law appoint an attorney to act in matters of discretion connected with a trust in an English colony or a foreign country. *Stuart v. Norton*, 14 Moo. P. C. 17.

3. Trustees may dismiss an agent for misconduct committed by him anterior to his own appointment. *Belaney v. Kelly*, 24 L. T., N. S., 738; 19 W. R. 1171.

4. Trust money was lent upon certain securities in breach of trust. One of the trustees was ordered to pay into court the whole amount of the trust money. He proceeded to realise the securities, and paid into court the produce, which was insufficient to answer the breach of trust:—Held, that his solicitor could not be in a better position than himself, and consequently had not a lien on the fund in court for the costs of realising the securities. *Thompson v. Francois*, 5 De G. M. & G. 108.

XXIII. Investment of Trust Funds.

- I. *Duty and Powers. In General*, 7014.
- II. *Discretion*, 7015.
- III. *Express Powers of Investment with Consent*, 7016.
- IV. *Express Power to advance Trust Fund to Husband with Consent*, 7018.
- V. *Right to Sever Fund for Investment*, 7018.
- VI. *By Trustees for the Purchase of Real Estate*, 7019.
See also V. ante.
- VII. *Of Funds in Court and Investment with the Sanction of the Court*, 7022.
- VIII. *In Particular Securities*, 7027.
- IX. *Of Residue and Wasting Property and Duty to Convert*. *See LIFE. ESTATE FOR, VI.*
- X. *Of Parliamentary Deposits*. *See PARLIAMENTARY DEPOSITS, II.*
- XI. *Funds under Particular Statutes*. *See LANDS CLAUSES ACT, XIII.—SETTLED ESTATES ACTS, IX.*
- XII. *Application to the Court for Advice as to under the 22 & 23 Vict., c. 35, s. 30*. *See TRUSTEE RELIEF ACTS, IV.*

I. DUTY AND POWERS. IN GENERAL.

5. Trustees not answerable for having applied the trust property, even to what turned out a losing adventure, if without fraud or negligence. *Wilkinson v. Stafford*, 1 Ves. J. 41.

6. Trustee investing money at his own discretion, runs risk of depreciation. *Hancock v. Allen*, Dick. 498.

7. A testator empowered his trustees to lend such part of the trust moneys as they should think proper to A. and B., who were respectively his son and son-in-law:—Held, that this authorised a several loan to either. *Parher v. Bloom*, 20 Beav. 295.

8. One year is a "reasonable time" in which a purchase directed by will should be made. *Parry v. Warrington*, 6 Madd. 155.

9. It is the duty of a trustee who executes a power to show that he has complied with the exigencies required by it. So where he varies the investment of the trust fund, the burden of proof lies on him to show that it is a fit and proper investment. *Norris v. Wright*, 14 Beav. 291.

10. A testator gave a legacy of 12,500*l.* 4 per cent. annuities. At the making of his will there was a stock called new 4 per cents., in which he had a small sum, and a stock called 4 per cents. consolidated, of which he was a holder to a very large amount. Before the death of the testator the latter stock was reduced to 3½ per cent.; another 4 per cent. stock was created. The investment of the legacy is to be made in an existing 4 per cent. stock, and not in the stock which had been reduced to 3½ per cent. *Banks v. Sladen*, 1 Russ. & M. 216; Taml. 407; 8 L. J., Ch., 101.

11. Personal estate was bequeathed to a trustee to lay out upon personal or Government security, paying the interest to one for life, remainder as to the principal sum, after the life-interest to others:—Held, that upon the bill of the next in remainder, the money not already laid out upon private security must be laid out on Government security. *Holmes v. Moore*, 2 Moll. 328.

12. When specific property is bequeathed upon trust without any power being given to the trustees to alter the mode of investment, such trustees may, nevertheless, sell the property and invest the proceeds on any of the statutory investments, and vary such investment from time to time, provided that they never buy any redeemable security at a premium. *Waite v. Littlewood*, 41 L. J., Ch., 636.

13. Although the Court will not, except under special circumstances, invest a fund in court in any stock except consols, yet if executors or trustees have power under the will to invest in other Government securities, they will not be held liable for a breach of trust for so doing, although the stock in which they invest should be reduced, provided they acted fairly and reasonably. Where a testator gave personal estate to his executors, upon trust to convert the same and to invest the produce in "Government or some other good security," and left a sum of navy 5*l.* per cents., which were afterwards reduced to 3*l.* 5*s.* per cents., the surviving executrix, who was also tenant for life, was not held liable for

having permitted the fund to remain in that investment. *Baud v. Fardell*, 4 W. R. 40; 25 L. J., Ch., 21; 1 Jur., N. S., 1214.

1. Words held sufficient to give an option of investing on real security or in consols. *Aspland v. Watte*, 3 W. R. 526; 25 L. J., Ch., 53.

2. Where the question as to the propriety of an investment by trustees for a tenant for life and remainderman arises between the latter parties, while the Court will not, on the one hand, sanction a collusive and fraudulent investment that would have the effect of diminishing the capital to which the remainderman will be entitled on the death of the tenant for life, yet, on the other hand, it is not in the power of the remainderman to require the investment to be made at the lowest rate of interest, in order that the capital may be increased. *Vickery v. Evans*, 10 Jur., N. S., 30; 9 L. T., N. S., 822; 8 N. R. 286; 33 L. J., Ch., 261; 33 Beav. 376; 12 W. R. 237.

Where, however, the trustees are also residuary legatees, and where there is a large discretion reposed in them, and no fraud in the case, it would seem that there is no rule prohibiting an investment of the trust-funds at 4½. per cent., on sufficient security. *Ib.*

3. Where it appeared, upon an information against the Fishmongers' Company, that the company had omitted to invest a legacy directed to be invested in land for the benefit of the charity, but had applied their own funds in aid of the charity to a larger amount than the investment would have produced, the Court held, that the neglect to invest it either in land, or (if that could not be advantageously accomplished) in some separate fund, was a substantial ground of complaint, and directed accordingly such investment as appeared most beneficial to the charity, but refused an inquiry as to the loss alleged, but not shown to have been sustained by the neglect to invest. And, considering that the suit was not instituted for the benefit of the charity, the Court directed the defendants to pay the costs, as between party and party, and refused the relators their extra costs out of charity fund. *Att.-Gen. v. Fishmongers' Co.*, 1 Keen 492.

4. C. bequeathed 2,000*l.* to trustees upon trust to invest in real estate; and he then gave certain cottages and hereditaments to the same trustees on the same trusts as he had declared as to the estate to be purchased with the 2,000*l.* He then gave his thirty shares in the Leeds Banking Company to the same trustees upon the same or the like trusts as were declared concerning the 2,000*l.* and the cottages. The banking company failed, and the trustees had paid large sums out of the testator's estate on account of the shares. A suit was instituted for the administration of the testator's estate, and the Master of the Rolls considered the trustees of the will liable for not having converted the shares:—Held, that the directions for investment contained in the will could not be taken to apply equally to the 2,000*l.* and the cottages, and must be read *reddendo singula singulis*. The bequest of the bank shares was specific, and the shares need not be converted unless the direction to convert was clear. The Court was of opinion that it was not clear, and reversed the order

of the Master of the Rolls. *Craven v. Craddock*, 20 L. T., N. S., 638.

5. Trustees authorized by a settlement to lend the trust fund upon such security as they should think advantageous laid out a portion of the trust fund in the purchase of lands in fee simple; an offer having been made to purchase the lands at a profit, the Court directed the purchase to be completed, and the purchase money to be brought into court to the credit of the trust. *Robinson v. Robinson*, 10 Ir. R., Eq., 189.

6. When trustees lend on irregular securities, the onus is on them to show that they were of sufficient value, not on the *cestui que trust* to show that they were insufficient. *Stretton v. Ashmall*, 3 Drew. 9; 24 L. J., Ch., 277.

II. DISCRETION.

7. Discretion of trustees having power to change securities with consent, is not to be controlled by Court, unless mischievous and ruinous to that fund. *De Manneville v. Crompton*, 1 Ves. & B. 364.

8. An express direction by a testator for the conversion and for investment of his personal property from time to time as trustees may think fit, does not necessarily prevent the operation of the general rule of investing in securities approved by the Court. *Caldecott v. Caldecott*, 1 Y. & Coll. C. C. 312; 11 L. J., N. S. Ch., 158; 6 Jur. 232.

9. Where trustees are directed to pay a certain sum to a person for life, and are empowered according to their discretion to invest the trust funds out of which that sum is to arise, but decline or neglect to act, and the assistance of a court of equity is sought in order to carry into effect the purposes of the will, the Court will not, as a matter of course, exercise that discretion, but will only act on its established and known rules, unless the intention of the testator plainly appears to exclude such a mode of proceeding. *Prendergast v. Prendergast*, 3 H. L. Ca. 195; 14 Jur. 989.

A testator, after making certain specific bequests, proceeded as follows: "I give and bequeath to my trustees hereinafter named, so much of my personal estate and effects, as, at the time of my decease, shall produce the clear annual income of 1,500*l.*; and I direct that the same shall be selected and appropriated, and set apart, as soon as may be, etc., by my said trustees, in their uncontrolled discretion, upon trust to pay" to his wife the dividends during her life or widowhood; and after her death or second marriage, the same was to become part of his residuary personal estate. He directed that if the annual produce so appropriated should be increased or reduced in amount, his wife was to receive the increased or reduced dividends, as the case might be, in lieu of those before directed to be paid to her. The trustees were fully empowered, at their discretion, to permit the personal estate to continue on the same securities as at the time of his decease, or to sell and reinvest, as the testator himself might do. Some of the foreign funds ceased to pay any dividends, and the trustees refused to exercise their discretion as to altering the investments, but submitted to act as the Court should direct. The Court

refused to exercise the discretion vested in the trustees, but acting on its general rule in such matters (as the testator had not expressed a different intention), directed the annuity to be raised by the purchase of an adequate sum in consols, and ordered the Master to inquire, having regard to the interests of other parties under the will, what investments must be called in to effect this object:—Held, that the decree thus made was correct. *Ib.*

1. By a will a sum was given to two trustees on trust to pay the income to C. for his life, with a gift over of the principal on his death; but the trustees had a discretionary power to purchase with the principal an irredeemable annuity for the life of C. for his benefit. The trustees did not purchase an annuity, but one of them paid to C. during his life, from time to time, various small sums, amounting in the aggregate to more than the total income, but less than the principal:—Held, that this was a proper exercise of the discretionary power. *Messena v. Carr*, 39 L. J., Ch., 216; 9 L. R., Eq., 260; 18 W. R. 415; 22 L. T., N. S., 3.

2. A testator directed his trustees to lay out and invest 15,000*l.* upon Government, real, or personal security, or in such stocks, funds, or shares as they might, in their absolute discretion, think fit, and pay the interest to his wife for life; the capital to be for his children. The trustees, with the sanction of the widow, invested a portion of the money upon railway stock bearing a high rate of interest. Upon her death the securities were greatly reduced in value:—Held, that the trustees were bound to invest upon securities of a permanent nature; that, in the absence of evidence to the contrary, it must be assumed from the rate of interest that these investments were not permanent, and that the 15,000*l.* must be invested for the benefit of the children of the testator. *Stewart v. Sanderson*, 10 L. R., Eq., 26; 18 W. R. 278.

Discretionary Trusts in General.] See IX. *ante*.

III. EXPRESS POWERS OF INVESTMENT WITH CONSENT.

3. A marriage settlement recited that it had been agreed that a debt should be assigned to the trustees upon trust, after calling it in to invest the money upon such security as should be approved of by the husband and his father, either on Government, real, or personal security; and by the witnessing part, the debt was assigned upon trust for calling in, and investing the same on Government, real, or personal security, or in the purchase of lands at the sole order and by the sole direction, consent, and approbation of the husband and his father or the survivor, to stand possessed thereof on the trust therein mentioned. Then followed the trusts, and a power in the usual form for the trustees, with the consent of the husband and his father or the survivor in writing, to invest the trust money in the funds or on real security or in the purchase of freehold or leasehold estates:—Held, that the last clause controlled and interpreted the former parts of the settlement, and that a loan of the trust fund to a bank in which one of the trustees was a partner on an interest note without a written consent, was a breach of trust constituting a

provable debt against the separate estate of the trustee. *Exp. Hakenill, Re Wise*, 2 M. D. & De G. 607; 6 Jur. 787.

4. Consols were settled to the separate use of the wife for life, with a power to appoint by will, and with a power for the trustees, with the consent of the wife, to alter the securities, such securities to be either real or in the public funds. The trustees, without such consent, sold the consols, and invested the produce in long annuities, which they afterwards sold and lent the money, which was afterwards received by the husband, who invested it in leaseholds. The wife received the long annuities until sold, and afterwards joined her husband in executing a deed, reciting that the sale of the long annuities and the subsequent investments had been with her consent:—Held, that the appointees of the fund under her will were entitled, as against the husband and trustees, to have the consols replaced, and that the interest, over which the wife had a general power of appointment, was not liable to make good the breach of trust. *Kellaway v. Johnson*, 5 Beav. 319; 6 Jur. 751.

5. The trustees of a marriage settlement being empowered by it to invest the trust funds in freeholds, or copyholds of inheritance, with the consent of the husband and wife, authorised the husband to purchase a certain estate, as an investment of part of the trust funds, and afterwards they sold out a sufficient part of those funds to pay for the estate, and the husband received the proceeds. The estate was copyhold for lives, and the purchase was made without the wife's consent:—Held, nevertheless, that, as between the husband and the trustees, he must be considered to have purchased the estate for them. *Trench v. Harrison*, 17 Sim. 111.

6. Stock was transferred into the names of trustees of a marriage settlement, in trust for the intended wife for life, with trusts over. The trustees had power to sell out the stock and invest it on the mortgage or other securities, with the consent of the intended husband and wife. After the execution of the settlement, and before the marriage, the intended wife and husband and the settlor signed a memorandum, requesting the trustees to lend the stock to the owners or lessees of a particular property called V., who at that time were the settlor and two others. The stock was sold out and lent to the three, but no security was taken. The settlor then sold his interest in the property called V. to the other two, who gave a mortgage on the same:—Held, that the loan was a breach of trust on the part of the trustees. A bill was filed by the wife, her daughter, who had attained twenty-one, and her infant children, for the restoration of the stock; and by the decree the stock was ordered to be brought into court. *Fowler v. Reynal*, 13 Jur. 649; 2 De G. & Sm. 749. Affirmed 3 Macn. & G. 500; 21 L. J., N. S., Ch., 121; 13 Jur. 1019.

7. Where trust funds are invested on inadequate security, it is the duty of the trustees to re-invest them, although the written consent of the tenant for life, rendered necessary to any change in the investment, is refused, and the security is one expressly authorised by the trust. *Harrison v. Theaton*, 4 Jur., N. S., 550.

1. A marriage settlement empowered the two trustees to vary the investment of the trust funds, "with the consent in writing of the husband and wife." Part of the trust funds consisted of 1,000*l.*, which was a first charge on an hotel premises, of which the husband was, at the time of the marriage, the sole proprietor. Afterwards, the hotel was destroyed by fire, but was rebuilt on the same site, enlarged by the addition of adjoining ground. Subsequently the husband became bankrupt, and one of the trustees became, by purchase, sole proprietor of the new hotel and premises. The other trustee filed a bill against him, and against the assignees in bankruptcy of the husband, and prayed that the 1,000*l.* might be raised by a sale of the premises. It did not appear that the consent of the husband and wife had been obtained:—Held, that the want of the consent could not fetter the action of the Court, which, if satisfied that the existing security was insufficient, was bound, independently of any consent, and in order to protect the interests of all the *cestui que trustent*, to require that the money should be called in and properly invested; and the Court decreed that the 1,000*l.* should be raised out of the premises on which it was charged. *Costello v. O'Rorke*, 3 Ir. R., Eq., 172.

Another portion of the trust funds consisted of 1,000*l.*, which was paid in cash to the two trustees, who, in breach of trust, invested it in ordinary railway shares. Thereby a loss was sustained; and the trustees, in further breach of trust, transferred these shares to the N. Bank, to secure the private debt of the husband, the tenant for life. Subsequently O., one of the trustees (without the knowledge of his co-trustee), procured an assignment (for a nominal consideration) of those shares to two persons, who became trustees thereof for the R. Bank, which had made to the husband large advances, the full amount of which was secured by the guarantee of O. A week after this assignment, the amount of the husband's debt to the N. Bank was paid by a cheque on the R. Bank, which, before the transfer of the shares was lodged with it, cashed that cheque out of the original credit given to the husband. These shares were sold, without the other trustee's knowledge, for 592*l.* 10*s.*, which sum was applied in reducing the debt due by the husband to the R. Bank. O. obtained from the husband mortgages of the hotel, furniture, etc., to the amount which covered the whole sum guaranteed by him to the R. Bank:—Held, that O. was, as between him and his co-trustee, primarily bound to replace the 592*l.* 10*s.* *Id.*

2. A., on her marriage, assigned a debt due to her from B. to three trustees, upon trust, when requested by her to call it in and invest it, and hold it in trust for A., her husband and children. B., with full notice, but without such request, paid part of the money to the husband by order of the trustees, and other part to the trustees for the express purpose of being advanced to the husband in breach of trust. The money was lost:—Held, that B., as well as the trustees, was responsible for the breach of trust. *Andrews v. Boufield*, 10 Beav. 511.

3. Trustees of a marriage settlement were empowered, with consent of the husband and wife, to invest the funds on such security, either real or personal, as they, with such consent, should think proper. At the date of the marriage a sum of 2,500*l.*, part of the trust funds, was outstanding on the note of hand of the husband, having been advanced to him by the intended wife prior to the marriage. A separation having taken place, but the wife, nevertheless, desiring that the fund should remain in the husband's hands:—Held, that this investment might be continued until further order on the husband executing a bond to the trustees for the amount. *Picard v. Anderson*, 13 L. R., Eq., 608; 26 L. T., N. S., 725.

4. By a settlement trustees were authorised to invest the trust money in debentures, preference shares, or other securities, issued or guaranteed by any incorporated public company paying a dividend or a guaranteed income; and, with the consent in writing of the tenant for life (notwithstanding her coverture), to alter, vary, and transpose the funds and securities from time to time. The trustees, without any consent, invested the trust money in debentures of a railway, which were afterwards paid off, and the money then received was, in like manner, re-invested in debentures of another line. The dividends on that line were guaranteed by the contractors of it. The tenant for life and her husband joined in signing the receipts for the dividends from the latter investment, till the contractors failed, when the line ceased to pay anything. The wife died; but after her death the husband received a dividend from the subsequent investment. On a bill by him against the trustees of the settlement, to make them liable for a breach of trust:—Held, that the previous consent in writing of the wife was not required to an investment by the trustees; and that he could not make them liable for a breach of trust. *Stevens v. Robertson*, 37 L. J., Ch., 499; 18 L. T., N. S., 427; 16 W. R. 724.

The husband was entitled under the settlement to the trust funds for his life; and under his wife's will to the absolute interest in them in remainder (subject to the payment thereof, on his death, of certain legacies). He, as the executor of his wife's will, wished to pay the legacies forthwith, out of the settlement moneys, and for that purpose to have those moneys paid to him on his undertaking to satisfy the legatees:—Held, that the proper decree was to declare the trust funds bound by the trusts of the settlement and the will, with liberty to all parties interested to apply. *Id.*

5. Where a tenant for life gave his consent (as required by the terms of a settlement) to the investment by trustees of trust funds upon a particular mortgage:—Held, that he could not afterwards, on the security turning out inadequate, complain that it was an improper investment; but the loss being chiefly attributable to the subsequent mismanagement and negligence of the trustees, that he might recover against the trustees the loss of interest incurred thereby, and that his original consent to the improper investment gave them no counter-claim against the funds in court

representing his life interest, in respect of the costs incurred by them in suits and proceedings instituted on account of the trust funds. *Lockhart v. Reilly*, 25 L.J., Ch., 697; 3 W. R. 227.

The consent of the tenant for life was obtained from him by an acting trustee, when he was just of age, in pecuniary difficulties, and without a proper knowledge of the facts, yet the deed which signified such consent never having been set aside:—Held, that the Court was bound to treat it as a binding consent. *Id.*

See also VI. 2 *infra*.

IV. EXPRESS POWER TO ADVANCE TRUST FUNDS TO HUSBAND WITH CONSENT.

1. By a marriage settlement the interest of a trust fund was limited to a wife for life, for her separate use, with power to the trustees, upon her consent in writing, to advance the trust fund to her husband, upon the security of his bond; if the trustees, with consent of the wife, advance the fund to the husband, but without her written consent, and without the husband's bond, and if the trust fund be lost by his subsequent bankruptcy, the trustees are not entitled to be indemnified to the extent of the wife's interest. *Cocker v. Quayle*, 1 Russ. & M. 535.

2. Power to trustees to advance to A. 1,000*l.* with consent of B. under her hand, signed by two witnesses. Trustees advance the sum without consent. Subsequent acquiescence by such deed not sufficient, and trustees ordered to refund. *Bateman v. Davis*, 3 Madd. 98.

3. Trustees were empowered by a settlement to lend the trust funds to the husband, with the consent in writing of the wife. They lent him part of the funds, the wife by deed consenting to that loan and to the loan of the remaining trust moneys at such times and in such proportions as the husband might require, and the husband covenanting to repay the loan then made in six months on demand. Further parts of the trust moneys were advanced. The moneys advanced were all lost by the insolvency of the husband:—Held, that the trustees were not bound to call in the money at the end of six months, the form of the wife's consent showing that she sanctioned the loan for an indefinite time. Held, also, that the wife could not give a prospective consent, but her consent was necessary to each particular loan. *Child v. Child*, 20 Beav. 50.

4. Trustees of settled money due on bond by the husband, having power, with consent in writing of him and his wife, to call it in, or allow it to remain outstanding, neglect to call it in, and, the husband being twice bankrupt, the trustees prove for the bond, but never get in the composition, and afterward get the wife's consent to its remaining uncalled in. The trustees also purchase copyholds, having no other power than to lay out the trust money upon Government or real securities. This purchase turned out very profitable, and the *cestuis que trustent* refused to allow it to be sold. On bill filed to make the trustees liable for the bond debt, and on the question whether the profits made on the copyholds could be

set against the loss on the bond:—Held, that the trustees were liable; the subsequent consent of the wife had no retrospective operation; the investment in copyholds was a breach of trust, and the profits could not be set against the loss. Costs out of the estate. *Wiles v. Gresham*, 2 W. R. 355; 2 Drew. 258; 2 Eq. Rep. 560; 23 L. J., Ch., 667. Affirmed 3 W. R. 87; 24 L. J., Ch., 264; 3 Eq. Rep. 116; 24 L. J., Ch., 264; 5 De G. M. & G. 770. S. C. on motion for injunction 1 Eq. Rep. 348.

5. By a marriage settlement, 700*l.*, then in the hands of H., was agreed to be transferred to the joint account of H. and two other trustees, to be held by them upon trust to pay the same to the lady at her request in writing, and, subject thereto, for her separate use, and on her death, as she should by will appoint; with certain trusts over in default. The money was left for many years, with the lady's acquiescence, in the hands of H., who advanced to the husband the greater part of the principal, as to 200*l.* with the lady's knowledge, but not by her request in writing:—Held, that H. was liable to replace the 500*l.* but no more, and that the lady was disentitled to relief against the other trustees by reason of acquiescence. *Jones v. Higgins*, 2 L. R., Eq., 528; 35 L. J., Ch., 403; 14 W. R. 448; 14 L. T., N. S., 126.

6. By a clause in a marriage settlement, trustees were empowered and required, at the request in writing of the wife, to advance part of the trust moneys to the husband, on the security of his bond. After the marriage, the husband was arrested, went to prison, and took the benefit of the Insolvent Debtors Act. The wife then applied to the trustee for a loan to the husband, according to the terms of the settlement:—Held, that such a change had taken place in the circumstances of the husband, as rendered the clause inapplicable to him, and consequently that the trustee was justified in refusing to lend the money. *Boss v. Goddall*, 1 Y. & Coll. C. C. 617; 11 L. J., N. S., Ch., 391; 7 Jur. 146.

V. RIGHT TO SEVER FUND FOR INVESTMENT.

7. A testatrix directed her trustees to pay the interest or annual rent of 2,000*l.* to Mrs. A. during her life, and after her death to divide that sum among her children; and to pay the interest or annual rent of a similar amount to Mrs. B. in life-rent, with the fee to her children. The trustees were empowered by the deed to realise, or to continue to "hold any or all of such shares or stocks" as might belong to the testatrix at her decease, "should they consider it advisable or expedient to do so, without any personal responsibility for loss, if any, thereby sustained:" with power also "to lend or place out on such securities, heritable or movable, as they shall consider advantageous, the aforesaid legacies of 2,000*l.* and 2,000*l.* respectively, the securities to be conceived in favour of my trustees, and that for the purposes of this trust and no otherwise." The testatrix at her death held 850*l.* stock of an unlimited bank. The trustees, at the desire of Mrs. A., and without consulting Mrs. B., set 200*l.* of this stock aside as part of the fund appropriated to Mrs. A., and realised

the remainder. They afterwards, on the narrative of the purposes of the trust deed, and of the sums invested for the two specific legacies of 2,000*l.*, and that they had paid the residue, received their discharge from Mrs. A. and Mrs. B. Statements and separate accounts of interest on the investments allocated to each were sent half-yearly to Mrs. A. and Mrs. B. All the investments stood in the names of the testatrix's trustees. The bank became insolvent, and calls were made upon the trustees in respect of the 200*l.* stock. They sought to indemnify themselves for payment of the calls out of the whole trust estate. Mrs. B. objected to any portion of her legacy being taken:—Held, reversing the decision of the Court below, that the trustees had the power to sever and had severed the two legacies, and had placed them in separate investments for behoof of the respective beneficiaries, and therefore the trustees had no right to relief from the investments allotted to Mrs. B. and her family for liabilities incurred on those allotted to Mrs. A. and her family. *Exp. Garland* (10 Ves. 110) followed. *Fraser or Robinson v. Murdoch*, 6 L. R., App. Cas. (Sc.), 855; 45 L. T. 417; 30 W. R. 162.

VI. BY TRUSTEES FOR THE PURCHASE OF REAL ESTATE.

See also V. ante.

1. *In General*, 7019.
2. *Purchase of Leaseholds with Consent, whether Imperative or Discretionary*, 7022.

1. In General.

1. By private Act, money was directed to be laid out in the purchase of freehold lands, tenements, or hereditaments, and the fee-simple and inheritance thereof, which might be approved by this Court:—Held, first, that the purchase of a fixed rent-charge was not a proper investment; and secondly, that the purchase of a freehold estate, subject to a term of 1,000 years, at a fixed rent, was equally objectionable. *Exp. Gartside*, 6 L. J., N. S., Ch., 266.

2. A power to invest trust funds in the purchase of hereditaments of a clear and indefeasible estate of inheritance in fee simple in possession, authorises an investment in freehold ground rents. *Re Peyton*, 38 L. J., Ch., 477; 7 L. R., Eq., 463; 20 L. T., N. S., 728.

3. The trustees of a marriage settlement being empowered by it to invest the trust funds in freeholds, or copyholds of inheritance, with the consent of the husband and wife, authorised the husband to purchase a certain estate, as an investment of part of the trust funds, and afterwards they sold out a sufficient part of those funds to pay for the estate, and the husband received the proceeds. The estate was copyhold for lives, and the purchase was made without the wife's consent:—Held, nevertheless, that, as between the husband and the trustees, he must be considered to have purchased the estate for them. *Trench v. Harrison*, 17 Sim. 111.

4. A trust fund is created by will to be laid out in the purchase of lands; an estate is purchased, and trust money is laid out in repairs and improvements; this is a misapplication, and shall not be allowed; part of the trust money was sold out just before a dividend was payable; no allowance can be made to the tenant for life, who would be entitled to the dividend in price; where a trustee sells out trust money, the *cestui que trust* may elect whether he will have it replaced, or be paid the produce of it. *Bostock v. Blakeney*, 2 Bro. C. C. 653.

5. A testator directed his trustees to invest certain funds in the purchase of lands to be held with others devised in strict settlement:—Held, that they might invest in the purchase of the mines and minerals under part of the settled estates. *Bellet v. Littler*, 22 W. R. 836; 30 L. T., N. S., 861.

6. Moneys, which under the trusts of a will, settlement, or private Act of Parliament, are to be invested in the purchase of land, as well as moneys to be invested under the Settled Estates Act or the Lands Clauses Act, may be properly employed in the erection of new buildings on land settled to the same uses, provided the Court is satisfied that it is beneficial to the estate; but repairs and permanent improvements do not come within this principle. *Drake v. Trefusis*, 33 L. T., N. S., 85; 10 L. R., Ch., 364; 23 W. R. 762.

7. A testator devised real estates in strict settlement, and directed his residuary personalty to be laid out in the purchase of lands to be settled to the same uses. After the date of the will, the testator executed a deed whereby he assigned specific personalty to a large amount to the same persons, whom he named as the trustees and executors of his will, upon trusts (not referring to, but) corresponding with, and only in a remote contingency differing from, those of the will. The mansion-house having been pulled down, and requiring to be re-built, the tenant for life proposed that, out of the specific personalty fund settled by the deed, 24,000*l.* should be advanced to him to pay for the re-building, and that out of the same fund 40,000*l.* should be set aside, and the dividends accumulated for twenty years, until an amount of 24,000*l.* should be saved, with which the same fund should be recouped:—Held, that the Court had jurisdiction to make the order. *Donaldson v. Donaldson*, 3 L. R., Ch. D., 743; 34 L. T., N. S., 900; 24 W. R. 1037.

8. Where a testator orders his money to be laid out in land in a particular county, and his trustees cannot purchase in that county, the Court, after a convenient time, will deviate from the strict terms of the trust. So, where trustees cannot purchase a freehold without great disadvantage, unless they take a college-holding with it, the Court will dispense with the strict directions of the will. *Maynaring v. Maynaring*, 3 Atk. 414.

9. An estate was settled with a direction that the proceeds of the sale of timber should be laid out in land, to be settled to the like uses:—Held, that a sum produced by the sale of timber could not be laid out in building a farmhouse, as a permanent improvement of the settled estate. *Poulett (Earl) v. Somerset*, 19 W. R. 1048; 25 L. T., N. S., 56.

1. A nobleman directed his trustees to lay out his residuary personalty in the purchase of land to go along with certain settled property. The settled property comprised an advowson, of which the parsonage-house was, at his death, in a ruinous state, and he was about to re-build it:—Held, that the trustees might properly lay out part of the residuary personalty in re-building the house. *Re Hotham (Lord)*, 12 L. R., Eq., 76.

2. A testator devised his residuary personalty to the trustees of a settlement to be held and applied as moneys arising from the sale of any of the settled estates. The settlement directed that the moneys to arise from the sale of any of the settled estates should be laid out in the purchase of other lands to be settled to the same uses:—Held, that the trustees might apply the residuary personalty in making good sums expended by them in the permanent drainage of part of the settled estates, and in the erection of new farm buildings on other parts of the estates. *Re Leslie*, 34 L. T., N. S., 239; 24 W. R. 546; 2 L. R., Ch. D., 185; 45 L. J., Ch., 668.

3. Trustees of a settled estate having, out of moneys in their hands, in trust to be laid out in lands to be settled to the same uses, purchased a farm for 20,000*l.*, the Court, in an action, authorised 1,000*l.* of the same moneys to be applied in repairing, improving, and re-building the farm buildings and cottages upon the purchased lands. *Cowley (Lord) v. Wellesley*, 46 L. J., Ch., 869.

4. When the rents of real estate devised in strict settlement were directed to be accumulated during the minority of any person who should become tenant for life, and the accumulated fund and interest thereon were from time to time to be invested in the purchase of other lands to be settled to the same uses:—Held, that no part of such accumulated fund could be applied, at the instance of a tenant for life, in necessary repairs and improvements on the estate. *Brunskill v. Caird*, 16 L. R., Eq., 493; 21 W. R. 943; 43 L. J., Ch., 163.

5. Devise of lands to successive tenants for life, and then in strict settlement, with a condition that "he or they" should reside in the mansion-house on the lands, and a declaration of forfeiture in case of non-residence. The first tenant for life, who was a married woman, was named as such in the will:—Held, that on breach of the condition by her the estate for life was forfeited. *Dunne v. Dunne*, 3 Sm. & G. 22; 3 W. R. 256, 380; 3 Eq. Rep. 760; 7 De G. M. & G. 2070; 1 Jur., N. S., 176.

Held, also, that although the mansion-house was inadequate to the income of the devised property, and was also dilapidated, the tenant for life was not authorised to employ towards improving or repairing the mansion-house any part of the capital of funds directed by the testator to be laid out in the purchase of lands to the same uses. *Id.*

6. A testator devised his mansion-house and other real estate to trustees for the term of 1,000 years, upon certain trusts, and, subject thereto, he devised the same upon legal limitations, under which the plaintiff was tenant for life. Shortly after the testator's death the mansion-house was burnt down. The sole acting trustee had expended, in addition to insurance moneys, a sum of 2,000*l.* in re-building

the mansion-house, which amount he had borrowed on his own personal security and on a charge of the estate. It was admitted that this expenditure was very beneficial to the estate, and that the value thereof was increased. There were in court sums of consols, arising from the sale of part of the estate, and such funds were liable to be re-invested in land. By the decree in the action an inquiry had been directed as to what sum was necessary to complete the restoration of the mansion-house, and how the same ought to be raised, but no formal order was made sanctioning the raising of a loan for the purpose. A petition was presented by the personal representative of the trustee, asking that the funds in court might be sold, and that such further sum as, with the proceeds of such sale, would make up the 2,000*l.* borrowed by the trustee, might be raised by mortgage or sale of the settled estate, in order to enable such loan to be re-paid:—Held, that the Court had no jurisdiction to order a mortgage or sale of the settled estate, or to authorise the expenditure for the proposed purpose, even of moneys which were subject to a trust for re-investment, in land; but it appearing that the estate had been benefited by the outlay of the trustee to the full amount of the funds in court, and that the outlay had been *bonâ fide* made under the impression that it would be re-paid out of the estate, the Court would, although considering the conduct of the trustee irregular, order that he should be recouped his outlay to the extent of the funds in court, but no further. *Jesse v. Lloyd*, 48 L. T. 656.

7. The S. estates were by Act of Parliament vested in trustees upon trust to sell, with the consent of the earl, the tenant for life in possession, and to invest the sales moneys in the purchase of other lands convenient to be held with the bulk of the property. Under these trusts certain outlying portions of the estates were, by a contract between the trustees, the earl, and P., contracted to be sold to P. for 29,000*l.*, and 5,000*l.* was paid by P. to the earl as deposit, to be paid by him to the trustees when a proper purchase should be fixed upon in which to re-invest the sales moneys according to the trust. The purchase was never completed, and the 5,000*l.* thus left in the earl's hands was forfeited, and the same lands were, some years afterwards, sold for 22,000*l.*:—Held, that the 5,000*l.* belonged to the settled estates, and not to the Earl absolutely. *Shrewsbury (Earl) v. Shrewsbury (Countess)*, 18 Jur. 397.

The earl had bought, in his own name, for 18,000*l.*, the C. H. estate, which was convenient to be held with the bulk of the S. estates, and with the view of offering it to the trustees. In order to raise the purchase money the earl immediately mortgaged it to nearly the full amount of 18,000*l.*, and after having made some alterations in it to suit his own purposes, he offered the same to the trustees for 16,350*l.* The trustees agreed to the proposition, and a joint petition was presented to the Court, praying a reference to inquire into the title, and whether it was a fit and proper purchase, and an order was made in the terms of the prayer. Before any other step was taken the earl died. The agreement by the trustees to purchase the C. H. estate was not signed

by the trustees, but rested on some letters written by the earl to his solicitors, and by them to the earl, the solicitors being also solicitors to the trustees:—Held, that the C. H. estate was part of the earl's estate, and not part of the settled estates, there being no binding contract entered into by the earl capable of being enforced against his real representative. *Id.*

Quære, what would have been the result if the order had not stopped at directing the inquiries, but had proceeded to order the completion of the sale, in case of the inquiries as to fitness and title being satisfactory. *Id.*

1. Trustees, with the consent of A. B., the tenant for life, had a power to sell the trust estate, and invest the produce in other real estate in 1810. A. B., with the concurrence of the trustees, sold the estate for 8,440*l.*, and received the purchase money about the same time (but whether with the concurrence of the trustees was not proved). A. B. purchased another estate for 17,400*l.*; of the 8,440*l.*, 8,124*l.* was paid by A. B. in part payment of the second estate; the remainder was partly paid out of A. B.'s moneys, and partly by money raised by a mortgage of the estate. The estate was conveyed to A. B. in fee. No acknowledgment or declaration of trust was ever made by A. B., and he retained possession of the estate till thirty years after, when he became bankrupt. The Court, against A. B.'s assignees, presumed, under these circumstances, that the purchase had been made under the power for the benefit of the trust, and held that there had been no such adverse possession, and no such acquiescence on the part of the trustees, as to preclude the Court making a declaration that they had a lien on the estate to the extent of the trust moneys invested in the purchase. *Price v. Blakemore*, 6 Beav. 507.

2. By a private Act of Parliament certain settled estates, of which the ultimate remainderman was an infant, were vested in the plaintiffs as trustees for sale, with directions to sell the same for building purposes, and lay out the proceeds in the purchase of other lands, to be settled to uses similar to those declared by the settlement with respect to the lands sold, and to pay over the surplus, if any, to the tenant for life. The Act did not contain any express power to the trustees to expend any part of the trust funds in laying out the property in lots, or in making roads. Part of the land sold in accordance with the above Act, was purchased by the defendants, who were the solicitors of the plaintiffs in the management of the sale. Some portion of the property so purchased by the defendants they immediately re-sold at a considerable profit. The remaining portion was purchased by them with money paid into the bank in their names for that purpose by S. and R., to whom, upon receiving their own conveyances, they executed mortgages for securing such advance:—Held, on appeal, first, that the trustees ought, and that it was to be understood that the Legislature intended that they should have the power of doing that which was necessary to effect the purposes pointed out by the Act, viz., the power of making roads, and dividing the property into lots for sale. Held, secondly, that the sales made to the defendants ought to be set aside, and their sub-sales of the property

adopted for the benefit of the estate; and that they were chargeable with the purchase money so received. Held, thirdly, that S. and R., having had sufficient notice of the position filled by the defendants, could stand in no better position than they. *Cookson v. Lee*, 23 L. J., Ch., 243.

3. Personal estate was given to executors in trust to invest 50,000*l.*, part thereof in the purchase of land to be conveyed to the use of a nephew, with remainders over, and as to a considerable residue, in trust for his nephew as residuary legatee. The executor did not prove, and the residuary legatee became administrator with the will annexed, and purchased several estates, partly with money of the testator, in his own name, at prices amounting to 49,773*l.* He subsequently improved one of these estates so that it was worth 60,000*l.*, and by his will gave it to the tenant in tail in remainder of the estates directed to be purchased, on condition that he should accept it in satisfaction of all claims under the original will:—Held, that the estates purchased for 49,773*l.* were purchased in execution of the trust for investment, and that the condition was nugatory. *Mathias v. Mathias*, 3 Sim. & G. 552; 3 Jur., N. S., 429.

4. Trustee for the purchase of land died without personal assets, but, having purchased land, the estates purchased were held not liable to the trust, the circumstances affording no presumption that they were purchased in execution of the trust. *Perry v. Phelps*, 4 Ves. 108. Affirmed 17 Ves. 173.

5. J. S., by will, lent 8,784*l.* to A. in trust, to be invested in lands, and settled on herself for life; remainder to the heirs of B. A decree was had against A., to lay out the money in lands, and to settle the same according to J. S.'s will. A. purchased land to the value of 8,800*l.*, and devised those lands to C. (who was heir-at-law to B.) and her heirs, and gave several legacies, which could not be paid if the devise were not to be taken as part satisfaction, and for that reason it was decreed. *Gibson v. Scudamore*, Sel. Ch. Ca. 63.

6. Where trustees who are directed by will to purchase land within a reasonable time (a time being taken as the limit of such reasonable time), do not purchase within one year, the party who would have been entitled to land to be purchased is entitled to interest on fund provided for that purpose. *Perry v. Warrington*, 6 Madd. 155.

7. A testator, by his will, gave various annuities, which he directed to be secured in the public funds, and that as they respectively fell the principal should be added to the residue of his fortune, and be disposed of by his executors, as after directed, for the benefit of the heirs, under a bond or deed of entail therein mentioned. He then gave some legacies, and directed his executors to consolidate into one fund the whole of his fortune and movables, which fund they were to lay out in purchasing lands in Scotland, to be entailed upon the series of heirs specified in the bond and deed of entail already mentioned:—Held, reversing the decision of the Court of Session in Scotland, that the first year's clear annual proceeds of the executory estate from the death of the testator, it being invested in consols, was properly paid by the executors to the first

heir under the deed of entail. *Macpherson v. Macpherson*, 16 Jur. 847.

1. Effect of a contract for the purchase of lands for the reinvestment of trust moneys being made without reference to the fund proposed to be thereby reinvested. *Re Cadiz's Settlement*, 9 Hare (App.) lxxxv.; 17 Jur. 84.

Advance by Trustees of Part of Purchase Money. Lien.] 2. Under a marriage settlement the trustees were empowered, at the request of the husband and wife, to invest the trust fund in the purchase of real estate, and to re-sell the same. In exercise of this power the trustees, at the request of the husband and wife, bought certain real estate at a price which exceeded the whole of the trust fund, the husband promising to provide the balance out of his own moneys. The husband could not fulfil his promise, and C. P., one of the trustees, at the request of the husband and wife, borrowed the sum necessary to complete the purchase from a bank, and deposited with them the title deeds of the estate. C. P. died, and the husband was unable to repay the loan. In an action brought by the bank for an account and the realisation of their security, and for administration of C. P.'s estate:—Held, that the trust estate was entitled to a first charge upon the real estate purchased for the full amount of the trust fund; that, subject to such charge, the estate of C. P. was entitled to be indemnified out of such real estate for the amount borrowed by him, and actually invested in or about the purchase, and to enforce such indemnity by sale of such real estate without the consent of the husband and wife; the bank being entitled to stand in the place of C. P. as against the trust estate for the amount due to them. *Re Pumfrey, Worcester City and County Banking Co. v. Blisk*, 22 L. R., Ch. D., 255; 52 L. J., Ch., 228; 48 L. T. 516; 31 W. R. 195.

Costs.] 3. Under a direction by will to accumulate and lay out a certain sum of money in the purchase of land to be settled to uses thereby declared, the costs of the investment are to be paid out of the particular sum directed to be invested. *Gwyther v. Allen*, 1 Hare 506.

See also POWER, XXI. IX.

2. Purchase of Leaseholds with Consent, whether Imperative or Discretionary.

4. Where the power of trustees, with consent of husband and wife, or survivor, to vary the securities, was discretionary, and the wife having survived and married again, sought to have the funds invested in leaseholds (although eligible securities), the Court refused to interfere. *Lee v. Young*, 2 Y. & Coll. C. C. 532; 12 L. J., N. S., Ch., 478; 7 Jur. 761.

5. Trustees were "authorised and empowered," with the "consent and discretion" of the tenant for life, to lay out the trust moneys on leasehold hereditaments "in some convenient place":—Held, that it was imperative on the trustees, on the requisition of the

tenant for life, to invest in leaseholds, and that they could not refuse to do so on the ground of the liabilities to be incurred by them on the covenants, they having expressly contracted on the subject, but that they had a discretion to exercise as to value, title, and locality; secondly, that leasehold houses were within the power. *Beauclerk v. Ashburnham*, 8 Beav. 322; 14 L. J., N. S., Ch., 241; 9 Jur. 146.

6. By a deed, power was given to trustees, and they were required, with the approbation of the tenants for life, to invest in the purchase of leaseholds:—Held, that it was compulsory on them to invest when called upon to do so by the tenants for life. *Cadogan v. Essex (Earl)*, 2 Drew. 227; 18 Jur. 782; 23 L. J., Ch., 487; 2 Eq. Rep. 351.

By settlement certain moneys were vested in trustees upon trust to permit them to remain on the then securities during the lives of the tenants for life, and the survivor, with their consent in writing; and with the consent of the survivor, or after the decease of the survivor, at their discretion, to lay out such funds in stock, or upon freehold, copyhold, or leasehold premises, not less than sixty years being unexpired, and to stand possessed of the moneys or investments for the plaintiff for life, and after to the children, if any; and there was a proviso that it should be lawful for the trustees, and they were thereby required, at any time during the lives of the plaintiffs, or the survivor, with their approbation in writing, to lay out the moneys in the purchase of premises, freehold, copyhold, or leasehold, of not less than sixty years. The plaintiffs, the tenants for life, purchased leaseholds, and gave the trustees written notice of the fact, and required them so to apply a portion of the trust funds:—Held, that trusts were imperative and not discretionary. *S. C.* 2 W. R. 313.

VII. OF FUNDS IN COURT AND INVESTMENT WITH THE SANCTION OF THE COURT.

1. *In Bank Stock*, 7022.
2. *In East India Stock*, 7023.
3. *In Irish Securities*, 7025.
4. *In Other Securities*, 7025.
5. *Where Special Securities Directed by the Trust*, 7026.
6. *Practice on Application*, 7026.
7. *Asking Advice of Court as to Investments.*
See TRUSTEE RELIEF ACTS, IV. IV.
8. *Investment of Purchase Money paid into the Court under Special Statutes, as Cash under Control of the Court.* See LANDS CLAUSES ACT, XIII. IV.—SETTLED ESTATES ACTS, IX.—PARLIAMENTARY DEPOSITS, II.

1. In Bank Stock.

7. Where there was a power to invest trust funds in Government or real securities, the Court sanctioned an investment in Bank Stock and in East India Stock. *Bishop v. Bishop*,

30 L. J., Ch., 624; 9 W. R. 549; 4 L. T., N. S., 350.

1. Where a petition prayed an investment of 3 per cent. consols, in Bank Stock, or East India Stock, the Court directed the investment to be made in Bank Stock. *Peillon v. Brooking*, 4 L. T., N. S., 731.

The costs of all parties were ordered to be paid out of the capital of the trust fund; but several residuary legatees who had appeared by different counsel were allowed only one set of costs. *Ib.*

2. A trust fund invested in consols was paid into court under the Trustee Relief Act, on the petition of the tenant for life to change the investment into East India or Bank Stock, and for payment of the dividends to him: a transfer into Bank Stock was, under the circumstances, ordered; and, a petition being otherwise necessary, the costs were directed to be paid out of the corpus. *Re Langford*, 2 John. & H. 458; 31 L. J., Ch., 334; 5 L. T., N. S., 579; 10 W. R. 121.

3. On application of a person who had a life interest in two funds invested in consols, the Court, under the provisions of 22 & 23 Vict., c. 35, directed such funds to be sold by the accountant-general, and to be invested in Bank Stock. *Cohen v. Whaley, Newton v. Whaley*, 7 Jur., N. S., 937; 3 L. T., N. S., 436; 9 W. R. 137.

4. Where a party is very poor, the Court will not only sanction the exchange from Consols to Bank Stock, but will dispense with any provision in the order disenabling the party from receiving three dividends in one year. *Re Ingram*, 11 W. R. 980; 8 L. T., N. S., 758.

5. The Court of Chancery will not, at the instance of one having a life interest in a trust fund, change the investment of it from new 3 per cent stock, under 23 & 24 Vict., c. 38, without a special reason. *Re Boyces*, 1 Ir. R., Eq., 45; 2 Ir. R., Eq., 255.

More increase of income is not a sufficient reason. The change of investment may be made, if it appears that the increase of income will be beneficial to those entitled in remainder. *Ib.*

On an application by two unmarried women and a married woman and her husband to have certain sums of money, to which they were entitled for life under their father's will, transferred from the Government new 3 per cent. stock to Bank of Ireland stock. The Court will not permit such a transfer, except under special circumstances, showing either that the transfer will be beneficial to those entitled in remainder, or that it is necessary in order to carry out the primary object of the trust. *S. C. nom. Re Boyce*, 15 W. R. 827.

See also Next Subdivision.

2. In East India Stock.

6. While the 3 & 4 Will. 4, c. 85, for the regulation of the East India Company's charter, was in force, the capital stock of the company was not "a Government or parliamentary stock or fund," nor was it "a foreign stock or fund." *Brown v. Brown*, 4 Kay & J. 704.

The Court will in no case authorise trustees

to invest trust money in the New East India stock. *Re Fromon*, 8 W. R. 272.

7. Money having been paid into court in obedience to the Standing Orders, upon an intended application to Parliament for a bill for the construction of a railway, the parties paying in the money applied that the same might be invested in the New East India 5 per cent. loan, raised under the powers of the 22 & 23 Vict., c. 39; but Wood, V.-Ch., was of opinion that such investment would not be East India Stock within the meaning of the 22 & 23 Vict., c. 35, s. 32, and the full Court of Appeal concurred. *Re Colne Valley and Halstead Railway Bill*, 29 L. J., Ch., 33; 1 L. T., N. S., 20, 26; 1 De G. & J. 53; 1 John. 528; 8 W. R. 18; 5 Jur., N. S., 1129; 29 L. J., Ch., 33.

Such investment is not what the Court of Chancery would sanction; but if a trustee had so invested money, and were brought before the Court as for a breach of trust, and he pleaded the provisions of the 22 & 23 Vict., c. 35, s. 32, the Court would be bound to decide in his favour. *Ib.*

8. It is a matter of discretion vested in the Court as to whether a transfer of a fund in court, belonging to a married woman equitably entitled for life, and which was invested in consols, should be laid out in East India Stock, under 23 & 24 Vict., c. 38. *Cockburn v. Peel*, 7 Jur., N. S., 810; 30 L. J., Ch., 575; 9 W. R. 725; 4 L. T., N. S., 571.

Where, however, the fund is not in court, trustees making the transfer will be entitled to the protection of the Court, if they act *bonâ fide* and to the best of their discretion. *Ib.*

9. In the administration of trust funds in court no direction will be made for the investment in East India Stock, though the Court gave the tenants for life permission to apply in chambers for leave to invest the funds on real security in England. *Ungless v. Twiff*, 30 L. J., Ch., 784; 9 W. R. 729.

10. An investment of settled trust funds in East India or Bank Stock sanctioned, upon the petition and at the cost of the tenant for life, who was the settlor. *Equitable Insurance Co. v. Fuller*, 1 John. & H. 379; 7 Jur., N. S., 307; 30 L. J., Ch., 497; 9 W. R. 400; 4 L. T., N. S., 50. Affirming 30 L. J., Ch., 848.

11. D., by will, dated in 1844, gave all his real and personal estate to trustees, to convert such part as should not consist of money, or securities for money in Government securities, into money, and to invest the same in the public stocks or funds of Great Britain, and to stand possessed thereof, and to lay out and invest the same in the purchase of freehold lands of inheritance in Ireland, either in one purchase or from time to time, as eligible purchases might offer; the estates, when purchased, to be vested in the trustees, to the use of C. for life, and after her death to H. for life, with limitations over in favour of the sons of H. in tail; and until such time as his residuary estate should be laid out in the purchase of lands, his trustee should pay and apply the dividends, interest, and annual produce, or of such part as should remain so uninvested, in the purchase of lands, to and for the use of such persons, and for such

estates and interest, as he or they would be entitled to in the hereditaments directed to be purchased, or as near thereto as the law would permit. D. died in 1858, and at the time of his death a considerable portion of his estate was vested in English and Irish Bank Stock and in East India Stock. Upon a case for the opinion of the Court, whether the trustees were justified in retaining such part of the estate as was so invested in the English and Irish Bank Stock and East India Stock until eligible purchases of land could be obtained, and for the direction of the Court as to the proper mode of paying the income and accumulations of it, and as to future investments, and the costs of the special case:—Held, first, that the trustees were justified in retaining the English and Irish Bank Stock and East India Stock by way of interim investment until proper purchases of land could be effected. *Hume v. Richardson*, 8 Jur., N. S., 686; 31 L. J., Ch., 713; 10 W. R. 528; 6 L. T., N. S., 624; 4 De G. F. & J. 23.

Held, secondly, that the whole of the future income arising from such investments should be paid to the successive tenants for life. *Id.*

Held, thirdly, that according to the terms of the will, Bank and East India Stock were not securities for money in Government securities; that the 12th section of 23 & 24 Vict., c. 38, which made the 32nd section of 22 & 23 Vict., c. 35, retrospective, made it so only as to instruments on which the 32nd section did not previously operate, but did not alter rights which had then actually accrued and arisen; and that the tenant for life was entitled to no more than the stock would have produced if placed in the state of investment which the testator intended: that was to say, to the income of so much 3l. per cent. consols as would have been produced if the Bank Stock and India Stock had been converted into those funds at the death of the testator. *Id.*

Held, also, that the costs of the special case must be paid out of the surplus income, which was to be treated as capital. *Id.*

1. Section 32 of 22 & 23 Vict., c. 35, enabling trustees, in certain cases, to invest their trust funds in Bank Stock or East India Stock, does not apply where the trust fund is already invested in Bank Annuities, and the trustee has no power, independently of the Act, to vary any investment. *Re Warde*, 2 John. & H. 191.

2. The Court ordered a fund invested in consols, out of which maintenance had been allowed by an order of the Court for infants in a suit, and which has become diminished, to be invested in East India Stock, the infants having nearly attained their majority. *Fluid v. Fluid*, 7 L. T., N. S., 590.

3. Where a fund invested in consols, out of which maintenance has been allowed by an order of the Court, for infants in a suit, becomes diminished, the Court will, if the infants have nearly attained their majority, order the fund to be sold and invested in East India Stock. *Hard v. Hard*, 11 W. R. 50.

4. Where a woman, fifty-one years of age, who had been married thirty-four years without ever having had children, asked that a sum of consols which was settled upon herself

for life, remainder to her children, remainder to herself absolutely, might be sold out and invested in East India stock, the Court directed the change of investment, notwithstanding the opposition of the petitioner's husband, as the probability of there being any children to take under the settlement was extremely remote. *Vidler v. Parratt*, 12 W. R. 976; 10 L. T., N. S., 686; 4 N. R. 392.

5. An intended husband, by his marriage settlement and under a power enabling him, appointed the freeholds, of which he was tenant for life in possession, to trustees during his intended wife's life upon trust out of the rents and profits to pay her an annuity of 500l. for her jointure in lieu of dower, and gave her the usual powers of distress and entry for securing the due payment of the annuity (such powers extending to give her the enjoyment in case she took possession without impeachment of waste, and such extension being beyond her power to give), and covenanted for further assurance. He afterwards acquired the fee. Subsequently, in 1843, the settled hereditaments being in part subject to an antecedent mortgage created by the husband, and being considered by the wife an insufficient security for her annuity, the husband, by an indenture reciting these facts, assured, subject to the mortgage, the same and other property, the wife releasing her 500l. annuity, to trustees upon trust (in the events which happened) for sale, and for the investment of the whole if not more than sufficient, and if more than sufficient, then of a sufficient part in a competent share of consols to produce a clear yearly income of 500l.; or if the moneys should not be equal to purchase a sufficient amount of such stock to produce such yearly income, then for the investment of the whole of such moneys in or upon some or one of the parliamentary stocks or public funds, or upon Government or real securities, with power of variation of securities; and after the death of the husband for payment of the income of the wife during her life, in lieu and full satisfaction of her annuity under the marriage settlement, with remainder over. The settled property was from time to time sold, and the net proceeds invested in consols; but the investment failed to produce 500l. a year. The husband having sold his reversionary interest in part of the trust fund expectant on his wife's death and died:—Held, in a suit constituted by the wife to have the trusts of the settlement and the deeds of 1843 carried into effect, first, that the object of the arrangement of 1843 was to give the wife a better means of insuring to her 500l. a year; but that she had no right to come upon the capital of the investment to make good that annual sum. *Mortimer v. Pictou*, 4 De G. J. & S. 166; 3 N. R. 338; 10 Jur., N. S., 83; 33 L. J., Ch., 337; 12 W. R. 292; 9 L. T., N. S., 591, 795.

Held, secondly, that the income of the investment in consols falling short of that annual sum, and the chief object of the trust being likely to be defeated by the insufficiency of the investment, the case was one for a change of investment into East India Stock, under 22 & 23 Vict., c. 35, s. 32; 23 & 24 Vict., c. 38, ss. 10, 11, 12, and the General Order of 1st February 1861, notwithstanding the op-

position of the purchasers of the reversion of the fund, but without prejudice to their rights as between the husband's executors and themselves, and that the wife was entitled to the interest of that new investment as from the date of the order of it. *Ib.*

Where the condition of a trust fund is such that the income arising from it does not answer its primary purpose, it is the duty of the Court to exercise the power given by the statute. *Ib.*

1. When money is paid into court in consequence of a tenancy for life, and there is no provision in the private Act under which it is paid in for service on any other person than the tenant for life, service on the trustees of the instrument under which he claims was dispensed with, and an investment was ordered in East India Stock under 23 & 24 Vict., c. 38, s. 10. *Re Adam*, 17 L. T., N. S., 641.

2. The Court of Chancery may order the investment in East India Stock of a fund paid into court under the provisions of a special Act anterior to 23 & 24 Vict., c. 38, although such special Act directs the investment to be in consols or 3l. per cent. reduced bank annuities. *Re Wilkinson*, 9 L. R., Eq., 343.

3. An application for an order for investment of such a fund in Bank Stock or New East India Stock (in which trustees are authorised to invest by 30 & 31 Vict., c. 132) refused. *Exp. Great Northern Railway Co.*, 9 L. R., Eq., 274.

3. In Irish Securities.

4. The 3rd section of 4 & 5 Will. 4, c. 29 enacts that in certain cases loans on real securities in Ireland shall be made under the directions of the Court of Chancery or Exchequer in England to be obtained in any cause upon petition in a summary way:—Held, that the concluding part of the section must be read thus: "in any cause, or upon petition in a summary way;" and that the proposed securities must be approved of by the Master. *Exp. French*, 7 Sim. 510.

5. Under the 4 & 5 Will. 4, c. 29, a trust to invest money in real securities in England or Wales or Great Britain, will authorise an investment on real securities in Ireland also; and although the money be already invested in Great Britain, the Court will, on the application of the tenant for life of the fund, direct a reference to the Master to inquire whether it will be for the benefit of all parties interested that that investment should be changed for one at a higher rate of interest in Ireland. *Exp. Pamlett (Lord)*, 1 Phil. 570; 14 L. J., N. S., Ch., 321.

6. An application made under the 4 & 5 Will. 4, c. 29, to invest trust funds on Irish security, refused, for though for the benefit of the tenant for life, as increasing his income, it was otherwise as to those in remainder, as affording a less secure investment. *Stuart v. Stuart*, 3 Beav. 430; 10 L. J., N. S., Ch., 148; 5 Jur. 3.

7. Lynch's Act (4 & 5 Will. 4, c. 29) only relieves a trustee from liability in respect of an investment in Ireland instead of England, and therefore where, upon petition under the Act, the Court sanctioned an investment which

was made without proper evidence of value, and without the consent of the necessary parties, and there was a loss, the trustees were held liable for the breach of trust. *Norris v. Wright*, 14 Beav. 291.

8. Pending a suit to make trustees liable for the improper investment of trust moneys on an Irish estate, the property was put up for sale under the Incumbered Estates Act, and an order was made giving the trustees liberty to buy, which they did:—Held, that this order did not relieve the trustees from any liability in the cause, although it was not expressed to be made "without prejudice." *Ib.*

9. An order of reference, under the Act 4 & 5 Will. 4, c. 29, as to whether it would be for the benefit of the parties beneficially interested in a settled fund to land it on the security of freehold estates in Ireland, may be made *ex parte*; but the Court will not confirm the Master's report, finding that such a loan would be for the benefit of such parties, unless they all, as well those entitled in remainder as those entitled for life, have either been served with the petition or appeared before the Master. *Re Kirkpatrick's Trust*, 15 Jur. 914.

4. In Other Securities.

10. The Court will not, on the application of a tenant for life, except in special cases, order a fund in court to be invested in any other security but that of consols. *Darwin v. Darwin*, 17 Jur. 781; 22 L. J., Ch., 1007.

11. Sum of money paid into court under the Trustee Act allowed to be invested in new 3l. per cent. annuities. *Re Dunster's Trust*, 3 W. R. 267; 3 Eq. Rep. 449.

12. Under special circumstances the Court permitted an infant's fund to be invested in new 3l. per cent. reduced bank annuities, instead of consols. *Hanson v. Murray*, 1 Jur., N. S., 917; 3 W. R. 557.

There is a difference between an order for investment made in the cause and one made on petition, in the matter of the Trustee Relief Act 1847, with regard to varying the stock for investment. S. C. 3 Eq. Rep. 758.

13. The Court will allow the investment of a fund in court on foreign bonds where the interest is payable to bearer by coupons passing from hand to hand. *Re Brackenbury*, 22 W. R. 682; 31 L. T., N. S., 79.

14. An investment of a fund in court in freehold houses will not, however eligible, be sanctioned by the Court. *Moore v. Walter*, 11 W. R. 713; 8 L. T., N. S., 448.

15. Trustees, under a power in a will, invested the residuary estate in London and Westminster Bank shares. An administration decree having been made the remaindermen under the will applied to have the funds invested in consols; and it appearing that one of the trustees desired the change of investment, but was willing to retire from the trust, the Court ordered the fund to be invested in consols, with liberty to apply with reference to any appointment of new trustees. *Butler v. Withers*, 1 John. & H. 333; 4 L. T., N. S., 736.

16. After an administration decree has been made all powers of management of the estate

which may be vested in trustees are subject to the control of the Court; and the judge who exercises such control must be personally satisfied of the propriety of the course proposed to be adopted by the trustees. *Bethell v. Abraham*, 17 L. R., Eq., 24; 43 L. J., Ch., 180; 22 W. R. 179; 29 L. T., N. S., 715.

Trustees having power to invest certain moneys belonging to a testator's estate at their discretion, and having also power to continue or change securities from time to time, as to the majority should seem meet, applied to the Court in a suit for the administration of the trust estate for liberty to invest the moneys in and to convert securities into American funds or railway stocks. Infants were interested in the trust estate:—Held, that if the trustees had the discretion they claimed (which was doubtful), the Court ought not, in a case where infants were interested, to permit them to exercise that discretion in the way they proposed. *Id.*

1. A testator by his will gave 6,000*l.* on trust for C. for life, and after her death, in certain events, for R. for life. He directed the 6,000*l.* to be invested *inter alia* in the guaranteed stock of any railway company in India upon which a minimum rate of interest should be guaranteed by the Government of India. All railways in India, not belonging to the Government, are leasehold. C. applied that the 6,000*l.* might be invested in East Indian Railway Stock Annuity B., and in Scinde, Punjab, and Delhi Railway 5 per Cent. guaranteed Stock. R. opposed:—Held, that the Court would approve of the proposed investment. *Re Mansel, Rhodes v. Jenkin*, 45 L. T. 741; 30 W. R. 133.

2. The trusts of a settlement as to two-thirds of the trust funds made it imperative on the trustees, and as to the remaining one-third left it discretionary with them, to invest in American securities. During the civil war in America two petitions were presented, seeking an authority from the Court to make such investments, but, having regard to the then condition of the United States, the Court directed an investment in British funds with liberty to apply. After the termination of the war a third petition was presented, which the Court answered by authorising investments in American Federal securities, directing the costs to be paid out of the corpus. *Re Knowles*, 37 L. J., Ch., 840; 18 L. T., N. S., 809.

3. Stock in the funds belonging to a charity incorporated by Act of Parliament, and having power to invest in the public funds, may, under 23 & 24 Vict., c. 38, s. 11, be sold out for the purpose of re-investment on any of the stocks, funds, and securities on which cash under the control of the Court may be invested. *Re Clergy Orphan Corporation*, 18 L. R., Eq., 280; 22 W. R. 789; 30 L. T., N. S., 809.

Such funds may also be sold out and re-invested on metropolitan consolidated stock under the Metropolitan Board of Works Loans Act 1871, 34 & 35 Vict., c. 47, s. 13. *Id.*

4. Upon a petition by a tenant for life without impeachment of waste for the investment of 6,100*l.*, part of a large fund in court, in the purchase of land, the Court approved of the purchase, notwithstanding the timber on the property was valued at 1,800*l.* *Re Jones*, 1 Jur., N. S., 817; 24 L. J. Ch., 504.

5. Where Special Securities Directed by the Trust.

5. By an Act of Parliament, funds in court were, by way of interim investment, to be laid out in navy, victualling, or Exchequer bills. But under 23 & 24 Vict., c. 38, and the General Orders of the 1st February 1861, the Court allowed them to be invested in consols. *Re Birmingham Blue Coat School*, 35 Beav. 345; 35 L. J., Ch., 837; 1 L. R., Eq., 632.

6. Money paid into court under a private Act, and invested in Exchequer bills, is "cash under the control of the Court," within the meaning of the Act 23 & 24 Vict., c. 38, and the General Order of the 1st February 1861, and may be invested in any of the securities sanctioned by the Court, although such private Act directs the investment to be in Exchequer bills. *Jackson v. Tyas*, 52 L. J., Ch., 830.

7. Trustees of settlements coming within the operation of Lord St. Leonards' Act 1860 (23 & 24 Vict., c. 38), may invest the trust funds in any securities in which cash under the control of the Court may be invested, notwithstanding prohibitive or restrictive words in the instrument creating the trust. *Re Wedderburn*, 9 L. R., Ch. D., 112; 47 L. J., Ch., 743; 27 W. R. 53; 38 L. T., N. S., 904.

6. Practice on Application.

8. On motion for application of money placed in bank by a former order, there must not only be a certificate that the money was paid into the bank, but that it is actually there at the time of the motion. *Anon.*, 1 Atk. 519.

9. Notice of motion was given for the payment of money into Court, but the notice did not proceed to state that any application would be made for its investment; one of the parties did not appear on the motion:—Held, that no order for investment of the fund could be made. *Robinson v. Wood*, 1 Beav. 206.

10. When money is to be laid out under a marriage settlement in purchases, application must be made to the Court upon each separate purchase. *Harrington v. Fleming*, 1 Bro. C. C. 74.

11. On a petition for the investment of stock, and payment of the dividends, the Court required an affidavit of title to be made by the petitioners. *Exp. St. Mary's College, Winchester*, 14 W. R. 788; 14 L. T., N. S., 550.

12. Upon an application for the investment of money paid into the bank, in the name of the accountant-general, to the credit of the copyhold commissioners, under the 73rd section of this Act, it is proper for the petitioner to serve the commissioners with notice of the application; and, notwithstanding the Act for the commutation of manorial rights in respect of copyholds makes no provision for the payment of any costs, the Court ordered the petitioner to pay the costs of the copyhold commissioners, and to add them to his own; and that all such costs should be paid to the petitioner out of the fund, and said that this would be the rule for the future. *Exp. Hereford (Bishop)*, 5 De G. & Sm. 265; 21 L. J., Ch., 608.

13. An order for the interim investment of

money paid into Court under a private Act had been made by the Vice-Chancellor Kindersley:—Held, that an application for the payment out of court of part of the funds for the purposes of the same Act, should be made before the same judge. *Re Harman's Bowden Park Estate Act*, 1 W. R. 492; 1 Eq. Rep. 246.

1. The 23 & 24 Vict., c. 38 is an enabling Act, and s. 10, which enacts that all orders for conversion of bank annuities into other funds or securities be made upon petition, to be presented by any of the parties in a summary way, does not preclude the Court, in the exercise of its ordinary jurisdiction, from making such orders on a decree in a suit. *Lucas v. Rudd*, 16 W. R. 325.

2. When money is paid into court in consequence of a tenancy for life, and there is no provision in the private Act under which it is paid in for service on any other person than the tenant for life, service on the trustees of the instrument under which he claims was dispensed with, and an investment was ordered in East India Stock under 23 & 24 Vict., c. 38, s. 10. *Re Adam*, 17 L. T., N. S., 641.

VIII. IN PARTICULAR SECURITIES.

1. *Exchequer Bills*, 7027.
2. *Foreign Bonds or Securities*, 7027.
3. *Loan on Personal Security*, 7027.
4. *Mortgages*, 7028.
5. *Shares of Public Companies*, 7031.
6. *South Sea Stock*, 7032.
7. *Other Securities*, 7032.

1. Exchequer Bills.

3. The words "Government security or securities":—Held, not to apply to Exchequer bills. *Exp. Chaplin*, 3 Y. & Coll. 397; 3 Jur. 750.

4. Where the trustee was authorised to invest the fund in Government or real security:—Held, that pending a treaty for a mortgage he was justified in investing in Exchequer bills, but that having left them in a broker's hands, who misapplied them, he was personally liable for the value of the bills at the time of the loss, and not for the stock which the money would have purchased. *Matthews v. Brise*, 6 Beav. 239; 12 L. J., N. S., Ch., 363. Affirmed 15 L. J., N. S., Ch., 39; 10 Jur. 105.

2. Foreign Bonds or Securities.

5. If shares in a foreign adventure are bequeathed to trustees, the Court, unless asked to change the investment, will make no order as to the continuance of the shares as an investment. *Bates v. Mackinley*, 8 Jur., N. S., 299; 31 L. J., Ch., 389; 5 L. T., N. S., 783.

6. Under a direction in a will of "all my personal property invested in Government or other securities, in bonds or shares of whatever nature or kind, be held in the same or the like investments by and in the names of my trustees," Victoria, Russian, and Brazilian Government bonds, which pass by delivery and were lodged for safety with a bank, and also railway stocks, are investments within the mean-

ing of the will. *Arnould v. Grinstead*, 21 W. R. 155.

7. Under a settlement the trustees were empowered to invest the trust funds in the "bonds, debentures, or other securities, or the stocks or funds of any colony or foreign country." The question arose whether they could properly invest in the bonds of a French railway company, the payment of the capital on which within fifty years was secured by a sinking fund guaranteed, together with interest in the meantime, by the Imperial Government:—Held, that these bonds were not "securities of a foreign country" within the meaning of the trust for investment. *Re Langdale*, 10 L. R., Eq., 39.

8. A testator by will gave all his residue to trustees upon trust to invest in the parliamentary stocks or funds, or upon real securities; and the will contained a proviso that, as often as the trustees should think it expedient so to do, they might sell out, transfer, or otherwise vary any of the trust moneys, funds, and securities, and invest the same in or on any other funds or securities whatsoever:—Held, that the sale of new 3½ per cent. annuities and the investment of the proceeds in Russian railway and Egyptian bonds was authorised, and not a breach of trust. *Lewis v. Nobbs*, 8 L. R., Ch. D., 591; 47 L. J., Ch., 662.

9. Where a sum of 4,000*l.* was vested in trustees upon certain trusts, with a power to invest it in land or in Government securities in England, but they invested it in bills and other private securities in Ireland, whereby a sum of 1,200*l.* remained unaccounted for by them:—Held, that although, from the nature of the trusts, none of the *cestuis que trustent* had a present right to any part of the principal fund, yet that the sum unaccounted for was a debt due in equity, and demandable from the defendant as a defaulting trustee. *Waller v. Fowler*, San. & Sc. 274.

10. Where the testator directed his executors to set apart so much of his estate as would produce a certain annuity, and pay the interest to his widow for her life or widowhood, and that she should receive any surplus and bear any deficiency that might arise in the annual produce of the fund so set apart, and the principal afterwards to fall into his residuary estate, the conversion and investment were to be in the absolute discretion of the executors. At the time of his death the personal estate was invested in foreign funds; the Court refused to direct any appropriation of the latter funds, but that the annuity should be raised by the purchase of consols, after a reference to ascertain which should be applied to that purpose; regard being had to the interests of other parties under the will. *Pren-dergast v. Inshington*, 5 Hare 171. And see 8 C. 16 L. J., N. S., Ch., 125.

3. Loan on Personal Security.

11. Power to lend trust money upon real or personal security, does not enable trustees to accommodate a trader with a loan upon his bond. *Langton v. Olivant*, Coop. 33.

12. Though the settlor should authorise the trustees to continue the trust funds upon the personal security of a trading firm, in which

he had invested them, yet the trustees are guilty of a breach of trust, if, upon a change taking place in the firm, they permit the funds to remain upon the personal security of the new firm. *Cummins v. Cummins*, 3 J. & L. 64; 6 Ir. Eq. R. 723.

1. Trustees lending money on personal security, is not of itself such gross neglect as to amount to a breach of trust; and the legatee, and afterwards his assignee, having acquiesced in such loan, a bill to charge the trustees was dismissed. *Harden v. Parsons*, 1 Eden 145.

2. Trustees may lend money on good personal security, until a proper purchase in land can be had, but are not justified in placing it out in a fluctuating or precarious fund. *Emelie v. Emelie*, 7 Bro. P. C. 259.

3. The investment of trust money on personal security, is a breach of trust. *Walker v. Symonds*, 3 Swan. 63.

4. Trustee charged with breach of trust for not putting out money at interest, nor on the best security, according to the trust in a deed. Money lent on a promissory note, is not put out on a security. *Ryder v. Bickerton*, 3 Swan. 80.

5. Trustees taking upon themselves to lend an infant's money on a private security, must in all cases be responsible in case of the failure of the security. *Holmes v. Dring*, 2 Cox 1.

6. One trustee suffering the other to have trust money under a note of hand, held liable. *Kable v. Thompson*, 3 Bro. C. C. 112.

7. Testator bequeathed 500*l.* to his executors, upon trust that they should lay out and invest the same in the public funds, or in such other security or in such other manner as to them should seem expedient, at interest, and apply the produce to a charitable purpose. One of the executors, who took the entire management of the estate, paid the debts, and most of the legacies of the testator, but neither specifically appropriated nor invested 500*l.* for the charity. He paid interest, however, on 500*l.* to the charity; at the same time receiving interest on the promissory note of a debtor to the estate, who was in good credit, but whose debt was the only fund available for payment of the legacy. The executor afterwards died. On the admission, by his representatives, that he had, in his lifetime, assented to the payment of the legacy to himself as trustee:—Held, that his estate was severally answerable as for a breach of trust. *Att.-Gen. v. Higham*, 2 Y. & Coll. C. C. 634.

4. Mortgages.

- (a) *Of Copyholds*, 7028.
- (b) *Of Freeholds*, 7028.
- (c) *Of Judgments*, 7029.
- (d) *Of Leaseholds*, 7029.
- (e) *Railway Mortgages or Debentures*, 7030.
- (f) *Stock Mortgages*, 7030.
- (g) *On Second Mortgage*, 7030.
- (h) *Other Matters*, 7031.

(a) *Of Copyholds.*

8. A trustee taking a mortgage of copyholds without a power of sale does not thereby

commit a breach of trust. *Farrar v. Barraclough*, 2 W. R. 244; 2 Sm. & G. 231.

9. Defendant, being trustee under a will, containing no direction as to investment, lent part of the trust fund upon the security of unsundered copyholds, the deposit of a lease, and a bond. He was ordered to bring the money into court within six weeks. *Wyatt v. Sharratt*, 3 Beav. 498.

(b) *Of Freeholds.*

10. A testator bequeathed all the residue of his property to trustees upon trust to invest it "on good and approved freehold or leasehold securities." The trustees advanced a sum of 2,600*l.* of the trust fund to a builder, upon security of certain freehold buildings and land, valued by a surveyor at 3,500*l.*, the income of which was 175*l.* per annum. The mortgagor became insolvent, and upon a sale of the mortgaged property there was a loss of 353*l.* to the trust estate:—Held, that, although the defendant's general conduct had been faithful and honest to his *cestuis que trustent*, he had been negligent and wanting in judgment in making the investment upon property of such doubtful value; that to advance two-thirds of the supposed value of the property could not be considered a prudent act of a trustee, notwithstanding he had had the property valued by a surveyor; and that, as the defendant had not exercised due care and diligence in the investment, he must be held liable to make good the loss occasioned to the trust fund; but as there was nothing to impeach his character, no costs would be given as against him. *Jones v. Lewis*, before the *Ld. Ch.*, 26th February 1852. Reversing *S. C.* 3 De G. & Sm. 471; 18 L. J., N. S., Ch., 430; 13 Jur. 877.

11. Power to trustees to invest on Government or real security:—Held, not to authorise a loan by the trustees of part of the trust fund on the security of freehold houses in a town, the value of which depended upon their situation, and was besides liable to be diminished by the effect of covenants relating to other premises which were let with them. *Phillipson v. Gatty*, 7 Hare 516; 13 Jur. 318. Affirmed 2 H. & Tw. 459.

12. The general understanding is, that a trustee should only lend to the extent of two-thirds of the value on agricultural freeholds, and to the extent of one-half on freehold houses. *Semble*, also, that one-half is the limit in the case of a leasehold renewable for ever at a large head rent. *Macleod v. Annisley*, 16 Beav. 600; 17 Jur. 608; 22 L. J., Ch., 633; 1 W. R. 250.

13. Trustees having power to invest upon real security invested 1,400*l.*, part of the trust fund, upon the security of a freehold house at Broadstairs, used as an hotel. The evidence of value, upon which they made the investment, was a report made by a London surveyor, who, according to his report, went to Broadstairs, and examined the property, and made some inquiries; he valued the security at 2,700*l.*, including in this sum 800*l.*, as the value of the beer and spirit licence. No other inquiries appeared to have been made. In fact, the house had only recently been opened as an hotel, and did not prove successful. The

security turned out to be deficient:—Held, that the security was not a proper security for the investment of trust funds, and that the trustees must be charged with the amount advanced. *Budge v. Gummow*, 42 L. J., Ch., 22; 27 L. T., N. S., 666; 7 L. R., Ch., 719; 20 W. R. 1022.

1. Two executors were empowered by will to lend money on Government real or personal security. One of them, in 1815, lent part of the fund to the other executor and his partner in trade, upon mortgage. The mortgagors became bankrupt in 1831, and then the mortgaged property, which consisted in part of a windmill, a watermill, and a house in a town, being sold, produced considerably less than the sum advanced; the executors were held liable for the deficiency. *Semble*, so much as two-thirds of the value should only be advanced upon property of a permanent value, as freehold land, and not upon houses or buildings used in a trade, and whose value depends upon the absence of competition in that trade. *Stickney v. Semell*, 1 Myl. & C. 8.

2. A testatrix directed her executors, who were also her residuary legatees, to invest such sums in the stocks, or on freehold security, as would produce 150*l.* a year, and she bequeathed 150*l.* to A. for life; and after his death she gave the security on which the investment should have been made to B. The executors invested 3,530*l.* at 4½ per cent., on a mortgage for five years of freeholds, which were let for a long term on ground rents producing 176*l.* per annum. The value of the freeholds was about 4,344*l.*, but the property on which the rents were secured was of much greater value:—Held, that the investment was not improper. But held, that if the payment to the plaintiff should not be delayed by the inability of the trustees to call in the mortgage for five years, the plaintiff was entitled to have the mortgage sold and the deficiency paid by the executors. *Vickers v. Evans*, 33 Beav. 376; 10 Jur., N. S., 80; 9 L. T., N. S., 822; 33 L. J., Ch., 261; 12 W. R. 237; 8 N. R. 286.

A. by will directed her executors and trustees to invest such a sum of money as, when so invested, would produce 150*l.* per annum, and to pay the income to A. for life, and after A.'s death, to hold the stocks, funds, and securities in or upon which the investment should be made, for B. absolutely. The executors were made residuary legatees; and the will also contained a clause directing that it should not be binding on the trustees to make such investment, if doing so involved selling the testatrix's freehold or leasehold property, or shares in public companies, or other investments; the trustees having the fullest discretionary powers to sell such shares or other investments or not, and to retain them as long as they might think expedient so to do. The executors set apart capital, which, being invested at interest at 4½ per cent., was sufficient to meet the annuity; and they invested such sum on a mortgage of freehold ground rents, more than sufficient in amount to raise the annuity, and reserved in respect of newly-erected building property. On a bill by B., challenging the amount of the appropriation as insufficient, and the investment as improper:—Held, that having regard to the *bona fide* exercise of the discretion reposed in

the executors, the appropriation was sufficient, and that their being interested as residuary legatees did not prevent them from exercising such discretion in a manner which might prove beneficial to themselves. *Id.*

3. In May 1870, F. and G., the trustees of a will, one of whom, F., was an experienced farmer, and the other, G., a solicitor, advanced a sum of 2,400*l.*, part of the trust estate, along with another sum of 2,600*l.* not part of the estate, making together 5,000*l.*, at 4*l.* per cent., on the security of a freehold farm, which in 1868 had been sold to the mortgagor, who was farming that and the neighbouring land on a peculiar system of husbandry. The trustees had power to advance on contributory mortgages. In 1868 the farm had been valued on behalf of the vendors, of whom G. was one, and also the solicitor, at 6,895*l.* This valuation was communicated to F. at the time of the mortgage; and no other valuation was made. Interest was paid in full but irregularly, down to November 1877, since which time the farm, which was situated on clay soil, in a wet situation, had become unsaleable and unlettable, owing to unfavourable seasons, and had yielded no income. The mortgagor became insolvent. Upon claim by the *cestui que trust* against F. and the executors of G. to be declared entitled to payment of the 2,400*l.* and interest since November 1877:—Held, notwithstanding that no valuation was used at the date of the mortgage other than the valuation made on behalf of the vendors at the time of the sale to the mortgagor, that G., the trustee, was himself one, and solicitor of the others, of the vendors to the mortgagor; and that the sum advanced was more than two-thirds of the estimated value of the farm—that the trustees were not liable to make good the deficient security. *Re Godfrey, Godfrey v. Faulkner*, 23 L. R., Ch. D., 483; 52 L. J., Ch., 820; 48 L. T. 853; 32 W. R. 23.

The test of liability always is, whether or not the trustees have acted as prudent men would have acted in dealing with their own property. The "two-thirds" rule is not enforceable with exact strictness. *Id.*

(c) Of Judgments.

4. A power to trustees to lay out money "in the public stocks or funds in Great Britain, or on any mortgage of freehold or leasehold estates, or any other real securities in England, Wales, or Ireland," does not authorise them to lend it on the security of a judgment, even since the 3 & 4 Vict., c. 105, s. 22. *Johnston v. Lloyd*, 7 Ir. Eq. R. 252.

(d) Of Leaseholds.

5. Defendant, being trustee under a will, containing no direction as to investment, lent part of the trust fund upon the security of unsurrendered copyholds, the deposit of a lease, and a bond. He was ordered to bring the money into court within six weeks. *Wyatt v. Sharratt*, 3 Beav. 498.

6. A power to invest trust moneys on real security in Ireland authorises a loan on lease-

holds for lives, perpetually renewable at a head rent. *Macleod v. Annesley*, 16 Beav. 600; 17 Jur. 608; 22 L. J., Ch., 633; 1 W. R. 250.

The general understanding is, that a trustee should only lend to the extent of two-thirds of the value on agricultural freeholds, and to the extent of one-half on freehold houses. *Semble*, also, that one-half is the limit in the case of a leasehold renewable for ever at a large head rent. *Ib.*

Trustee made liable for a loss on a mortgage investment, he not having taken due precautions to ascertain the value of the property mortgaged. *Ib.*

Under a power to trustees of a settlement "to lay out and invest the trust moneys upon Government or real securities in England, Ireland, Scotland, or Wales," the trustee invested part of the trust moneys on leaseholds for lives in Ireland, with a covenant for perpetual renewal, subject to a head-rent. The property at the time of the investment was subject to certain charges, after payment of which barely sufficient surplus rents were left to pay the interest on the mortgage debt, and afterwards it became much depreciated in value, and insufficient to answer the debt:—Held, in a suit instituted by one of the *cestui que trustent*, to make the trustee liable for the loss arising from the investment, that leaseholds for lives in Ireland, with a covenant for perpetual renewal, if the same had been of adequate value, would not have been a breach of trust, but that having regard to the value of the property, the investment was a breach of trust. *Ib.*

1. Trustees being empowered under a settlement to invest moneys upon mortgage of freehold, copyhold, or leasehold estate, invested upon mortgage of leaseholds, with only fourteen years to run; the Court directed the mortgage to be called in, without prejudicing any question as to the liability of the trustees in the event of a loss. *Pince v. Beattie*, 9 Jur., N. S., 1119; 11 W. R. 979; 9 L. T., N. S., 315.

2. Under a power to invest in "real securities," trust funds were invested on mortgage of long leaseholds. The mortgagees of a one-sixth share of the trust fund commenced an action against the trustee to administer the trust estate, alleging that the investment was improper, and that the trust funds were in danger of being lost. Pending the action, the trustee paid the remaining five-sixth shares to the other persons entitled, who had not been made parties to the action in any way, and paid the plaintiff's share into court:—Held, that the trust funds had been improperly invested. *Re Chennell, Jones v. Chennell*, 47 L. J., Ch., 583; 8 L. R., Ch. D., 492; 26 W. R. 595; 38 L. T., N. S., 494. Affirming 47 L. J., Ch., 80.

Held, also, that under the circumstances, the action had been instituted unnecessarily, and therefore that the trustee was justified in partly distributing the fund, and was entitled to be paid his costs of the action, and costs, charges, and expenses as trustee out of the share in court. *Ib.*

3. As a general rule long terms of years do not answer the description of "real securities," within the meaning of a power for trustees to lend on mortgage of "real securities." *Re*

Boyd's Settled Estates, 14 L. R., Ch. D., 626; 49 L. J., Ch., 808; 43 L. T. 348.

(e) *Railway Mortgages or Debentures.*

4. Under a power to invest trust money "on real securities," a trustee lent it to a railway company, on the usual assignment of the "undertaking," tolls, etc., the principal not payable till seven years:—Held, that whether real security or not, the investment was improper. *Mant v. Leith*, 15 Beav. 524; 16 Jur. 302; 21 L. J., Ch., 719.

5. A testator directed his trustees to invest in the funds, or on Government securities, or upon the security by way of mortgage of any freehold, copyhold, or leasehold hereditaments in England or Wales:—Held, that this did not authorise an investment upon the security of railway mortgages made in conformity with the 8 & 9 Vict., c. 16, s. 38, or in Great Northern Railway debenture stock. *Mortimore v. Mortimore*, 28 L. J., Ch., 558; 4 De G. & J. 472.

(f) *Stock Mortgages.*

6. A trustee sold consols, forming part of the trust estate, and invested the proceeds in a stock mortgage:—Held, that this was an improper investment. *Whitney v. Smith*, 4 L. R., Ch., 513; 17 W. R. 579; 20 L. T., N. S., 468.

7. The general rule, that where stock is standing in the names of trustees any party interested may have an order *ex debito justitiæ*, to have it transferred into court, does not apply to a case where there are discretionary trusts still to be performed. Under the statutory power to vary securities, a stock mortgage is an improper investment. But where trust funds had been lent on stock mortgage, and re-transferred before the institution of the suit:—Held, that this, though a mistake on the part of the trustees, was no reason for depriving them of the control of the fund. *Bromley v. Kelly*, 39 L. J., Ch., 274; 18 W. R. 374.

(g) *On Second Mortgage.*

8. Trustees lent trust moneys on a second mortgage of house property greatly out of repair, and the principal part was lost:—Held, that they were liable as for a breach of trust, notwithstanding a trustee indemnity clause, declaring they should not be liable for the insufficiency or deficiency in abuse of any securities except through their wilful default. *Drosier v. Brereton*, 15 Beav. 84.

In charging trustees for breaches of trust, and the costs of suit, it is immaterial how the trust was created, and whether for valuable consideration, or by the voluntary gift of the trustees themselves. *Ib.*

9. It is the duty of a trustee who executes a power to show that he has complied with the exigencies required by it. So, where he varies the investment of the trust fund, the burden of proof lies on him to show, that it is a fit and proper investment. *Norris v. Wright*, 14 Beav. 291.

Whether a trustee is justified in lending

trust money on a second mortgage, without obtaining the legal estate, *quære. Ib.*

An estate of the value of 80,000*l.* was subjected to a first mortgage of 40,000*l.* and to two others, for 11,000*l.* and 6,800*l.*, and between the second and third there was a dispute as to priority. A trustee advanced 1,908*l.* trust money on the security of an assignment of an equal amount of the 6,800*l.*:—Held, that this was a breach of trust. *Ib.*

(h) *Other Matters.*

1. *Semble*, that in the absence of direction as to investment, trustees cannot properly invest on mortgage. *Raby v. Ridehalgh*, 7 De G. M. & G. 104; 3 Eq. Rep. 901; 3 W. R. 344; 1 Jur., N. S., 363; 24 L. J., Ch., 58.

2. Trustees lent trust money on mortgage, upon a valuation made on behalf of the mortgagor. The security proved greatly deficient:—Held, that the trustees were personally liable for the loss. *Ingle v. Partridge*, 34 Beav. 411.

3. Trustees had power to invest upon such securities as they should approve:—Held, that they were bound nevertheless to exercise a careful discretion in selecting a security as to value, and that an investment in trade buildings, not having ascertained that they were at least worth twice the money invested, was a breach of trust. *Stretton v. Ashmall*, 3 Drew. 9; 24 L. J., Ch., 277; 3 W. R. 4.

4. The trustees of a settlement, having invested the settled funds on a mortgage security, which turned out insufficient, and it not appearing that they took due precaution to ascertain whether the security was sufficient, were ordered to pay into court the whole amount of the trust funds, taking upon themselves the security. By the decree in the court below they were declared liable to pay so much only as the mortgaged premises, when sold, should prove insufficient to answer. *Lockhart v. Reilly, Reilly v. Lockhart*, 3 W. R. 227; 25 L. J., Ch., 697.

5. By an ante-nuptial settlement a sum of stock was settled upon certain trusts for the benefit of the wife and children of the marriage. The settlement contained powers for the trustees to sell the trust fund, and reinvest the proceeds in Government or real securities. By a contemporaneous memorandum, which was executed by the father, the wife, and the intended husband, and indorsed upon the deed of settlement, the trustees were empowered to advance any portion of the trust fund to the owners or lessees of Vauxhall Gardens, upon mortgage, either as first, second, or third mortgagees, for such time and at such rate of interest as the trustees might think fit. The trustees lent the whole of the trust fund to three persons, who afterwards became the joint proprietors of, and partners in, Vauxhall Gardens; but no written security was then taken by the trustees. One of these proprietors of the gardens subsequently retired from the partnership. Some time afterwards the trustees obtained a covenant from the two remaining partners to surrender the Vauxhall Gardens by way of mortgage, subject to two prior charges. This mortgage eventually proving a wholly inadequate security for the

trust fund, a suit was instituted to compel the trustees to reinstate the stock:—Held, that under the circumstances the trustees must be considered, in having made the advance without security, and in having afterwards accepted the covenant of two only of the three joint-debtors, to have misapplied the trust fund, and that they had subjected themselves to the liability of replacing it. *Fowler v. Reynal*, 3 Macn. & G. 500; 21 L. J., N. S., Ch., 121; 15 Jur. 1019. Affirming 2 De G. & Sm. 749; 13 Jur. 649.

6. G. and H., trustees of a settlement, on the solicitation of D., the tenant for life of the settlement, lent the trust funds on a security which totally failed. G. was a solicitor, and in the transaction of the loan, no other solicitor was employed for the lenders, and no sufficient investigation of title was made:—Held, that the trustees were compellable to replace the trust fund. *French v. Graham*, 10 Ir. Ch. R. 522.

Held, also, that both being solvent, H. was bound to replace one moiety, and G. the other moiety, that G. was not entitled to be indemnified by the tenant for life, the onus of investigating the title having been cast upon him, but that H. was entitled to be recouped, by the tenant for life, the amount of his moiety. *Ib.*

7. If trustees lending money on mortgage have the same solicitor as the mortgagor, they must take the utmost precaution; if they trust implicitly in the solicitor, however high his reputation, they will be held responsible for any loss which his fraud may occasion. The indemnity clause usually inserted in settlements will not protect them. *Sutton v. Wilders*, 12 L. R., Eq., 373; 41 L. J., Ch., 30; 25 L. T. 292; 19 W. R. 1021.

5. *Shares of Public Companies.*

8. An investment in the shares or stock of a public company, which provides that the shares shall be registered in the name of a single person, is not a proper investment of trust funds. *Consterdine v. Consterdine*, 8 Jur., N. S., 906; 31 L. J., Ch., 807; 10 W. R. 727; 7 L. T., N. S., 122.

A testator gave his real and personal estate to three trustees, with power, in their "absolute discretion," when they should think fit, but not otherwise, to sell, and convert and invest upon certain securities or "upon the stocks, shares, securities," of any incorporated company paying a dividend:—Held, that the trustees were authorised to invest in railway stock bearing a fixed rate of interest, but that they ought not to allow part of the assets to remain on shares as invested by the testator himself, which, by the rules of the company, could only stand in the name of a single trustee. *S. C.* 31 Beav. 330.

Shares which, by the rules of a company, could only be held in the name of a single person, were bequeathed specifically to three trustees for A. for life, with remainder over:—Held, that they might lawfully be held in the name of a single trustee. *Ib.*

A power to trustees to invest in stock or shares of a public company, authorises the

purchase of shares or stock in an incorporated company bearing a fixed rate of interest. *Id.*

1. *Seamble*, trustees having power to invest in the shares of trading companies ought not to invest in the shares of any company whose articles of association provide that the company should have a paramount lien and charge upon all the shares of any shareholder for all moneys owing to the company from him, alone or jointly with any other person, and that when a share is held by more persons than one, the company should have a lien and charge thereon in respect of all moneys so owing to them from all or any of the holders thereof, alone or jointly with any other persons. *New London & Brazilian Bank v. Brookbank*, 21 L. R., Ch. D., 302; 51 L. J., Ch., 711.

2. A power to invest trust funds "upon the security of the funds of any company incorporated by Act of Parliament," does not warrant their investment in preference railway shares. *Harris v. Harris*, 29 Beav. 107; 7 Jur., N. S., 955; 9 W. R. 444.

3. A will authorised investments in "shares of any established railway in full operation":—Held, that investments in shares in railways within the United Kingdom, established by Act of Parliament, were authorised. *Edwards v. Thompson*, 38 L. J., Ch., 65.

4. Certain old shares in a bank being in the name of one of two trustees, he received a circular asking him whether he would take new shares in respect of such old shares. The *cestui que trust* (a married woman, tenant for life without power of anticipation) urged him to take them, and she sent to the bank the form filled up by him. In the suit a call as to the old shares was directed to be paid out of the estate, but as to call on the new shares:—Held, that he could not be indemnified. *Sheriff v. Butler*, 14 W. R. 629; 14 L. T., N. S., 510; 12 Jur., N. S., 329.

5. A testator had, at the time of his death, one hundred shares in a bank with unlimited liability. By his will he directed his trustees and executors to convert his personal estate at their sole discretion, and at such time or times as they should think fit, and to invest the proceeds in shares in any public company incorporated by Act of Parliament and paying a dividend. The shares, which were very profitable, were retained by the sole trustee, who, subsequently, accepted twenty-five additional new shares allotted in respect of the old ones. The trustee then retired, and appointed two new trustees. Ultimately the bank stopped payment:—Held, that the original trustee had not committed a breach of trust in retaining the old shares, but had done so in accepting the new ones, and was liable to indemnify the testator's estate for losses incurred thereby. *Edwards v. Edmunds*, 34 L. T., N. S., 522.

6. A testator by a will dated in August 1862 bequeathed his shares in a public company, and the rest of his estate, to the trustees to convert, "immediately after his death, or so soon thereafter as they might see fit to do so." Part of the estate consisted of thirty-six shares in an unlimited banking company. At his death the shares were at a premium, and considered a good and safe investment. Soon after his death the bank issued new shares, offering them to the original shareholders at

par. Nine were offered to the trustees in respect of the testator's shares, and being at a premium were purchased by them, though the trust for investment did not authorise investment in shares. The old and new shares were held together by the trustees until July 1866, when the bank broke:—Held, that the trustees should not have purchased the new shares, and should have sold the old shares in reasonable time after the testator's death; that reasonable time, in such case, if no cause is shown for delay, is a year after a testator's death; and that the trustees must replace not only the amount of the calls made upon all the forty-six shares and the purchase money of the shares purchased, but also the loss to the estate in respect of the shares having become valueless. *Scutthorpe v. Tipper*, 41 L. J., Ch., 266; 13 L. R., Eq., 232; 20 W. R. 276.

6. South Sea Stock.

7. A goldsmith, without any directions from the proprietors, subscribed lottery orders into the S. S. Company; he was held indemnified by the Act 6 Geo. 1, c. 4, s. 23, empowering all trustees, guardians, executors, etc., to make such subscriptions, and it would have been the same if the *cestui que trust* had forbidden him to subscribe. *Trenchard v. Wanley*, 2 P. W. 165. And in the next term, in *Weaver v. Fowler* (2 P. W. 170) *Ld. Macclesfield* made the same resolution.

8. Laying out trust money in S. S. stock where it subjects the trust to a loss, is not a good security, for the directors may trade away the whole stock whilst they keep within the terms of the charter; S. S. annuities and Bank annuities only, are proper and good security; for it is not in the power of the directors to bring any loss upon them. *Traf-ford v. Boehm*, 3 Atk. 444.

9. A., who his trustee for B. of 1,000*l.* S. S. stock, at the desire of B. borrows 4,000*l.* on this stock of the company, and B. receives the money; A. pays the 10 per cent. (under the 7 Geo. 1, sess. 2, sec. 7) to be discharged of the loan; though B. forbade the payment, yet he is liable. *Balsh v. Hyham*, 2 P. W. 453.

7. Other Securities.

10. *Seamble*, there is no impropriety in the temporary investment by trustees of trust money on a deposit note. *Wilkins v. Hogg*, 8 Jur., N. S., 25; 31 L. J., Ch., 41.

11. It is not necessarily a breach of trust, under a will directing trustees to invest in parliamentary stocks or funds, or on real securities, to continue in its actual state of investment part of the assets, consisting of turnpike bonds. *Robinson v. Robinson*, 1 De G. M. & G. 247; 21 L. J., N. S., Ch., 111; 16 Jur. 255. Reversing 11 Beav. 371; 18 L. J., N. S., Ch., 73; 12 Jur. 969.

A testator by his will gave his residuary personal estate to trustees upon trust, to get in the same, or to continue it, in or upon any of the parliamentary stocks, or on real securities, and to pay the interest and dividends thereof to his son for life, and after his decease to pay and transfer the stocks amongst

his son's children equally. A considerable part of the testator's estate, consisting of London dock and bank stock and sewers bonds, was allowed by the trustees (who were the testator's executors), to remain unconverted for several years after the testator's death, and eventually a loss accrued to the estate from the sale of the bank stock and sewers bonds, but a gain arose from a sale of the London dock stock; certain turnpike road bonds, part of the testator's residuary estate, were never converted by the trustees at all. The payment of the amount due on the sewers bonds was secured by the rates and assessments, which the commissioners were authorised by Act of Parliament to levy, and the payment of the amount due in respect of the turnpike road bonds was secured on the toll houses and tolls payable thereat:—Held, that neither the sewers bonds nor the road bonds were real securities within the meaning of the testator's will; that the loss which arose on the sale of the sewers bonds and bank stock could not be set off against the gain that arose from the sale of the London dock stock, and that the tenant for life was entitled to 3½ per cent. per annum and no more, which would have been the amount payable to him if the conversion had been made within one year from the testator's death. *S. C. 11 Beav. 371; 18 L. J., N. S., Ch. 73; 12 Jur. 969.*

1. Lands vested in trust out of receipts, etc., to make certain payments, and lay out surplus upon mortgage or Government securities, with a view to accumulation, with bequest of such accumulations. On petition, a real estate contiguous to testator's real estate was permitted to be purchased under the circumstances, and to be considered as personal estate. *Webb v. Shaftsbury (Lord)*, 6 Madd. 100.

2. There is a known established distinction in equity, between Government and real securities; "real" is a term adopted in the law, and must be understood to mean land securities only. *Att.-Gen. v. Bowles*, 3 Atk. 808.

XXIV. Breach of Trust and Remedies in Respect thereof.

See also EXECUTOR AND ADMINISTRATOR.

- I. *Liability of Trustees. In General*, 7033.
- II. *Negligence*, 7035.
- III. *Criminal Breach of Trust*, 7040.
- IV. *Improper Transfer or Sale of or Non-investment in Stock. Option of Cestui que Trust*, 7040.
- V. *Advances to Husband with Concurrence of Wife*, 7042.
- VI. *Following Trust Property into Investments and Liability of Purchaser with Notice*, 7044.
- VII. *Other Breaches of Trust*, 7054.
- VIII. *When it Amounts to a Speciality Debt*, 7056.
- IX. *Delay or Acquiescence. Effect*, 7058.
- X. *Remedy by Way of Injunction*, 7064.

- XI. *Other Remedies*, 7064.
- XII. *Inquiries. When Directed*, 7065.
- XIII. *Liability of Retiring or Deceased Trustees*. See XV. I. 2—XV. II. ante.
- XIV. *Indemnity Lien and Re-imbursement*. See XXVII. post.
- XV. *Release*. See XXVIII. post.
- XVI. *Account and Wifful Default*. See XXVI. post.
- XVII. *Liability for Interest or Profits*. See XXV. post.
- XVIII. *Proof in Bankruptcy for*. See BANKRUPTCY, XXIV. xxxvi. and XL. 6.
- XIX. *Breach of Trust by Trustees to Preserve Contingent Remainders*. See VESTED CONTINGENT AND FUTURE INTERESTS.
- XX. *Liability for Acts of Co-Trustees*. See XXI. ante.
- XXI. *Liability of Husband or Wife*. See HUSBAND AND WIFE.

I. LIABILITY OF TRUSTEE. IN GENERAL.

3. In charging trustees for breaches of trust and costs of suit, it is immaterial how the trust was created, and whether for valuable consideration, or by the voluntary gift of the trustees themselves. *Drosier v. Brereton*, 15 Beav. 221.

4. Trustee not to be charged with imaginary values, but only as a bailiff. *Palmer v. Jones*, 1 Vern. 144.

5. Trustee, investing money at his own discretion, runs risk of depreciation. *Hancom v. Allen*, Dick. 498.

6. Trustees investing trust money on an unauthorised security are responsible for any future loss, traceable to that first error. *Fylor v. Fylor*, 3 Beav. 550; 5 Jur. 187.

7. Trustees and their representatives chargeable in equity for a breach of trust, though no benefit derived from it. *Adair v. Sham*, 1 Sch. & Lef. 272.

8. A trustee is not answerable for an innocent mistake, and from which he derived no advantage; and a court of equity will grant a perpetual injunction to prevent any proceedings at law, grounded on such mistake. *Crookshanks v. Turner*, 7 Bro. P. C. 255.

9. Where trustees of a charity under an instrument of doubtful construction have acted honestly, though erroneously, they will not be charged in respect of past misapplication of the funds. *Att.-Gen. v. Exeter (Corporation)*, 2 Russ. 45.

10. Trustees not answerable for having applied the trust property, even to what turned out a losing adventure, if without fraud or negligence. *Wilkinson v. Stafford*, 1 Ves. J. 41.

Trustee not answerable for having engaged the infant's name in an adventure, if, afraid of the consequences, he does not engage the property. *Contra, Eden's case* in the House of Lords cited. *Ib.*

11. A trustee who acts *bonâ fide* and exercises an honest discretion in the performance of his duties, is not chargeable with any loss which may occur. *Selby v. Bowie*, 9 Jur., N. S., 432; 11 W. R. 606; 8 L. T., N. S., 372; 1 N. R. 420; 2 N. R. 2.

1. *Quere*, how far a trustee is bound by notice of claims not under the deed of settlement. *Re Croydon's Trust*, 19 L. J., N. S., Ch., 172; 14 Jur. 54.

2. Trustee of lunatic renewing lease for his own benefit, declared guilty of breach of trust, and discharged. *Exp. Phelps*, 9 Mod. 357.

3. A trustee in a recognisance releases it without any consideration; decreed to pay the principal and interest not exceeding the penalty. *Jevon v. Bush*, 1 Vern. 342.

4. Trustee charged in respect of a misrepresentation to a purchaser having notice, and alleging only that he did not recollect the fact. *Burrows v. Lock*, 10 Ves. 470.

5. A trustee is not in all cases to be made liable, upon the mere ground of having deviated from the strict letter of his trust, for such deviation may be necessary or beneficial to the interests of the *cestuis que trustent*, but when a trustee ventures to deviate from the letter of his trust, he does so under the obligation and at the peril of afterwards satisfying the Court that the deviation was necessary or beneficial. *Harrison v. Randall*, 9 Hare 397; 21 L. J., N. S., Ch., 294; 16 Jur. 72.

A trustee who, having good reason to doubt the validity of an appointment, thinks proper to act upon it, must be affected by the consequences which follow upon the act. *Id.* 407.

6. A lady who accepts a trust, although not formally appointed trustee, is accountable for moneys actually received by her as such trustee, and cannot plead ignorance of the trust. *Pearce v. Pearce*, 22 Beav. 248; 2 Jur., N. S., 843; 25 L. J., Ch., 893.

7. A trustee was held not liable for the non-performance of a trust of which he was ignorant, but inasmuch as he had been guilty of negligence in not ascertaining the nature of certain deeds in his possession, or giving his *cestuis que trustent* an opportunity of doing so, the bill against him was dismissed without costs. *Youde v. Cloud*, 22 W. R. 764; 18 L. R., Eq., 634; 44 L. J., Ch., 93.

8. A suggestion by the trustees of a fund, that the administrator of one of the *cestuis que trustent*, who in that character was entitled to a distributive share of the fund, has unfairly obtained the letters of administration under which he claimed such share, is no defence in this court to a claim of the administrator; nor is it a defence for trustees to suggest that a deed under which the plaintiff derives his title from the *cestuis que trustent* was founded on mistake, or is otherwise subject to be displaced, for it is contrary to the course of the Court to direct an inquiry as to the validity or invalidity of a deed upon a suggestion in the answer of the defendants, the trustees of the fund to which it relates, where the ascertainment of the validity or invalidity of the deed is not essential to the safety of the defendants; and the fact of a bill having been filed to set aside the deed under which the claim is made, or to exclude the fund in question from its operation, is not a ground upon which the trustees can resist the legal title to receive the fund, for the Court cannot give the plaintiff in such other suit the benefit of an injunction to protect the fund upon the suggestion in the answer of the trustees, but the existence of such other suit entitles the trustees to retain

such a portion of the trust fund as may be sufficient to answer their costs of such other suit. *Devey v. Thornton*, 9 Hare 22.

9. A husband and wife made a post-nuptial settlement of the wife's reversionary chose in action. The wife survived her husband, and it afterwards fell into possession. The wife having done no act to repudiate the settlement:—Held, in a suit to charge the trustees with a breach of trust, that it was no answer to say, that the settlement was void as against the *feme covert*. *Thompson v. Finch*, 22 Beav. 316.

A demand in respect of a breach of trust may be proved against the estate of an insolvent trustee. *Id.*

10. Under a power contained in a will to apply for A.'s advancement in life a portion of his reversionary share, B., the trustee, raised money by mortgage of the share, in order to pay A.'s apprentice premium to an apothecary. It was intended to apprentice A. to X., but it being discovered that X. was not a licensed apothecary, it was arranged by the solicitor acting in the matter that A. should be nominally apprenticed to Y., a licensed apothecary, but actually serve his time with X. The receipt for the whole amount was signed by Y., but only half was paid, and that to X., the remaining half being handed over to A.'s father, who gave Y. his promissory note for the amount, but never discharged the obligation. The purpose for which the money was raised having failed:—Held, that B., although not shown to have been guilty of more than negligence in following his solicitor's advice, was bound to bear the consequences of the mistake, and to replace the money borrowed on security of A.'s reversionary share. *Simpson v. Brown*, 13 W. R. 312; 11 L. T., N. S., 593.

11. In 1810 1,818*l.* consols and certain freehold estate was vested in trustees on the marriage of Mr. and Mrs. L., in trust for them successively for life, remainder to the children. In 1815 the trustees sold out the fund and lent it to L. on mortgage of his life interest in the freehold, on his bond and certain policies. One trustee died, and the survivor, having received back from L. the produce of the stock (1,115*l.*) eight days after, re-lent it to him upon no security, and it was lost; and the surviving trustee being out of the jurisdiction and the husband insolvent, upon a bill filed by the children to have the whole 1,818*l.* repaid from the estate of the deceased trustee, decree made with costs. *Semble*, it is no purging of an original breach of trust to do something different from that imposed by the deed creating the trust, even if the whole sum sold should have been replaced. *Lander v. Weston*, 4 W. R. 158; 3 Drew. 389; 25 L. J., Ch., 235; 2 Jur., N. S., 58.

12. As to liability of new trustees for breach of trust. See *Exp. Geaves*, *Re Strahan*, 8 De G. M. & G. 291; 2 Jur., N. S., 651; 25 L. J., Bk., 53; 4 W. R. 356.

13. E., who was named as trustee in a marriage settlement, never executed the deed; nor did he, for upwards of twenty years, interfere in carrying out the trusts thereof. Ultimately he signed a memorandum, indorsed upon the indenture of the settlement, relating to one particular portion of the trust property:—Held,

that in respect of the property comprised in such memorandum, he was liable to answer for the negligence of himself and his co-trustees; but that the mere signing the memorandum above stated did not operate to extend his liability, so as to make him answerable for the entire amount of property comprised in the settlement. *Malay v. Edge*, 4 W. R. 213; 2 Jur., N. S., 80.

II. NEGLIGENCE.

1. *Loss and Safe Custody of Trust Property*, 7035.
2. *As to Deeds*, 7035.
3. *In Calling in the Trust Property or Enforcing Covenants for its Payment*, 7035.
4. *Payment of Trust Moneys to Persons not Entitled*, 7039.
5. *Duty as to Insurance Policies and Premiums*. See EXECUTOR AND ADMINISTRATOR, X. VIII. 6—SETTLEMENT, V.
6. *In Execution of Powers of and Trusts for Sale*. See POWER, XXII.
7. *Duty to Renew Leases*. See XX. III. ante.

1. Loss and Safe Custody of Trust Property.

1. Trustees charged with loss occasioned by mere negligence, and costs follow of course. *Caffrey v. Darby*, 6 Ves. 488.

2. Unexplained loss of property by trustee or bailee attributed to negligence. *Brown v. Sewell*, 11 Hare 53; 17 Jur. 708; 22 L. J., Ch., 1063.

3. Defendant was trustee to plaintiff, an infant, and received for him 40*l.* in gold, of which he was robbed by his own domestic servant, together with 200*l.* of his own; Lord Chancellor allowed the trustee this 40*l.* on his own oath, for he was to keep it as his own. *Morley v. Morley*, 3 Ch. Ca. 2.

4. A decree having been made for a general account, and payment of a balance against a party who died, and his personal representative having delivered certain goods, part of the effects, to her own solicitor to be delivered over, is not answerable in the event of his being robbed of them. Tender of the goods not incumbent on her, she would not have been answerable if they had remained in her own possession till the accident. *Jones v. Lewis*, 2 Ves. 240.

Loss by Agents.] See XXII. ante.

Loss by Co-trustees.] See XXI. ante.

2. As to Deeds.

5. Where there is no imputation of breach of trust in trustee, suffering deed to get out of his possession, he need not be party to bill for its restitution. *Knye v. Moore*, 1 Sim. & S. 61. S. C. nom. — *v. Moseley*, 1 L. J., Ch., 18.

6. Negligence cannot be imputed to trustees for leaving documents of title in the hands of one of their number, and allowing him to receive the income, and no authority to deal with the property can be implied even in favour of a *bona fide* purchaser from such trustee. *Cottam v. Eastern Counties Railway Co.*, 1 John. & H. 243; 6 Jur., N. S., 1367; 9 W. R. 94; 3 L. T., N. S., 465; 30 L. J., Ch., 217.

Trust money was invested in railway debentures, payable to three trustees. The debentures were left in the hands of A., one of the trustees who was also allowed to receive the interest. A. forged the signatures of his co-trustees to a deed, purporting to be a transfer from the three, and delivered the debentures with the transfer to the purchasers, who paid full value to A., and had no notice of the forgery. They delivered the transfer to the railway company, who made an entry of it in their books, and the subsequent interest was paid by the company to the purchasers. On a bill filed by the other trustees after A. had been convicted of forgery:—Held, that the defence of purchaser for value without notice did not apply, and the debentures were ordered to be delivered up to the plaintiffs, and the transfer and entry thereof in the company's books cancelled. *Id.*

7. A trustee may, under special circumstances, be held responsible for the non-registration of the deed creating the trust. *Macnamara v. Carey*, 1 Ir. R., Eq., 9.

8. A testator died in 1810, in India, having bequeathed his English property to two infants, whom he acknowledged as his natural children; and having appointed his nephew, E., to be their guardian. Part of his property consisted of a bond, dated in 1810, in which he was obligee, the obligor being seised of real estate in Ireland. In 1811 E. obtained possession of the bond from the testator's executor; but he did not register it, nor did he ever take any steps towards realising the security. In 1821 the elder of the infants attained twenty-one; in 1832 she married; and in 1833, when the bond had become irrevocable, E., for the first time, informed the elder child and her husband of the existence of the bond; and upon finding it was then too late to register it, he handed it to the husband, directing him to see to it. No step was taken until E.'s death in 1870, after which, in 1871, a bill was filed, seeking to make E.'s estate liable as for a breach of trust. At this time the younger infant was dead, and had no legal personal representative; but his son, who was entitled to administer, was made a defendant. *Semble*, that E. was not at any time liable for any breach of trust. *Sleeman v. Wilson*, 13 L. R., Eq., 36.

9. A trustee was held not liable for the non-performance of a trust of which he was ignorant, but inasmuch as he had been guilty of negligence in not ascertaining the nature of certain deeds in his possession, or giving his *cestuis que trustent* an opportunity of doing so, the bill against him was dismissed without costs. *Youde v. Cloud*, 22 W. R. 764; 18 L. R., Eq., 634; 42 L. J., Ch., 93.

3. In Calling in the Trust Property or Enforcing Covenants for its Payment.

10. It being the duty of A., under the trusts of a settlement, to remit a sum of 1,000*l.* from India, to B., C., and D., in England, he permitted it to remain in the hands of private traders, in whose hands it was lost:—Held, that A. was responsible for it, though it had been properly invested by those parties, and

been sold out at the request of the *cestuis que trustent*, and the loss was occasioned by their subsequent bankruptcy, and the bankruptcy of their correspondents in London, on whom they had drawn bills for the amount. *Bacon v. Clark*, 3 Myl. & C. 294.

1. Trustees are liable for not taking proper steps to get the trust fund transferred into their names. *M'Gachen v. Den*, 15 Beav. 84.

2. Trustees charged with loss occasioned by mere negligence, and costs follow of course. *Caffrey v. Darby*, 6 Ves. 488.

3. In 1826 a debt due from a firm at Calcutta was assigned to trustees in England, in trust to call in and invest on Indian securities, and accumulate. The debtors became bankrupts in 1830, and the trustees not having, in the meantime, taken proper steps to call in the money, a considerable portion of the debt was lost:—Held, that they were liable for the breach of trust, and ought to make good the accumulation which would have been produced; secondly, that one of the trustees who had been abroad with his regiment during that period was equally liable; but, thirdly, that they were to be excused during such a reasonable time as was necessary in order to communicate between England and India. *Byrne v. Norcott*, 13 Beav. 336.

4. On a marriage two of the wife's debtors, one of them the bankrupt, were appointed trustees of a fund, to be made up of their several debts:—Held, that the debts not being got in and invested, each trustee was liable only for his own default. *Exp. Woodward, Re Turner*, 3 Mont. & A. 232; 2 Dea. 401; 6 L. J., N. S., Bky., 60; 1 Jur. 585.

5. By a marriage settlement, a trustee was required, immediately after the marriage, to compel payment of a sum of money secured by a covenant in the deed; he neglected to do so even when required to call it in, and allowed the interest to fall into arrear. He was held liable to pay the costs of a suit instituted to compel him to perform the trusts. *Kirby v. Mash*, 3 Y. & Coll. 295; 8 L. J., N. S., Exch. Eq., 33; 3 Jur. 221.

6. A., on his marriage with B., by his marriage settlement, covenanted with a trustee, that he would, on Martinmas Day 1824, pay 10,000*l.*, the trusts of which were to be for A. for life, with remainder to B. for life, with remainder to the children of the marriage, and in default of children, for the persons therein mentioned. A. died in 1836, without having performed the covenant. After A.'s death a suit was instituted by B. against the trustee, to make him personally liable for the non-performance of the covenant. A reference was made to the Master to inquire whether A. was of ability, after 1824, to pay the 10,000*l.*, or any part of it. It appeared that A. had for seven years after 1824, an income of 1,800*l.* a year, but that he had no other property than this income, and that he had always lived up to or exceeded his income. The Master found that A. was of ability during these seven years to have paid 4,200*l.* in part performance of the covenant. No exceptions were taken to the report. On the hearing of the cause on further directions:—Held, that the trustee was liable to pay 4,200*l.*, and that, had the report been excepted to, it would have been confirmed. *Mailland v. Bateman*, 13 L. J., N. S., Ch., 273;

8 Jur. 926. And see *Bateman v. Mailland*, 14 L. J., N. S., Ch., 383.

7. Trustees made personally responsible for the consequences of their neglect to enforce a covenant contained in a marriage settlement. By a marriage settlement it was covenanted and agreed that 5,000*l.* consols, part of the wife's property, should be transferred to trustees upon certain trusts for the husband, and wife, and children. At the time of the settlement a sum of 4,946*l.* was standing in the name of the wife, but the trustees took no steps to enforce a transfer, and it was sold out and misapplied by the husband:—Held, that the trustees were personally responsible for the loss; and, secondly, that they were not relieved from their liability by the trustee indemnity clause declaring that they shall not be liable "for any casual or involuntary loss without their wilful default; but for such moneys only as should actually come to their hands." *Fenwick v. Greenmoll*, 10 Beav. 412; 11 Jur. 620.

8. A marriage settlement, made in 1811, recited that the husband was entitled to 20,000 rupees, secured by a note of the East India Company, and 10,000 rupees, part thereof, were thereby assigned (with certain property of the wife) to the trustees of the settlement, upon trust for the husband and wife for their lives, with remainder for the children of the marriage. One of the trustees died six weeks after the settlement was made. The husband died in 1819, and the wife in 1822. The trustees did not, nor did the survivor, take any steps during the lifetime of the husband to recover the 10,000 rupees. After they had attained their ages of twenty-one years, the children filed a bill against the surviving trustee and the representatives of the deceased trustee for an account of trust funds, charging them with the 10,000 rupees. Under a reference to the Master to inquire whether the defendant might, by due diligence, have received or got in the 10,000 sicca rupees, the defendant produced evidence, showing it to have been the common belief of persons who knew the husband, that he was not possessed of any such property, but no proof was given that the husband was insolvent; and the Court charged the surviving trustee with the fund, and interest from the death of the wife, and directed a reference to inquire the value of the 10,000 rupees at the time of the settlement. *Simes v. Byre*, 6 Hare 137.

9. Testator bequeathed 500*l.* to his executors, upon trust that they should lay out and invest the same in the public funds, or in such other security or in such other manner as to them should seem expedient, at interest, and apply the produce to a charitable purpose. One of the executors, who took the entire management of the estate, paid the debts, and most of the legacies of the testator, but neither specifically appropriated nor invested 500*l.* for the charity. He paid interest, however, on 500*l.* to the charity; at the same time receiving interest on the promissory note of a debtor to the estate, who was in good credit, but whose debt was the only fund available for payment of the legacy. The executor afterwards died. On the admission, by his representatives, that he had, in his lifetime, assented to the payment of the legacy to him—

self as trustee:—Held, that his estate was severally answerable as for a breach of trust. *Att.-Gen. v. Higham*, 2 Y. & Coll. C. C. 634.

1. By a marriage settlement, a debt due from A. was assigned to A. and B., upon trust, with all convenient speed, to get in and invest in consols, for two and a half years. B. took no steps to get in the money, and A. then became bankrupt:—Held, that B. was responsible for the loss. *Grove v. Price*, 26 Beav. 193.

2. By settlement, dated in 1814, a legacy belonging to the intended wife was, with other property, vested in S. and R., upon trust to get in and invest, and pay the income to Mrs. E. for life, remainder as she should by will direct, remainder over, power being reserved to her to make a will. By her will, dated in 1829, she appointed the fund to her daughter for life (deceased), remainder to the plaintiffs, and made the defendants her executors, directing them to get in all the funds. In 1825 the balance unpaid of the legacy so settled had been transferred to new trustees of the settlement, and by them immediately sold out, and nothing more was ever known concerning such balance, or its application. In 1830 the defendants took out administration to the testatrix, with her will annexed (she not having power to appoint executors), limited to the balance of the legacy outstanding, and the accumulations thereof, if any. The defendants could not show that they had ever taken active or proper steps to inquire after the wasted fund, or to recover the same:—Held, that notwithstanding the lapse of time, and the irregularity of their succession as trustees, they would be clearly liable to make good the breach of trust (if any) committed in 1825. *Taylor v. Millington*, 4 Jur., N. S., 204.

But held, that by reason of a power contained in the settlement enabling the trustees to take and recoup themselves all costs out of the trust estate, and the fund wasted having been small, the plaintiffs had failed to establish a breach of trust. *Ib.*

3. A testator directed his estate to be accumulated until the death of the survivor of certain persons, and then to be divided among the children of his sister. By an order of the Court, 100*l.* a year out of the income of the estate was directed to be paid to one of those children, a lady, until the further order of the Court. By a marriage settlement the lady assigned to the trustees the whole of her share under the will of a testator, together with the accumulations, for herself for life, with remainder to her children. The 100*l.* a year was continued to be paid after marriage to her trustees, and by them allowed to be received and expended by the mother. The mother was living; and the estate had not yet become divisible under the will. Upon a bill by the children:—Held, that notwithstanding the order of the Court, the 100*l.* a year payable thereunder formed part of the funds comprised in the settlement, and ought to have been invested by the trustees, and they were ordered to make good the amount, subject to the right, as against the mother, to be recouped the amount out of her life interest in the fund. *Barratt v. Wyatt*, 8 Jur., N. S., 1045; 81 L. J., Ch., 652; 10 W. R. 454.

4. In a marriage settlement, dated in 1807, a recital was contained to the effect that a sum of stock had been transferred into the names of the trustees. The deed was executed by all parties. The stock never was transferred, and the person who ought to have transferred it became bankrupt in 1848. Both the trustees were dead. On bill filed in 1855, by a *cestui que trust* under the settlement, who came of age in 1839, to have the trust fund made good:—Held, that he was not too late, and the estates of the trustees declared to be jointly and severally liable to make good the fund. *Story v. Gape*, 2 Jur., N. S., 706.

5. In 1828 two trustees executed a marriage settlement, which recited that a sum of money (for which they also signed an indorsed receipt) had been paid to them as such trustees. The trustees had never in fact received the money, and by their neglect to do so it was ultimately lost. The trustees died, having left all their property upon trust for the payment of their debts:—Held, that a breach of trust had been committed, for which the estates of the deceased trustees were liable. *Westmoreland v. Holland*, 19 W. R. 302; 23 L. T., N. S., 797.

6. A marriage settlement executed in 1817, contained a covenant by the husband with a trustee to pay to the trustee within three years 3,000*l.*, to be held upon the usual trusts in favour of the husband and wife and the issue of the marriage, or else to secure that sum by mortgage. The money was neither paid nor secured, and the trustee never attempted to enforce the covenant, but acted as solicitor to the purchaser on a sale in 1846 by the covenantor for his own benefit of the property he had covenanted to mortgage. The trustee died in 1848; his sons had notice of the settlement in 1851. The covenantor became bankrupt in 1852, and applied to the widow and executrix of the trustee to prove for the 3,000*l.*, which she declined to do. Dividends of 11*s.* in the pound were declared in the bankruptcy, and new trustees of the settlement were appointed by the Court, whose proof was rejected as too late. The widow and executrix of the trustee died in 1865, and his sons entered into possession of his property as devisees and legatees under his will, but when cited to take out letters of administration to their father, they declined to do so. Upon a bill filed in 1867, by the widow and children of the covenantor and the new trustees, against the sons and administrator *ad litem* of the deceased trustee, in answer to which the sons admitted assets:—Held, first, that the sons having admitted assets, the administrator *ad litem* represented the deceased trustee sufficiently for the purposes of the suit. *Woodhouse v. Woodhouse*, 20 L. T., N. S., 209; 38 L. J., Ch., 481.

Held, secondly, that the rights of the plaintiffs were not barred by lapse of time, and that the sons were liable to make good the loss occasioned by the breach of trust to the extent of the assets of their father in their hands. *Ib.*

7. By a post-nuptial settlement dated in 1814, made in pursuance of an ante-nuptial agreement, after reciting that the husband had agreed to settle 1,000*l.* in manner thereafter mentioned, and to enter into the covenants thereafter contained, and reciting that this

sum had been paid to G., it was witnessed that G. covenanted with the settlor that he would hold that sum upon trust, with the approbation of the settlor, to invest it, in the joint names of the settlor and himself, either in the public funds or in Government or real securities, and would hold the trust funds and securities upon trust for the settlor and his wife during their respective lives, and after their death upon trust for the benefit of their children; and the settlor covenanted that he would at the expiration of twelve months pay to G. another sum of 1,000*l.* to be held by him upon the same trusts as the first sum. G. died in 1821, and the settlor, having survived his wife, died in 1868. Neither of the sums was really paid to G., or invested in the joint names of G. and the settlor:—Held, first, that the settlor had constituted himself a trustee of the first sum, and that his estate was liable for his breach of trust in not seeing that it was invested, notwithstanding the Statute of Limitations. *Stone v. Stone*, 5 L. R., Ch., 74; 39 L. J., Ch., 196; 22 L. T., N. S., 182.

1. A trustee, who had no actual knowledge of his right to real property, suffered an adverse title to be acquired by lapse of time. A bill to make him accountable was dismissed. But the chirograph of a fine relating to the title having come to the trustee's hands, without the deed leading the uses, such dismissal was without costs. *Youde v. Cloud*, 44 L. J., Ch., 93; 22 W. R. 764; 18 L. R., Eq., 634.

2. A fund to which under the will of C. M. his widow was entitled for life, with remainder to her children, was left in the hands of her son Sir W. M., under an agreement, in which the children concurred, that he should be at liberty to use it in his business till the widow, Sir W. M., and R. (the trustees of C. M.'s will) should deem it advantageous to call it in and invest it. One of the children married Mr. P., and her share in the fund was settled so as to give her children an interest in it. R., who had no notice of this settlement, was repeatedly called upon by P. to take steps to call in the fund, but declined to do so. On a suit by P. and his infant children, after Mrs. P.'s death, seeking to make R. liable on the footing of wilful neglect and default for not having called in the fund:—Held, on appeal, that as a discretion was expressly given to the trustees, R. was not liable for any loss, as he appeared to have acted honestly to the best of his judgment in declining to call in the fund:—Held, further, that whether R. could or could not have been made a trustee for the infants by notice of the settlement, as he had no such notice he was not to be treated as having been a trustee for them, and they could not make him liable for anything for which P. could not; that P. could not complain of a trustee for not getting in a fund recoverable only in equity, and for which he might himself have sued; and that therefore the infants could not complain on that ground. *Paddon v. Richardson*, 1 Jur., N. S., 1192; 7 De G. M. & G. 563; 3 Eq. Rep. 933.

3. By deed made on the marriage of A. and B., C., the father of B., settled 1,000*l.* upon A. and B. and their issue, which sum was recited as having been paid to the trustees, and covenanted to pay another 1,000*l.* upon

his decease, upon the same trusts. Shortly before C.'s death, he, by deed, gave to other trustees 5,000*l.* upon trusts nearly identical with the trusts of the settlement for A. and B. and their issue; and by his will, of the same date, he declared that what he had given to B. should be taken in full satisfaction and discharge of all claims and demands upon him in any right or manner whatsoever. The trustees of the settlement never received the 1,000*l.* under the covenant of C., and C.'s estate had long been administered. Bill by one of the children of A. and B. against the representative of one of the trustees of the settlement, claiming a portion of the two sums of 1,000*l.* and 1,000*l.* Defence, that the trustees never received either 1,000*l.*, and that the 5,000*l.* was in satisfaction:—Held (reversing 2 Jur., N. S., 1158; 5 W. R. 39), first, that the 5,000*l.* was to be taken in satisfaction of the 1,000*l.* covenanted to be paid. *Davis v. Chambers*, 3 Jur., N. S., 297; 5 W. R. 245; 7 De G. M. & G. 386.

Held, secondly, that although *prima facie* the recital in the settlement of payment to trustees is the strongest possible evidence to charge them, yet that the circumstances of this case negatived the receipt by the trustees. *Id.*

4. A testator died in 1810 in India, having bequeathed his English property to two infants, whom he acknowledged as his natural children; and having appointed his nephew, E., to be their guardian. Part of his property consisted of a bond, dated in 1810, in which he was obligee, the obligor being seised of real estate in Ireland. In 1811 E. obtained possession of the bond from the testator's executor; but he did not register it, nor did he ever take any steps towards realising the security. In 1821 the elder of the infants attained twenty-one; in 1832 she married; and in 1833, when the bond had become irrevocable, E., for the first time, informed the elder child and her husband of the existence of the bond; and upon finding it was then too late to register it, he handed it to the husband, directing him to see to it. No step was taken until E.'s death in 1870, after which, in 1871, a bill was filed, seeking to make E.'s estate liable as for a breach of trust. At this time the younger infant was dead, and had no legal personal representative; but his son, who was entitled to administer, was made a defendant. *Semble*, that E. was not at any time liable for any breach of trust. *Sleeman v. Wilson*, 13 L. R., Eq., 36.

Held, that the parties, by acquiescing for thirty-eight years, and waiting till E.'s death, had lost their right to make any claim against his estate. *Id.*

5. B., by his marriage settlement (1858), covenanted with the trustees, W. and another, for the payment six months after his death of 500*l.*, to be held by them in trust for his wife and issue of the marriage. By a separation deed (1859) to which W. was a party, but not as trustee of the settlement, S. covenanted with B. that she would immediately pay the settlement trustees 500*l.*, to be held on B.'s death in substitution for the 500*l.* under B.'s covenant, and in exoneration of his estate, and in the meantime on trusts for the wife and issue. The consideration for S.'s covenant moved entirely from B. S. died in 1868 without

having paid the 500*l.*, leaving all her estate in trust for the wife for life and her issue. W. was her trustee and executor. The whole of S.'s estate consisted of certain bank shares. W. did not transfer the shares from S.'s name, but allowed the wife to receive the dividends. W. died in October 1877, and C. and P. were in April 1878 appointed trustees of S.'s will and of the settlement. The share certificates were handed to C. and P., who had constructive notice of the separation deed. The shares remained in S.'s name, the wife still receiving the dividends until December 1879, when the bank stopped, and the whole of S.'s estate was lost. B. having died in February 1878, the 500*l.* under his covenant became due in August 1878:—Held, that W. or C. and P., as trustees of the settlement, even if competent (which question the Court declined to decide), were never under any obligation to enforce the covenant of S. with B. *Re Baker, Collins v. Rhodes, Re Seaman, Rhodes v. Wish*, 44 L. T. 414. Reversed 20 L. R., Ch. D., 2350; 51 L. J., Ch., 315; 45 L. T. 658; 30 W. R. 858.

Held, also, that C. and P., being trustees for the beneficiaries under S.'s will, would not have been justified in paying out of her estate the 500*l.* due on her covenant. *Ib.*

Held, also, (1) that S.'s executors had not actively committed a devastavit of her estate, as against B.'s executors, as to the capital of the shares; (2) that the negligence of B. and his executors in not enforcing S.'s covenant was a sufficient answer to any claim by B.'s executors against S.'s executors charging them with devastavit by negligence as to the capital of the shares or the dividends, and also to any claim by B.'s executors that his estate, on paying the 500*l.* under his covenant, should be recouped out of his wife's interest. *Ib.*

1. Certain gas shares were settled upon trust for a woman for life, then for her husband for life, and then for her children. New shares were allotted in respect of the original shares, and the husband, without the interference of the trustee, obtained possession of the old and new shares, paid calls on the new shares, and disposed of all the shares. He then became bankrupt:—Held, that the trustee was only liable to make good to the estate the value of the shares less the amount paid for calls. *Briggs v. Massey*, 51 L. J., Ch., 447; 46 L. T. 354; 30 W. R. 325. Reversing 50 L. J., Ch., 747; 45 L. T. 139; 29 W. R. 926.

Prepayments. 2. Testator directed his trustees, at the expiration of three years after his death, to pay 10,000*l.* (which he charged on an estate devised to his son, one of the trustees) to his daughter's husband, on condition that he should, to the satisfaction of the trustees, give to them the best and most sufficient security in his power, so that the 10,000*l.* might be effectually secured to them upon certain trusts, for the testator's daughter and her children. The son paid the money to the husband before the expiration of the three years, and the trustees took a bond for securing it:—Held, they were justified in anticipating the time of payment, but not in taking the bond. *Mills v. Osborne*, 7 Sim. 30.

3. A. upon the marriage of his daughter, executed his bond and warrant to the trustees of the settlement, who were to hold it upon

trust, *inter alia*, that in case the wife should die during the life of her husband, leaving no issue of the marriage her surviving, or leaving such they should all die under twenty-one, the money secured by the bond should not be called in, but the bond should be given up to A., his heirs, executors, and administrators, to be cancelled. The money was not to be called in during his life:—Held, that the trustees of settlement were bound to accept payment of the money secured by the bond from the executor of A., though the husband and wife objected to its being paid in. *Kempland v. Humphries*, 2 Jones 726.

4. Where a fund is vested by a settlement in trustees for A. for life and over, and the reversion has been subsequently settled, the person entitled to the life interest and the trustees of the subsequent settlement are entitled to call for a transfer of the trust fund, and can give the original trustees an effectual discharge although the settlement does not provide for a transfer of payment by anticipation. *Anson v. Potter*, 13 L. R., Ch. D., 141; 41 L. T. 582.

4. Payment of Trust Moneys to Persons not Entitled.

5. Trustees who, without sufficient cause, doubted the identity of their *cestui que trust*, and, in breach of trust, paid over the trust fund to others, were ordered to make good the same, and pay the costs and interest at 5 per cent., the accounts to be taken with rests. *Hutchins v. Hutchins*, 15 Jur. 869.

6. Trustees who paid over a trust fund to wrong persons, trusting to a marriage certificate which turned out to be a forgery, made responsible for so much of the fund as could not be recovered from those who had wrongfully received it. In a suit by the persons beneficially interested, to make good the moneys, with interest from the date of the wrongful payment, and the father of the recipients, who had sent the forged certificate of his marriage to the trustees, was also made responsible for the money. *Eaves v. Hickson*, 30 Beav. 136; 5 L. T., N. S., 598; 7 Jur., N. S., 1297; 10 W. R. 29.

7. A wife was entitled in remainder to a share of moneys in the hands of a trustee. She deserted her husband, and married another man. The trustee, relying upon her representations that she was legally married, advanced a portion of her reversionary share to the bigamous husband. The fund having fallen into possession:—Held, that the trustee was answerable to the husband for the money which he had so advanced. *Sporle v. Barnaby*, 10 Jur., N. S., 1142; 13 W. R. 151; 11 L. T., N. S., 412.

8. Payment by a trustee to an infant *cestui que trust*, nineteen years of age, on the false representation by herself and her parents, that she had attained the age of twenty-one, held to be a discharge to the trustee for the sum so paid. *Overton v. Banister*, 3 Hare 503; 8 Jur. 906.

9. *Quare*, whether a trustee, having prepared a deed of appointment under a power, but not knowing of the execution of it, shall be held to have had such notice so as to affect

him in respect of his payment of the money to the legatee of the person who had the power under a subsequent will. *Cothay v. Sydenham*, 2 Bro. C. C. 391.

1. A trustee for a married woman, having received notice of a charge executed by her, was held personally liable for payments afterwards made to her; and that notwithstanding the validity of the charge was disputed by her, and no application had been made for an injunction. *Hodgson v. Hodgson*, 2 Keen 704; 7 L. J., N. S., Ch., 5.

2. If a trustee for payment of children's portions, pays one his full share, and the trust estate decays, he shall not be allowed it. *Tilsly v. Throckmorton*, 2 Ch. Ca. 132.

3. N. A. made a will, with certain trusts relating to his real and personal estate, and appointed trustees to carry them into execution. One of these trusts was for the payment of a legacy of 2,500*l.* as a portion to an eldest daughter. R. A. B., the father of this legatee, was one of the executors and trustees under the will. An Act of Parliament was obtained to carry some of the trusts of this will into execution; and under this Act, lands devised by N. A. were sold. The trustee under the Act was W. L. On a bill filed against him by the legatee of the 2,500*l.*, he sought to take advantage of the payment by him of that sum to R. A. B.:—Held, that R. A. B.'s receipt was no discharge of W. L.'s liability, as, by the terms of the Act, he was absolutely bound to pay the debts and discharge the children's portions; and it was not set up in the answer, nor proved, that R. A. B. had specifically received this money as trustee for his daughter. *Lawrence v. Blake*, 8 Cl. & F. 504; 6 Jur. 427.

4. A trustee or apparent trustee for A., who was in possession of an estate, was also committee of B., a lunatic who claimed the estate, and the trustee was properly aware of the claim. On a bill filed to recover the estate for B., it was decided that the estate was his:—Held, that the trustee was liable to B. for the rents received by him and paid to A. *Wright v. Chard*, 4 Drew. 673. Affirmed 6 Jur., N. S., 476; 29 L. J., Ch., 415; 8 W. R. 334; 2 L. T., N. S., 104.

5. The trustee of the will, who, acting on the opinions of counsel, had distributed the whole estate according to a different view, was ordered to pay to the representatives of the child the amount of the child's share and the costs of the suit. *Boulton v. Beard*, 3 De G. M. & G. 608.

6. A testator directed his trustees and executors to settle 4,000*l.* consols upon his daughter E. in case of her marriage; he also gave her upon the death of his widow one-third of his residuary estate, which was subsequently represented by 2,633*l.* 6*s.* 8*d.* stock. E., upon her marriage, in 1847, settled this fund. In 1859 the widow died. In December 1859 the trustees of the will executed a settlement of the 4,000*l.* consols, constituting P. and M. trustees of that fund, which was duly transferred to them. Shortly afterwards P. and M. were also appointed trustees of the settlement of 1847. In March 1860 the trustees of the will sold the 2,633*l.* 6*s.* 8*d.* stock, and paid the proceeds to P. without any authority from M. Shortly afterwards P.,

under a power of attorney from M., sold the 4,000*l.* consols, and received the proceeds. P. invested a portion of each of the funds received, but he retained the balances in his hands, and ultimately became bankrupt. Upon a bill, by E. and her children, against the trustees of the will, and against P. and M., charging breach of trust in respect of both funds, and deficiency in the investments to answer them, and seeking to make the former liable in respect of the payment to P. alone:—Held, that the trustees of the will were liable at the suit of the plaintiffs in respect of the irregular payment to P.; and that, having regard to the blended condition of the trust funds and the necessity of ascertaining how much of each fund was in a proper state of investment, the suit was not multifarious. *Margetts v. Perks*, 34 L. J., Ch., 109.

III. CRIMINAL BREACH OF TRUST.

7. The Court sanctioned criminal proceedings under s. 13 of the 20 & 21 Vict., c. 54 (similar to the 24 & 25 Vict., c. 96, s. 80), upon an affidavit that a trustee had paid 1,409*l.* into his own bankers, had drawn out the whole with the exception of 28*l.*, and had paid a private debt of 150*l.* out of the trust fund. *Wadham v. Rigg*, 1 Dr. & Sm. 216.

IV. IMPROPER TRANSFER OR SALE OF OR NON-INVESTMENT IN STOCK. OPTION OF CESTUI QUE TRUST.

1. *Transfer or Sale*, 7040.
2. *Non-Investment*, 7041.

1. Transfer or Sale.

8. Trustee, mistaking his power, sold stock without authority; decreed to replace it immediately: if at a less price, to invest the surplus in the same stock to the same uses. *Powlett (Earl) v. Herbert*, 1 Ves. J. 297.

9. Trustee of stock sells it; the *cestui que trust* has an option to have the stock or the produce, with interest. *Forrest v. Elmes*, 4 Ves. 497.

10. Executor and trustee having been guilty of a breach of trust, by selling out stock and dealing improperly with the money, the *cestuis que trustent* have an option to have the stock replaced, or the money produced by the sales, with interest at 5 per cent. or more, if more has been made by it, and the costs occasioned by his misconduct. *Pocock v. Reddington*, 5 Ves. 794.

11. If a trustee of stock transfer, *cestui que trust* may elect to have it replaced, or to have the money for which the stock sold. *Harrison v. Harrison*, 2 Atk. 121.

12. Trustee selling out stock, which was the trust fund, without corrupt motive, decreed to replace the stock with costs of so much of the suit as was occasioned by his act; but no option given to the *cestui que trust* to have the money produced by the sale invested, as there would if the trustee made anything, or sought to make anything, by the sale. *O'Brien v. O'Brien*, 1 Moll. 533.

1. Where bankrupt trustee has sold out stock, the *cestui que trust* may either prove for the price or for the value at the time of the bankruptcy. *Exp. Gurner, Re Iveson*, 1 M. D. & De G. 497.

2. Where a trustee, at the request of the *cestui que trust*, a married woman and tenant for life of the fund for her separate use, sold out the trust fund, and invested it on an improper security:—Held, in a suit by such tenant for life against the trustees, to have the trust fund replaced in a proper state of investment, that no costs ought to be given as between the plaintiff and the defendant on either side; held, also, that the costs of the parties, entitled in remainder, were to be paid by the plaintiff. Where a trustee, at the instance of a *cestui que trust*, a married woman, sold out stock, and placed the trust fund in an improper state of investment; he was charged only with the amount of the dividends which would have accrued due on the trust fund had it remained in its original investment. Where the trusts are to invest in any of the public stocks or funds, or on real securities, railway debentures, though real securities, are not real securities within the terms of the trust. *Mant v. Leith*, 21 L. J., N. S., Ch., 719; 16 Jur. 802; 15 Beav. 524.

3. Where trustees, having power to invest on Government or real security, and vary such investment from time to time, sold out stock for the purpose of investing the produce of the stock in a mortgage, which they were not justified in taking, it was held, that the Court could not treat the sale of the stock as lawful, and the investment as unlawful, so as to satisfy the trust by replacing the money; but that the whole must be treated as one unjustifiable transaction, and that the trustees must replace the stock. *Phillipson v. Gatty*, 2 H. & Tw. 459. Affirming 7 Hare 516; 13 Jur. 818.

4. A trustee properly invested trust money in Exchequer bills, but he kept them in the hands of a broker; upon a misapplication of them by the broker:—Held, that the trustee was personally liable for the value of the Exchequer bills at the time of the loss, and not for the stock the money would have purchased. *Mathews v. Brise*, 6 Beav. 239; 12 L. J., N. S., Ch., 263. Affirming 15 L. J., N. S., Ch., 39; 10 Jur. 105.

5. A trust fund is created by will to be laid out in the purchase of lands; an estate is purchased, and the trust money is laid out in repairs and improvements; this is a misapplication, and shall not be allowed: part of the trust money was sold out just before the dividend was payable; no allowance can be made to the tenant for life, who would be entitled to the dividend in the price: where a trustee sells out trust money, the *cestui que trust* may elect whether he will have it replaced, or be paid the produce of it. *Bostock v. Blakeney*, 2 Bro. C. C. 653.

2. Non-Investment.

6. Where there is a falling off of stock, without the neglect of trustee, he is not liable to make good the deficiency, but is answerable only as far as the value, especially where it

was specific stock. *Jackson v. Jackson*, 1 Atk. 513.

7. Where a person, executor and trustee of legacy to be laid out in stock, has fully administered estate and assented to legacy, and retains legacy in his hands not as assets but as trustee, he is liable for breach of trust, and ordered to purchase stock at price of the time when he was first able to invest it. *Byrnhall v. Bradford*, 6 Madd. 235.

8. Where trustees may invest in stock or on real security, and they lend on personal security, they shall be answerable for the principal money only, and not for the value of the stock which might have been purchased. *Marsh v. Hunter*, 6 Madd. 295.

9. A trustee, who was directed by the will of the testator to invest the residue in consols, and to accumulate the dividends, invested it on mortgage of real estate; he was held liable to make good the amount of stock which would have been purchased in consols, together with the amount of accumulation which would have been produced by a proper investment of the dividends of such stock. *Pride v. Fooks*, 2 Beav. 480; 9 L. J., N. S., Ch., 234; 4 Jur. 213.

10. The testator directed his trustees to invest the residue of his personal estate in Government or real securities. Some of the *cestuis que trustent* and one of the trustees permitted the trust moneys to remain in the hands of the other trustee at interest:—Held, that, inasmuch as no investment was made, the trustees were chargeable with the whole amount of the trust funds possessed by them, with interest, but were not answerable for the amount of consols or any other particular security in which they might, according to the directions of the will, have invested the trust moneys. *Shepherd v. Moulds*, 4 Hare 500; 14 L. J., N. S., Ch., 366; 9 Jur. 506.

11. If trustees are directed to invest trust money on Government or real securities, and they do neither, they are answerable, at the option of the *cestuis que trustent*, either for the money or the stock which might have been purchased therewith. Husband and wife had a power to sell real estates, with the consent of the trustees; the moneys were, with all convenient speed, to be laid out in the purchase of other lands; and, until a convenient purchase could be effected, it was made lawful for the trustees, with consent of the husband and wife, to invest the money in government or real securities. A sale took place in 1811, and in 1816 the produce was lent by the trustees on personal security:—Held, that the trustees were liable for the stock which the money would have produced in 1816:—Held, also, that the trustees ought not to have consented to a sale without first providing the means of investing the purchase money. *Watts v. Girdlestone*, 6 Beav. 188; 12 L. J., N. S., Ch., 363; 7 Jur. 501.

12. A trustee having, under a settlement, a power of sale, with a trust for interim investments in the funds or on real security, concurred in a sale, and permitted the tenant for life to receive the purchase money, which was not invested according to the trust:—Held, that the *cestui que trust* has not the option of requiring the trustee to replace the purchase money with interest, or to buy such a sum of stock as the proceeds of the sale would have

purchased, if invested at the time. *Rees v. Williams*, 1 De G. & Sm. 314.

1. Where a trustee neglects to invest on real or Government securities according to the trust, the *cestui que trust* has the right of selecting whether the trustee shall be answerable for the money or for the stock. A trustee, having the option of investing on mortgage or Government security, improperly took an insufficient mortgage security. Being held answerable, the Court decided that, having exercised his discretion, though improperly, he was answerable for the money lost, and not for the stock it might have produced. *Ames v. Parkinson*, 7 Beav. 379.

2. Trustees, authorised to lay out trust money in the public funds or on mortgage, invested it on a mortgage. The mortgage was paid off, and the amount was received by the tenant for life, who, contrary to the trusts, invested it in real estate:—Held, that the *cestuis que trustent* had the option of charging the tenant for life, either with the sum sterling received, or with the amount of 3 per cents. which might have been purchased therewith at the time the breach of trust was committed. *Ouseley v. Anstruther*, 10 Beav. 456.

3. Where a testator directs his trustees to invest trust moneys in Parliamentary stocks or funds, or on real securities, and they omit so to invest it, the *cestuis que trustent* have not the option of charging them with the moneys which could have been produced if the moneys had been invested in the funds, but are only entitled to have the trust moneys replaced, with interest at 4 per cent. *Robinson v. Robinson*, 1 De G. Macn. & G. 247; 21 L. J., N. S., Ch., 111; 16 Jur. 255. Reversing 11 Beav. 371; L. J., N. S., Ch., 73; 12 Jur. 969.

4. A trustee, by omitting to invest a sum of money sufficient to pay an annuity of 100*l.* a year to a party for life, is liable, when the parties in remainder become entitled to the fund, to make good any rise in the stock, assuming it had been purchased, and although the principal directed to be invested was paid, and a release obtained, still it was set aside, and the difference in value was directed to be paid to the *cestuis que trustent*, who were illiterate and ignorant of their rights. *Aspland v. Watte*, 25 L. J., Ch., 53; 3 W. R. 526.

5. A trustee, with power to invest in consols or on real security, who makes an improper investment, has the option of replacing either the actual sum misapplied with interest at 4*l.* per cent. per annum, or the sum which would have been produced by an investment in consols. *Fisher v. Glavin*, 38 L. J., Ch., 230.

6. A testator gave the residue of his personal estate to trustees, directing them to convert it into money and invest the proceeds in Government or real security, of which they were to stand possessed upon trust for A. during her life; and afterwards for B. The trustees permitted a share which the testator had in an Indian loan, bearing interest at 10 per cent., to remain for several years on that security, during which time they paid to A. the interest at 10 per cent. which it yielded annually; and the loan being afterwards paid off, they invested the money in the 3 per cents. at a time when the funds were so low that the amount of stock purchased was considerably

greater than if the conversion had taken place at the end of a year from the testator's death:—Held, that the tenant for life was not entitled to the actual interest which the money yielded while it remained on the Indian security, but only to the dividends of so much 3 per cent. stock as would have been purchased with it at the end of a year from the testator's death; and that the trustees ought to be charged with the whole of the stock actually purchased, and all sums allowed in their discharge as payments to the tenant for life; not the sums which they had in fact paid her, but only a sum equal to what she would have received for dividends, if the money had been transferred from the Indian security, and invested in the 3 per cent. stock at the end of a year from the testator's death. *Dimes v. Scott*, 4 Russ. 195.

V. ADVANCES TO HUSBAND WITH CONCURRENCE OF WIFE.

1. *Liability of Trustees*, 7042.
2. *Recouping the Trustees*, 7043.
3. *Where Empress Power to Advance or Invest with Consent of Wife*. See XXIII. iv. ante.

1. Liability of Trustees.

7. Stock was settled on a wife, for her separate use, for life, with a power of appointment by will. The trustees, at the requests of husband and wife, sold out the stock, and paid the proceeds to the husband, who afterwards became bankrupt. The wife filed a bill to compel the trustees to replace the stock, and obtained a decree under which the trustees transferred part of the stock into court, and they were allowed time to transfer the remainder. The wife died, having by her will appointed the stock to her husband, and appointed him her executor. He filed a bill of revivor and supplement against the trustees and his assignees, claiming the stock under the appointment, and praying the same relief as his wife might have had. But as he had received the proceeds of the stock sold out, his bill was dismissed. *Nail v. Punter*, 5 Sim. 565.

8. By settlement before marriage, it was agreed, that 2,000*l.* in the hands of a trustee should be laid out in land, and settled on the husband for life; then to the wife for life, for her jointure, and to the children equally; and in default of issue, then to the wife in fee. The husband and wife being necessitous, the trustee paid them 600*l.* on a release and their joint bond of indemnity, and afterwards 400*l.* in the same manner, with a new agreement that the remaining 1,000*l.* should be laid out in an annuity, for the separate use of the wife, during coverture, and in fee in case of survivorship. The trustee afterwards paid the husband the remaining 1,000*l.*, and then he died, leaving his wife destitute. Upon a bill by the wife against the trustee's representative, upon this breach of trust, and to be paid what shall be due to her for the 2,000*l.*, the parties, on the recommendation of the Lord Chancellor, agreed to pay the

wife 100*l.* per annum for life, tax free, together with the costs, which was ordered accordingly. *Thayer v. Gould*, 1 Atk. 615.

1. Where trustees under marriage settlement lend wife's money to husband with her consent, and husband becomes bankrupt, they cannot, on behalf of wife, prove for interest of money, but only for the principal, she having been supported by husband since marriage upon the principles applicable to wife's pin-money. *Semble, scous*, if they prove, to save themselves from consequences of their own act, her consent not having been given. *Exp. Green*, 2 Dea. & Ch. 113; 2 L. J., N. S., Bk^y., 2.

2. Where a testatrix gave a sum in stock to a feme covert, to be transferred into her name, the dividends to be for her sole and separate use, the principal remaining in the executor's hands until her youngest child attained twenty-one, when it was to become her own, or in case of her demise to devolve to her husband. The trustees transferred the stock into her own name alone, and she with her husband sold it out, and both signed the transfer:—Held, to constitute a breach of trust, and the trustees ordered to bring the fund into court, but that the wife had made a valid disposition of the dividends to accrue until the youngest child, born after the death of the testatrix, attained twenty-one. *Crosby v. Church*, 3 Beav. 485; 10 L. J., N. S., Ch., 212; 5 Jur. 50.

3. In his marriage settlement, a husband covenanted that any after-acquired property, exceeding 200*l.*, should be settled in the same manner as certain sums therein mentioned. The husband, as next-of-kin, became, in 1848, entitled to a sum exceeding the above amount, and he induced the administrator, who had notice of the trust, to pay the whole to him, the wife consenting, and signing a memorandum at the time. The husband died in January 1862, and in December following the surviving trustee of the settlement, in conjunction with the widow, filed a bill for a declaration that the estate of the administrator (he having died in 1853) was, in the hands of his representative, liable to make good the sum paid to the husband; and the Court held that the widow was entitled to have raised out of the real estate of the administrator (his personal estate having been fully administered) a sum sufficient to provide her an annuity equal to the interest of the misapplied fund; and that the right of the trustee of the settlement to sue was not barred by the Statute of Limitations. *Cresswell v. Demell*, 10 Jur., N. S., 354.

4. Settlement upon marriage, of stock, the property of the wife, in trust from time to time to receive the dividends, and pay them into the hands of the wife for her sole and separate use, her receipt to be a discharge; after her decease, if the husband should survive, for him for life; and after the decease of the survivor, to transfer the principal among the children, according to her appointment by will; in default thereof, equally; if no children, according to her appointment by will. The trustees, with the privity of the wife, sold the stock, and paid the money to the husband, taking his bond of indemnity; he died insolvent. Upon the bill of the widow and children, the fund, having been replaced

by the trustees, was transferred to the account-general, upon the trusts of the settlement to trustees, to pay the dividends to the widow, from the death of the husband, with costs. *Whistler v. Newman*, 4 Ves. 129. See, as to the authority of this case, 5 Ves. 17. n. and 694. n.

5. A sum of money charged upon lands was, by a marriage settlement, assigned to trustees, to pay the interest to A., the husband, for his life, and after his death to pay the wife a jointure of 200*l.* a year; provided that it should be lawful for A., with the consent of the trustees, in writing, to call in the fund, and lay out and dispose of the same in the purchase of an estate of inheritance or freehold, for a term of at least three lives, or of a lease for a term of years, whereof ninety-nine years shall be unexpired, or otherwise advantageously, which purchase or disposal, when so made, should be settled and vested to the several uses, trusts, intents, and purposes thereinbefore mentioned in respect to the said sums. A portion of the fund was paid to the surviving trustee, who lent it to A., on a release being executed by A. and the wife B. and C. their son, and acknowledged by her:—Held, after the death of A., in a suit by B. to replace the trust fund, that the release as to her was inoperative. *Smithwick v. Smithwick*, 12 Ir. Ch. R. 181.

2. Recouping the Trustees.

6. Stock was settled on a wife, for her separate use, for life, with a power of appointment by will. The trustees, at the request of the husband and wife, sold out the stock, and paid the proceeds to the husband, who afterwards became bankrupt. The wife filed a bill to compel the trustees to replace the stock, and obtained a decree, under which the trustees transferred part of the stock into court, and they were allowed time to transfer the remainder. The wife died, having, by her will, appointed the stock to her husband, and appointed him her executor. He filed a bill of revivor and supplement against the trustees and his assignees, claiming the stock under the appointment, and praying the same relief as his wife might have had; but, as he had received the proceeds of the stock sold out, his bill was dismissed. *Nail v. Punter*, 5 Sim. 555.

7. A money fund belonging to the wife was vested in trustees, upon trust to pay the interest to the husband for his life, or until he should take the benefit of any Act for the relief of insolvent debtors; and, after his decease, or obtaining the benefit of such Act, upon trust to pay the interest to the wife for her life, the same to be paid to her, in case of the insolvency of the husband, to her separate use, and, after her decease, in trust for the issue. The trustees, at the instance of the wife, committed a breach of trust, by lending part of the trust funds to the husband, who afterwards was discharged as an insolvent. Upon a bill by the wife and her children to make the trustees answerable for the breach of trust:—Held, that the contingent interest of the wife for her separate use was not bound to make good to the trustees the money so

advanced. *Quere*, whether her life interest, after death of husband, was so bound. *Semble*, if the discharge of husband as an insolvent had been concerted with her so as to get a present interest, and defeat the equity of the trustees, they would be entitled against her. *Mara v. Manning*, 2 J. & L. 311; 8 Ir. Eq. R. 218.

1. Trust money was settled on a married woman for life for her separate use, without power of anticipation, but with power to her to appoint the capital after her death by deed. The trustees lent part of the trust money to the husband on mortgage, and she consented to the investment by the mortgage deed. Part of the trust money having thereby been lost:—Held, that the wife had not, by executing the deed, appointed the reversion, so as to make it liable for loss. *Fletcher v. Green*, 33 Beav. 426.

Trustees committed a breach of trust, by lending trust moneys on mortgage; they instituted a suit to realise their security, in which the property was sold, and the produce paid into court and invested. In taking the accounts, they were debited with the cash, and not with the investment. On further directions, the stock was ordered to be sold, and the produce, after payment of the costs, was paid to the trustees. The funds having risen, there was a gain of 251*l.* by the investment:—Held, that the trustees were entitled to the benefit of this sum, in discharge of their liabilities. *Ib.*

2. The trustee of a marriage settlement concurred in a breach of trust, by lending the fund to the husband, on a security not warranted by the settlement:—Held, that the representatives of such trustee could maintain a bill against the husband and the *cestui que trust*, for the restitution of the fund. *Greenwood v. Wakeford*, 1 Beav. 576; 8 L. J., N. S., Ch., 323.

3. The trustees of a marriage settlement permitted the husband to retain the trust funds, which he appropriated to his own use. One of the trustees ultimately became entitled under the settlement to half the trust funds:—Held, that the estate of the husband was liable to refund to them his moiety. *Butler v. Carter*, 37 L. J., Ch., 270; 5 L. R., Eq., 276.

4. The trustees of a fund settled on a husband for life or until insolvency, and then to his wife for life for her separate use, at the solicitation of her husband, and with the concurrence of the wife, committed a breach of trust by lending part of the trust funds to the husband, who afterwards became an insolvent. In a suit against the trustees, charging them with a breach of trust, the husband and wife being parties to the suit:—Held, that the Court could make a declaration that the husband should recoup the trustees the amount which they were liable to make good to the trust funds; and that a cross-bill by the trustees was not necessary. *Keays v. Lane*, 3 Ir. R., Eq., 1.

Held, also, that the husband not being in insolvent circumstances at the time of the loan, his wife's separate estate in the trust fund was then reversionary; and, therefore, as it could not then be bound by her, it was not available to recoup the trustees. *Ib.*

5. A trust fund settled on husband, wife, and children in succession, was received by the husband and lent by him to his brother. A bill by one trustee against the other trustee, the husband and wife, and omitting the brother and children:—Held, sustainable, and a decree was made against the husband, reserving all rights against the brother and the trustees. *Hughes v. Key*, 20 Beav. 395.

The co-trustee, who had not joined as co-plaintiff, refused his costs. *Ib.*

6. By a marriage settlement of 1832, real and personal estate of H., the intended wife, was conveyed to trustees in trust for R., the intended husband for life, and after the death of the survivor of R. and H., in trust for the children of the marriage, as R. and H. or the survivor should appoint, and in default of appointment for the children equally. The trustees allowed R. to obtain possession of the trust fund, which he mixed with moneys of his own, and in 1861 one of the trustees commenced a suit to compel him to replace the fund. By arrangement of the trustees with R., he and H., by deed of the 25th September 1861, irrevocably appointed the fund equally among the children, four of whom were of age, and one (the plaintiff) a minor. On the following day the four adult children, and two years afterwards the plaintiff, when of age, executed a deed releasing the trustees from the trusts of the settlement. The children executed the release by the direction of their father, without any professional advice or assistance, and in ignorance of its contents or effect, and of their rights under the settlement. R. from time to time paid sums of money for the plaintiff; he purchased for the plaintiff a commission in the army, paid for his outfit, etc., made him an adequate yearly allowance, and paid a large sum for his promotion. No one of the sums so advanced was equal in amount to the plaintiff's share of the trust fund, nor was there any evidence that it was stated at the time of the advances, or understood between the plaintiff and R., that they were made out of the trust fund in R.'s hands:—Held, 1st, that the release should be set aside; 2nd, that R.'s position was that of a debtor to his five children for their respective shares of the trust fund; 3rd, that the sums advanced being respectively less in amount, that the plaintiff's share was not a satisfaction of it, *pro tanto*, and that R. was not entitled to credit for them. *Reads v. Reads*, 9 L. R., Ir., 409.

VI. FOLLOWING TRUST PROPERTY AND LIABILITY OF PURCHASER WITH NOTICE.

1. *Into Investments in Name of or under Control of Trustee*, 7045.
2. *Into Hands of Bankers or other Agents*, 7048.
3. *Shuffling the Funds of two different Settlements*, 7050.
4. *Relief against Purchasers with Notice*, 7050.
5. *Notice. What is in particular Cases or through particular Persons.* See NOTICE.
6. *Purchaser without Notice. In General.* See VENDOR AND PURCHASER, XXV.

1. Into Investments in Name of or under Control of Trustee.

(a) *When Invested on Personal Securities*, 7045.

(b) *When Invested in Land*, 7046.

(a) *When Invested on Personal Securities.*

1. If executor, for benefit of the testator's estate, should invest part of it in the funds, or transfer money from one stock to another, this is not a conversion, but it may still be followed as much as if it had continued in the same condition at the testator's death. *Waite v. Whormood*, 2 Atk. 159.

2. Part of a sum of money which had been raised by a husband upon the security of property comprised in his marriage settlement, by means of a suppression of the settlement, was lent by him to the trustee of settlement upon his bond, the trustee being ignorant of the means by which the money had been raised. After the death of the husband, the wife, who was entitled to a life interest in the settled property, with remainder to her children, took out administration to her husband, and filed a bill in her own name, and in the names of her children, by herself, as their next friend, against the trustee, who had, in the meantime, taken the benefit of the Insolvent Debtors Act, praying that the sum due upon the bond (which the widow, as administratrix, offered to deliver up) might be replaced with interest upon the trusts of the settlement:—Held, that the widow and children had a clear equity to follow the money in the hands of the trustee, and that they would have had the same equity if, instead of being a trustee, he had been a stranger; and, *semble*, that such a claim would not have been barred by the trustee's discharge under the Insolvent Debtors Act, even if it had been proved (which it was not) that the bond debt had been included in his schedule. *Buckridge v. Glasco*, Cr. & Ph. 126; 10 L. J., N. S., Ch., 134; 5 Jur. 163.

3. When trust funds are invested on an improper security, the parties interested have a lien on the securities into which it is traced. *Mant v. Leith*, 15 Beav. 524; 16 Jur. 302; 21 L. J., Ch., 719.

4. Under circumstances of great peculiarity, and notwithstanding a great deal of intermixture backwards and forwards of cheques relating to trust funds:—Held, that the trust funds were traced into certain securities, and decreed for redemption accordingly. *Harford v. Lloyd*, 20 Beav. 310.

5. Held, that by instituting an administration suit, and obtaining an order against the trustee personally for payment of the trust moneys into court (which order had not been obeyed), the *cestuis que trustent* had not waived their right to pursue the trust money into the unauthorised investment. *Francois v. Francois*, 5 De G. M. & G. 108.

6. A defaulting trustee effected a policy of assurance on his own account (but in the name of the next friend of the *cestui que trust*, who was a married woman) with the approbation of the Master, as being the best security which it was in the trustee's power to give for the

restoration of the trust fund. The amount secured by the policy became payable at the death of the trustee, which occurred before the Master had made his report:—Held, that the money was not general assets of the trustee, but was applicable in the first place to compensate the loss occasioned by the breach of trust. *Ward v. Ward*, 2 Sm. & Gif. 125; 18 Jur. 529.

7. Where a trustee mixes his own money with the trust fund, and takes security for the whole fund, if the security fail, the trust fund is entitled to priority of payment. But if the *cestuis que trustent* have elected to adopt the loan, they cannot compel the trustee to make good the deficiency. *Lamb v. Orton*, 2 N. R. 435.

8. E. effected a policy of assurance on his life in the name of two trustees, B. and M., for the benefit of his two daughters, and died largely indebted to M. M. received the policy money, and invested the greater part of it in debentures of a joint-stock banking company. These debentures he placed in a separate envelope, inscribed with the names of E.'s daughters, and paid them the interest until the bank stopped payment. The bank was subsequently wound up under the Joint Stock Company Winding-up Act, when M. was found to be largely indebted to the bank. M. survived his co-trustee, and became bankrupt (having previously handed over the debentures to a third party), and the official manager of the company was appointed official assignee of his bankruptcy. E.'s daughters claimed the debentures as being held in trust for them. Held, first, that there was a valid trust of the policy money in the hands of M., notwithstanding the fact of E. being indebted to him; secondly, that the debentures were well appropriated to the trust, and were not subject to M.'s liabilities to the bank. *Eap. Boyd, Re Royal Bank of Australia*, 5 W. R. 634.

9. If a trustee mixes a trust fund with his own moneys, as long as the mixed fund remains under his control, either in its original shape or in such a substituted form that it can be traced, it is primarily liable to answer the trust. *Frith v. Cartland*, 11 Jur., N. S., 238; 34 L. J., Ch., 301; 13 W. R. 493; 12 L. T., N. S., 175.

The rules as to following trust funds in the hands of a defaulting trustee apply against the assignees of the defaulting trustee as fully as against the trustee himself; and the evidence that the trust fund was acquired on the eve of the bankruptcy, and when the bankrupt was about to abscond with that and his other moneys:—Held, not to raise any equity in favour of assignees or general creditors, as against the owners of the trust fund. *S. C.* 2 Hem. & M. 417.

10. A testator, having moneys in his hands belonging to other parties, invested a portion, by their direction, together with his own moneys, in consols, and informed the parties of such investment, and duly accounted to them for the dividends. He afterwards sold out nearly the whole of the stock, and then replaced a portion of it, and, on his death, having directed his confidential clerk to buy stock to replace the rest, he expressed his wish that the stock to be purchased by the clerk should be appropriated to replace the

trust stock. The clerk purchased a sum of stock in the testator's name; but the whole stock standing in the testator's name at his death was not sufficient to replace the trust moneys:—Held, that, under the circumstances, the stock standing in the testator's name at his death was impressed with a trust, and did not form part of his general assets. *Robertson v. Morrice*, 9 Jur. 122.

1. W. A., who at the time of his death in 1867 was carrying on the business of a farmer, gave his residuary personal estate to his widow and a co-trustee, upon trust to permit his widow to have the use and enjoyment of the household furniture, and the dividends, interest, and annual income and produce of his other residuary estate for life, and then upon trusts in favour of the testator's two sons. The testator's residuary estate consisted almost entirely of the household furniture and farm stock, and the widow, with the consent of her co-trustee, carried on the business of the farm. She took a new lease of the farm in her own name, and painted her own name upon the carts; but the financial part of the business was carried on through a joint banking account opened in the names of "the executors of the late W. A." In 1879 the widow presented her petition for liquidation. All the property in her possession consisted of the furniture and farm stock bequeathed by the testator, or of stock which had replaced the original stock in the ordinary course of business. Upon being sold, it realised a sum of 2,063*l.* 15*s.* 6*d.*, with produce estimated at 250*l.* still to be realised. The testator's residuary account had been passed at 1,917*l.* 7*s.* 6*d.*:—Held, that the farming stock in the hands of the widow was well ear-marked as trust property, and that only the life interest of the widow in the proceeds of the realisation passed to the trustees in the liquidation. *Exp. Barber, Re Anslow*, 42 L. T. 411; 28 W. R. 522.

2. Trust funds were vested in the purchase of transferable shares of a banking company, in the name of one of the trustees, who executed a declaration of the trusts thereof (the rules of the company not allowing shares to stand in the name of joint owners or *cestui que trustent*). The trustee was also a proprietor of shares in his own right in the same company, and made various sales and purchases of shares therein. There was nothing to distinguish which were the individual shares held by the different proprietors, the same being in the nature of capital expressed by quantity. The trustee contracted to assign a certain number of shares to the banking company as a security for advances which they made to him; he afterwards became bankrupt:—Held, that the trustee must be presumed to have transferred or pledged such shares as belonged to himself, and, so far as he had shares of his own, not to have transferred or pledged the shares of his *cestui que trustent*; and that, therefore, the *cestui que trustent* were entitled to so many of the shares standing in the name of the trustee at the time of his bankruptcy as could be presumed to be identical with the shares in which the trust funds were invested, from the fact that such a number of shares had always thenceforward stood in the name of the trustee. *Pinkett v. Wright*, 2 Hare 120; 12 L. J., N. S., Ch., 119; 6 Jur. 1102. Affirmed

S. C. *sub nom. Murray v. Pinkett*, 12 Cl. & F. 764.

3. An informal document, signed by a trustee who was indebted to the trust, construed to amount to an equitable mortgage in favour of the trust, notwithstanding a denial by the answer. *Baynard v. Woolley*, 20 Beav. 583.

4. A sole trustee, who had appropriated 4,000*l.*, part of the trust property, deposited in the box in which he kept the trust deed and the securities for other portions of the trust funds two policies of assurance, one on his own life for 2,000*l.*, the other on the life of his father for 3,000*l.*, inclosing them in an envelope with a memorandum, that "in the event of his" (the trustee's) "death," the amount of the inclosed policies was to be applied to the repayment of 4,000*l.* borrowed by him of the *cestui que trust*. Six years afterwards the trustee became bankrupt. The policy for 2,000*l.* was found by the officer of the Court of Bankruptcy inclosed with the memorandum in the box, the other policy having been paid to the bankrupt upon his father's death:—Held, as between the *cestui que trust* and the assignees in bankruptcy, first, that notwithstanding the words importing contingency, the memorandum was a valid declaration that the policy was, in any event, subject to the trusts of the settlement *Re Bankhead*, 2 Kay & J. 560.

Held, secondly, that there being a valid declaration of trust by the sole trustee, he was the proper person to be in possession of the policy; in other words, "the true owner" within the meaning of the 12 & 13 Vict., c. 106; and he being also in the reputed possession of the property when the bankruptcy took place, there was no separation of interests, the true owner and the reputed owner were the same person, and the 125th section did not apply. And an order was made, under the 130th section, for an assignment of the policy to the new trustees of the settlement. *Id.*

(b) When Invested in Land.

5. Remedy for a breach of trust is personal, and money produced thereby, laid out on an estate in Ireland, cannot be specifically followed; the party's assets were, however, marshalled in favour of the claim. *Ow v. Bateman*, 2 Ves. 19.

6. The Court is cautious in following money into land, but will do it if proved that the money was laid out in land; the doubt is on the proof: always done when admitted on the answer of person laying it out. *Lane v. Dighton*, Amb. 413.

Where money is sought to be followed into land, the admission by the personal representative of party laying it out will not bind the heir, but it will be ground of inquiry. *Id.*

7. Trustee for the purchase of land died without personal assets, but, having purchased land, the estates purchased were held not liable to the trust, the circumstances affording no presumption that they were purchased in execution of the trust. *Perry v. Phillips*, 4 Ves. 108. Affirmed 17 Ves. 173.

8. A., by marriage articles, covenanted that all lands he should afterwards purchase in the parish of K. should be to the uses of he

articles. He purchased lands in K., and took a conveyance in fee in the name of his youngest son, without a declaration of trust:—Held, that youngest son was a trustee as to the lands for the parties entitled under the settlement. *Blake v. Blake*, 7 Bro. P. C. 241.

1. An executor by the very will empowered to purchase lands for the heir, yet, the purchase being in his own name, and he dead, insolvent as to the other assets, the heir could not follow the land to make a trust for him; though the executor had told the mother of the purchase he was about to make, and had her consent; and so the executor's heir went away with the land for want of express proof of the application of the trust money. *Halcott v. Markant*, Pre. Ch. 168.

2. Money settled to separate use of wife, and in event of no children to her absolutely, surviving husband, with power to trustees, with her consent, to invest it in land:—Held, that no lien existed on estates purchased by husband, having obtained the money from trustees; the circumstances not raising the presumption, as if he had been under an engagement to purchase, that his purchases were in pursuance of engagements, and upon evidence the fact of the application of trust fund, or the inability of husband by other means, not being made out. *Lench v. Lench*, 10 Ves. 511.

3. A trustee purchases lands out of the profits received out of the trust estate, and takes the conveyance in his own name; though possibly, if he be unable to make other satisfaction for the profits so misapplied, those lands may be sequestrated, yet they cannot be decreed to be a trust for the *cestui que trust*. *Kirk v. Webb*, Pre. Ch. 84. See also *Heron v. Heron*, *id.* 163.

4. A. dies intestate, leaving a wife and two daughters; after his death 200*l.* is found hid in a wall, and 200*l.* in a box. The widow lays out this money in land, and settles it to the use of herself for life, remainder to her daughters in tail, remainder to her own right heirs. After the death of the mother and two daughters, plaintiff, as administrator to the daughters, brings a bill against the heir-at-law, to have two-thirds of the 400*l.* out of the land as personal estate, and the Master of the Rolls decreed for him, but the decree was reversed by the Lord Keeper, money having no earmark. *Kendar v. Milward*, 2 Vern. 440. S. C. *nom. Kindar v. Miller*, Pre. Ch. 172.

5. Legatees allowed to follow money of testator laid out in land, etc., by executor. *Ryall v. Ryall*, 1 Atk. 59; cited in *Ambl.* 411.

6. The customer, having received a fund out of court, upon an undertaking to purchase and convey a house, etc., upon the trusts of his marriage settlement, and having deposited it with his bankers, drew on it from time to time, and amongst other things for the purchase of the house, which he procured to be conveyed to himself in fee, the deeds of which he deposited as a security for further advances; the Court, in deciding between the bankers and the trustees of the settlement, would presume that the purchase money of the house was drawn from the fund applicable for that purpose. *Manningford v. Toleman*, 1 Colly. 670; 14 L. J., N. S., Ch., 160; 9 Jur. 438.

7. Where a trustee states in writing to his

cestui que trust that part of the trust moneys are laid out in a certain property, although not an investment warranted by the terms of the trust, and although the *cestui que trust* goes on receiving interest, and not the rents:—Held, that the *cestui que trust* might at his option take the property in which the trust funds had been laid out, as representing the whole trust fund, or might have it sold, and prove, if necessary, against the trustee's estate for the deficiency (if any). But the *cestui que trust* was not allowed to take the property as representing the actual portion of the trust fund laid out by the trustee, and prove for the balance. *Thornton v. Stokill*, 1 Jur., N. S., 751.

8. L. M. bequeathed 50,000*l.* to two trustees upon trust to invest in the purchase of lands in Wales, and to settle and convey the same to C. M. for life, with remainder to C. M.'s eldest son for life, with remainder to his first son in tail, with remainders over. C. M., who was also residuary legatee of the testator's estate, took out letters of administration, and subsequently he, with moneys amounting to 49,000*l.*, which were part of testator's personal estate, purchased the Lamphey and other estates, of which he took conveyances to himself in fee. The Lamphey estate C. M., by will, devised to his eldest son absolutely, subject, however, to the payments, charges, liabilities, and demands of his uncle L. M.'s will, and in exoneration of his, C. M.'s, other estates, which he devised to his younger children. The Lamphey estate, subsequently to the purchase, became much improved in value. A bill was filed by the younger sons of C. M., praying for a declaration that the Lamphey estate ought to be taken in satisfaction of the 50,000*l.* directed by the will of L. M. to be laid out in land. By his report the Master found that the Lamphey and other estates were purchased by C. M. by or with part of the personal estate of L. M., in execution or discharge of the trust for investment of the 50,000*l.* On exceptions to the report by the devisees of C. M.'s will:—Held, that the purchases having been made by the trustee C. M. with the trust moneys in his hands, a presumption arose that the purchases were made with a view to execute an obligation. *Mathias v. Mathias*, 3 Jur., N. S., 429; 3 Sm. & G. 552.

Held, also, that the moneys invested being trust moneys (and the circumstances attending the purchasers of the estates were enough to attribute them to the performance of the trust), the trustee could have no right to deal with the estates so as to alter or prejudice the rights of the remaindermen. *Id.*

9. Bank stock to the amount of 13,000*l.* was transferred to a trustee to sell and invest the produce in lands, which were to be settled on certain uses and trusts. S., the administrator of the trustee, laid out 38,650*l.* in the purchase of lands, which were conveyed to him absolutely. The price of the stock at the time of the purchase was 23,630*l.* By a subsequent deed reciting the purchase of the lands thereby conveyed, and of other lands also therein mentioned, and that a portion of the purchase money of the several estates, lands and premises, consisted of the 13,000*l.* bank stock, and that the lands were conveyed to S., in pursuance and part performance of the trusts

declared of the stock, and that he was desirous of fully performing the trusts by conveying the several lands on the trusts, he conveyed part of the purchased lands accordingly. The entire value of the stock was not represented by the lands so conveyed:—Held, that there was no dedication to the trusts of any other lands than those actually conveyed by the trust deed. *Sealy v. Stannell*, 2 Ir. R., Eq. 326.

Held, also, that there was no lien in favour of the persons entitled to the trust estate, on the other purchased lands, and that their claim was simply that of creditors on foot of a breach of trust. *Id.*

1. In a suit to render the estate of a deceased trustee of a will liable for certain breaches of trust, a decree was made declaring the liability of the estate to make good what should be found due in respect of such breaches of trust, and directing accounts and inquiries. Before the chief clerk had made his certificate, but it having appeared in the course of taking the accounts and inquiries that the estate was liable for a considerable amount which the personal estate was insufficient to satisfy, the *cestui que trust* applied by petition, under 15 & 16 Vict., c. 86, s. 55, for the sale of certain real estate belonging to the deceased trustee, a mortgage on which had been redeemed by the existing trustee of the will:—Held, that the Court had jurisdiction to order the sale, and that it was in accordance with the practice of the Court in such a case, when once it had been ascertained that the real estate would have to be resorted to, to make an order for the sale of the real estate without waiting for further consideration. *Bell v. Turner*, 2 L. R., Ch. D., 409; 45 L. J., Ch., 681; 24 W. R. 451.

2. Into Hands of Bankers or Other Agents.

2. In 1843 trust moneys were standing to the credit of the trustees with certain bankers, who had clear and distinct notice that the money was trust money. The bankers transferred the money to themselves, without the knowledge or sanction of the trustees, in discharge of a debt due to them from the tenant for life of the fund, who afterwards became bankrupt. Decree for payment by the bankers of the trust fund, with interest, in a suit instituted against them by the trustees. *Bridgham v. Gill*, 24 Beav. 302.

3. Where money is paid into a banker's by a customer for a purpose specified, and instructions are given in writing, and those instructions are acted upon, although such sum is carried to the general account of the party paying it in, and although the money is not eventually applied, but comes again into the banker's hands after business has ceased to be carried on:—Held, that it is sufficiently earmarked to prevent its belonging to the general creditors. *Farley v. Turner*, 5 W. R. 666; 3 Jur., N. S., 532.

4. Where a sum of money was standing in the books of a banking company to the credit of "the account of the trustees of the late W. H.," and the bank, knowing that the trustees (each of whom had an overdrawn account at the bank) were not beneficially entitled, allowed them to transfer sums at different times from

the trust account to their respective private accounts:—Held, that the *cestuis que trustent* were entitled to recover from the bank the sums so allowed to be transferred, and that it was immaterial whether or not the bank knew what were the circumstances of the trust, and also whether or not the bank profited by the transfer from the one account to the other, so long as they were aware that the money dealt with was trust money. *Forster v. Manchester & Liverpool District Banking Co.*, 44 L. T. 406.

5. Trust money was so placed to a banking account that any of the trustees could draw out separately. One of them drew out money and bought a house as a residence for some of the *cestuis que trustent*, but took a conveyance to himself alone. He then deposited the deeds with another bank to secure his private balance, and afterwards became bankrupt. The co-trustees neglected to examine the banker's book for a long time after the purchase:—Held, that by reason of their negligence they were not entitled to priority over the security by deposit. *Allan v. Scott*, 12 L. T., N. S., 449.

6. A., in whom a lease was vested, deposited it with his bankers by way of equitable mortgage. The bankers afterwards received notice, as the fact was, that he was a mere trustee of the leasehold, but they subsequently obtained from him a formal mortgage of the legal estate:—Held, that the *cestuis que trustent* had priority over the bankers. *Baillie v. McKean*, 35 Beav. 177.

7. Bankers advanced to customers 300*l.* to redeem some railway stock which had been transferred to another firm as a security for that sum. The stock was thereupon transferred in blank to the bankers. Subsequently, the customers, in a letter to the bankers, stated that they had been requested by their principal to extend the term of the loan on the stock. The stock actually belonged to a third party, A.:—Held, that, after the receipt of this letter, the bankers had constructive notice of A.'s right to the stock, and that no subsequent advances made by the bankers to the customers could affect the stock. *Locke v. Prescott*, 32 Beav. 261.

8. Trust funds were invested in the purchase of transferrable shares in a banking company in the name of one of the trustees, who was also a holder of shares in his own right in the same company, and afterwards made various sales and purchases of shares therein. There was no distinguishing mark by which the shares could be traced, the same being in the nature of capital, expressed by quantity. The trustee agreed to assign some of the shares standing in his name to the banking company, as security for repayment of advances which had been made to him, but no transfer was made. He afterwards became bankrupt, without having shares sufficient to satisfy the trusts and his agreement to assign:—Held, first, that the banking company had no lien on any of the shares which had been held in trust; secondly, that although the shares held in trust might have been changed by sale and re-purchase, the trustee must still be considered as holding for the purposes of the trust the same number of shares out of a larger number that were standing in his name at the time of his bankruptcy; thirdly, that as

no shares were transferred in pursuance of the agreement, no question as to whether the bank directors were purchasers with or without notice could arise; and of the two equities, for the *cestui que trust* and for the bank, the former must be preferred. *Murray v. Pinkett*, 12 Cl. & F. 764. Affirming *Pinkett v. Wright*, 2 Hare 120; 12 L. J., N. S., Ch., 119; 6 Jur. 1102.

1. Where money has been paid in to the ordinary banking account of a company, not being in any way ear-marked, the company will not, on an allegation that the money is impressed with a trust, such allegation not being admitted by the company, be restrained, on motion, from dealing with the money. *Bank of Turkey v. Ottoman Co.*, 14 W. R. 819; 14 L. T., N. S., 884.

2. H., having a balance of 3,961l. 10s. 3d. at his bank, paid in 5,000l. trust money. Between the time of doing so and his death he paid in various sums, together amounting to 12,533l. 11s. 6d., and in the same interval drew out 18,847l. 4s. 4d. No part of this sum was devoted to the purposes of the trust, and he was still liable for the 5,000l. at the date of his death:—Held, that the balance remaining at his bank formed part of his general estate, and could not be appropriated by the beneficial owner of the 5,000l. *Brown v. Adams*, 39 L. J., Ch., 67; 4 L. R., Ch., 764; 17 W. R. 999; 21 L. T., N. S., 71.

3. When a customer has opened with his bankers separate accounts specially headed with the names of the trusts to which the moneys paid into those accounts belong, the bankers are not at liberty upon the bankruptcy of the customer to apply those moneys in payment of the balance due to them upon the customer's overdrawn private account. *Exp. Kingston, Re Gross*, 25 L. T., N. S., 250; 6 L. R., Ch., 632; 40 L. J., Bk., 91; 19 W. R. 910.

A county treasurer used to pay the county moneys into Bacon's Bank, but kept his private account at the National and Provincial Bank, and carried over the police rates to this account by cheques drawn on Bacon's Bank. In 1869 he opened a separate account with the National and Provincial Bank, headed "Police Account." Some of the items to his credit in this account could be traced as having come from county funds, but most of them could not. The cheques which he drew upon it were all headed "Police Account," and appeared to have been drawn only for county purposes. For the purposes of interest the National and Provincial Bank treated the accounts as one account, and the interest on the balance in his favour was carried to the credit of his private account. At the time when the police account was opened the manager of the bank knew that he was county treasurer, and understood that he had been in the habit of paying county moneys into the bank. In April 1870 he absconded, his private account being overdrawn, and the police account being in credit:—Held, that the bank was not entitled to set off the one account against the other, but that the county magistrates were entitled to recover the balance standing to his credit on the police account. *Id.*

4. When a trustee pays trust money into a bank to his credit, the account being a simple

account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him belongs, so long as it remains due, specifically to the trust, as between the *cestui que trust* on the one side, and the trustee or his representatives on the other; and the state of things is not varied by the circumstance of the bank holding also for the trustee, or owing to him money in every sense his own. And where the account consists of a series of items in respect of moneys paid in, and drawn out by general cheques by the trustee, the mode of ascertaining what part of the balance is trust property, and what part the trustee's own money, is to hold, as in *Clayton's case* (1 Meriv. 572), that each cheque drawn out by the trustee is to be applied in payment of the earlier items of the opposite side of the account, i.e., in diminution of the trust fund *pro tanto* if those items arise from trust moneys paid into the account, or of the customer's own moneys *pro tanto* if they arise from moneys paid in on his private personal account. *Pennell v. Daffell*, 18 Jur. 273; 23 L. J., Ch., 115; 4 De G. M. & G. 372; 1 Eq. Rep. 579.

An official assignee under the Court of Bankruptcy received certain sums of money on account of bankrupt's estates, and paid them in to a general account standing in his own name at the bankers' where they were mixed with his own moneys:—Held, in a suit for the administration of his estate, that the balance at the bankers' was not "ear-marked" for the benefit of the bankrupt's estate, but they must come in *pari passu* with the other creditors. S. C. 1 W. R. 239, 499.

5. Trust moneys cannot be followed unless clearly identified. Where, therefore, a solicitor, having trust moneys in his hands, paid certain sums part of such moneys into his banking account without distinguishing them as trust moneys, and subsequently filed a liquidation petition:—Held, that the trustee in the liquidation was entitled to the balance of the moneys in the hands of the bank as against the persons claiming to be entitled as trustees of the alleged trust funds under the marriage settlement of the bankrupt. *Exp. Hardcastle, Re Manson*, 44 L. T. 523; 29 W. R. 615.

6. A banking company were employed as agents to collect money and to remit it to their employers. The bank received the money in cash, placed it with the other cash of the bank, and informed their employers that the money had been remitted; but before the money was actually remitted the bank went into liquidation:—Held, that the money was part of the general assets of the bank, and that the employers of the bank were not entitled to be paid in priority to the other creditors. *Re West of England & South Wales District Bank, Exp. Dale & Co.*, 11 L. R., Ch. D., 772; 48 L. J., Ch., 600; 27 W. R. 815; 40 L. T. 712.

7. If money held by a person in a fiduciary character, though not as trustee, has been paid by him to his account at his banker's, the person for whom he held the money can follow it, and has a charge on the balance in the banker's hands. *Re West of England & South Wales District Bank, Exp. Dale & Co.* (11 L. R., Ch. D., 772), dissented from. *Re Hallett's*

estate, Knatchbull v. Hallett, 13 L. R., Ch. D., 696; 49 L. J., Ch., 415; 42 L. T. 421; 28 W. R. 732. Reversing 41 L. T. 186; 48 L. J., Ch., 734.

1. A solicitor was employed by the trustees for sale of an estate, his duty being to receive the purchase moneys and pay them in to the trustees' banking account. He received large sums, paid them in to his private account, and died insolvent. His banking account at his death showed a large credit, principally made up of specific sums which corresponded with receipts by him on account of sales of the trust estate:—Held, that these specific sums could be followed by the trustees, and that there could not be a set-off allowed in respect of sums alleged to have been paid by the solicitor on account of the trust estate. *Birt v. Burt*, 36 L. T., N. S., 943.

2. Money was advanced to a solicitor by A. for the purpose of being invested on mortgage security. The solicitor wrote that he had invested the money on mortgage to M. on leaseholds in Camden Town, and that A. was receiving interest at the rate of 5 per cent. The solicitor in fact, subsequently to this, advanced large sums on mortgage to M., but no specific mortgage was made in favour of A. The draft, however, of a mortgage for the sum advanced in favour of A. was found unexecuted after the solicitor's death. The solicitor had died insolvent. A. applied that a sum equal to the sum advanced by him should be paid to him out of a large sum in court representing the moneys advanced by the solicitor to M.:—Held, that the solicitor was bound by his representation; that the money was trust money, and that A. ought to be paid in priority to the general creditors. *Re Middleton v. Follock, Ex p. Wetherall*, 35 L. T., N. S., 608.

3. A trustee employed a broker, who had notice of the trust, to sell out consols and invest the proceeds in railway stock. The broker sold the consols for cash, bought railway stock to the same amount for the settling day, and received the price of the consols in a cheque, which he paid into his account at his banker's. He stopped payment before the settling day, and went into liquidation. The trustee claimed so much of the broker's balance at his banker's as was attributable to the price of the consols:—Held, that as the price of the consols was known by the broker to be trust money, it could be followed, and that the claim must therefore be allowed. *Ex p. Cooke, Re Strachan*, 4 L. R., Ch. D., 123; 46 L. J., Bky., 52; 35 L. T., N. S., 649; 25 W. R. 171.

3. Shuffling the Funds of two Different Settlements.

4. If a solicitor who is trustee of two funds for different *cestui que trustent*, shuffles one for the other for the purpose of concealing a fraud he has committed, a co-trustee, who has unwillingly been led to do an act which enabled the solicitor to deal with the fund, cannot claim a restoration of the fund dealt with, though it remained in the name of the fraudulent trustee. *Case v. James*, 7 Jur., N. S., 616; 30 L. J., Ch., 749; 9 W. R. 528; 4 L. T., N. S., 272; 29 Beav. 512. Affirmed 7

Jur., N. S., 869; 30 L. J., Ch., 749; 9 W. R. 771; 4 L. T., N. S., 664.

A trustee of a settlement, unknown to his *cestui que trust*, sold the trust fund, and applied the proceeds to his own use. He represented that the money had been lent on mortgage, and they pressed for its reinvestment. He afterwards induced his co-trustee of a second fund to join him in transferring it into his name, and take as security a transfer of a mortgage, which in the result proved to be a forgery. He afterwards made a small addition to the fund out of his own moneys, and gave notice to the *cestui que trust* of the first fund that it had been replaced, and they immediately put a distringas upon the stock. He afterwards died insolvent, leaving the stock standing in his name. Upon a bill by the surviving trustee of the second fund, against the *cestui que trust* of the first fund, asking that the stock might be restored to him:—Held, that the plaintiff had no remedy against the *cestui que trust* of the first fund; that the *cestui que trust* of the second fund, had they known the facts, might have stopped and reclaimed it prior to the notice; that the notice of reinvestment to the *cestui que trust* of the first fund amounted to a valid transfer, which made them as against the plaintiff purchasers for value without notice of the fraud; and that the bill must be dismissed with costs. *Id.*

5. A trustee of two different settlements, having applied to his own use funds subject to one of the settlements, replaced it by funds which under a power of attorney from his co-trustee under the other, he transferred into the names of himself and his co-trustee in the former. In a suit in respect of breaches of trust of the former settlement, the trustees of it transferred the fund thus replaced into court on motion:—Held, that the transfer was equivalent to an alienation for value without notice, and that *cestui que trustent* under the other settlement could not follow the trust fund. *Thorndike v. Hunt; Brown v. Butter*, 3 De G. & J. 563; 5 Jur., N. S., 879; 28 L. J., Ch., 417; 7 W. R. 246; 32 L. T. 346.

4. Relief against Purchasers with Notice.

(a) *In General*, 7050.

(b) *Following Specific Property into Hands of*, 7052.

(a) *In General*.

6. Relief for *cestui que trust* of lease against assignment or sale by trustee. *Rook v. Staples*, Cary 76.

7. All persons coming into possession of property, bound by a trust with notice of the trust, are chargeable in equity as trustees. *Adair v. Sham*, 1 Sch. & Lef. 262.

8. Trustees in will to support contingent remainders, joining with tenant for life in destroying such remainders, are guilty of breach of trust, and purchaser with notice of trust is liable to make good the estate. *Gorges v. Pye*, 7 Bro. P. C. 221; Pre. Ch. 308; 1 P. W. 128.

9. If trustees, to preserve contingent remain-

ders, join in sale to one, without notice, the purchaser will be safe; *contra*, if he have notice. *Willoughby v. Willoughby*, Amb. 284.

1. If the persons claiming under the breach of trust have notice of it, then they are subject to the same trust; so if the conveyance be voluntary, or without a valuable consideration; but if for a valuable consideration, and without notice, the purchaser will hold the land discharged, and the trustees must buy and settle other land to the same uses. *Mansell v. Mansell*, 2 P. W. 681.

2. Both the trustee and the assignee are responsible to the *cestui que trust* for profits subsequent to an assignment in breach of trust. *Vandebende v. Livingston*, 3 Swan. 625.

3. A purchaser, with notice implied or constructive, from a trustee, will be bound by the trust, although there has been a fine levied to him and five years' non-claim. *Thompson v. Simpson*, 2 Dr. & War. 459.

4. Length of possession will not prevail against charitable trusts, where the land was purchased with notice of the trusts. *Att.-Gen. v. Christ's Hospital*, 3 Myl. & K. 344.

5. A purchaser or mortgagee shall not protect himself by taking a conveyance from a trustee after notice of the trust; for by taking such conveyance he becomes the trustee himself. *Saunders v. Dehery*, 2 Vern. 271.

6. A person knowingly inducing trustees to lend trust money to his debtor, on a security not warranted by the trusts, in order that when advanced, such person may obtain thereout payment of his debt, is accountable to the *cestui que trustent*. *Flyer v. Flyer*, 3 Beav. 550; 5 Jur. 187.

7. Where a trustee lends trust money in breach of the trust, and the borrower, with notice of the trust, applies the money to his own use, he cannot be permitted to separate the loan from the trust, and insist, that the loan being barred by the statute, the trust is barred also. *Ernest v. Croydill*, 6 Jur., N. S., 740; 29 L. J., Ch., 680; 8 W. R. 736.

8. A. made a voluntary surrender of copyholds to a trustee upon trust for F. during her life; and if at her death she left children who attained twenty-one, upon trust to sell and divide the money among them; but if that event did not take place, upon trust for A. in fee. Afterwards, by a deed reciting that the trustee was seised of the premises upon trust for F. and her husband and A., the trustee and F. and her husband and A. concurred in demising the premises for a valuable consideration to G., for a long term of years:—Held, that the lessee was to be considered as having notice of the trust for the benefit of the children of F., and that the lease was void as against them. *Malpas v. Ackland*, 3 Russ. 273.

9. Testator gave leasehold premises to his daughter for life, if his term or terms and interest should therein for so long subsist, for her sole and separate use, notwithstanding her present or future coverture, and after her decease to her children equally, their executors, etc., during all the remainder of the estate, term or terms, and interest therein which should be then to come and unexpired. No trustees being interposed, the husband, having possession, was held accountable according to the uses of the will, both as to the original leases,

and also as to reversionary leases, granted to him, as the person entitled under the will of the former tenant upon favourable terms, and the equity was established against a purchaser from him with notice. *Parker v. Brooke*, 9 Ves. 583.

10. T., a trustee, lent trust money on mortgage to M. By an arrangement on the marriage of M.'s daughter, a valuable leasehold interest was granted by M. out of the mortgaged premises, and put in settlement, T. being the person who managed it and the solicitor who prepared the lease and settlement, neither the daughter nor her husband being informed of the mortgage. T. afterwards, with his co-trustee and their *cestui que trustent*, filed a bill to foreclose the mortgage and sell discharged of the lease, if necessary:—Held, that the parties deriving under the settlement must be fixed with notice of the mortgage and trust, and could not rely on T.'s conduct as a defence even against him, and therefore could not object to his being a co-plaintiff. *Quære*, whether, if notice were not shown, such an equity against a trustee would be a defence. *Tracycross v. Moore*, 13 Ir. Eq. R. 250.

11. A trustee of a money fund, in violation of his duty, lent the trust money to F. upon the security of a judgment, F. at the time not being aware that it was trust money. Subsequently F., at the request of the *cestui que trust*, and by the direction of the trustee, paid the interest to the *cestui que trust*, who was entitled to it during her life. The trustee afterwards threatened to issue execution on the judgment. F. stated to the *cestui que trust* that if she did not interfere to protect him against the demand of the trustee, he would be obliged to pay him, and she not having done so, F., as he alleged, paid the money to the trustee, who thereupon satisfied the judgment on record. Upon a bill against F. and the trustee, filed after the decease of the tenant for life, by the person entitled absolutely to the trust fund, it was decreed that F. should pay the money with interest. *Sheridan v. Joyce*, 1 J. & L. 401; 7 Ir. Eq. R. 115.

12. A fraudulent abstraction of trust property by the trustee, and a fraudulent receipt and appropriation of it by another person for his own personal benefit, place the receiver in the same situation as the trustee from whom he received it, and he becomes subject in a court of equity to the same rights and remedies as may be enforced by the parties beneficially entitled against the fraudulent trustee himself; and when it is said that the person who receives under such circumstances is converted by the Court into a trustee, the expression is used for the purpose of describing the nature and extent of the remedy against him, and denotes that the parties entitled beneficially have the same rights and remedies against him as they would be entitled to against an express trustee who had fraudulently committed a breach of trust. *Rolfe v. Gregory*, 4 De G. J. & S. 576; 5 N. R. 257.

But the relief against the receiver in such cases is founded on fraud and not constructive trust, and therefore the right of the party defrauded is not affected by lapse of time,

or, generally speaking, by anything done or omitted to be done so long as he remains without any fault of his own in ignorance of the fraud that has been committed. *Id.*

(b) *Following Specific Property into Hands of.*

1. A trustee, in violation of his duty, lent the trust money to F., upon the security of judgment; F. at the time not being aware that it was trust money. Subsequently F. was informed that it was trust money, and recognised and acknowledged the title of the trustee thereto:—Held, that from the time he had notice of the trusts, F. was a trustee of the money, and as such liable for the safety of it. *Sheridan v. Joyce*, 1 J. & L. 401; 7 Ir. Eq. R. 115.

2. A., the trustee of a fund settled on B., a married woman, to her separate use, with a restraint against anticipation, lent the same to C., D., & Co., who were merchants, but not ordinary bankers, and who had actual notice of the nature of the trusts to which the fund was liable. C., D., & Co. entered the transaction in their ledger and balance book, as an account opened with B., and down to the time of their bankruptcy regularly paid the interest of the fund to her, during A.'s lifetime, through him, but, after his death, directly to her. C., D., & Co. became bankrupts:—Held, that they had made themselves in fact direct trustees of, and were jointly and severally liable to restore, the trust fund. *Eap. Watson, Re Acraman*, 7 Jur. 1001.

3. A trustee *de facto* held liable to account as a trustee *de jure*. *Hennessy v. Bray*, 33 Beav. 96.

The estate of a tenant for life was liable to forfeiture on his mortgaging it. He mortgaged it to A. unknown to the parties taking under the forfeiture:—Held, that A. was liable to account to them for the rents, at all events from the filing of the bill, and beyond that, from the time he had notice of the trusts creating the forfeiture. *Id.*

4. Courts of equity will not lend their assistance to enforce the specific performance of ordinary contracts for the sale and purchase of chattels, unless there be something very special in the nature of the contract. On the other hand, if a trust be created, the circumstance that the subject matter is a personal chattel will not prevent this Court from enforcing the due execution of that trust. *Poolley v. Budd*, 14 Beav. 34.

Trusts may be constituted not merely by direct declaration of trust, but also by the constructive operation of the consequences flowing from the acts of parties. Thus equity will enforce the execution of a trust, not only against the trustees themselves, but against all persons who obtain possession of the property affected by the trust, provided they had notice of it. *Id.*

A., who sold 500 tons of iron, stacked on his wharf, to B., in consideration of a bill accepted by a third party, gave an acknowledgment engaging to deliver it to the bearer, he (A.) "having been paid for the same." B. mortgaged the iron, and the bill having been dishonoured, A. refused to deliver the iron.

The mortgagee proceeded in equity to make A. responsible for the iron:—Held, that A. had no ownership or property in the iron so stacked, and was a trustee, and therefore a demurrer for want of equity was overruled. *Id.*

5. Where by one deed of settlement, a fund and estates of the wife were settled to her for life, remainder in trust for the children of the marriage, and by another deed the husband settled a rent charge on his estates in trust for the wife for life; she, after her husband's death, obtained, by fraud and concealment of the settlement, the fund to be transferred to her, and assigned her life interest in her estates to a party with notice of the fraud:—Held, that the rents of her estates and the rent charge were liable to be applied in replacing the fund, and a receiver appointed. *Woodyatt v. Gresley*, 8 Sim. 180.

6. In March 1840 A., and B., a solicitor at Carmarthen, raised 2,500*l.* by sale of a sum of stock, of which they were trustees, with the intention of lending it on mortgage to C., who resided at Carmarthen, but spent part of the year in London. A. enabled B. to receive the 2,500*l.* for the purpose of the loan, and intrusted him with the conduct of the transaction. Accordingly B. prepared the mortgage deed; and on the 29th May 1840 through his London agents, and by arrangement between him and C.'s solicitor, procured C. (who knew that the money was in B.'s hands) to execute it, and to sign a receipt on the back of it for the 2,500*l.* The agents took the deed away with them, and shortly afterwards procured A. to execute it, and then sent it to B. It having been arranged between B. and C. that the mortgage money should be paid into the Carmarthen Bank to C.'s credit, B., on the 31st May, paid 513*l.*, and, on the 31st October, 1050*l.* accordingly, in part of the 2,500*l.* In November he died insolvent:—Held, that, as between A. and C., A. was to be treated as mortgagee for the whole 2,500*l.* *West v. Jones*, 1 Sim., N. S., 205; 20 L. J., N. S., Ch., 362.

7. A trust fund of 1,500*l.* created under marriage settlement, by which certain lands were limited to husband for life, remainder to first and other sons in tail, with power to husband of leasing for forty-one years or three lives at best rent, was directed by deed to be conveyed, etc., to same uses, etc., and in meantime, trustees, with the consent of husband, were empowered to lend money on certain security; husband purchased leasehold for 8,911*l.* to which he took the assignment to himself alone, and obtained purchase money out of trust fund to amount of 11,696*l.*, taking security for 1,400*l.* less than 11,696*l.*; husband granted lease at great undervalue for his own term to attorney who managed the purchase, which purchase proved very beneficial:—Held, that the first son of marriage was entitled to follow that part of trust fund which had been misapplied, and to have benefit of purchase, and to have lands sold discharged of lease to attorney, whose equity against him (the son) as personal representative of father was barred by notice of settlement and breach of trust. *Phayre v. Perce*, 3 Dow 116; 1 Bl. N. S. 129, 594.

A person who has notice cannot avail himself

of an act of trustees in breach of their trust. *Ib.*

1. M. devised estates to trustees, for his daughter, an infant, with power to the trustees to demise and lease the same for any term not exceeding twenty-one years, "at the best yearly rent that could be gotten for the same, without taking any fine or premium, with power to appoint new trustees. In pursuance of this power the trustees, some time afterwards, appointed R. sole trustee, and conveyed to him the devised estate upon the trusts and subject to the powers expressed and declared by the will of M., and for "no other trust, intent, or purpose whatsoever." By an indenture of lease between R. and B., certain part of the premises said to be described in and devised by the will of M., was demised by R. to B. for twenty-one years, in consideration of the yearly rent of 1,100*l.*, the first five years of which rent was to be paid in advance, in a manner therein provided, and the remainder after the expiration of such five years, by equal quarterly payments:—Held, first, that enough appeared from the evidence to fix B., the lessee, with notice of the trustees' title. *Booth v. A'Beckett*, 1 Moo. P. C., N. S., 201.

Held, secondly, that as the granting of such a lease was a breach of the trusts of the will of M., the same ought to be declared void and set aside, and the premises assigned to the persons to be appointed trustees of the will of M. *Ib.*

2. Trust moneys standing in the names of three trustees were invested in railway debentures under the authority of the trust deed. These debentures were subsequently transferred to a purchaser for value by one of the three trustees, who forged the signatures of his co-trustees to the instrument purporting to effect the transfer, and absconded with the proceeds:—Held, that the purchaser who had taken the transfer with notice of the trust, and without inquiry into the circumstances attending the alleged signatures, could not insist upon his purchase as against the co-trustees, who were entitled to have such forged transfer cancelled. *Cottam v. Eastern Counties Railway Co.*, 1 John. & H. 243; 6 Jur., N. S., 1367; 9 W. R. 94; 3 L. T., N. S., 465.

3. A., one of three sureties, who had become bound to the extent of 2,000*l.* to a corporation for the due accounting of the office of its treasurer by B., received formal notice from the corporation that B. was a defaulter, and on the next day took from B. a deposit note of a bank for 2,300*l.*, which had been placed in the bank by B., one month previously, in the name of his daughter. On a bill filed by the corporation against B., who had absconded, and the three sureties, to make good the amount found due by B., ultra the 2,300*l.*:—Held, establishing the liability of the trustees, that the circumstances under which A. received the 2,300*l.*, were such as ought to have induced him to make inquiry, and that, having neglected to do so, he was bound to restore that amount, with interest after the rate of 5*l.* per cent. *Berwick-upon-Tweed (Mayor) v. Murray or Dobie*, 7 De G. M. & G. 497; 3 Jur., N. S., 847; 26 L. J., Ch., 201.

4. Where the produce of a specific legacy misapplied by A., an administrator, being traced into *post obit* securities given by B. to

C.:—Held, that the *cestui que trust* was entitled to a charge on the securities. *Hartford v. Lloyd*, 20 Beav. 310.

A specific legacy of 6,000*l.* consols, bequeathed to the plaintiff, was unnecessarily and improperly sold out by the administrator, A., with the aid of B., and the produce carried partly to the banking account of A., and the remainder to that of B. A series of shifting of cheques and transfer of moneys took place, but the sum of 2,908*l.* was traced to B. About this time, B. laid out moneys in the purchase of a *post obit* security; and though the trust moneys could not be distinctly traced into the securities, yet the Court held, from the suspicious character of the transactions, that such was the just inference, so far as to throw on the other side the onus of disproving it; and this not having been done:—Held, that the plaintiff had a charge on the securities for the 2,908*l.* and interest. *Ib.*

In addition to this, B. had sold and transferred the securities to C., in consideration of a debt then owing. C. had notice that the money by which the securities had been obtained had been derived from A., though C. had no notice of the breach of trust:—Held, that C. could not set up an adverse title against A., and, *a fortiori*, that C. could not do so against the plaintiffs (A.'s) *cestui que trust*. *Ib.*

5. A., one of three trustees, executed an assignment of leasehold property held jointly by them, to a purchaser, and forged the signatures of his co-trustees, and also the requisite assent of the *cestui que trust* to the sale. A. was a solicitor, and acted as such on behalf of the purchaser:—Held, that the circumstances attending the transaction were sufficient to affect the purchaser with notice of some trust, if not the actual nature of it; and that he had constructive notice of the trust through the knowledge of A., his solicitor. *Boursot v. Savage*, 2 L. R., Eq., 134; 14 W. R. 564; 14 L. T., N. S., 299.

Held, also, that the execution by one of the three joint tenants was a valid assignment of the legal interest in one-third to the purchaser, but that the actual and constructive notice of the trust disentitled him to the beneficial interest, and reconveyance was ordered. *Ib.*

6. The trustee of stock, being beneficially entitled to one moiety undivided, assigned his interest to a mortgagee, who placed a *distringas* on the moiety. The trustee afterwards sold out a moiety and absconded. On a bill by the *cestui que trust* of a moiety:—Held, that he was entitled to the remaining moiety, but the Court gave the mortgagee his costs. *Wilkins v. Sibley*, 4 Giff. 442.

J. and F. were trustees under a marriage settlement of 2,700*l.* consols, in trust for D. and his wife, but to which they ultimately became entitled beneficially. J. bequeathed his interest in the fund to the plaintiffs, in trust for his children. F., on the death of D.'s wife in 1848, sold out a moiety of the fund, and divided the proceeds between himself and the plaintiffs. The other moiety was left standing in his name. In 1851 F. assigned a moiety of the remaining fund to S., by way of mortgage, who caused a *distringas* to be placed on it. In July 1852 F., without

the knowledge of S., sold out a moiety of the fund, appropriated the proceeds to his own use, and absconded. In 1854 new trustees (S. being one) were appointed, and the fund then standing in their names was paid into court. On the death of D., in 1860, the plaintiffs claimed the remaining fund:—Held, that they were entitled to it as against S. (who also claimed it in right of F.), but, that as it was by S.'s diligence that the fund in court had been preserved, he was relieved from paying the costs of the suit. *S. C. 9 Jur.*, N. S., 888; 11 W. R. 897; 8 L. T., N. S., 760.

1. In 1830 a settlement of certain property held under renewable leases, was made in favour of A. In 1831 A., being about to marry, made a settlement of this property for the uses of the marriage. The deed of 1830 was not registered. The settlement of 1831 was registered. In 1840 A., being in actual possession, sold to B., and B., who had no actual notice of the settlement of 1831, entered into possession, and made alterations in the premises. After the death of A., his son, who was entitled under the settlement of 1831, filed a bill against B. to set aside the sale, for an account and for waste:—Held, that it was not necessary to register the deed of 1830; that the registered settlement of 1831 prevailed against the *bonâ fide* purchase of B., and that the Court below had properly declared him to stand possessed of the leases as a trustee for the parties beneficially interested under that settlement. But held also, that he was entitled to indemnity against the covenantors in the leases which he was thus declared to hold as trustee; that an inquiry ought to be made as to alleged improvements and as to alleged waste; and that he was entitled to be allowed the benefits of these improvements; and that, being a *bonâ fide* purchaser, without misconduct, he ought not to be charged with costs. *Mill v. Hill*, 3 H. L. Ca. 828.

2. The manager of a benefit building society established under 6 & 7 Will. 4, c. 32, deposited, in pursuance of a resolution passed by the directors but contrary to the provisions of the Act and the rules of the society, money of the society with a finance company of which he was also manager. The company gave a cheque to the manager for the repayment of the money to the building society, but he did not pay over the money to the society:—Held, that the money was trust money improperly deposited with the finance company, that the giving the cheque to the manager was no discharge to the company, nor repayment to the building society, and that, therefore, the trust money being still in the hands of the finance company, a suit would lie on behalf of the real owners to recover it, and that without making the directors of the building society parties to it. *Hardy v. Metropolitan Land & Finance Co.*, 41 L. J., Ch., 257; 7 L. R., Ch., 427; 20 W. R. 425; 26 L. T., N. S., 407.

3. Where trust moneys are improperly advanced to traders for the purposes of their trade, they knowing them to be trust moneys, the Court will not follow the moneys into the hands of the traders, so as to affect them with the consequences of a breach of trust; and where moneys so lent produced a larger rate of interest to the tenant for life than if in-

vested in the funds, the Court will not, in favour of the persons entitled in remainder, make the trustees liable for the surplus, or hold that such surplus ought to have been converted into capital. *Stroud v. Gwyer*, 6 Jur., N. S., 719; 28 Beav. 130.

VII. OTHER BREACHES OF TRUST.

4. By indenture of the 3rd March 1832, executed upon the marriage of J. H. and E. R., the sum of 400*l.*, the fortune of E. R., the intended wife, was assigned to the trustees, D. B. and C. B., upon trust, that they should invest the same, as soon as conveniently might be, either in some public bank, stocks, or fund, or else upon one or more good and sufficient securities, either real or personal, and in such manner as they, the said trustees, should in their discretion think fit. The money was paid to one of the trustees, C. B., and, shortly after the execution of the settlement, the trust fund was lent by the same trustee to Sir J. C., upon the security of his bond to both trustees, with warrant of attorney collateral. During the lifetime of Sir J. C. the interest was regularly paid; but upon his death, which was in 1835, the security proved worthless, and the trust fund was lost. In 1842 D. B. filed the present bill against his co-trustee, C. B., and J. H., and his wife, seeking a declaration that the trustee, C. B., was responsible for the breach of trust, and praying that he might be ordered to bring in said sum of 400*l.*, and invest same upon the trusts of the settlement. It appeared that J. H., the husband, was fully aware of the loan, and had concurred in it; but that the plaintiff, though not active in the breach of trust, was acquainted with all the circumstances of the affair shortly after its occurrence. E. H., the wife, was not in any manner implicated in the transaction:—Held, that though the conduct of the defendant, C. B., was free from any moral blame, yet that he was responsible for the consequences of the breach of trust, and was therefore bound to bring in sufficient funds to secure the wife in the event of her surviving her husband. *Buckley v. Buckley*, Dr. 375.

5. A trustee, having power to vary trust funds, admitted that he had sold part of the funds, but did not show how the produce had been invested:—Held, on such an admission, that he was liable to make good the fund. *Meyer v. Montrieux*, 5 Beav. 146; 11 L. J., N. S., Ch., 398.

6. Where trustees of lands held subject to a mortgage, by a deed conveyed their estate therein to other persons, and the mortgagee filed a bill against them and others to foreclose, alleging that he was advised that the deed was a breach of trust, to which the trustees demurred, the demurrer was allowed with costs. *Tryon v. Westminster Improvement Commissioners*, 2 Giff. 434.

7. Certain policies of insurance effected by a father on his life, as a provision for his daughters, were assigned to a trustee upon trust for such of the daughters as the father should appoint, and certain estates were demised to the same trustee upon trust, out

of the rents and profits, to secure the payment of the premiums. The trustee advanced some sums of money in payment of the premiums, and the father appointed the bonuses which had accrued upon the policies to three of his daughters, and the three daughters soon afterwards authorised the trustee to receive the sum paid by the office for the bonuses, and invest part thereof as a fund to keep down the premiums, and a part of the sum was applied in satisfaction of the arrears of such premiums. A subsequent appointment was made in favour of the other daughters, of the residue of the sums to be received on the policies, and which was intended to equalise the shares:—Held, that the first appointment was a fraud upon the power, its immediate object being to relieve the father, and its necessary consequence to relax the diligence of the trustee in enforcing the right of the daughters against the father; and that the application of the trust funds in pursuance of the appointment by the trustee, who knew that the appointment was fraudulent, was a breach of trust for which he was responsible to the objects of the power. *Harrison v. Randall*, 9 Hare 397; 21 L. J., N. S., Ch., 294; 16 Jur. 72.

1. Bequest of consols to A. B., a feme covert, to be transferred to her in her own name, and the interest to be for her separate use, and the principal to remain in trust of the executors till the youngest of her children attained twenty-one, when the principal was to be her own; or, in case of her demise, it was to devolve to her husband. The trustees, on the death of the testatrix, transferred the fund to A. B.; she and her husband afterwards sold it out, and they both signed the transfer:—Held, that a breach of trust had been committed, but that A. B. had made a valid disposition of the dividends which might accrue previously to her youngest child, born after the death of the testatrix, attaining twenty-one. *Crosby v. Church*, 3 Beav. 485; 10 L. J., N. S., Ch., 212; 4 Jur. 50.

2. Moneys secured by judgments, the property of the wife, were by ante-nuptial settlement assigned to trustees upon trust for her during her life, and in case there should be issue of the marriage, upon certain trusts for their benefit, and if no issue, upon trust to permit the wife to dispose of the moneys to such persons as she, whether sole or married, by any deed or writing, with or without power of revocation, to be by her sealed and delivered in the presence of or attested by two or more witnesses, should appoint, or in default of appointment, gift, or devise, to her next-of-kin, under the Statute of Distributions. There was no issue of the marriage. The surviving trustee received a portion of the moneys secured by the judgments, and paid a part thereof to the husband during his lifetime, and the remaining part to the wife after his death. No appointment by deed or writing was ever executed by the wife:—Held, that the wife took only a life interest, with the power of appointment, and as she had not duly executed the power, the payments to her and her husband were invalid, and accordingly the trustee was bound to replace the fund for the benefit of the next-of-kin of the wife. *Reid v. Thompson*, 2 Ir. Ch. R. 26.

3. Where, on marriage, a settlement is made

of the wife's property to herself for life, to her separate use, with remainder as she should appoint, by any writing signed by her, and attested by two witnesses, and for default of appointment to the children of the marriage, and the trustees part with the trust fund upon the joint application of the husband and wife, by letter, not attested by any witness, the trustees, after the death of the wife, must make good the trust fund for the children. *Hopkins v. Myall*, 2 Russ. & M. 86.

4. A testator bequeathed certain leaseholds to his son, whom he also appointed his executor, with directions to sell, and reimburse himself a debt, etc., due to him from the testator, and to stand possessed of the surplus, if any, upon the trusts of the will. The son never proved the will, but took possession of the leaseholds in satisfaction of his debt, and afterwards bequeathed them to the plaintiff. Upon a bill filed by the latter twenty years after the death of the elder testator, to recover the said leaseholds:—Held, that the trusts of the will must be performed, and the leaseholds sold, and accounts taken; the balance, if any, to be made good out of the son's estate. *Smith v. Bakes*, 20 Beav. 563.

5. A testator directed his trustees to invest a sufficient sum on Government or real securities or railway stock to produce an annuity of 100*l.* a year, and after the death of the annuitant to call in and divide the principal among his brothers then living, or the children of such as should be then dead. The testator left three brothers; and the trustees (of whom the annuitant was one) provided for the annuity in part by appropriating a railway debenture for 1,500*l.*, which bore interest at first at 5*l.* per cent., and afterwards at 4*l.* per cent., and in part by interest paid by one of the brothers upon a loan to him of moneys of the testator. A child of another brother who was dead, having filed a bill, during the annuitant's life, against the surviving trustees, to have a sufficient fund properly invested:—Held, that he was entitled to an inquiry as to what sum should have been invested at the end of a year from the testator's death to meet the annuity, and to a declaration that the trustees were liable to make good the sum so ascertained. *Starkey v. Dyson*, 24 W. R. 37.

6. A fund was vested in trustees for A. for life, remainder for B. for life, remainder for such persons as A. should by will appoint. A. appointed that certain legacies should be paid out of the fund after B.'s death, and named B. her executor. B. proved the will, and the trustees then handed over the whole fund to B., who spent it and died insolvent. On a bill by the legatees against the original trustees:—Held, that they were discharged by the payment to A.'s executor. *Hayes v. Oatley*, 41 L. J., Ch., 610; 14 L. R., Eq., 1; 26 L. T., N. S., 26.

7. A trustee gave the estate in a mortgage in trust for A. absolutely, executed a reconveyance, and signed a receipt for the mortgage money, and handed it to one of A.'s executors, who was also his own solicitor, and who afterwards misapplied the money:—Held, that the money having got into the hands of the executor, the trustee was not liable. *Waugh v. Wyche*, 2 W. R. 485; 2 Drew. 318; 23 L. J., Ch., 833.

VIII. WHEN IT AMOUNTS TO A SPECIALTY DEBT.

1. Breach of trust can fail only on the personal estate of a trustee. *Vernon v. Vandry*, 2 Atk. 119.

2. A. and B. are trustees under a deed, by which neither of them is to answer for the other; A. receives a sum of money under the trust, and gives a writing under hand and seal acknowledging it, and that B. had received no part of it; A. never placed out the money, and dies; this writing is a specialty and good against the executor, but not against the heir of A., he not being mentioned in it. *Gifford v. Manley*, Forrest. 109.

3. A *cestui que trust*, claiming compensation for a breach of trust against the representatives of the trustee, can only come in as a simple contract creditor. *Kearnan v. Fitzsimon*, 3 Ridgw. P. C. 1.

4. The money due in respect of a breach of trust, where the trust is created by instrument under seal, is a specialty debt. *Wood v. Hardisty*, 2 Colly. 542; 15 L. J., N. S., Ch., 328.

5. N., reciting that he was entitled to a simple contract debt due to him by his sons, A., B., C., and D., who were partners in trade, assigned it to A. and B. upon trust, if they should think fit to call in the same, to invest it on good and solvent security, and hold same upon certain trusts. A. and B. sealed and delivered the deed, and afterwards misapplied the trust moneys:—Held, that the breach of trust was a debt of A. and B. by specialty, not binding their heirs. *Cumming v. Cumming*, 3 J. & L. 64; 8 Ir. Eq. R. 723.

6. By deed between A. and B., it was agreed that a sum in the hands of A., but belonging to B., should be laid out in the funds in A.'s name, and in trust for B. A. died, never having vested the money:—Held, that B. was a specialty creditor of A. for the amount. *Mavor v. Davenport*, 2 Sim. 227.

7. A. and B., solicitors, in partnership, jointly attended to the management of certain settled funds, of which A. and E. were trustees, who had executed the settlement. E. was the client of A., who represented to E. that he had a good mortgage security on which to invest a portion of the trust moneys; and E., accordingly, assented to his making such investment. A. did not, however, invest the money on the mortgage, but paid it into the bank of his firm, to their partnership account there; the proceeds being applied, with the knowledge of B., to the use of the firm. A. died in insolvent circumstances, leaving B. him surviving:—Held, that B. was personally liable to E. for the money; and that E. was *pro tanto* a specialty creditor of A.'s estate. *Eager v. Barnes*, 7 L. T., N. S., 408; 31 Beav. 579.

8. The creditors of a bankrupt appoint the Bank of England as the place where the estate shall be deposited. A dividend is declared; two of three assignees sign drafts for the dividends, which they forward to the other assignee for his signature; he also signs them, and receives the money, which he applies to his own purposes. Upon his death a creditor's suit is instituted for the administration of the assets:—Held, first, that under the covenant which the assignees entered into with the

commissioners, the misapplied dividends were a special contract debt due from the estate of the assignee who had misapplied them to the estate of the bankrupt; secondly, that the estate of the assignee was liable, under 49 Geo. 3, c. 121, s. 4, to pay 20 per cent. upon the funds misapplied; thirdly, that the 20 per cent. was not a specialty, but a simple contract debt; fourthly, that the 20 per cent. was part of the general estate of the bankrupt, and did not belong to the creditors entitled to the misapplied dividends. *Wackerbarth v. Powell*, Buck 495, in part reversed on appeal, 2 G. & J. 151.

9. Under the usual decree, in a creditors' suit, the Master has no jurisdiction to enter a claim founded on an alleged breach of trust committed by the testator, by investing the trust funds on improper securities. *Costerton v. Costerton*, 2 Keen 774; 7 L. J., N. S., Ch., 302.

10. By marriage settlement a sum of 5,000*l.* was vested in trust to permit the wife, in case she should survive her husband, to receive the interest of during her life; and in case there should be no issue of the marriage, in trust for the husband absolutely, with power to the trustees, with the consent of the husband and wife, to invest the money in Government or on real security. The money was afterwards, with the consent of the husband and wife, lent on mortgage. The husband died without issue; and by his will bequeathed his interest in the 5,000*l.* to A. upon certain trusts, and appointed him his executor. The wife afterwards marries B., and upon her marriage the interest of the 5,000*l.* was assigned to A. upon trust to pay the yearly interest on the 5,000*l.* to the wife for life; and A. covenanted with the wife that he, his executors, etc., would stand possessed of the premises assigned to him upon the trusts therein mentioned. The 5,000*l.* was paid to A. out of the produce of a sale had in a suit in which he was a defendant; and A. represented to B.'s wife that he had invested the money upon Government security; and paid her interest according to the rate it would have borne if it had been so invested. The money was not, in fact, so invested, but was applied by A. to his own use:—Held, in a suit for the administration of A.'s assets, that the new trustee of B.'s last marriage settlement was entitled to rank as a specialty creditor for the difference between the amount of the interest actually paid by A., and interest upon the 5,000*l.*, calculated at 6 per cent.; and also (there being a deficiency of the assets to pay the 5,000*l.*, which was a debt by simple contract) as a specialty creditor for any future deficiency in the interest, calculated at 6 per cent. *Jameson v. Farver*, 3 Ir. Eq. R. 346.

By marriage articles, the intended husband covenanted with the trustees, that a certain sum of money should be vested in the trustees, and the survivor of them, and the executors and administrators of such survivor for ever, upon the trusts specified in the articles. The marriage was celebrated, and the husband, with the assent of the trustees, obtained possession of the money:—Held, in a suit for the administration of the assets of the husband, that the trustees were entitled to rank as specialty creditors of the husband, in respect of that sum of money. *Id.*

11. Where a bill was filed against A. and B., on an admitted breach of trust by B., and the

accounts prayed to be taken and the real estate of B. applied in payment of the plaintiff's claim and the other creditors; afterwards a creditor's suit was instituted against the representatives of B., and the usual decree made; the plaintiffs in the first suit claimed priority over the plaintiffs in the second suit, as to the fund in court, but held that after the payment of costs in the first suit, the fund was to be applied amongst all the creditors of B. *Smith v. Birch*, 3 Beav. 10; 9 L. J., N. S., Ch., 394; 4 Jur. 670.

1. A deed, appointing new trustees, recited, that they had agreed to become trustees, and then assigned the trust premises to them to hold on the trusts of the original deed. There was no express agreement or declaration that they would execute the trusts:—Held, that a debt created by a breach of trust, was not a specialty debt. *Wynoh v. Grant*, 2 Drew. 312; 23 L. J., Ch., 834; 2 Eq. Rep. 1135.

J. G. and W. G. are appointed as new trustees of a settlement, and commit a breach of trust by investing the fund on a bad security, so that it is lost. J. G. dies, and W. G. becomes bankrupt. On bill filed for an account, and decree made declaring that such dealing was a breach of trust, and on the question whether it did not constitute a specialty debt:—Held, that it constituted a simple contract debt only, and the acceptance of the trusteeship could not be held a covenant and constituting a specialty debt. S. C. 2 W. R. 486.

2. A. & B. were trustees of a settlement, and a breach of trust was committed, B. being the guilty party. The trust fund was ultimately restored, and A.'s costs were directed to be paid out of B.'s estate:—Held, that these costs were not a specialty debt, as against B.'s estate. *Lookhart v. Reilly*, 27 L. J., Ch., 54; 1 De G. & J. 464.

A. paid a sum on account of his costs, after the 19 & 20 Vict., c. 97, and it was held that the sum was paid in the character of surety, and therefore that, under the 5th section, he was entitled to claim as a specialty creditor on account of it. *Ib.*

Held, also, that the Mercantile Law Amendment Act had a retrospective operation so as to be applicable to obligations incurred prior to the passing of the Act, and applied to that portion of the costs of A. which he had paid since the passing of the Act. *Ib.*

3. A. covenants under hand and seal to settle a sum of stock upon certain trusts, and subsequently appropriates this sum to his own use:—Held, that the violation of the obligation so entered into constituted a debt by specialty in favour of the trustees against the assets of A. *Re Hankinworth, Lovell v. Sherrin*, 2 W. R. 34; 2 Eq. Rep. 329.

4. R. having certain property conveyed to him upon trust, by three deeds, two of which he executed and one of which he did not execute, but possessed the estate conveyed and committed breaches of trust under all three, died, and two suits were instituted, but one only prosecuted, and five questions arose under it:—1. Whether the plaintiff as a creditor under the deed not executed by R. was a creditor by specialty? 2. Whether under the second deed certain creditors were by specialty? 3. Whether a bond creditor of R. by which his heirs were expressed to be bound, was to take precedence of all on the real estate?

4. Whether the liability of R. under the second deed survived to his co-trustee? and 5. How the costs should be paid:—Held, that the plaintiff was a simple contract creditor, those under the other deeds specialty creditors, and the obligee in the bond entitled to precedence on the real estate; that the liability of R. did not survive; and costs of obligee out of the estate, of plaintiff out of the personality. *Jenkins v. Robertson*, 1 W. R. 298; 1 Eq. Rep. 123.

The words "it is declared" are sufficient to create a contract between the trustee and *cestui que trust*. *Ib.*

5. Trust property being vested in three trustees, a part of which is outstanding upon mortgage, the mortgage is called in, the money received by one, and applied to his own use. He lives many years, and his executors, after his death, continue to pay the interest. His estate is insufficient even to pay specialty debts; and the Master, in a suit in which his estate is administered, finds that the money so misapplied is a specialty debt due to the representatives of the surviving co-trustee. The trust deed which was executed by the trustees contained the words, "And it is hereby declared and agreed between and by all the said parties hereto," that the property should be held upon certain trusts. Exceptions are taken to the Master's finding, for that he should have found that there was no debt, or if there was, that it was not a specialty debt:—Held, that the trust deed constituted a covenant, being under hand and seal, and a contract between all the parties to it; and there being a clear right to sue at law, this Court, in declaring that there was a covenant, could also allow such money so received and misapplied as a specialty debt due from the estate of the deceased trustee, who received the money, to the estate of his surviving co-trustee. The breach of trust, if any, was not in allowing the receipt of the money, but in the misapplication of it. Exceptions overruled with costs. *Alexander v. Foster*, 5 W. R. 33.

6. A breach of trust will constitute merely a simple contract debt, unless there is something in the creation of the trust to raise a liability on covenant against the trustee. *Adey v. Arnold*, 2 De G. M. & G. 482; 16 Jur. 1123.

By deed of indorsement under seal, appointing new trustees, and executed by them, a trust fund was assigned to the new trustees, "to hold unto them, their executors, administrators, and assigns, as their own money, property, and effects, but nevertheless upon the trusts and for the ends, intents, and purposes declared by the within indenture;" but there was no declaration of trust by the trustees:—Held, that a loss which occurred by a breach of trust did not constitute a specialty debt. *Ib.*

Semble, a declaration by trustees in a deed executed by them, that they will apply a trust fund in a particular manner, will be construed to amount to a covenant; and any loss to the trust fund arising from a breach of trust will constitute a specialty debt. *Ib.*

7. A trustee under a deed, the terms of which would amount to the creation of a contract, is not a specialty debtor if he has not executed the deed, although he has acted

under it. *Richardson v. Jenkins*, 1 Drew. 477; 17 Jur. 446; 22 L. J., Ch., 874.

The words "covenant or agree" are not necessary in a trust deed to constitute a specialty contract. A declaration by the trustee that he will stand possessed on certain trusts, etc., is sufficient. *Id.*

1. By a decree, the estates of two deceased trustees were declared severally liable to replace a fund. The representatives of one only admitted assets, and the decree directed payment by them, and an account of the other. The whole being paid by the former:—Held, that their right to contribution against the estate of the latter constituted a mere simple contract debt, although as against both estates the demand was a specialty debt. *Priestman v. Tindall*, 24 Beav. 244.

2. A trustee executed a deed acknowledging that he had trust money in his hands, and that he intended to secure it on property in which he had a reversionary interest. The deed contained no covenant to pay the money:—Held, that having regard to the absence of a covenant in the deed to repay the debt, and to the fact of the existence of an antecedent liability on the part of the trustee to pay, the debt had not been converted by the deed into a specialty debt. *Brook v. Harwood*, 37 L. J., Ch., 209; 3 L. R., Ch., 225; 16 W. R. 410; 18 L. T., N. S., 622.

3. Where a trustee, by deed under his hand and seal, accepted the trusts of a will, and afterwards committed a breach of trust, and died insolvent:—Held, that the *cestuis que trustent* were not entitled to rank as specialty creditors in the administration of his assets. *Holland v. Holland*, 38 L. J., Ch., 398; 4 L. R., Ch., 449; 17 W. R. 657.

4. A defaulting trustee, under a will, executed a deed under seal, whereby, after reciting that he held in his hands trust moneys to a certain amount, which he proposed to secure by a mortgage on his own estate, he conveyed certain property to the *cestuis que trustent* by way of mortgage. The deed contained a proviso for redemption and a power of sale, but no covenant to pay the mortgage debt or interest. The mortgaged estate was insufficient to cover the debt:—Held, that the deed did not convert the debt into a specialty debt. *Isaacson v. Harwood*, 3 L. R., Ch., 225; 37 L. J., Ch., 209.

IX. DELAY OR ACQUIESCENCE. EFFECT.

5. Trustee not protected by acquiescence of the *cestui que trust*, not duly informed. *Ryder v. Bickerton*, 3 Swan. 81.

6. Trustees lending money on personal security, is not of itself such gross neglect as to amount to a breach of trust, and the legatee (and afterwards his assignee) having acquiesced in such loan a bill to charge the trustees was dismissed. *Harden v. Parsons*, 1 Eden 145.

7. Devisees in trust to sell for payment of debts, assign to the son of the devisor; the creditors receive the interest from him for eleven years, and agree with him for an increase of interest on their debts; the original trustees continue liable. *Hardwick v. Mynud*, 1 Anstr. 110.

8. Trustees having committed breach of trust

by granting longer leases than they had power by deed to do; the fact of the *cestuis que trustent* receiving rent from the lessees in ignorance of the invalidity of their leases, did not operate as a new agreement. But the *cestuis que trustent* having neglected to look into their rights, no account directed beyond filing the bill, and no costs given to the plaintiff. *Bones v. East London Water Works*, 3 Madd. 375.

9. A *cestuique trust* concurring or acquiescing in breach of trust:—Held, not entitled to relief; subject to inquiry into circumstances which induced concurrence or acquiescence. *Walker v. Symonds*, 3 Swan. 64.

10. On the hearing of a cause, commenced in 1888, to charge a trustee with the loss occasioned by the bankruptcy of his co-trustee, whom, ten years before, he had permitted to acquire sole possession of the trust fund, the Court not being satisfied that all the circumstances as to the fact and time of *cestui que trust's* knowledge of the breach of trust were in evidence, directed an inquiry as to that fact, with liberty to either party to examine the co-trustee. *Broadhurst v. Balguy*, 1 Y. & Coll. C. C. 16.

11. Where property has been administered and applied without complaint according to an uniform course of management for a long series of years, the Court will not, by an interlocutory order, disturb the possession, upon the ground that such application is a breach of trust, unless it is perfectly clear that the party in whom the property is vested is a mere naked trustee, and has not, even to a limited extent, any of the rights or interests of an owner. A motion for the appointment of a receiver of the estates vested in the Irish Society, at the instance of one of the London companies claiming a beneficial interest in the income of the estates, was therefore refused. *Skinner's Co. v. Irish Society*, 1 Myl. & C. 162.

12. Construction of a clause in a marriage settlement. A court of equity will not direct payments made under a mistaken construction of a doubtful clause in a settlement, to be refunded after many years of acquiescence by all parties and after the death of one of the authors of the settlement, especially where subsequent family arrangements have proceeded on the footing of that construction. *Clifton v. Cockburn*, 3 Myl. & K. 76.

13. If a person interested under a will files a bill for an account against the executors, not seeking to charge them for wilful default, and dies pending the suit, his personal representative cannot charge them by bill of revivor and supplement, if the acts complained of were known to the deceased plaintiff. *Garrett v. Noble*, 6 Sim. 504; 3 L. J., N. S., Ch., 159.

14. S. deposited 900*l.* in a scrivener's hands, who without his consent laid it out on a defective mortgage; S. received the interest for many years, and noticed the mortgage in his receipts; decreed, he shall bear the loss. *Clark v. Perrier*, 2 Freem. 48.

15. A *cestui que trust*, discovering a breach of trust, but not receiving any benefit from it, or conniving in it for any purpose, and not recognising the transaction, is not precluded from complaining of it merely on the ground that he abstained from making such complaint until long after he first knew of it. *Phillipson v.*

Gatty, 7 Hare 516; 13 Jur. 318. Affirmed 2 H. & Tw. 459.

Where stock stood invested in trust, for the mother for life, with remainder to her son and daughter and their children, the daughter knew of an application by the son for a loan from the trustees of part of the trust moneys, upon his personal security, and that the trustees were willing to make the loan, with the consent of her mother, the tenant for life, and that the loan was, in fact, afterwards made. The daughter objected to the loan in her communications with her mother, but did not otherwise oppose it, and had not any communication with the trustees on the subject:—Held, that this was not such acquiescence on the part of the daughter to the loan as to preclude her from charging the trustees with the breach of trust, in a suit instituted seven years after the transaction took place; held, also, that the daughter was not precluded from so charging the trustees, by the fact that she knew that the mother had (untruly) stated to her son that she (the daughter) had consented to the loan, such statement of the daughter's consent never having been communicated to the trustees, or constituted any part of the sanction or authority under which they acted. *Ib.*

It was not necessary to decide the simple case, whether, if the daughter had permitted the son, in the belief that the daughter assented to it, to obtain the loan from the trustees, they could have availed themselves of any defence to the suit which the son might have as against the daughter; for, in this case, the letters of the son to the mother, requesting the loan, and upon which the mother's consent was given, proposed not to affect the daughter's rights as against the trustees. *Ib.*

1. Where a party at the time of the misapplication of a trust fund by the trustee was cognisant of the fact, but had then no right or interest whatever to the fund, and afterwards acquired such right as administrator to the *cestui que trust*:—Held, that his rights as administrator were not affected by such previous knowledge on the ground of acquiescence. Where, therefore, the trustee in such a case became bankrupt after committing a breach of trust, the administrator of the *cestui que trust* was not prevented from proving for the amount of the interest on the trust fund which accrued due in the lifetime of the *cestui que trust*. *Esop. Smith, Re Clark*, 2 M. D. & De G. 113.

2. The plaintiff, deliberately and with full notice, accepted the benefits under his mother's will, which prohibited him from setting up any claim on account of any error, irregularity, or impropriety in the execution of the trusts of her father's will:—Held, that he could not maintain a suit against the executor of the father's will, to make him accountable for the profits made by the employment of part of the trust funds in his business. *Egg v. Dewey*, 10 B. 444; 16 L. J., N. S., Ch., 409; 11 Jur. 1023.

3. Half of a trust fund, held on the trusts of a settlement of 1778, was re-settled by a settlement of 1791. In a suit to administer the trusts of the settlement of 1778, that half was, in the year 1809, ordered to be transferred to the trustees of the settlement of 1791. The transfer was never made, nor was it ever applied for by the trustees of the settlement of 1791. In

1827 the parties beneficially entitled under the settlement of 1791 were adult and *sui juris*. The then present investment of the trust fund was, as it had for many years before been, an investment in India, subject to the control of the trustees of 1778; but those trustees were, and had long been, in England. The parties so beneficially entitled knew of and acquiesced in the investment, and never required that their half of the fund should be transferred to the trustees of 1791. The trust fund was afterwards lost by the failure, in 1830, of a house of business in India:—Held, that the parties beneficially entitled were precluded from insisting that the trustees of 1778 were liable to make good the loss by reason of their not having made the transfer to the trustees of 1791. *Munch v. Cookerell*, 5 Myl. & C. 179; 9 L. J., N. S., Ch., 153; 4 Jur. 140. Reversing on this point 9 Sim. 339; 3 Jur. 36. Distinction between the degree of knowledge and sanction necessary to exonerate trustees from a breach of trust, and that which is necessary to preclude the *cestui que trust* from complaining of an omission which, if concurred in by the *cestui que trust*, did not constitute a breach of trust. *Ib.*

4. C. and G. being trustees of a sum of money for B., B. gave a receipt for the money to G., and left the money in his hands on security of his bond. G. having become insolvent, C. was held liable to make good the deficiency, there having been no acquiescence sufficient to bind B. *Byass v. Gates*, 2 W. R. 487.

5. A *cestui que trust* held under the circumstances not barred by delay or acquiescence. *Hawkins v. Gardner*, 2 Sm. & Giff. 441.

6. Husband and wife, in 1840, conveyed real estate, to which the wife was entitled in fee expectant on the death of A. B., to trustees, in trust for sale, to invest the moneys arising therefrom in the stocks or funds or upon real security, and to pay the dividends, etc., to such person or persons, etc., as the wife should direct or appoint; and in default thereof, to pay the same to the wife for life, for her sole use and benefit; and after her death, to her next-of-kin. The trustees sold the property, and invested the proceeds, with the concurrence of the wife, upon securities not mentioned in the settlement. The trust fund having been lost, the wife, as if the fund was in existence, exercised her power of appointment in favour of her infant children, who shortly afterwards, by their next friend, instituted a suit against their parents and the representatives of the trustees of the settlement, for the purpose of making the latter liable for the loss of the trust fund:—Held, that the fund had been dealt with by the trustees with the knowledge and concurrence of the wife, who had complete dominion over it, in a way not contemplated by the settlement; and therefore the bill, being a devise to make the trustees liable, by means of an execution of a power of appointment, for acts done by the wife, must be dismissed, but without costs. *Brewer v. Swirles*, 18 Jur. 1069; 23 L. J., Ch., 542; 2 W. R. 339; 2 Eq. Rep. 493.

7. A testator by his will bequeathed the residue of his property to his executors, W. C. and N., in trust to invest and pay the income

to his widow for life, and after her decease (in the events which happened) to five children. The eldest child attained twenty-one in 1839, and the youngest in June 1846. The three executors proved the will, but N., a solicitor, was almost entirely the acting trustee. The money was left by his co-trustees in the hands of N. alone; and on the youngest child attaining twenty-one, he, on behalf of himself and the other children, attempted to obtain payment from N., and in 1848 addressed a letter to N. consenting in effect to receive payment by instalments of 50%. In 1849 a bill was filed by the five children for the purpose of making the three trustees responsible:—Held, that it was the duty of the trustees N. and C., not only to have the money in their hands, but to explain to their *cestuis que trustent* what their rights were; and that not having been fully informed at the time of what their rights were, there was nothing in the conduct of the plaintiffs, whether in the way of acquiescence or of giving time, to deprive them of their remedy against the trustees, who were held jointly and severally liable accordingly. *Burrows v. Walls*, 3 W. R. 327; 5 De G. M. & G. 233; 3 Eq. Rep. 960.

1. A testator gave the residue of his property to trustees, with a direction to convert all his personal estate and invest the amount in the Bank of England, in trust to permit his wife to receive the rents and profits, dividends, or other annual produce for her life, and after her death to go among her children in the manner limited in the will. Part of the property was 24l. per annum Long Annuities. The trustees did not sell these Long Annuities, but paid the dividends for many years to the tenant for life. Two of the children joined with her in an assignment by way of mortgage of their shares in the residue. It appeared that the tenant for life had asked the trustees to convert:—Held, that the non-conversion was a breach of trust; that the children had not acquiesced, because the dividends received by the mortgagee were received in respect of life interest; and that the tenant for life did not acquiesce by merely receiving the dividends which were paid to her. *Bate v. Hooper*, 3 W. R. 639; 5 De G. M. & G. 338.

2. It is not necessary that acquiescence on the part of a *cestui que trust* in an improper investment should be evidenced by writing, if otherwise proved. *Macleod v. Annesley*, 17 Jur. 608; 22 L. J., Ch., 633; 16 Beav. 600; 1 W. R. 250.

3. A testator gave all his residuary real and personal estate upon trust to convert, part on his own decease and part on his wife's death, and gave the proceeds among his seven children. By a codicil this will was revoked as to one-seventh, out of which a legacy was given, and the residue to his daughter for life, and after to her children. The property was converted, and the income paid until 1838, when it appeared that a security of a malt-house, etc., upon which it had been invested was deficient by the insolvency and death of the mortgagor and the existence of deeds by which it had been previously assigned over. The trustees' defence was, that they were protected by a clause of indemnity in the will

which referred to diminution by insolvency or insufficient security, and that the *cestuis que trustent* had acquiesced by a letter and subsequent acts:—Held, that the clause referred to was not an indemnity, as the words "without their wilful default" controlled the others; that no sufficient acquiescence was proved; and that the onus of showing diligent inquiry on the part of the trustees (which had not been shown) lay upon them and not on the *cestuis que trustent*. *Stretton v. Ashmall*, 3 W. R. 4; 3 Drew. 9; 24 L. J., Ch., 277.

4. A tenant for life acquiesced in a breach of trust by sanctioning a trustee in lending the trust moneys upon what at the time were insufficient securities. Subsequently the securities were increased in value, and but little was lost by the improper investment; but owing to continued neglect on the part of the trustee, considerable costs were incurred, and the fund thereby decreased:—Held, that the right of the tenant for life against the trustee for subsequent laches was not lost by his original acquiescence. *Lockhart v. Reilly*, *Reilly v. Lockhart*, 4 W. R. 438; 25 L. J., Ch., 697.

5. A widow, a tenant for life, desiring an increase of income, induced a trustee to invest out of a trust fund a sum exceeding two-thirds of its value on mortgage of copyhold house property, at interest at 5l. per cent. After the rents had become insufficient to pay the interest, her daughter, on her marriage, became entitled to one-fourth of the trust fund. The trustee having stated to the husband and wife the deficiency in the widow's income, and its cause, they accepted a small sum of money in hand in lieu of their one-fourth, and made no objection for ten years, when the widow died. Becoming then entitled to the three-fourths part of the fund, they sought by suit to charge the trustee with the deficiency:—Held, that they had so far acquiesced in the investment, and could not complain of it. *Farrar v. Barraclough*, 2 Sm. & G. 231; 2 W. R. 244.

6. In a marriage settlement, a husband covenanted with the trustees, that his heirs, executors, administrators, and assigns would after his death pay to his wife a jointure of 40l. per annum; and that they would pay the trustees 400l. for the benefit of the children of the marriage, in case there should be any. The husband became indebted to one of the trustees, who entered up judgment against him, and insured the husband's life for the amount of the judgment. Upon the sale of the trust property:—Held, that the assignee of the trustees' judgment was entitled, in respect of incumbrance, to priority to the settlor's wife and children; and that in considering the dealings between a trustee and his *cestui que trust*, the length of time in which the acts of the former had been acquiesced in, with the knowledge of the latter, was to be taken into account in favour of the trustee. *Re M'Kenna, Exor. Busteed*, 5 L. T., N. S., 241.

7. A trustee permitted his co-trustee, the father of one of the *cestuis que trustent*, to sell out the trust fund, the co-trustee depositing with him a packet of title deeds by way of indemnity. The son, on coming of age in 1851, had an interview with the trustee upon

the subject. In 1855 the father, when dangerously ill, spoke to the son about the breach of trust, and desired him to call on the trustee, and obtain from him and keep the packet of deeds, which the son did. The son afterwards received a letter from his father, while still dangerously ill, requesting the son, in the event of the father's death, not to hold the trustee responsible, and inclosing the form of a memorandum for the son to copy and sign and send to the trustee, and by which the son, in consideration of the delivery up of the deeds, discharged the trustee from all liability. The father died in 1859, and in 1861 the son filed a bill, seeking to make the trustee liable for the breach of trust:—Held, that the son had by his conduct so acquiesced in the breach of trust, as to preclude him from complaining of it. *Farrant v. Blanchford*, 1 De G. J. & S. 107; 9 Jur., N. S., 423; 32 L. J., Ch., 237; 11 W. R. 294; 7 L. T., N. S., 770. Reversing 11 W. R. 178.

When a breach of trust has been committed, from which a trustee alleges that he has been released, it is incumbent upon him to show that such release was given by the *cestui que trust* deliberately and advisedly, with full knowledge of all the circumstances, and of his own rights and claims against the trustee. Acquiescence may, however, be an answer to the *cestui que trust*; and therefore where a *cestui que trust*, with full knowledge of all the circumstances of the breach of trust, had taken no proceedings for ten years:—Held, to amount to acquiescence on his part. *Id.*

1. A trustee holding a fund in trust for three children, allowed their father to receive the income of their shares during their minorities, considering him to be unable to maintain them. Two of the children attained twenty-one in their father's lifetime, and received their shares of the capital. The father died, bequeathing his property to the three children equally, and appointing the trustee his executor. The youngest child attained twenty-one soon after his death, and within a few weeks received her share of the capital of the trust fund, and signed a receipt expressing her approbation of the mode in which the income had been applied during her minority. About half a year afterwards, she and her two sisters received their shares of the father's estate, and gave a release by deed to the trustees. After this she filed a bill to charge the trustees with the dividends accrued on her share of the trust fund during her minority:—Held, that after having, with a knowledge of the facts, received from the trustee her share of her father's estate, which was primarily liable to the claim, and given him a release, she could not maintain the claim against him. *Aveline v. Melluish*, 2 De G. J. & S. 288; 10 Jur., N. S., 788; 12 W. R. 1020; 10 L. T., N. S., 830.

2. A *cestui que trust*, whose interest is reversionary, is not bound to assert his title until it comes into possession. He is not, however, less capable of giving his assent, by acts or otherwise, to a breach of trust by reason of his interest being in reversion. *Life Association of Scotland v. Siddall, Cooper v. Greene*, 7 Jur., N. S., 785; 9 W. R. 541; 4 L. T., N. S., 311; 3 De G. F. & J. 58.

A *cestui que trust* is not bound by acqui-

escence, unless fully informed of his rights, and of all the material facts and circumstances of the case. *Id.*

Although the onus lies upon a party relying upon acquiescence to prove the facts upon which the consent of the *cestui que trust* is to be inferred, there may be cases in which, from great length of time, such facts would be presumed. *Id.*

3. Certain commissioners were empowered by an Act of Parliament to levy rates and to apply them for certain specified purposes. They had applied part, and intended to apply more, of the proceeds of such rates towards defraying the expenses of an application to Parliament for an extension of their powers, such an application not being one of the purposes mentioned in the Act. An injunction was granted (see 1 W. R. 323) restraining the commissioners from such further intended application. And on the hearing of the cause on a motion for decree:—Held, that although, if an earlier application to the Court had been made, the misapplication of the trust funds might have been prevented, yet that the commissioners were bound to replace the trust funds; but under the circumstances, delay having taken place in applying to the Court, the commissioners were exonerated from payment of the costs personally. *Att.-Gen. v. Eastlake*, 2 Eq. Rep. 145; 17 Jur. 801.

4. A testator devised a farm to his son, to be valued by A., and one-third of the valuation to be paid to the plaintiff. In 1833 A. bought the farm himself for 750*l.*, and paid one-third to the plaintiff, who accepted it. In 1850, A. being dead, the plaintiffs filed a bill to set aside the sale for inadequacy of consideration:—Held, that considering the lapse of time and the death of A., the plaintiff was too late, and the bill was dismissed. *Baker v. Read*, 18 Beav. 398. S. C. on appeal 3 W. R. 118.

5. A *cestui que trust* having, with knowledge, received the income of an improper investment:—Held, bound to give credit for the difference between it and the income which would have arisen from a proper investment of the trust fund. *Davies v. Hodson*, 25 Beav. 177.

A testator gave funds to trustees, to pay the income to his wife or otherwise, for the maintenance of his seven children, till the youngest should attain twenty-five if a son, and if a daughter till that age or marriage; and when the youngest should attain twenty-five, to divide the same equally amongst his children, the shares of the daughters to be for their separate use. The trustees, four years after the testator's death, sold out the funds and invested the proceeds in railway shares (which resulted in great loss). The youngest child attained twenty-five. Upon a bill by a married daughter of the testator claiming her original share of the funds:—Held, that she, though aware of the sale of the trust funds, either immediately before or shortly after the purchase of the railway shares, had not sanctioned the breach of trust; that she was bound to assume that the discretion vested in the trustees was properly exercised; and though she did not complain for some years afterwards, that she was entitled to have her share of the stock replaced, allowing for the sums paid for maintenance beyond those which

would have arisen from the dividends of the trust stock. *S. C. 27 L. J., Ch., 449.*

1. By a marriage settlement made in 1821, stock belonging to the wife was assigned to B. and another, upon trust for the separate use of the wife for life, with remainder for the husband for life, with remainder, in default of children of the marriage, for B. The trustees neglected to have the stock transferred to them, and it remained in the name of the wife, and in 1822 the husband sold it, and possessed himself of the proceeds. B. died in 1829, the husband in 1858, and the wife in 1864. There were no children. In 1866 B.'s executors claimed the trust fund from the husband's estate:—Held, that their claim was not barred by the Statute of Limitations, or by acquiescence, or by the fact that B. was one of the trustees whose negligence rendered the misapplication of the trust fund possible. *Butler v. Carter*, 5 L. R., Eq., 276; 16 W. R. 388; 18 L. T., N. S., 11.

2. The Court will not visit a trustee with the consequences of a breach of trust, committed with the sanction or by the desire of the *cestui que trustent*, or of one committed without such sanction or desire, if when it comes to the knowledge of the *cestui que trustent* he has acquiesced in and obtained the benefit for a long period. *Griffiths v. Porter*, 25 Beav. 236.

Two trustees, A. and B., joined in the receipt of trust money. A. allowed B. to retain the cheque for the money, which, against the remonstrances of D., he placed in the hands of a solicitor, to invest on mortgage, and it was lost:—Held, that both were liable. *Id.*

Two trustees, A. and B., had allowed trust money to be received by their solicitors. The *cestui que trust* authorised its investments on a mortgage by B. alone. The money being in danger, and the solicitors pressed, a mortgage was given, but as to which B. exercised no judgment, and it turned out insufficient:—Held, that both trustees were liable for the loss. *Id.*

A tenant for life received 5*l.* per cent. on a mortgage improperly taken by trustees, and for which, on a loss, they were made responsible:—Held, that he was only entitled to 4 per cent. in taking the account of income, and that 1 per cent. must be taken as part of the subsequent income. *Id.*

3. Where trustees are made liable for a breach of trust, the tenant for life having received the benefit, they are entitled to be recouped out of the interest of the tenant for life, although they have since ceased to be trustees. *Barratt v. Wyatt*, 30 Beav. 442.

4. When trustees have committed a breach of trust in order to discharge themselves, they must clearly show that their *cestui que trust*, on becoming beneficially entitled, adopted the transaction. *Cope v. Clark*, 18 W. R. 279.

5. A trustee, by omitting to invest a sum of money sufficient to pay an annuity of 100*l.* a year to a party for life, is liable, when the parties in remainder become entitled to the fund, to make good any rise in the stock, assuming it had been purchased; and although the principal directed to be invested was paid, and a release obtained, still it was set aside after a subsequent delay of ten years, and the difference in value was directed to be paid to

the *cestui que trustent*, who were illiterate and ignorant of their rights. *Aspland v. Watte*, 25 L. J., Ch., 53; 1 Jur., N. S., 968; 3 W. R. 626.

6. Even where the Statute of Limitations does not apply, the Court will not entertain a suit by a *cestui que trust*, instituted for the purpose of challenging the accounts settled by his trustees, when the accounts and matters had been investigated twenty years before, and he had every opportunity of going into them. Lapse of time alone will be a sufficient bar to such a suit. *Bright v. Legerton*, 6 Jur., N. S., 1179; 29 L. J., Ch., 852; 8 W. R. 678; 29 Beav. 60. Affirmed 3 L. T., N. S., 713; 7 Jur., N. S., 559; 9 W. R. 239; 30 L. J., Ch., 338.

7. A husband survived his wife, who was one of several equitable tenants in common. He was advised by counsel that he had no title as tenant by the curtesy, his wife never having been in possession, and that if he intended to set up such a title, he ought not to sue with his infant daughter in a partition suit which was then in contemplation. The suit was nevertheless instituted by him as the next friend of the daughter, and in 1830 a decree was obtained. A partition was made under the decree, and the legal estate in the daughter's share conveyed to the use of the father during the infancy of the daughter, in trust for her maintenance, and afterwards to her own use in fee. The daughter attained twenty-one in 1843, and married in 1847. In 1852 the father filed a bill to be relieved from the trusts, on the ground of mistake, and to have his title as tenant by the curtesy established:—Held, among other things, that length of time and acquiescence and the marriage of the daughter, although without the father's consent, before the father disputed the daughter's title, constituted a sufficient answer to the suit; and that possession obtained in the character of trustee cannot be retained as one adverse to the *cestui que trust*, after the legal estate under which the possession was taken has determined. *Stone v. Godfrey*, 5 De G. M. & G. 76; 18 Jur. 524; 23 L. J., Ch., 769.

8. At the time when the conveyance was completed, the trustee of the will of a testator whose property was at the date of the will under contract for sale to a railway company, and who was a solicitor, took counsel's opinion as to the person to whom the purchase money was payable, and who ought to join in the conveyance, and the opinion was given in favour of the devisee. The trustee accordingly paid the money to her, and informed the plaintiff of the result, but no settlement of accounts was come to between the plaintiff and the trustee up to the time of the institution of the action, and the plaintiff had not executed any release or discharge to the trustee. This action was brought to recover the money out of the trustee's estate, after his death, and nearly five years after the payment had been made:—Held, that no case of acquiescence was made out against the plaintiff, and that he was entitled to recover from the trustee's estate the moneys received from the railway company, the amount to be recouped to the trustee's representative by his co-defendant, the devisee. *Wilson v. Donald, Re Jackson*, 44 L. T. 467.

9. A *cestui que trust*, who with knowledge

that his trustee has committed a breach of trust, obtains from him a part only of that to which he is entitled, does not thereby waive his right to such relief as he may be able to obtain unless an intention so to do can be clearly inferred from the surrounding circumstances. In November 1860 an order was made in a suit for administering the trusts of the will of J. C., to which H. C., a former trustee, was defendant, directing her to pay into court a sum of money in respect of breaches of trust committed in 1843 and 1845, the amount of which had been ascertained by the chief clerk in the suit. H. C. went abroad, and substituted service of the order was made upon her. By the order on further consideration, in 1863, H. C. appearing by counsel, certain sums of money to which she was entitled, and her life interest under the testator's will, were ordered to be impounded and paid over "to the account of H. C. funds applicable for the repayment of trust funds misappropriated," and an inquiry was directed as to what steps should be taken to obtain restitution of the funds. Certain other orders were made in the suit, but no personal order was made on H. C. for payment of the amount of her defalcation, nor any steps taken against her, although she returned to England in 1870, where she remained till her death in 1880, and her residence was known to the then trustees of the will and some of the *cestui que trustent*. On her death the surviving trustee of the will of J. C. brought this action against her executors, claiming the administration of her real and personal estate on behalf of himself and all the other creditors, alleging himself a creditor in respect of the unpaid balance of the sum representing the breach of trust. At the date of the institution of the action several beneficiaries under J. C.'s will were infants:—Held, that the action was not an attempt to enforce a stale demand, and that the *cestui que trustent* must not be taken to have elected to abandon their claim against her, and to rest content with impounding her life interest: that there being a debt due from H. C. at her death to the estate of J. C., and the trusts of his will not being completed, the surviving trustee was the proper person to bring the action, and that the *cestui que trustent* need not be parties; although as between a *cestui que trust* and a stranger the claim of the *cestui que trust* is barred by lapse of time operating against his trustee, lapse of time is no bar as between a *cestui que trust* and his trustee. *Re Cross, Harston v. Tenison*, 20 L. R., Ch. D., 109; 51 L. J., Ch., 645; 45 L. T. 777; 30 W. R. 376. Reversing 30 W. R. 313.

Constructive Trust.] 1. A constructive trust may be barred by long acquiescence. *Exp. Hasell*, 3 Y. & C. 617; 3 Jur. 1101.

2. Though no time bars a direct trust, as between *cestui que trust* and trustee, a constructive trust barred by long acquiescence, though the true state of the fact may be easily ascertained, and the ground of original relief was clear, and even arising out of fraud. *Beekford v. Wade*, 17 Ves. 97.

3. A testator died in 1810, in India, having bequeathed his English property to two infants, whom he acknowledged as his natural children; and having appointed his nephew,

E., to be their guardian. Part of his property consisted of a bond, dated in 1810, in which he was obligee, the obligor being seised of real estate in Ireland. In 1811 E. obtained possession of the bond from the testator's executor; but he did not register it, nor did he ever take any steps towards realising the security. In 1821 the elder of the infants attained twenty-one; in 1832 she married; and in 1833, when the bond had become irrevocable, E., for the first time, informed the elder child and her husband of the existence of the bond; and upon finding it was then too late to register it, he handed it to the husband, directing him to see to it. No step was taken until E.'s death in 1870, after which, in 1871, a bill was filed, seeking to make E.'s estate liable as for a breach of trust. At this time the younger infant was dead, and had no legal personal representative; but his son, who was entitled to administer, was made a defendant:—Held, that the parties, by acquiescing for thirty-eight years, and waiting till E.'s death, had lost their right to make any claim against his estate. *Semble*, that E. was not at any time liable for any breach of trust. *Sleeman v. Wilson*, 13 L. R., Eq., 36.

By Married Woman with Separate Estate with Clause against Anticipation.] 4. A married woman, restrained from anticipation, cannot agree to release her trustees from liability incurred by their disregard of that restraint. *Dickson v. Hook*, 14 W. R. 552.

5. *Quere*, whether a married woman who is entitled to the interest of a fund to her separate use, without restraint upon anticipation, can be bound by acquiescence in an improper investment of the fund. *Davies v. Hodgson*, 4 Jur., N. S., 252.

6. Trustee of separate property of married woman, without power of anticipation, joining in a lease for which a fine was paid and received by a third person:—Held, a breach of trust, although the *feme covert* (being a minor at the time) joined in the lease. *Booth v. Purser*, 1 Ir. Eq. R. 37.

7. Personal estate was by settlement vested in trustees for R., a married woman, for life, without power of anticipation; and in case there should be no issue of the marriage, in case M., her husband, should survive her, as she should by deed or will appoint, and in case she should survive, for her absolutely. W., the acting trustee of the settlement, at the instance of the wife, applied the property in discharge of her husband's liabilities. M. died, and by R.'s request the trustee took no steps to realise his assets. R. married again after the lapse of some years, and in her marriage settlement recited her wish to give credit to W. for all payments made by the trustees at her request:—Held, that R. had lost her right to make the trustee liable for his breaches of trust. *Rutherford v. Maziore*, 13 Ir. Ch. R. 204.

8. Slaves in the West Indies were bequeathed to executors, upon trusts for a niece of the testator for her life with remainder to her children. The executors having renounced and disclaimed, administration with the will annexed was granted to the niece, who afterwards married a minor. Before her husband had attained twenty-one the husband and wife

executed a settlement, reciting that the husband was, in right of the wife, possessed of the slaves, theretofore the property of her late uncle; but not in any manner referring to the will. The settlement purported to assign the slaves to trustees, in trust to sell and invest the proceeds and pay the income for the separate use of the wife for life, without power of anticipation, with trusts by way of remainder to the children of the marriage. Before the husband came of age, the husband and wife sold the slaves without noticing the settlement in the contract, but paid part of the purchase money to one of the trustees of the settlement, the other trustees not concurring in or being in fact aware of the sale or payment. An amicable bill was then filed on behalf of the infant children of the marriage, to have the trusts of the settlement carried into execution, or a new settlement made in conformity with an offer of the husband to execute such settlement on receiving 3,500*l.* out of the wife's fortune. This bill contained an allegation that the proceeds of the slaves had been invested in the names of the trustees. The trustees, by their answer, admitted the truth of this allegation. The husband and wife, answering separately, disputed the validity of the settlement, and refused to be bound by it; but the husband offered to execute a settlement on the terms above mentioned. The decree declared the settlement void, and directed a new settlement to be made upon the footing of the offer made by the husband. A settlement was accordingly executed, and the 3,500*l.* paid to the husband. Afterwards it was discovered that the admission in the trustees' answer was incorrect, the trustee who received the proceeds of the slaves having applied the money to his own use, and having by false statements induced his co-trustees to believe and admit upon the answer that the investment in their names and his had been made as there stated. His circumstances were such that any attempt to recover the amount at any period would have been hopeless. More than twenty years after the wife was aware of these circumstances she instituted a suit against the co-trustees to make them personally liable for the breach of trust:—Held, first, that the above facts, independently of the admission of the co-trustees in their answer, did not render them personally liable in respect of the proceeds of the sale of the slaves, the title of the settlors not having been such as to enable the trustees legally to possess themselves of the fund; and, secondly, that in the circumstances of the case, that admission did not create any such liability. *Derbishire v. Home*, 3 De G. M. & G. 80.

Semle, that a clause restraining a married woman from anticipation does not exempt her from the ordinary consequences of lapse of time and acquiescence; also, that in the circumstances above stated, the administratrix committed a breach of trust by marrying without providing for the security of the trust property; also, that having, by her separate answer in the first suit, refused to be bound by the first settlement, she could not afterwards sue the trustees for non-performance of the trusts of it; also, that her having concealed from them the nature of her title

when she assumed to settle the funds, would of itself have been a defence to such a suit. *Id.*

See also LIMITATIONS. STATUTE OF.

X. REMEDY BY WAY OF INJUNCTION.

1. Injunction to restrain an action at law to recover money lent in breach of trust, refused. *Lambert v. Lambert*, 5 Ir. Eq. R. 339.

2. When any Act involving a breach of trust is intended to be done, though not in its consequences irremediable, the Court will prevent it by injunction. *Att.-Gen. v. Aspinall*, 2 Myl. & C. 613; 7 L. J., N. S., Ch., 51; 1 Jur. 812.

XI. OTHER REMEDIES.

3. *Cestuis que trustent* do not, by enforcing their remedy against a defaulting trustee personally, lose their lien on the security on which the trust money has been invested. *Francis v. Francis*, 5 De G. M. & G. 108.

4. Sale declared to be made subject to the trusts of the testator's will, where, under a decree that his real estate (which was devised in strict settlement, subject to debts) should be sold, the sale had been effected by collusion between the creditors and tenants for life. *Manaton v. Moleworth*, 1 Eden 18.

5. The trustee of a voluntary deed under which he is also a *cestui que trust* having concurred in allowing the settlor to dispose of parts of the trust property:—Held, that he was not entitled to have the relief granted on a bill filed by one of the *cestuis que trustent* extended for his benefit. *Parnell v. Hingston*, 3 Sm. & G. 337.

6. Where trustees lent the trust moneys to one of the *cestuis que trustent*, upon a contract which constituted a breach of trust, the Court, in a suit by the trustees against all the *cestuis que trustent*, refused, as against the *cestuis que trustent* who had obtained the loan, to make a decree for the repayment of the money, contrary to the terms of the contract. *Phillipson v. Gatty*, 2 H. & Tw. 459. Affirming 7 Hare 516; 13 Jur. 318.

7. Under 15 & 16 Vict., c. 86, s. 42, a *cestui que trust* is not entitled as of right to a decree for execution of the trusts unless the case is in its particular circumstances a proper one for making such a decree. *McWade v. Brodhurst*, 24 W. R. 232.

8. An actual sale of goods for money, the vendor intending to use the purchase money in making a voluntary payment and the purchaser knowing of that intention, is not a fraudulent transfer within s. 6, sub-s. 2, of the Bankruptcy Act 1869. If a debtor on the eve of bankruptcy voluntarily makes good trust money which he has misapplied, the payment cannot be set aside as a fraudulent preference of the trust estate. *Ewp. Strubbins, Re Wilkinson*, 17 L. R., Ch. D., 58; 60 L. J., Ch., 547; 44 L. T. 877; 29 W. R. 653.

Within three months before the filing of a liquidation petition the debtor, who was one of the executors of a will, sold some goods to his co-executor with the intention of applying the purchase money in repaying to the testator's

estate money which he had improperly abstracted from it. This intention was known to the co-executor, and the purchase money was, with his knowledge, immediately after its payment by him, paid by the vendor into a bank to the credit of the executors:—Held, that the transaction was not either a fraudulent preference within s. 92 of the Bankruptcy Act 1869, or a fraudulent transfer of property within s. 6, sub-s. 2, and that neither the co-executor nor the testator's estate could be compelled to refund the money. *Id.*

Receiver.] See XXX. II. *post*.

Attachment.] See DEBTORS ACT.

Proof in Bankruptcy.] See BANKRUPTCY, XXIV. xxxvi.

See also Preceding Subdivisions.

XII. INQUIRIES. WHEN DIRECTED.

1. On motion, reference directed to inquire whether defendant trustee remains accountable for any acts done by him as such, and if not, to settle release. — *v. Osborne*, 6 Ves. 455.

2. Estates being devised to trustees to be sold for payment of debts, and subject thereto for the testator's infant children, the surviving trustee retains possession of one of the estates in satisfaction of debts, which he alleges himself to have paid, the testator being insolvent. On a bill for an account and conveyance of this estate by one of the children, and the representatives of another, forty-five years after the testator's death, stating that they had recently discovered the facts, special inquiries directed to ascertain whether they had any notice of the circumstances, whether they had in any manner released, and whether the trustee had advanced to the amount of the value of the estate. *Chalmers v. Bradely*, 1 Jac. & Walk. 51.

3. Where discretion of trustee is to be exercised on matters of fact, Court will substitute a Master, but not if upon matter of opinion or judgment. *Walker v. Walker*, 5 Madd. 424.

4. In the answer to a bill for relief in respect of a breach of trust, it was alleged that some of the *cestuis que trustent* had assented thereto:—Held, that the parties sought to be charged were entitled to an inquiry as to that fact. *Fyler v. Fyler*, 3 Beav. 550; 5 Jur. 187.

5. Inquiry refused as to the concurrence of *cestuis que trust*, in a breach of trust, where it was not alleged by the answer, and was unsatisfactorily proved by the evidence. *Lincoln v. Wright*, 4 Beav. 427; 10 L. J., N. S., Ch., 331.

6. A suit was instituted, after a great lapse of time, and after the death of all the trustees of a will, to make the estates of such trustees liable for breaches of trust in the administration. Their representatives being personally ignorant of the matters, the Court refused to declare the liability in the first instance, but directed inquiries. *Kirkman v. Booth*, 11 Beav. 273; 18 L. J., N. S., Ch., 25; 12 Jur. 525.

7. On the hearing of a cause, commenced in

1838, to charge a trustee with the loss occasioned by the bankruptcy of his co-trustee, whom, ten years before, he had permitted to acquire sole possession of the trust fund, the Court not being satisfied that all the circumstances as to the fact and time of *cestui que trust's* knowledge of the breach of trust were in evidence, directed an inquiry as to that fact, with liberty to either party to examine the co-trustee. *Broadhurst v. Balguy*, 1 Y. & Coll. C. C. 16.

8. A *cestui que trust* concurring or acquiescing in breach of trust, not entitled to relief; subject to inquiry into circumstances which induced concurrence or acquiescence. *Walker v. Symonds*, 3 Swan. 64.

9. Where a trustee of Navy 5l. per cent. stock dissented from the conversion of it to 4l. per cents., under the statute 3 Geo. 4, c. 9, and it was charged by the bill that the dissent was given under circumstances injurious to the property, an inquiry was directed as to how he ought to have acted. *Angell v. Dawson*, 3 Y. & Coll. 308; 8 L. J., N. S., Exch. Eq., 50.

Where by the terms of a settlement 7,000l. stock was vested in trustees, upon certain specific trusts, and the bill alleged that one of the trustees had sold out the stock and applied part of it in discharge of a claim in no way connected with the trust:—Held, although the bill did not make a case or pray for inquiry upon this point, that the plaintiffs were, nevertheless, entitled to an inquiry; the trustee, by his answer, stating that the stock so applied had been included in the settlement by mistake, notwithstanding that he himself had been a party to, and had executed the settlement. *Id.*

10. Where a decree has declared that a corporation is liable to make good the loss occasioned by a breach of trust, the Court will not specifically charge the loss upon the general corporate property; but will leave the plaintiff to enforce his remedy by the usual process against a corporation. An order, therefore, contained in such a decree, directing inquiries into the corporate property and the special trusts to which it was subject, with a view to charge the loss upon such portion of that property as should be subject to any special trust, was reversed. *Att.-Gen. v. East Retford (Corporation)*, 3 Myl. & C. 484; 8 L. J., N. S., Ch., 49; 2 Jur. 1079. Reversing on this point 2 Myl. & K. 35, 62.

11. In a suit for the administration of the estate of a deceased trustee which was instituted by persons claiming to be his creditors by virtue of a breach of trust, against his executor and devisee in trust, subject to the payment of debts, and the persons beneficially interested under his will, and in which the executor and devisee in trust by answer admitted his testator's breach of trust, but the persons beneficially interested by answer denied it, and in which no evidence was entered into on the part of the plaintiffs, the common administration decree in a creditors' suit was made, without any special direction for inquiry respecting the breach of trust. *Teague v. Fisher*, 3 W. R. 587.

12. A trustee having sold certain trust property, and allowed the proceeds to be received by one of the *cestuis que trustent*, inquiry

directed as to the application of such proceeds, in order to ascertain the specific remedy which the trustee might have against such *cestui que trust*. *Racham v. Siddall*, 1 Macn. & G. 607; 2 H. & Tw. 44; 16 Sim. 297; 12 Jur. 640.

XXV. Liability for Interest or Profits.

See also EXECUTOR AND ADMINISTRATOR, X. VII. 4—X. XIII.

- I. Interest, 7066.
- II. Profits, 7070.
- III. Set-off between Profit and Loss on Various Investments, 7072.

I. INTEREST.

1. Liability for. In General, 7066.
2. Rate of, 7067.
3. Compound Interest and Rests, 7068.
4. Liability for Interest or Profits. Election of *Cestui que Trust*, 7069.

1. Liability for. In General.

1. A trustee or executor is chargeable with interest, although not prayed by the bill. *Woodhead v. Marriot*, C. P. C. 62.

2. An executor or trustee insolvent at the time they place out money at interest, shall, if they make any, pay interest, as they run no risk; *secus*, of one who is in good circumstances. *Bromfield v. Wytherley*, Pre. Ch. 1506; 1 Eq. Abr. 398, but cited and overruled, 1 Bro. C. C. 360.

3. Although a trustee is not directed to put money out at interest, yet, if he makes interest, he shall account for it. *Lee v. Lee*, 2 Vern. 548.

4. Court ordering loss on trust estate, in consequence of conduct of trustees, to be made up by the trustees personally, refused interest on the amount, which was comparatively but a small sum. *Bone v. Cooke*, 13 Price 343; M'Clell. 168.

5. Trustee bound to pay interest on money retained a length of time. *Trimleston v. Hamill*, 1 Ball & B. 385.

6. Executors not liable to interest on balances, unless the purpose for which the money is retained, appear to be answered; but trustees and guardians are, without such proof. *Dawson v. Massey*, 1 Ball & B. 231.

Person bound by recognisance to account annually, and retaining money in his hands, though no use be made of it, must pay interest on such balances. *Id.* 230.

Interest decreed upon balances kept by guardian in banker's hands. *Id.* 219.

7. Trustees charged with interest for wilful misconduct, as not paying money into court pursuant to an order, but slight difference in the sums admitted and reported in his hands, is not sufficient, and further inquiry whether he made interest to be directed, unless a strong case. *Sammes v. Rickman*, 2 Ves. J. 36.

8. Interest decreed against the estate of an

accounting party, who had dealt with certain funds, in such a manner, that the Court would have given interest on the balances in his hands against him personally, but who had taken the benefit of the Insolvent Act before there was any decree charging him with interest. *Moons v. De Bernales*, 1 Russ. 301.

9. A testator directed his trustees and executors to invest the residue of his estate on good freehold security; the trustee retained in his hands a balance of between 300*l.* and 400*l.* for a period of more than two years, part of which money was in the hands of his bankers:—Held, under the circumstances, that he was not responsible for interest during that time, although he had been informed of certain persons who were desirous of borrowing money on freehold security, he having employed a solicitor to procure a proper investment. *Wyatt v. Wallis*, C. P. C. 155. n.; 8 Jur. 117.

To fix a trustee in such a case with a breach of trust, the *cestui que trust* must find out some person having a proper security, and desirous of borrowing a considerable portion of the trust money, and then inform the trustee of the offer. *Id.*

10. Owners of a privateer acting for themselves and the crew, in the sale of the prizes, having neglected to render accounts, and delayed the distribution of the proceeds, charged with interest on the balances, and costs. *Pearce v. Green*, 1 Jac. & Walk. 135.

The first duty of an agent, receiver, trustee, or executor, is to be constantly ready with his accounts, and neglect in this is a ground for charging him with interest. *Id.*

11. Where, on a bill to call a trustee to account, he, by answer, submits readily to it, though found in debt, he shall pay the interest for the balance only from the time of the account liquidated, and no costs; *secus*, if he controverts the account; there, if found in arrear, he shall pay interest and costs. *Parrot v. Treby*, Pre. Ch. 254.

12. A marriage settlement, made in 1811, recited that the husband was entitled to 20,000 rupees, secured by a note of the East India Company, and 10,000 rupees, part thereof, were thereby assigned (with certain property of the wife) to the trustees of the settlement, upon trust for the husband and wife for their lives, with remainder for the children of the marriage. One of the trustees died six weeks after the settlement was made. The husband died in 1819, and the wife in 1822. The trustees did not, nor did the survivor, take any step during the lifetime of the husband to recover the 10,000 rupees. After they had attained their ages of twenty-one years, the children filed a bill against the surviving trustee and the representatives of the deceased trustee for an account of trust funds, charging them with the 10,000 rupees. Under a reference to the Master to inquire whether the defendant might, by due diligence, have received or got in the 10,000 sicca rupees, the defendant produced evidence, showing it to have been the common belief of persons who knew the husband, that he was not possessed of any such property, but no proof was given that the husband was insolvent; and the Court charged the surviving trustee with the fund, and interest from the death of the wife, and directed a reference to inquire the value of

the 10,000 rupees at the time of the settlement. *Simoes v. Eyre*, 6 Hare 137.

1. Trust being established, interest was given against the trustees' estate before the filing of the bill, viz., from the death of the person subject to whose life interest the plaintiffs claimed. *Hawkins v. Gardiner*, 2 Sm. & Gif. 441.

2. Rate of.

2. A special case is requisite for charging trustee or executor with a higher rate of interest than 4l. per cent. *Woodhead v. Marriott*, C. P. C. 62.

3. In three cases the Court charges more than its usual rate of 4l. per cent. upon balances due from a trustee, viz.: first, where the trustee, in the opinion of the Court, ought to have received more than 4l. per cent.; secondly, where he has received more; and, thirdly, where he is in the opinion of the Court to be presumed to have received more. Examination of circumstances with reference to the applicability of the third of these rules. *Penny v. Avison*, 3 Jur., N. S., 62.

4. Interest at 5l. per cent. is only exacted in cases of grave misconduct or fraud on the part of a trustee. *Imperial Credit Association v. Coleman*, 21 W. R. 696.

5. A trustee of a charity estate, who has used the balances of the rents in carrying on his trade, will be charged with interest at 5 per cent., but not with annual rests. *Att.-Gen. v. Solly*, 2 Sim. 518.

6. Trustees under a will decreed to pay interest at 5l. per cent. per annum, on balances mixed by them with their own moneys, and used in their own business, although the will authorised them to invest the residue on "good private securities." *Westover v. Chapman*, 1 Colly. 177.

7. If trustees, for the purpose of their own trade, use trust moneys which, according to the directions of the will, they ought to have otherwise invested, in a decree against them directing an account, compound interest will be charged. *Townend v. Townend*, 1 Giff. 201; 5 Jur., N. S., 506; 7 W. R. 529; 33 L. T. 143.

8. A trustee wilfully applying trust moneys to his own use, is chargeable with interest at 5l. per cent.; but where, under the trusts of a doubtful will, the tenant for life, who was also a trustee, neglected to make proper investments, she was held chargeable with interest at 4l. per cent. only, and the decree was made without costs. *Mousley v. Carr*, 4 Beav. 49; 10 L. J., N. S., Ch., 160.

9. Bequest of personal estate in trust, to invest it in Government or real securities and to permit the interest to accumulate until it amounted to 500l., and from time to time, when it amounted to that sum, to lay out or invest such interest in Government or real securities, to be applied in the same manner as the principal; the trustees retaining the trust moneys in their business, an inquiry was directed what would have been the amount of the personal estate, and the interest thereof, if it had been invested and accumulated in the manner directed by the will, and the trustees were decreed to pay the amount, and were charged with interest at 5 per cent. on a

balance in their hands. *Brown v. Sansome*, 1 M'Clel. & Y. 427.

10. Where trustees improperly retain balances, or cause or permit trust money to be lost, they are chargeable for the same with interest at 4 per cent. *Robinson v. Robinson*, 1 De G. M. & G. 247; 21 L. J., N. S., Ch., 111; 16 Jur. 255.

11. A tenant for life, having received 5 per cent. on an investment, which she knew to be and insisted was improper, was ordered to account for the excess beyond 4 per cent., for the benefit of the trust. *Baynard v. Woolley*, 20 Beav. 583.

12. Trustees, under a misrepresentation that the fund was invested in stock, charged with interest at 5l. per cent. upon the same principle as if they had sold out stock and used the money, viz., an option to the *cestui que trust*, to have the actual profit or 5 per cent. *Bate v. Scales*, 12 Ves. 402.

13. The testator directed his executors to lay out the residue of his estate in the purchase of lands or upon heritable or personal securities, at such rate of interest as they should think reasonable; the executors lent the fund to one of themselves on a bond, at 4 per cent., when 5 per cent. might have been made by heritable or Government securities:—Held, liable to pay interest at 5 per cent. *Forbes v. Ross*, 2 Cox 113.

14. Interest upon exchequer bills allowed, at 5 per cent. from the time of the sale, upon the ground that a claimant had a right to consider it as a debt from that time, and had elected so to consider it. *Devaynes v. Noble*, 1 Meriv. 580.

15. Trustees, with power to invest on real security, in the presence of their *cestuis que trustent*, agreed with the solicitor, who had long been employed in managing the property, to leave their fund in his hands, he paying 5 per cent. interest; but it did not appear that anything more was clearly explained to the *cestuis que trustent* than that they were to receive 5 per cent. interest. On the bankruptcy of the solicitor, it appeared that the only security taken by the trustees was a deposit of the deeds of an estate, which the solicitor had contracted to purchase:—Held, that the trustees must make good the loss upon this security, with 4 per cent. interest. *Hooker v. Platt*, 1 Jur. 473.

16. By a deed, A. agreed that B. should insure her life, and that the costs of such insurance, and the payments for keeping the same on foot, should be paid out of the property charged; and she directed the trustees to make the necessary payments for effecting and keeping on foot the policies. The trustees did not make the payments, but the policy was kept on foot by B.:—Held, that he was entitled to interest thereon at 4l. per cent. *Hodgson v. Hodgson*, 2 Keen 704; 7 L. J., N. S., Ch., 5.

17. Trustees, in breach of trust, lent trust money to one of them, F., and his partners in trade. F. and his partners gave their bond to F. and his co-trustees for the amount payable with interest at 5 per cent. No action could be maintained on the bond:—Held, in a suit to make the trustees liable for a breach of trust, that F. was only liable to pay 4 per cent. on the loss which had accrued to the trust fund. *Fletcher v. Green*, 33 Beav. 426.

18. Interest at 5l. per cent. given against the

trustees on a sum lost by breach of trust. *Munch v. Cockerell*, 5 Myl. & C. 179; 9 Sim. 339; 9 L. J., N. S., Ch., 153; 4 Jur. 140; 3 *Id* 36.

1. Where a defaulting trustee has misapplied trust money, the Court will charge him with 5l. per cent. interest, unless it be shown that he has made more by the user of it. *Berwick (Mayor) v. Murray*, 3 Jur., N. S., 847; 26 L. J., Ch., 201.

2. A deceased trustee had invested money on mortgage at 5 per cent. on an insufficient security, and for some years, both before and after his decease, interest was paid at that rate to the *cestui que trust*; but some years after his decease the payment of interest ceased:—Held, that his estate was chargeable with interest at the rate of 5 per cent. from the time of the last payment. *Price v. Price*, 42 L. J., N. S., 626.

3. A trustee, with power to invest the trust property in leasehold or chattel personal securities, or upon the personal security of any person, advanced, at the request of his *cestuis que trustent*, some of the property to two ladies on the security of mortgages (with the usual covenants) of a leasehold house in which the ladies were living, and of the furniture in it. The trustee was also the lessor of the house. The mortgagors became insolvent, paid no rent, and no part of the principal or interest on the loan. The trustee, as lessor, determined the lease by entry, and then sold all his interest in the leasehold premises and the furniture; but he thereby so mixed the trust property with his own that it was impossible to distinguish the one from the other, or to pronounce with certainty how much of the proceeds of the sale was his, and how much belonged to the *cestuis que trustent*. The advance had been made at 5l. per cent. After some delay, the trustee replaced the principal money of the loan, but invested it against the wishes of his *cestuis que trustent* in 3l. per cent. consols, the dividends on which, however, were paid to them:—Held, that the trustee was bound to make good to the trust estate the whole of the money advanced on the loan, with all interest due thereon at the rate of 5l. per cent. per annum, to be computed up to the date of the decree; and that he must pay the costs of the suit. *Cook v. Addison*, 38 L. J., Ch., 322; 7 L. R., Eq., 466; 17 W. R. 480; 20 L. T., N. S., 212.

4. When a trustee has employed trust funds for his own benefit he will be charged as of course with simple interest at 5 per cent. *Burdick v. Garrick*, 37 L. J., Ch., 369; 5 L. R., Ch., 233; 18 W. R. 387.

5. D. claimed a fund as next-of-kin to J. D., who had sailed from England in 1814, and had never since been heard of. The fund came into possession of a trustee in 1844, who retained it in his own hands, and refused to pay it over to D. without direct and positive proof of the death of J. D.:—Held, that the trustee must pay over the whole fund, together with interest at 5l. per cent. from the time when he ought to have invested it. *Dobson v. Pattinson*, 5 W. R. 771.

6. Where there is a direction in the will to accumulate, and the trustee has failed to comply with the direction, he will be charged with interest at 4l. per cent. from one year

after the testator's death. *Amiss v. Hall*, 3 Jur., N. S., 584.

7. The trustee of a will held a fund upon trust (after the determination of a previous life interest) to transfer and pay the same to a child when and as he should attain twenty-one, with a proviso that in case the child should be under age at the determination of the life interest the income of the fund or any part thereof should or might be applied for or towards his maintenance, education, and advancement, and the surplus, if any, should accumulate to and become part of the fund. After the child attained twenty-one (the life interest having previously determined), the trustee retained the fund without making any arrangement with the child or explaining to him his rights:—Held, that the trustee must be taken to have continued to hold the fund after the child attained twenty-one, upon the same trusts and with the same obligations to accumulate as before, and that he was liable to account for the fund with compound interest. *Wilson v. Peake* (3 Jur., N. S., 155) distinguished; *Amiss v. Hall* (3 Jur., N. S., 584) observed upon. *Re Emmett's Estate, Emmet v. Emmet* (No 2), 17 L. R., Ch. D., 142; 50 L. J., Ch., 341; 44 L. T. 172; 29 W. R. 464.

Part of the fund had been invested at 5l. per cent. or other rates of interest upon authorised securities, and the rest of it had been either improperly invested or had not been kept separate from the trustee's own moneys:—Held, that as to so much of the fund as had been invested at 5l. per cent. or any other rate upon authorised securities, interest must be calculated at the rate actually yielded; that the rest of the fund must be treated as having been in the trustee's hands uninvested, and that under the circumstances he must be charged with interest thereon calculated at 4l. per cent. only. *Id*.

3. Compound Interest and Rests.

8. A trustee of a charity estate, who has used the balances of the rents in carrying on his trade, will be charged with interest at 5 per cent., but not with annual rests. *Att.-Gen. v. Solly*, 2 Sim. 518.

9. The order to take an account with rests is always a matter entirely discretionary with the Court, on a consideration of the circumstances. Where A. held funds, part of the estate of B., but held them as security to cover liabilities into which he had entered on account of B., the estate itself being otherwise clearly answerable for such liabilities, and where the creditors of B. had not required him to invest the balance which might probably exist after his liabilities had been indemnified:—Held, that, in the absence of any positive stipulation, he was not, on the final settlement of accounts with the creditors, bound to pay a larger interest than 5 per cent. on the money he had so retained, and the account was not to be taken with rests. Under such circumstances, if the fund had been paid into court, it would have realised 4 per cent. with yearly or half-yearly rests, which being equal to 5 per cent. without rests, A. was held liable to that interest, on the equitable principle of putting the creditors into the same

situation as if he had paid the fund into court in the ordinary manner. *Court v. Roberts*, 6 Cl. & F. 65.

1. A trustee of a marriage settlement, who allowed a sum of 350*l.* to remain in the hands of a trading firm for a period exceeding fifteen years after the death of the tenant for life, but who eventually, and before the bill was filed, paid the principal, with 5*l.* per cent. interest:—Held, liable to account with annual rests, and also to the costs of the suit. *Jones v. Fawell*, 21 L. J., Ch., 725.

2. A testator, by his will, gave his residuary real and personal estate to trustees, upon trust for his wife for life, and after her decease upon trust for his children; and he directed that after the death of his wife, and during the minority of any of his children, the trustees should apply, towards the maintenance of his children, a certain portion of the income of their then expectant shares, and accumulate the surplus income of each such share at compound interest. After the death of the widow, the sole surviving trustee neglected to accumulate the surplus income of each child's share, and invested large portions of the testator's estate in exchequer bills and other securities not authorised by the trusts of the will:—Held, that the investments which had been made being improper investments the executor was chargeable in the same manner as if he had retained the moneys in his own hands; but, under the circumstances of the case, as it did not appear that he had benefited himself by it, and had not employed the sums so retained in trade, that he was chargeable only with interest at 4*l.* per cent. *Knott v. Cottee*, 16 Jur. 752.

Held, also, that as the trustee had been guilty of a breach of trust in neglecting to accumulate the surplus income of each child's share, he was to be charged with annual rests. *Id.*

Held, also, notwithstanding he was chargeable as above, that he was entitled to his usual costs of suit, as between solicitor and client, out of the estate. *Id.*

3. J. C. bequeathed the residue of his personal estate to J. L. A., in trust "to pay and apply the same to the relief of such persons resident within the parish of St. E. as might be sufferers from accidental losses or misfortunes, which should not have been occasioned in any way by their own imprudence or misconduct." The testator directed that the residue "should remain in the hands of J. L. A., to be bestowed in such portions as the cases might deserve, with the joint consent and approbation of the rector and churchwardens for the time being of the parish of St. E." J. L. A. kept the whole trust fund in his hands for twelve years, concealed from the rector and churchwardens. Upon its being accidentally discovered, the fund was invested by J. L. A. in 3*l.* 5*s.* per cent. annuities without the concurrence of the rector and churchwardens, and afterwards transferred into court, under the provisions of the Trustee Relief Act:—Held, that J. L. A. was to be charged with interest at 5*l.* per cent. on the balance of cash in his hands on the 30th August 1843, with annual rests in computing the same, and with interest at 5*l.* per cent. on dividends received half-yearly. Held also,

that investment by a trustee in 3*l.* 5*s.* per cent. annuities was an improper investment. *Att.-Gen. v. Alford*, 18 Jur. 592.

4. When a trustee has employed trust funds for his own benefit, he will be charged as of course with simple interest at 5*l.* per cent. But compound interest will only be given when the money has been used in trade, and the payment by a solicitor of it into his bank to the general account of his firm is not such an employment of the money in trade as to make him liable to be charged with compound interest. *Burdick v. Garrick*, 37 L. J., Ch., 369; 5 L. R., Ch., 233; 13 W. R. 387.

5. Where there is an express direction to accumulate trust property, and the accumulation is not made, the trustees are liable to account upon the footing of yearly or half-yearly rests. *Feltham v. Turnor*, 23 L. T., N. S., 345.

4. Liability for Interest or Profits. Election of *Cestui que Trust*.

6. Where a trustee has an infant's money to lay out for his benefit, and employs it in his trade, the Court will give an option for the benefit of the infant either to have interest or the profits of the trade. *Anon.*, 2 Ves. 630.

7. If a trustee mixes trust funds with his private moneys, and employs both in a trade, an adventure of his own, the *cestui que trust* may, if he prefers it, insist upon having a proportionate share of the profits, instead of interest on the amount of the trust funds so employed. *Dooker v. Somes*, 2 Myl. & K. 655; 3 L. J., N. S., Ch., 200.

8. Where trust property is employed in trade without authority, the *cestuis que trustent* must elect to take either the profits for the whole period, or interest for the whole period. Circumstances may arise to entitle them to take profits for one and interest for another part of the period; but a notice of dissolution of partnership, published for a particular purpose, and not accompanied by a settlement of accounts or a transfer of the property is not sufficient. *Heathcote v. Hulme*, 1 Jac. & Walk. 122.

9. Difficulties of enforcing a *cestui que trust's* right (however clear) to participate in profits of trade, carried on in part with trust fund. *Wedderburn v. Wedderburn*, 4 Myl. & C. 41; 8 L. J., N. S., Ch., 177; 3 Jur. 596. Affirming 2 Keen 722.

10. Trustees, under a misrepresentation that the fund was invested in stock, charged with interest at 5 per cent. upon the same principle as if they had sold out stock and used the money, viz., an option to the *cestui que trust* to have the actual profit or 5 per cent. *Bate v. Soales*, 12 Ves. 402.

11. When trust funds are, without authority, lent to traders, with notice of the trust, and employed in their business, such traders are not liable to account to the *cestui que trust* for a share of the profits of the business. *Stroud v. Gwyer*, 28 Beav. 130; 6 Jur., N. S., 719.

12. Where trustees lend or use trust money in trade, they are chargeable not only with the money and interest, but with the profits made in the trade, the interest generally being 5 per cent. *Robinson v. Robinson*, 1 De G. M. & G.

247; 21 L. J., N. S., Ch., 111; 16 Jur. 225. And see S. C. 11 Beav. 371; 18 L. J., N. S., Ch., 73; 12 Jur. 969.

1. Where executors were empowered to lend such parts of the trust funds as they should think proper to one of the *cestuis que trustent*, and did so, and he employed the loan in trade:—Held, that the case was to be considered as if he were a stranger, and that he was not liable to account to the estate for the profits of the loan in trade. *Parker v. Blozham*, 20 Beav. 295.

2. Though the employment of a trust fund in trade by a firm is technically a breach of trust, yet if the amount of profit attributable to capital alone is not ascertainable, and the trustees acted *bonâ fide* and accounted to the *cestui que trust* for the value of her share with 5 per cent. compound interest, the Court would not call upon them for an account of the profits, so as to enable her to exercise an option between the profits and the compound interest. *Vyse v. Foster*, 42 L. J., Ch., 245; 8 L. R., Ch., 309; 21 W. R. 207; 27 L. T., N. S., 774.

II. PROFITS.

3. Trustees cannot deal with trust fund for their own benefit; if stock is purchased with trust money, in whatever name it may stand, the profits belong to fund. *Phayre v. Peres*, 3 Dow 128; 1 Bli. N. S. 594.

4. Both the trustee and the assignee are responsible to the *cestui que trust* for profits subsequent to an assignment in breach of trust. *Vandebende v. Livingston*, 3 Swan 625.

5. Profit derived by a trustee, either from the trust property or from his office of trustee, belongs to the *cestui que trust*. *Sudgen v. Crossland*, 3 Sm. & G. 192.

6. It is no answer to the rule, that persons standing in the situation of trustees or agents must account to their *cestuis que trustent* or principals, or for all benefit which they themselves obtain by virtue of that character, that in the course of acquiring the benefit which has been derived by the trustee or agent, he incurred a possibility of loss; it is sufficient, if the transaction has resulted in gain obtained by virtue of the trusteeship or agency, to give the benefit to the *cestuis que trustent*. *Williams v. Stevens*, 1 L. R., P. C., 352; 15 W. R. 409; 36 L. J., P. C., 21; 4 Moo. P. C., N. S., 235.

7. A sum of 10,000*l.* trust money was agreed to be laid out in land and settled, but the trustees bought South Sea stock with the money, which increased to 30,000*l.* As the trust would have suffered by the fall, so shall it have the benefit of the rise of this stock. *Anon.*, 1 P. W. 648.

8. The sole proprietor of a recipe for medicine assigned it on the marriage of his daughter to trustees for her and her husband for their lives, and then to their children. The mother destroyed the recipe, but communicated verbally the contents to the eldest for the benefit of the younger children. Upon bill filed by the younger children against the eldest, he was declared to hold secret in trust for the settlement, and was decreed to account for profits since mother's death; and as a sale was impracticable, an issue was directed to ascertain the value of the secret. *Green v.*

Folgham, 1 Sim. & S. 398. S. C. *nom. Green v. Church*, 1 L. J., Ch., 203.

9. A trustee entered into a contract for the sale of trust property, and it was agreed that the purchaser should, out of the purchase money, retain a private debt due to him from the trustee. On a bill by the trustee:—Held, that this Court would not decree the specific performance of such a contract. *Thompson v. Blackstone*, 6 Beav. 470.

10. E. C. assigned a legacy to A. B. upon trust to pay a debt due to him; but before the execution of the deed, L., another creditor of E. C., assigned his debt to A. B. for a sum considerably less than its amount. The debtor and creditors were parties to this transaction. Under a decree made in the cause the chief clerk certified that A. B. was entitled to the full amount of the debt assigned by L.; and on motion to vary the certificate, on the ground that A. B. was, when he purchased the debt, acting as trustee for E. C., and was therefore only entitled to the amount actually paid, it was held that A. B. was entitled to the full amount of the debt. *Crompton v. Huber*, 1 Jur., N. S., 465; 3 W. R. 347.

11. Sale of a testator's share in a partnership trade, and the property belonging to it, by his executors to his partners for the purpose of being re-sold to one of his executors, set aside, and his estate held entitled to his aliquot proportion of the subsequent profits, as if the partnership had continued. Interest allowed at 5 per cent. on sums paid out of his estate. *Cook v. Collingridge*, Jac. 607; 1 L. J., Ch., 74.

12. Trustee of an infant having saved 3,000*l.* out of the profits of his estate, lays it out in a purchase of lands lying near the infant's estate, with the consent of his grandmother, declaring the trust for the benefit of the infant, if he, when at age, shall agree to it; infant dies within age; the trustees shall account to the infant's executors for the 3,000*l.*, but the profits of the land set off against the interest. *Winchelsea v. Norcliffe*, 1 Vern. 435.

13. Where executor or trustee, entrusted with disposition of some church preferments, made a presentation to A., under a secret condition for his own benefit, the presentation was set aside, and he was decreed to present a more proper person. *Richardson v. Chapman*, 7 Bro. P. C. 317.

14. A. bequeathed a leasehold interest in a colliery to B. and C. upon certain trusts, and appointed B., C., and D. his son executors. B. and C. renounced the trust and did not prove. D. proved the will and entered into possession of the property. He made a profit of the colliery and continued to work at a profit, although it ought to have been sold twelve months after the death of A.:—Held, that he could not make a profit of his trust; that the clear proceeds of the colliery formed part of A.'s personal estate; and that, although the lease of the colliery ought to have been sold twelve months after the death of A., yet, as that was not done, its value would not be ascertained as at the time when it ought to have been realised, but that the amount actually realised by D. must be accounted for by him, he being allowed his reasonable expenses. *Lord v. Wightwick*, 23 L. J., Ch., 235; 18 Jur. 253; 2 Eq. Rep. 349.

15. The corporation of the city of Toronto, in

Canada, was authorised by an Act of the Legislature of Canada to issue debentures to assist in the construction of a railway. At that period B. was the mayor and a member of the finance committee, and took an active part in passing a bye-law, which authorised the issue by the corporation of debentures for the completion of the railway. B. at that time was engaged in co-partnership with H., and their firm purchased of the contractors for the railway company some of the debentures so issued which had been assigned to the contractors by the corporation. B. and his partner afterwards sold the debentures, and thereby realised a large profit. This transaction was without the knowledge of the corporation:—Held, that B. must, in the circumstances of his being a member of the corporation, and the manner in which he acted throughout the transaction, be treated as the trustee of the corporation, and was not entitled to any benefit received from the sale of the debentures, and was liable to account to the corporation for the ascertained and unquestioned amount of profit made and received by him in the transaction in which he had engaged in respect of the sale of the corporation debentures. *Bones v. Toronto (City)*, 11 Moo. P. C. 463.

Held, also, that it made no difference that the profit from the sale of the debentures was made by B. and his partner jointly, and not by B. alone. *Ib.*

1 The rule of the Court is imperative, that, in the absence of any contract for that purpose, no person can, by acting as trustee, derive any pecuniary benefit to himself. *Crosskill v. Bomer*, *Bomer v. Turner*, 32 Beav. 86.

Three trustees, two of whom were bankers, were empowered to carry on a business, and to borrow money from any bankers or other persons for that purpose. The bankers made advances of money to the trust at compound interest:—Held, that, having regard to their fiduciary character, they could make no profit, and were entitled to simple interest only on their advances. *Ib.*

2. Nothing can be better settled, or more in conformity with the dictates of justice, than the rule, that persons standing in the situation of trustees or agents must account to their principals or *cestuis que trustent* for all the benefits which they themselves obtain by virtue of that character or relation. *Williams v. Stevens*, 12 Jur., N. S., 952.

It is no answer to say, that in the course of acquiring the benefit which has been derived by the trustee or the agent, he incurred a possibility of loss. That may well be; but if the transaction has resulted in gain, and is one in which the trustee or the agent was in reality enabled to accomplish what he has done by virtue of his trusteeship or his agency, the consequence results, that the whole benefit of the transaction belongs to the person whom he must be considered to have represented throughout. *Ib.*

3. A tenant for life of a trust estate mortgaged it, and it was sold by the mortgagee. After the sale the purchaser and mortgagee, for a nominal consideration, assigned to the tenant for life certain alleged arrears of interest and profits of part of the trust fund, which, as the plaintiff alleged, the trustees

had made in excess of the interest for which they had accounted. A bill filed against the trustees, on the title conferred by this assignment, for an account of their profits, was dismissed with costs. *Hill v. Boyle*, 4 L. R., Eq., 260.

4. A trustee who was a solicitor, sold out stock forming part of the trust estate and invested it on mortgage. He acted in the transaction as solicitor for the mortgagor as well as for the trust estate, but made no charge against the trust estate for his services, being paid for them by the mortgagor. He also derived some profit as a solicitor in consequence of the employment of part of the mortgaged estate for building purposes:—Held, that the plaintiff could not charge him with the profit thus made, as having been made by the employment of the trust estate in his business. *Whitney v. Smith*, 4 L. R., Ch., 513; 17 W. R. 579; 20 L. T., N. S., 468.

5. The plaintiff was tenant for life under the settlement executed on her marriage, part of the settled property consisting of a sum of 15,500*l.* This sum was allowed to remain in the hands of the plaintiff's father, who employed it in trade, he covenanting at his death to pay it to the trustees. Upon the death of the father, 10,000*l.*, part of the 15,500*l.*, was allowed to remain in the business, such investment being unauthorised by the settlement. Large profits accrued to the 10,000*l.*, some of which, with the plaintiff's consent, had been paid to her husband:—Held, that the plaintiff was entitled in respect of income to 4 per cent. on the original 10,000*l.* and upon all accretions of profits retained and employed in the business, and that the rest of the profits must be regarded as capital subject to the trust of the settlement, and must be made good out of the husband's estate, so far as he had received any part thereof. *Re Hill*, *Hill v. Hill*, 50 L. J., Ch., 551; 45 L. T. 126.

6. A trust was created by a debtor for the benefit of creditors, and the trustee had the power to bind the debtor personally and heritably for the benefit of the trust. By the terms of the trust deed, the trustee was likewise required to do all in his power to keep the residue of the trust estate as large as possible for the debtor. The trustee purchased an annuity granted by the debtor after the date of the trust deed. The trustee died. His representatives sought to enforce the annuity against the grantor. It was held that they could not do so, and a decree of the Court of Session affirming their right, was reversed, a trustee being bound not to do anything which can place him in a position inconsistent with the interests of the trust. *Hamilton v. Wright*, 9 Cl. & F. 111.

7. A trustee will not be permitted to place himself in a position in which his personal interest will conflict with those of the trust; and if he does place himself in such a position, and acquires benefits from so doing, those benefits will be transferred to the trust estate. *Bennett v. Gaslight & Coke Co.*, 52 L. J., Ch., 98; 48 L. T. 156.

On the insolvency of a person who had a lucrative agency agreement with a gas company for the sale by him, at a commission, of

their sulphate of ammonia, the company renewed the agency agreement for a limited period to two of the trustees of the insolvent's estate appointed by the creditors' trust deed for the benefit of the estate. Before the expiration of that agreement and the winding-up of the trust, one of those two trustees obtained for his firm from the company a fresh agency agreement, to commence from the expiration of that agreement, and to be on less lucrative, though still beneficial, terms:—Held, that the trustee was not at liberty, by obtaining a fresh agreement for the benefit of his own firm, to render it contrary to his own interest to press for a renewal of the old agreement, or a grant of a new one, for the benefit of the trust estate, and that the interest of the trustee under the fresh agreement must be transferred to the trust estate. *Hamilton v. Wright* (9 Cl. & F. 111) followed. *Id.*

1. Where trustees acquire a benefit as ostensible owners of trust property, that benefit cannot be retained by them, but must be surrendered to those who are beneficially interested. *Aberdeen Town Council v. Aberdeen University*, 2 L. R., App. Cas. (Sc.), 544.

Remuneration and Charges by Professional Trustees.] See VIII. VII. *ante*, and XXXI. XVI. *post*.

As to Profits by Persons in a Fiduciary Relationship.] See FRAUD, II.—COMPANY, I. II. 3—VII. VIII.—GUARDIAN AND WARD, V. II. —LUNATIC, V.—MORTGAGE—PRINCIPAL AND AGENT, VII. 3—VENDOR AND PURCHASER.

III. SET-OFF BETWEEN PROFIT AND LOSS ON VARIOUS INVESTMENTS.

2. When trust funds are invested on several improper securities, the trustees, in accounting, are not entitled to set off the gain on one against the loss on the other. *Robinson v. Robinson*, 11 Beav. 371; 18 L. J., N. S., Ch., 73; 12 Jur. 969. And see S. C. 1 De G. M. & G. 247; 21 L. J., N. S., Ch., 111; 16 Jur. 285.

3. A testator gave the residue of his personal estate to trustees, directing them to convert it into money, and invest the proceeds in Government or real security, of which they were to stand possessed, upon trust for A., during her life, and after her death for B. The trustees permitted a share, which the testator had in an Indian Loan, bearing interest at 10½ per cent., to remain for several years on that security, during which time they paid to A. the interest at 10½ per cent. which it yielded annually; and the loan being afterwards paid off, they invested the money in 3 per cent. at a time when the funds were so low, that the amount of stock purchased was considerably greater than if the conversion had taken place at the end of a year from the testator's death:—Held, that the tenant for life was not entitled to the actual interest which the money yielded, while it remained on the Indian security; but only to the dividends of so much 3 per cent. stock as would have been purchased with it, at the end of a year from the testator's death; that the trustees ought to be charged with the whole of the stock actually purchased, and all the sums

actually received in respect of the Indian rate of interest, and that they ought to be allowed in their discharge as payments for the tenant for life, not the sums which they had in fact paid her, but only a sum equal to what she would have received for dividends if the money had been transferred from the Indian security, and invested in the 3 per cent. stock at the end of a year from the testator's death. *Dimes v. Scott*, 4 Russ. 195.

XXVI. Account.

See also EXECUTOR AND ADMINISTRATOR, X. XIV.—XXIX.—XXX.

- I. *When Ordered*, 7072.
- II. *Wilful Default*, 7073.
- III. *Other Matters*, 7075.
- IV. *In General*. See ACCOUNT.

I. WHEN ORDERED.

4. Account decreed against a trustee, who having engaged the trust property in an adventure, afterwards renounced it for the trust, and declared it to be on his own account, though no part of the trust money actually laid out. *Wilkinson v. Stafford*, 1 Ves. J. 32.

5. Where lands are devised in trust to maintain an infant till twenty-three, and then to account, and for want of a devise over, the lands belong to the heir; the infant and heir may have an account in the meantime, upon suggesting the insolvency of the trustee. *Tilley v. Simpson*, Mos. 244.

6. Where property is vested in trustees for the benefit of A.,—on a bill filed for the purpose of establishing securities given by A., the Court will not direct any accounts against him in his absence, nor appoint a receiver. *Brown v. Blount*, 9 L. J., Ch., 74.

7. The purchaser of scrip shares in a provisionally registered railway company neglected to send in his scrip to be registered, after the Act of Parliament incorporating the company had been obtained. The company, in consequence, registered the original allottee of the shares as the owner liable to the company for calls, and, in compliance with the provisions of the Railway Act, sent him the sealed certificate of ownership. The allottee, being unable to find the scripholder, sold the shares in the market:—Held, in a suit afterwards brought by the scripholder, that the allottee was a trustee of the proceeds of the shares for the plaintiff, and liable as such to account; held, also, that the plaintiff was entitled, under the circumstances, to the costs of suit as against the defendant, although the sum recovered did not exceed 9*l.* *Beckett v. Bilbrough*, 8 Hare 188; 19 L. J., N. S., Ch., 522; 14 Jur. 238.

8. Bill by *cestuis que trustent* and two of the trustees under a marriage settlement, against the executrix of the settlor and the remaining trustee, praying payment of the trust money, or a general administration of the settlor's assets, and seeking to impeach a

prior security, claimed over the settlor's property by the defendant trustee:—Held, that a demurrer by the trustee for multifariousness and for general want of equity, must be overruled: first, because the matters contained in the bill were all matters of account, and the defendant was interested in taking the account; and, secondly, because there was a general equity against him in his character of trustee. But, *semble*, that a partial demurrer for want of equity would have been sustainable. *Addison v. Walker*, 4 Y. & Coll. 442; 10 L. J., N. S., Exch. Eq., 73.

1. A testator, who died in 1852, bequeathed all the residue of his real and personal estate to trustees, unto and to the use of his granddaughter, who, with her husband, in 1856, requested the trustees to render an account. The trustees offered to allow them, "or any other person, or an accountant named by them," to inspect the accounts, but the acting trustee refused to allow their solicitor to do so, on the ground that he had lent money to them and was not inquiring in their interest, but in his own. A bill was filed for an account, which was ordered, and also that the defendants pay all the costs up to the hearing. *Kemp v. Burn*, 9 Jur., N. S., 375; 11 W. R. 278.

2. Account decreed against a trustee, who having engaged the trust property in an adventure, afterwards renounced it for the trust, and declared it to be on his own account, though no part of the trust money actually laid out. *Wilkinson v. Stafford*, 1 Ves. J. 32.

II. WILFUL DEFAULT.

1. *In what Cases*, 7073.
2. *Allegations in Pleading*, 7074.
3. *Practice*, 7075.

1. In what Cases.

3. *Quere*, the trustee of leaseholds settled to separate use of married woman, bound to see that head-rents are paid, or liable as for wilful default, if the premises are evicted for non-payment of rent. *Booth v. Purser*, 1 Ir. Eq. Rep. 40.

4. In ordinary cases it is the duty of trustees to get in the funds, but where under the terms of the instrument constituting the trust it is the duty of the trustees not to do so if in their discretion they consider it inexpedient, misconduct on their part must be proved in order to render them liable for loss, and the ordinary rules as to wilful neglect and default have little application. A *cestui que trust* sought to charge a trustee with breach of trust in not recovering moneys, which were recoverable only in equity:—Held, that as under the circumstances the *cestui que trust* might have himself sued, he could not make the trustee liable for not doing what he could at any time have himself done. *Paddon v. Richardson*, 1 Jur. 1192; 7 De G. M. & G. 563; 3 Eq. Rep. 933.

5. Trustees are mere stake-holders, and cannot be affected with more than they actually received without wilful default. *Sed quere*. *Pybus v. Smith*, 1 Ves. J. 189.

6. A creditor, who makes out a *prima facie* case of misconduct in trustees, is entitled to

a decree that they shall account for whatever they might have received without their wilful default or neglect; though, in a prior suit instituted by another creditor, and conducted without collusion, a common decree for an account has been previously made against them. *Shepherd v. Tongood*, T. & R. 379.

7. A bill was filed against trustees, praying that the amount of the trust fund which the trustees had, "or but for their wilful default might have, received might be ascertained." At the hearing the bill was dismissed as against one trustee, and the amount and particulars of the trust fund were directed to be ascertained. Nothing was said about wilful default, nor did the trustee ask that the bill might be dismissed as to wilful default. The Master made his report, which stated certain facts, and referred to certain documents, from which, it was alleged, it would appear that there had been wilful default. At the hearing, upon further directions, a decree was made, referring it to the Master, to inquire whether the trustee "could with the diligence, and without wilful neglect or default, have received" more than a particular stated fund; but, upon appeal it was held that the direction as to wilful default should be struck out of the decree. *Coope v. Carter*, 21 L. J., N. S., Ch., 570.

As a general rule, in order to obtain a direction for inquiry as to wilful default against an executor or trustee, the bill must allege a case, pray for it, and one case, at least, must be proved; and, *semble*, that if from admission or proof a suspicion arises whether wilful default has or has not been committed, and it appears likely that further evidence can be obtained, the Court ought to direct an inquiry short of directing wilful default, but in such a way as to call the defendant's attention to it, with the view to ground thereon a new order at a future stage, directing an inquiry for wilful default. *Id.*

8. P., a member of a firm of bankers, was trustee of a marriage settlement; and, by a breach of trust, paid a sum of 17,000*l.*, part of the trust fund, into the bank to his separate account. S., another partner of the firm, subsequently was introduced into the trust; and a deed was executed, reciting that the trust fund consisted of 13,000*l.*, and assigning certain bond debts belonging to the firm to the trustees by way of security for the 13,000*l.* These bonds were placed in a box, and remained at the bankers'; but all except one were afterwards paid off, and other bonds substituted for them. It did not appear that S. had any notice that any further sum than 13,000*l.* ever belonged to the trust. Afterwards the firm became bankrupt, and new trustees of the settlement were appointed:—Held, first, that the new trustees could prove against S.'s separate estate for the 13,000*l.*, but not for the remaining sum of 4,000*l.* Secondly, that as to the original bond, which still remained, and of which P. was sole obligee, he was both reputed and true owner, and therefore the "order and disposition" clause of the Bankruptcy Consolidation Act did not apply. Thirdly, that as to the substituted bonds, of which the firm were obligees, the firm were both reputed and true owners, but fixed with a trust for the *cestui que trustent*

of the settlement; and therefore, in this case also the "order and disposition" clause did not apply. Fourthly, that a trustee who comes in as a new trustee of a settlement in which there is a covenant to settle after acquired property, will not be held liable for wilful default in not securing any property that may fall in either before or after he has been appointed a trustee, unless he has had notice, or reasonable ground for suspicion, that such property exists. *Epp. Geaves, Re Straham*, 4 W. R. 536; 2 Jur., N. S., 651; 25 L. J., Bky., 53; 8 De G. M. & G. 291.

1. The surviving trustee of a will cannot be made liable for wilful default in respect of purchase money which was received from the sale of part of the testator's estate by a deceased co-trustee alone and misappropriated, though he joined in the receipt for the sake of conformity. *Re Fryer, Martindale v. Piquot*, 5 W. R. 552; 26 L. J., Ch., 398; 3 Jur., N. S., 485.

2. An executrix and trustee under a will directing an immediate sale, allows her co-trustee to sell and retain the money, joins in the conveyance and signs the receipt, and also in an assignment of railway shares where the receipt of both was necessary. On an administration summons and decree for common accounts:—Held, that she could not be made liable for wilful neglect or default on such a decree; and a certificate of the chief clerk declaring her liable disallowed. *Blakely v. Blakely*, 3 W. R. 288; 1 Jur., N. S., 368.

3. Where an auctioneer trustee sold property of a testator, and died thirteen months afterwards insolvent, with the purchase money in his hands, his co-trustee not having in the meantime taken any proceedings to compel him to pay over or invest the money:—Held, that there had been wilful default on the part of the surviving trustee, and that he must be charged with all moneys which, but for such default, he might have received. *Williams v. Higgins*, 16 W. R. 390; 18 L. T., N. S., 525.

4. When on a bill, against a firm of solicitors who were the trustees of a settlement, for an account, but in which there was no charge of wilful neglect or default, and no relief prayed as against it, the plaintiff succeeded in establishing his case: the Court directed an inquiry as to the defendants' dealings with the trust fund, and if on taking the accounts it should appear that they had been guilty of wilful neglect or default in the discharge of their duty, they should be charged, in taking the accounts, with such wilful neglect or default. *Nash v. Howell*, 21 L. T., N. S., 743.

5. A solicitor purchased an estate from his client and took possession thereof: the sale was set aside:—Held, that A. was chargeable with the rents which, without wilful default, he might have received, although no special charge of wilful default was made by the bill. *Adams v. Sworder*, 3 N. R. 623; 12 W. R. 615; 10 L. T., N. S., 49; 4 De G. & S. 448; 23 L. J., Ch., 236.

6. A bill to administer the estate of a testator, charging the trustee with wilful default, was filed by a person interested in the estate in remainder, the tenants for life not being parties to the suit:—Held, that the decree must be confined to an account of wilful default as to the capital, and that no relief

could be obtained with respect to the income of the estate. *Whitney v. Smith*, 4 L. R., Ch., 513; 17 W. R. 579; 20 L. T., N. S., 468.

2. Allegations in Pleading.

7. A bill was filed against trustees, praying that the amount of the trust fund which the trustees "had, or but for their wilful neglect or default might have, received might be ascertained." At the hearing the bill was dismissed as against one trustee, and the amount and particulars of the trust fund were directed to be ascertained. Nothing was said about wilful default, nor did the trustee ask that the bill might be dismissed as to wilful default. The Master made his report, which stated certain facts, and referred to certain documents, from which it was alleged that it would appear that there had been wilful default. At the hearing upon further directions, a decree was made referring it to the Master to inquire whether the trustee "could with due diligence, and without wilful neglect or default, have received" more than a particular stated fund; but upon appeal it was held, that the direction as to wilful default should be struck out of the decree. *Coope v. Carter*, 2 De G. M. & G. 292; 21 L. J., Ch., 570.

As a general rule, in order to obtain a direction for inquiry as to wilful default against an executor or trustee, the bill must allege a case, pray for it, and one case at least must be proved; and *semble*, that if from admission or proof a suspicion arises whether wilful default has or has not been committed, and it appears likely that further evidence can be obtained, the Court ought to direct an inquiry short of directing wilful default, but in such a way as to call the defendant's attention to it, with the view to ground thereon a new order at a future stage, directing an inquiry as to wilful default. *Ib.*

8. In order to obtain an inquiry as to wilful neglect and default, it is necessary that the bill should allege at least one specific act of wilful neglect and default. *Dicta in Coope v. Carter* (2 De G. M. & G. 292) explained. *Massey v. Massey*, 1 N. R. 15.

9. The rule of the Court is, that in order to obtain an inquiry as to wilful default, the plaintiff must allege a case for such an inquiry, must pray for it, and must prove at least one act of wilful default; and although it may not be necessary in order to obtain a preliminary inquiry upon which an inquiry as to wilful default may be afterwards founded, that he should conclusively establish such an act, yet there must be such a case made out with respect to some specific item alleged in the bill as raises a doubt in the mind of the Court. *Sleight v. Lamson*, 3 Kay & J. 292; 26 L. J., Ch., 553.

Lord Eldon's rule, that in order to obtain an inquiry as to wilful neglect and default against an executor or a trustee, the plaintiff must allege and prove at least one act of wilful neglect or default, is still the rule, and was not intended to be relaxed by *Coope v. Carter* (2 De G. M. & G. 292). *Ib.*

Dicta in that case, from which the contrary has been inferred, explained. *Ib.*

10. In order to let in evidence of wilful

default by a trustee there must be a specific allegation of default. *Lambert v. Lambert*, 10 Ir. Ch. R. 500.

A general charge of wilful omission to let land is not sufficient as a ground for evidence of any particular omission. *Id.*

3. Practice.

1. On motion of trustee under a will for Master to take accounts, refused; wilful default being charged against him, and a cross-bill filed. *Wallis v. Sarel*, 8 Jur. 640.

2. A petition to carry into execution the trusts of a will, even though it seeks to charge a trustee for wilful default, may be rendered to the Master under the 15th section of the Chancery Regulation Act (Ireland). *Johnston v. Johnston*, 5 Ir. Ch. R. 493.

3. Special decree in a bill for an account, where the accounts and vouchers were alleged, under special circumstances, to be beyond the control and power of the accounting party. The plaintiff conveyed his property to trustees for the benefit of his creditors. The trustees, who were authorised to employ an agent, committed the management of the property to an agent. The agent rendered his account to the defendants, and left England taking with him the vouchers. The trustees being unable, from the absence of the documents, to furnish a satisfactory account, the plaintiff asked that they might be charged for what, without their wilful default, they might have received. The Court, however, in the first instance, made a special decree ordering a general account; and if, in taking the account, it should appear that the defendants could not render a satisfactory account by reason of the non-production of the documents and vouchers, it was referred to the Master to inquire, whether it was by the neglect or default of the trustees that they were unable to render a better account, with liberty to state special circumstances. *Turner v. Corney*, 5 Beav. 615.

4. A creditor who makes out a *prima facie* case of misconduct in trustees, is entitled to a decree that they shall account for whatever they might have received without their wilful default or neglect, though in a prior suit instituted by another creditor and considered without collusion, a common decree for an account has been previously made against them. *Shepherd v. Tomgood*, T. & R. 379.

5. When a decree for the common accounts against trustees, alleged to have committed a breach of trust, has been directed at the hearing of a cause, the Court has no power to vary or add to the decree in chambers, by directing an account as for wilful default. *Cary v. Knowles*, 15 L. T., N. S., 482.

III. OTHER MATTERS.

6. A mere agent of the trustee may not be accountable to the *cestui que trust*, but otherwise with respect to a substituted trustee, who accounts to nobody else. *Myler v. Fitzpatrick*, 6 Madd. 360.

7. A. is tenant for life of a trust, remainder to his sons. A., before a son is born, brings a

bill against the trustees, and an account is decreed and afterwards taken. This account shall bind the sons, for all persons that could be made parties were parties to the suit. *Leonard v. Sussex*, 2 Vern. 527.

8. Trustees entered into possession of rent and profits, and paid them over under a trust deed to a married woman to her separate use: it afterwards appeared that she was not entitled to receive them, but that upon the true construction of a will they ought to have gone to another person. That person filed a bill, and a decree was made in favour, but an account of the rents and profits was only ordered from the date of the filing of the bill:—Held, that whether an account should be directed from the filing of the bill, or from an anterior time, is a matter of discretion, and that the direction had been rightly exercised. *Vernon v. Wright*, 7 H. L. Ca. 35.

9. To a bill by *cestui que trust* against the representatives of the trustees, charging breaches of trust, and asking, as consequential to other relief, that they might admit assets or set out accounts, one of the defendants put in an answer denying the breaches of trust, and alleging that the accounts had been settled, and a release given in the lifetime of the trustee, and refusing to admit assets or set out accounts. Exceptions to such answer were allowed, and the Court refused to let them stand over till the hearing, on the ground that the plaintiffs were entitled, before going to the expense of establishing their case, to know whether there would be assets to satisfy their claim in case of success. *Brookes v. Boucher*, 8 Jur., N. S., 639; 31 L. J., Ch., 821; 10 W. R. 708.

10. A testator made two persons his executors, and the same persons, with one other, the trustees of his real and personal estate. A decree was made for the administration of the estate, and the usual accounts ordered to be taken. The chief clerk required separate accounts to be taken of the receipts and payments of the executors, and of the receipts and payments of the trustees:—Held, that the accounts of the executors and trustees were rightly taken separately, and that the percentage for court fees was payable both on the gross receipts of the executors, and on the gross receipts of the trustees; and that the receipts of the trustees properly included (1) the residue handed over to them by the executors, (2) temporary loans advanced to them by their bankers, and (3) sums transferred from the trustees' deposit account at their bankers to their drawing account. *Armitage v. Elworthy*, 13 L. R., Ch. D., 91; 41 L. T. 608; 28 W. R. 283.

XXVII. Indemnity Lien and Reimbursement.

I. *Indemnity Clause*, 7076.

II. *Express Agreements by Cestui que Trust for*, 7077.

III. *Loss. What Cestui que Trust or Parts of Estate Liable for*, 7078.

IV. *Lien of Trustee on Beneficial Interest of Cestui que Trust*, 7079.

- v. *Lien of Cestuis que Trustent Inter se*, 7082.
- vi. *Lien of Cestuis que Trustent on Beneficial Interest of Trustees*, 7082.
- vii. *To Trustee for Liability for Torts*, 7083.
- viii. *Priority of Trustee to Other Claims*, 7083.
- ix. *Other Matters*, 7083.
- x. *Following Trust Funds*. See XXIV. vi. *ante*.
- xi. *When Acting under the Authority of the Court*. See XIX. i. 2 *ante*—TRUSTEE RELIEF ACTS, IV. vi.
- xii. *In Respect of Costs*. See XXXI. *post*.
- xiii. *Refunding to and Recouping Executors*. See EXECUTOR AND ADMINISTRATOR, XV. iii.—XVIII. iii.—XIX.—XX.—XXIV. iii.
- xiv. *Application of Dividends on Proof in Bankruptcy*. See BANKRUPTCY, XXIV. xxxvi.

I. INDEMNITY CLAUSE.

1. Construction of a clause, giving trustees liberty to forbear enforcing payment; that it was for their indemnity, as, if with a view to insolvency, it might amount to fraud. *Eap. Alook*, 1 Ves. & B. 179.
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5. Trustees made personally responsible for the consequences of their neglect to enforce a covenant contained in a marriage settlement. By a marriage settlement it was covenanted and agreed that 5,000*l.* consols, part of the wife's property, should be transferred to trustees upon certain trusts for the husband, and wife, and children. At the time of the settlement a sum of 4,946*l.* was standing in the name of the wife, but the trustees took no steps to enforce a transfer, and it was sold out and misapplied by the husband:—Held, that the trustees were personally responsible for the loss; and, secondly, that they were not relieved from their liability by the trustee indemnity clause declaring that they shall not be liable "for any casual or involuntary loss without their wilful default; but for such moneys only as should actually come to their hands." *Fennick v. Greenwell*, 10 Beav. 412; 11 Jur. 620.
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In charging trustees for breaches of trust and the costs of suit, it is immaterial how the trust was created, and whether for valuable consideration or by the voluntary gift of the trustees themselves. *Id.*

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the will, their concurrence in enabling their co-trustee to receive the money did not make them liable for the misapplication of the fund. *Wilkins v. Hogg*, 8 Jur., N. S., 25; 31 L. J., Ch., 41; 10 W. R. 47; 5 L. T., N. S., 467. Affirming 3 Giff. 116; 7 Jur., N. S., 566; 30 L. J., Ch., 492; 9 W. R. 688; 4 L. T., N. S., 434.

There are three modes in which a trustee may become liable, according to the ordinary rules of the court: first, where one trustee receives trust money, and hands it over to a co-trustee without securing its due application; secondly, where he permits a co-trustee to receive trust money without making due inquiry as to his dealing with it; thirdly, where he becomes aware of a breach of trust, either committed or meditated, and abstains from taking the necessary steps to obtain restitution; but the operation of these rules was excluded by the indemnity clauses contained in the will. *Id.*

1. A testator authorised his two trustees and executors, A. and D., to carry on his business, giving them full discretion as to its management, and power to employ collectors of debts and accountants. The will contained an indemnity clause, that each trustee should be answerable only for losses arising from his own default, and that any trustee who should pay over to his co-trustee, or should concur in any act enabling him to receive any moneys for the purposes of the will, should not be obliged to the application thereof, nor should such trustee be rendered responsible by an express notice of the actual misapplication of the same moneys. The business was carried on, with the consent of the beneficiaries, by one trustee, A., the testator's son, and an account was opened at the bank, and a letter signed by both executors and trustees, authorising the bank to honour the signature of the one trustee, viz., A., the son. Under this authority the trustee (A.) drew out, nominally for the business, large sums of money, which he misappropriated to his own purposes:—Held (following *Wilkins v. Hogg*, 3 Giff. 116), that in the absence of proof of gross negligence or personal misconduct on the part of the trustee D., he was fully protected by the Indemnity Clause, from liability in respect of the loss to the estate, occasioned by the default of his co-trustee, A. *Pass v. Dundas*, 48 L. T. 665; 29 W. R. 332.

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2. A trustee of two separate funds held not entitled to require from the *cestui que trust* of both funds a covenant of indemnity in respect of dealings with one of the funds before paying over the other fund, as to which there was no question; and the trustee was made to pay the costs of a suit instituted by the *cestui que trust* to obtain payment of the latter fund without any such indemnity. *Price v. Loaden*, 21 Beav. 508.

3. Where, by the terms of a marriage settlement, it was declared that a trustee should stand possessed of a debt, upon trust, in the first instance, to call in or compel payment of such debt, unless the *cestuis que trustent* con-

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- v. *Lien of Cestuis que Trustent Inter se*, 7082.
- vi. *Lien of Cestuis que Trustent on Beneficial Interest of Trustees*, 7082.
- vii. *To Trustee for Liability for Torts*, 7083.
- viii. *Priority of Trustee to Other Claims*, 7083.
- ix. *Other Matters*, 7083.
- x. *Following Trust Funds*. See XXIV. vi. *ante*.
- xi. *When Acting under the Authority of the Court*. See XIX. i. 2 *ante*—TRUSTEE RELIEF ACTS, IV. vi.
- xii. *In Respect of Costs*. See XXXI. *post*.
- xiii. *Refunding to and Recouping Executors*. See EXECUTOR AND ADMINISTRATOR, XV. iii.—XVIII. iii.—XIX.—XX.—XXIV. iii.
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the bond was a settlement or security within the meaning of the will".—Held, that the bond so approved was a sufficient security within the meaning of the will. *Bacchus v. Gilbee*, 2 N. R. 502; 9 Jur., N. S., 838; 8 L. T., N. S., 714; 33 L. J., Ch., 23; 11 W. R. 49. Reversing 2 N. R. 310.

III. LOSS. WHAT CESTUIS QUE TRUSTENT, OR PARTS OF ESTATE LIABLE FOR.

1. Where trust fund is directed to be laid out in public funds till a purchaser can be found, and loss happens, it must fall in average on all those entitled to it. *Chambers v. Chambers*, Fitzg. 127.

2. The interest which a party takes under a settlement, is liable to make good any breach of trust or other liability which he may have incurred under it, and that though the settlement is effected by distinct deeds. *Woodyatt v. Gresley*, 8 Sim. 180.

3. In the year 1810 a sum of stock was transferred into the names of A. and B., in trust for a father and mother, in certain proportions, for their respective lives, with remainder to their children. Shortly afterwards the stock was transferred by A. and B. into the name of B. only, who appropriated it to his own use; in the year 1818 the father and mother filed a bill against A. and B. to have the stock replaced; and the children (two in number) were co-plaintiffs, and, being infants, sued by their father, as their next friend; but that suit was soon afterwards compromised, upon B. giving security for the payment of interest for the time past and for the time to come. A. subsequently died, and his personal estate was distributed among his legatees; and two of those legatees then died, having received their legacies, and the residuary personal estate of one of them was paid over to her residuary legatee. These distributions were made in ignorance of any demand arising out of the breach of trust in which it had concurred. The elder of the two children attained twenty-one in 1821, and the other in 1823. In 1833 they filed a bill alone against B. and the personal representative of A. and his surviving legatees, and the personal representatives of his deceased legatees, and the residuary legatee of one of those deceased legatees, and against the father and mother of the plaintiffs, praying to have the fund replaced:—Held, that the plaintiffs were entitled to call upon the surviving legatees of A. and the personal representatives and legatees of his deceased legatees to refund, and that without any previous inquiry as to whether the plaintiffs had known of or acquiesced in the breach of trust, or the compromise of the suit of 1818. *Marsh v. Russell*, 3 Myl. & C. 31; 6 L. J., N. S., Ch., 303; 1 Jur. 588.

4. The trustees of a sum of stock were empowered by the settlement to invest the trust fund in Government or real securities. They, with the sanction of one of the *cestuis que trustent*, sold out part of the stock, and lent the proceeds to another *cestui que trust* upon his personal security. The trustees were held liable to replace the stock sold out, but were allowed an indemnity with regard to the

sum advanced out of the interest in the trust property of the *cestui que trust* receiving and sanctioning the advance. *Phillipson v. Gatty*, 7 Hare 516; 13 Jur. 318. Affirming 2 H. & Tw. 459.

5. A plaintiff sued his trustee, to make him responsible for a trust fund which had been wrongfully paid to the plaintiff's father. The plaintiff had, as one of the next-of-kin of his father, received two-thirds of his estate:—Held, that the father's assets in the hands of the plaintiff were primarily liable to make good two-thirds of the trust fund, in exoneration of the trustee. *Orrett v. Corser*, 21 Beav. 52; 1 Jur., N. S., 882.

6. An estate having once borne a charge in favour of legatees or creditors, is discharged, though the fund has been misapplied by the trustees. *Omerod v. Hardman*, 5 Ves. 736.

7. A loss happening by the default of a trustee appointed by a testator falls on the legatees, and the estate is discharged from it. *Hutchinson v. Massarene*, 2 Ball. & B. 54.

8. Where lands are devised to trustees to raise money for several purposes, and they raise the money out of the profits, the land is thereby discharged, and the persons concerned must resort to the trustees. *Juon v. Brain*, Pre. Ch. 143.

9. Trustees appointed for raising and paying a portion of 500*l.* to A. Trustee enters and gives judgment to A. for paying the 500*l.* to A. when raised; the trustee raises the 500*l.* and more, and becomes insolvent; whether the land is discharged. *Harrison v. Cage*, 2 Vern. 85.

10. Land settled in trust to pay debts is discharged as soon as the money is raised, though misapplied by the trustees. *Anon.*, 1 Salk. 153.

11. If lands are appointed to pay debts, the heir is entitled to them when the debts are paid; and if to be sold, he is entitled to the surplus; but if there be any abuse, his remedy is against the trustee, and not against the purchaser. *Culpepper v. Aston*, 2 Ch. Ca. 115. *Sed quare*, if a purchaser with notice might not be affected.

12. Where a trustee was directed to apply the rents of a leasehold estate in paying the fines on renewal, and he misapplied the rents which ought to have been so employed:—Held, that the loss must fall on the tenant for life, and not upon the trust estate generally. *Solly v. Wood*, 7 Jur., N. S., 1225; 30 L. J., Ch., 813; 29 Beav. 482.

13. Where trust funds have been lost by a breach of trust, moneys recovered from the estate of a trustee who has made default for both principal trust funds and the income thereof, are applicable in the first instance in reduction of the principal debt. *Re Grabowski*, 37 L. J., Ch., 926; 6 L. R., Eq., 12.

14. It is a general rule of equity that when a person accepts a trust at the request of another, and that other is a *cestui que trust*, the *cestui que trust* is liable personally to indemnify the trustee against all losses accruing in the due execution of the trust. *Jervis v. Wolvestan*, 43 L. J., Ch., 809; 18 L. R., Eq., 18; 30 L. T., N. S., 452.

When the loss in respect of which such indemnity is sought occurs after the death of the *cestui que trust* the trustee is in the position of a creditor of the *cestui que trust*, and

entitled to recover as a creditor from legatees to whom his estate has been paid. *Ib.*

J. and P., at the request of a settlor, accepted transfers of shares in an unlimited company upon trust for a tenant for life and remainderman. J. and P. were executors of the will of the settlor, and distributed the residue of his estate. Subsequently in the lifetime of the tenant for life large calls were made on the shares, and the remaindermen under the settlement disclaimed:—Held, that J. and P. as trustees were entitled to be indemnified against the liability out of the settlor's residuary estate, and to recover the capital which they had distributed among the residuary legatees. *Ib.*

1. On a bill filed, by an incumbrancer of the interest of a deceased tenant for life in a fund, against a party sought to be made accountable in respect of a breach of trust affecting the whole fund, to which suit the *cestuis que trustent* in remainder were also made parties, a decree directing the restitution of the whole fund was varied, on appeal, by limiting the relief to the restitution of so much only of the interest of the fund as had accrued in the lifetime of the tenant for life. *Rackham v. Siddall*, 1 Macn. & G. 607; 2 H. & Tw. 44. Varying, on this point, 16 Sim. 297; 12 Jur. 640.

2. By a marriage settlement in 1834 the husband gave a bond for 2,000*l.* to the trustees, to be paid within six months of the marriage, to be left outstanding with the consent in writing of the wife and husband, and to be called in with the like consent. Another debt of 4,000*l.* was included in the settlement. The 2,000*l.* was never got in. The husband became bankrupt in 1836. The trustees proved for the debt, but afterwards joined in a supersedeas, on the bankrupt guaranteeing to his creditors 1*l.* 6*d.* in the pound. The other creditors were so paid; the trustees never took their composition. In 1838 the wife and husband gave a written consent that the debt should remain out on the husband's bond. No other consent was ever given. The husband was again bankrupt in 1847. In 1834 the trustees had, at the instance of the husband (having no power to invest in the purchase of lands), purchased copyhold land and buildings with part of the 4,000*l.* The husband erected new and valuable buildings on the land at his own expense, increasing its value far more than 2,000*l.* There was no evidence to connect this outlay with the discharge of the bond debt:—Held, that the trustees could not be indemnified out of the increase of value of the land, caused by the husband's outlay upon it. *Wiles v. Gresham*, 2 Drew. 258; 23 L. J., Ch., 667; 2 W. R. 355; 2 Eq. Rep. 560. Affirmed 5 De G. M. & G. 770; 24 L. J., Ch., 264; 3 Eq. Rep. 116; 3 W. R. 87. And see 8 C. 1 Eq. Rep. 348.

3. A testatrix directed her trustees to pay the interest or annual rent of 2,000*l.* to Mrs. A. during her life, and after her death to divide that sum among her children; and to pay the interest or annual rent of a similar amount to Mrs. B. in life-rent, with the fee to her children. The trustees were empowered by the deed to realise, or to continue to "hold any or all of such shares or stocks" as might belong to the testatrix at her decease, "should they consider it advisable or expedient to do

so, without any personal responsibility for loss, if any, thereby sustained;" with power also "to lend or place out on such securities, heritable or movable, as they shall consider advantageous, the aforesaid legacies of 2,000*l.* and 2,000*l.* respectively, the securities to be conceived in favour of my trustees, and that for the purposes of this trust and no otherwise." The testatrix at her death held 850*l.* stock of an unlimited bank. The trustees, at the desire of Mrs. A., and without consulting Mrs. B., set 200*l.* of this stock aside as part of the fund appropriated to Mrs. A., and realised the remainder. They afterwards, on the narrative of the purposes of the trust deed, and of the sums invested for the two specific legacies of 2,000*l.*, and that they had paid the residue, received their discharge from Mrs. A. and Mrs. B. Statements and separate accounts of interest on the investments allocated to each were sent half-yearly to Mrs. A. and Mrs. B. All the investments stood in the names of the testatrix's trustees. The bank became insolvent, and calls were made upon the trustees in respect of the 200*l.* stock. They sought to indemnify themselves for payment of the calls out of the whole trust estate. Mrs. B. objected to any portion of her legacy being taken:—Held, reversing the decision of the Court below, that the trustees had the power to sever and had severed the two legacies, and had placed them in separate investments for behoof of the respective beneficiaries, and therefore the trustees had no right to relief from the investments allotted to Mrs. B. and her family for liabilities incurred on those allotted to Mrs. A. and her family. *Exp. Garland* (10 Ves. 110) followed. *Fraser or Robinson v. Murdoch*, 6 L. R., App. Cas., 855; 45 L. T. 417; 30 W. R. 162.

IV. LIEN OF TRUSTEE ON BENEFICIAL INTEREST OF CESTUIS QUE TRUSTENT.

4. The interest of a *cestui que trust*, who concurs with a trustee in a breach of trust, is liable to indemnify the trustee. *Booth v. Booth*, 1 Beav. 125; 8 L. J., N. S., Ch., 39; 2 Jur. 938.

5. Where a trustee had permitted a tenant for life to possess himself of the fund, in breach of the trust:—Held, that he could not waive his right to resort to the interest of the tenant for life to re-place the fund, and having, by joining in a creditor's deed, by which the life interest was made applicable to the payment of debts, etc., *inter alia*, a debt due to the trustees, which he afterwards received, he was not precluded thereby from retaining the life interest, in order to make good trust fund. *Fuller v. Knight*, 6 Beav. Ch. 205; 12 L. J., N. S., Ch., 182.

6. Trustees who had improperly allowed perishable property to remain in specie, and to be enjoyed by the tenant for life, being made liable, were allowed, by means of an inquiry, in the same suit, to recover back against the estate of the tenant for life the amount overpaid to him. *Hood v. Clapham*, 19 Beav. 90; 1 Jur., N. S., 78; 24 L. J., Ch., 193.

7. The interest which a party takes under a settlement, is liable to make good any

breach of trust or other liability which he may have incurred under it, and that though the settlement is effected by distinct deeds. *Woodyatt v. Cresley*, 8 Sim. 180.

1. A trustee of a marriage settlement, after the death of the husband, entered into an account with the widow, acting also as her solicitor:—Held, that the trustee was entitled to retain out of the dividends upon the trust fund the balance due upon such account. *Russel v. Buchanan*, 4 Jur. 430.

2. The right of a trustee, in whose name shares in a company in liquidation were standing, to an indemnity from his *cestuis que trustent* enforced. *Hemming v. Maddick*, 20 W. R. 433; 41 L. J., Ch., 522; 7 L. R., Ch., 395; 26 L. T. 565.

3. A policy of assurance on the life of H. was taken in the names of trustees, and a settlement was executed by virtue of which the bonuses payable on the policy were to be held upon trust for H., and the money assured, on the trusts of the settlement. H. obtained possession of and misappropriated a portion of the trust funds:—Held, that the trustees were not entitled as against H.'s executrix to impound or retain the bonuses to make good the trust funds misappropriated by H., not as being settled property, because there was a prior resulting trust of them for H.; nor by way of set-off, because they were not payable till after H.'s death. *Hallett v. Hallett*, 31 L. R., Ch. D., 232; 49 L. J., Ch., 61; 41 L. T. 725; 28 W. R. 321.

4. The representatives of a surviving trustee who had concurred with his co-trustee in a breach of trust by lending to the tenant for life on his promissory note, were held entitled to file a bill against such tenant for life, and the other *cestuis que trustent*, for replacing the funds, and the appointment of new trustee, with costs against the tenant for life, or out of the fund. *Greenwood v. Wakeford*, 1 Beav. 576; 8 L. J., N. S., Ch., 333.

5. A legacy bequeathed by P. was settled upon the marriage of W. A. and his wife, upon trust for the wife of W. A. for life, for her separate use, but without any restriction against anticipation, and after her death for her children. The legacy was not then paid, but subsequently the widow of P., having directed her executors to pay all the legacies bequeathed by her husband's will, they offered to pay the legacy in question, but required a receipt from three trustees of the settlement. At that time there was only one trustee of such settlement, and two more, namely, D. and A., were appointed. On such appointment the executors handed over a cheque for the amount of the legacy to X., who had acted as the solicitor of the trustees. X. handed this cheque to A., who, as she alleged, handed it over in the presence of X. to W. A. The money was afterwards received by W. A., and by him applied to his own purposes:—Held, *semble*, that A. might during the life of W. A.'s wife be entitled to the annual income of the fund. *Gray v. Addison*, 2 Jur., N. S., 662.

6. A tenant for life received 5l. per cent. on a mortgage improperly taken by trustees, and for which, on a loss, they were made responsible:—Held, that he was only entitled to 4 per cent. in taking the account of income, and that 1 per cent. must be taken as part of the

subsequent income. *Griffiths v. Porter*, 25 Beav. 236.

7. Where trustees are made liable for a breach of trust, the tenant for life having received the benefit, they are entitled to be recouped out of the interest of the tenant for life, although they have since ceased to be trustees. *Barratt v. Wyatt*, 30 Beav. 442.

A testator directed his estate to be accumulated until the death of the survivor of certain persons, and then to be divided among the children of his sister. By an order of the Court, 100l. a year out of the income of the estate was directed to be paid to one of those children, a lady, until the further order of the Court. By a marriage settlement the lady assigned to the trustees the whole of her share under the will of a testator, together with the accumulations, for herself for life, with remainder to her children. The 100l. a year was continued to be paid after marriage to her trustees, and by them allowed to be received and expended by the mother. The mother was living; and the estate had not yet become divisible under the will. Upon a bill by the children:—Held, that notwithstanding the order of the Court, the 100l. a year payable thereunder formed part of the funds comprised in the settlement, and ought to have been invested by the trustees, and they were ordered to make good the amount, subject to the right, as against the mother, to be recouped the amount out of her life interest in the fund. S. C. 8 Jur., N. S., 1045; 31 L. J., Ch., 652; 10 W. R. 454.

8. G. and H., trustees of a settlement, on the solicitation of D., the tenant for life of the settlement, lent the trust funds on a security which totally failed. G. was a solicitor, and in the transaction of the loan no other solicitor was employed for the lenders, and no sufficient investigation of title was made:—Held, that the trustees were compellable to replace the trust fund. *French v. Graham*, 10 Ir. Ch. R. 522.

Held, also, that both being solvent, H. was bound to replace one moiety, and G. the other moiety, that G. was not entitled to be indemnified by the tenant for life, the onus of investigating the title having been cast upon him, but that H. was entitled to be recouped, by the tenant for life, the amount of his moiety. *Id.*

9. A. B. was tenant for life of a trust fund, with a general power to appoint by will, and, in default, it was settled on the plaintiff. A. B. ordered the trustees to pay over the fund to her on an indemnity, and she afterwards appointed the fund to the plaintiff and others, who filed a bill to make the trustees liable for a breach of trust:—Held, that, by the appointment, the fund became assets for answering A. B.'s liabilities, of which the indemnity was one, and that, therefore, the trustees were not liable. *Williams v. Lomas*, 16 Beav. 1.

10. Equity will endeavour to deliver a trustee from a misapplication of trust money, where he errs in the management only; but if he goes out of it with the approbation of the *cestui que trust*, it must be first made good out of the person's estate who consented. *Trafford v. Boehm*, 3 Atk. 444.

11. Tenant for life, who had obtained the benefit of a breach of trust, made responsible

upon a bill for that purpose instituted by the trustees. *M'Gachen v. Dew*, 15 Beav. 84.

1. A bond was settled on B. for life, remainder to his wife M. for life, remainder to their children. The trustees permitted B. to receive the produce of the fund, and invest it in the purchase of a leasehold interest, not justified by the trusts of the settlement. B. having died, M., with a knowledge of all the facts, continued to receive the rents of the leaseholds, which produced a larger income than could have been derived from a proper investment. M., having died, and the leasehold having expired, a suit was instituted to compel the representative of the surviving trustee to pay to the children the amount misapplied. The surviving trustee during his life, and his representative, by their answer, asserted that the investment was proper within the trusts of the settlement:—Held, that the trustee had not a right to be indemnified out of the assets of M. to any greater amount than the excess of the rents received by M., over what would have been the produce of the fund if rightly invested. *Bentley v. Robinson*, 10 Ir. Ch. R. 287.

2. Trustees having no express authority to invest on mortgage, at the instance and for the benefit of some, but without regard to the interest of others, of their *cestuis que trustent*, invested part of their trust fund on mortgage of real estate. A loss having arisen from the investment:—Held, that the trustees were bound to make good the loss to the trust estate, but that they were entitled to be recouped by each of the *cestuis que trustent* who had induced them to make the investments, out of his estate and his interest in the trust fund, to the extent of the amount actually received by such *cestui que trust* from the trustees in consequence of such breach of trust. The notion that in any case trustees to whom no direction has been given to invest in any particular kind of security can safely invest on mortgage, not encouraged. *Raby v. Ridehalgh*, 1 Jur., N. S., 363; 24 L. J., Ch., 528; 7 De G. M. & G. 104; 3 Eq. Rep. 601; 3 W. R. 344.

3. A trustee, acting *bonâ fide* and with the concurrence of the heir-at-law, under a will which was supposed to be valid, but turns out to be invalid, is entitled to be indemnified out of the personal estate. *Edgcombe v. Carpenter*, 1 Beav. 171; 8 L. J., N. S., Ch., 171.

4. The rebuilding of a dissenting chapel was entrusted to three of the several trustees in whom the estate was vested. There being a deficiency of money, they borrowed, on a deposit of the deeds of the chapel, a sum of money which they paid. Interest was for a long time paid out of the chapel funds, but ultimately the representatives of the trustees were compelled to pay the money. The legal estate was vested in new trustees:—Held, that the representatives of the persons who had paid the money borrowed, had a lien on the deeds, but that they were not entitled to a decree for foreclosure or sale, as by granting such relief the trust would be altogether destroyed. *Drake v. Williamson*, 25 Beav. 622. S. C. *nom. Darke v. Williamson*, 4 Jur., N. S., 1009; 4 W. R. 824.

See also VIII. *infra*—XXIV. v. *ante*.

Against Estate of Married Woman.] 5. Where there is a clause against anticipation, and trustees pay the income to a married woman in advance, they are liable to pay it over again, and are not entitled to be reimbursed out of the subsequent income. *Leach v. Way*, 5 L. J., N. S., Ch., 100.

6. A trustee under a marriage settlement accepted an allotment of new shares in a bank, which afterwards failed. The settlement contained a clause against anticipation:—Held, that he had no claim to be indemnified out of the trust estate. *Sheriff v. Butler*, 12 Jur., N. S., 329; 14 W. R. 629; 14 L. T., N. S., 510.

7. One of two trustees of a marriage settlement, under which the wife took a separate estate for life without power of anticipation, having shares in a bank vested in him upon the trusts of the settlement, obtained an allotment of new shares at the request of the wife, and upon the faith of her representation that the purchase money should be paid out of certain savings of her separate estate. The bank failed, and calls were made upon the trustee, who filed a bill to enforce payment out of the wife's savings:—Held, that the savings of the wife's separate estate were liable to indemnify the trustee against all calls and liabilities incurred on her behalf in respect of the shares. *Butler v. Cumpston*, 7 L. R., Eq., 16; 38 L. J., Ch., 35; 17 W. R. 24; 19 L. T., N. S., 274.

Held, also, that money arising from savings of separate estate which had been invested by the wife in the names of the trustees of the settlement without any intimation that it was to be held on the trusts of the settlement, was liable to indemnify the trustee of the shares. *Id.*

8. By a marriage settlement the interest of a trust fund was limited to a wife for life, for her separate use, with power to the trustees, upon her consent in writing, to advance the trust fund to her husband, upon the security of his bond; if the trustees, with consent of the wife, advance the fund to the husband, but without her written consent, and without the husband's bond, and if the trust fund be lost by his subsequent bankruptcy, the trustees are entitled to be indemnified to the extent of the wife's interest. *Cocker v. Quayle*, 1 Russ. & M. 535.

9. R., by deed, assigned property in Scotland to B., as trustee, with a direction to pay to his sister Mrs. R., a married woman, during her life, the net income of the property, or such part of it as he might deem necessary for the support of her and her family; and he thereby declared the provision for Mrs. R. to be purely alimentary, and exclusive of the marital right of her then or any future husband, and that it should not be assignable, or subject to any deed which either she or such husband might grant in relation thereto, or debts which they might contract. Advances were made by A. to the husband of Mrs. R., for the support of his family, and on other accounts; to secure the repayment of which, B., with Mrs. R.'s consent, executed to A. a deed of assignation of her interest in the trust property, reserving 60*l.* per annum for aliment to Mrs. R. and her family. Upon appeal from, and reversing, the decision of the Court of Session:—Held, that

the execution of the deed of assignation was *ultra vires* of B., and a breach of trust on his part, and that the deed was wholly invalid as against Mrs. R. *Ritchie v. Rennie*, 9 Jur. 435.

1. A married woman who is an annuitant under a will for life, for her separate use, without power of anticipation, is appointed executrix; but failing in obtaining probate, takes possession of and misappropriates the estate. In an administration suit asking the usual accounts against her, but not referring to her separate estate:—Held, that the arrears of the annuity were applicable to make good her misfeasances, but not the accruing payments. *Pemberton v. Mc Gill*, 8 W. R. 290.

2. A woman, on her marriage, settled a necklace upon trust for herself for life, with remainder to her eldest son. She also settled other property to her separate use for life, as to part of such property with, and as to other part without, restraint upon anticipation. She afterwards, in fraud of the settlement, sold the necklace, and appropriated the money to her own use:—Held, that the property settled to her separate use, with restraint upon anticipation, was not chargeable with the value of the necklace, but that the property settled without such restraint was so chargeable. *Clive v. Carey*, 1 John. & H. 199; 5 Jur., N. S., 487; 28 L. J., Ch., 685.

3. The separate estate of a married woman is not liable for general torts committed by her, nor for breaches of trust, unless the breaches of trust consist in appropriation of trust funds comprised in the same settlement as that creating her separate estate. *Wayford v. Heyl*, 44 L. J., Ch., 567; 20 L. R., Eq., 321; 33 L. T., N. S., 155; 23 W. R. 848.

See also XXIV. v. ante.

V. LIEN OF CESTUIS QUE TRUSTENT INTER SE.

4. Where one *cestui que trust* procures the trust money to be laid out improperly, and part of it is consequently lost, the other *cestuis que trustent* are entitled, as against him, in a suit properly constituted for that purpose, to have their shares of the trust money made good out of his share of that which is ultimately recovered. But if the bill prays relief against the trustees only, the liability of the share of that *cestui que trust* cannot be enforced against him. *Phillipson v. Gatty*, 2 H. & Tw. 459. Affirming 7 Hare 516; 13 Jur. 318.

5. Under a will, a trustee held an aggregate fund, in trust, as to one-third each, for A., B., and C. respectively for life, with remainder to their respective children. He, without any authority under the will, transferred one-third of the fund to the trustees of the respective settlement of A., B., and C. The share of B. having been dissipated by her trustees:—Held, that B.'s children were entitled to participate in A.'s third, which was still remaining in her trustees' hands. *Browne v. Butter*, 24 Beav. 159.

VI. LIEN OF CESTUIS QUE TRUSTENT ON BENEFICIAL INTEREST OF TRUSTEES.

6. A bankrupt's reversionary interest under the trusts of a will ordered to be sold, and

the proceeds applied in making good moneys which had come to his hands as trustee under the same trusts, and had been misapplied. *Exp. Hardman, Re Molyneux*, 3 M. D. & De G. 559.

7. A trustee and executor, who took a life interest in his testator's residuary real and personal estate, misappropriated and wasted portions of the estates specifically devised and bequeathed, and subsequently became bankrupt:—Held, that his estate in the residuary realty being legal could not be applied in making good his breaches of trust. *For v. Buckley*, 25 W. R. 170; 3 L. R., Ch. D., 508.

8. A testator devises freehold property to trustees, of whom the bankrupt is one, upon trust to sell and divide the proceeds equally amongst his brothers and sisters, including the bankrupt and his co-trustee. The *cestuis que trustent*, in consideration of a specific sum, stated in the deed, to be paid to each of them, but which was in fact not paid, convey the estate to the bankrupt, who, a few days afterwards, gives each of the *cestuis que trustent* two promissory notes, for the payment of the money by instalments, but the notes are never paid:—Held, that the *cestuis que trustent* had a lien on the estate in the hands of the bankrupt's assignees for the money still remaining unpaid. *Exp. Lacey*, 1 Dea. 557; 2 Mont. & A. 609; 5 L. J., N. S., Bky., 27.

9. A plaintiff sued his trustee, to make him responsible for a trust fund which had been wrongfully paid to the plaintiff's father. The plaintiff had, as one of the next-of-kin of his father, received two-thirds of his estate:—Held, that the father's assets in the hands of the plaintiff were primarily liable to make good two-thirds of the trust fund in exoneration of the trustee. *Orrett v. Corser*, 21 Beav. 52; 1 Jur., N. S., 882.

10. The personal interests of a trustee in a trust fund in court will be made applicable to the discharge of all claims against him as trustee. *Irby v. Irby*, 25 Beav. 633.

A. was entitled to a share of funds held upon the trusts of his father's marriage settlement, and for which his father's estate was liable. He was one of his father's executors. In a suit to administer the trusts of the settlement and his father's estate, a large balance was found due from A. as executor:—Held, that the trustees of the settlement were entitled to retain such balance out of A.'s share, and that purchasers from A., pending the suit, with notice of the proceedings, were bound by the same equity. *Id.*

11. An executrix and tenant for life unnecessarily and improperly sold out a sum of stock. A common decree for an account was made against her representatives:—Held, that her estate was liable to re-place the stock and dividends, and that relief might be had on further directions, though the particular matter was not charged by the bill. *Davenport v. Stafford*, 14 Beav. 319.

12. A trustee of a voluntary deed, under which he is also a *cestui que trust*, having concurred in allowing the settlor to dispose of parts of the trust property:—Held, that he was not entitled to have relief granted on a bill filed by one of the *cestuis que trustent* extended for his benefit. *Parnell v. Hingston*, 3 Sm. & G. 337.

1. A defaulting trustee cannot claim, as against his *cestui que trustent*, any beneficial interest in the trust estate, even although he may have become entitled thereto derivatively, for example, as being one of the next-of-kin of a *cestui que trust* who has died intestate. *Jacobs v. Ryland*, 17 L. R., Eq., 341; 43 L. J., Ch., 280.

VII. TO TRUSTEE FOR LIABILITY FOR TORTS.

2. A trustee, in due execution of his trust, directed the bailiff employed on the settled estate to have certain trees felled. The bailiff ordered the woodcutters usually employed on the estate to fell the trees. In doing so they allowed a bough to fall upon a passer by, who brought an action against the trustee and recovered heavy damages:—Held, that the trustee was entitled to an indemnity out of the trust estate. *Bennett v. Wyndham*, 4 De G. F. & J. 259.

VIII. PRIORITY OF TRUSTEE TO OTHER CLAIMS.

3. The right of a trustee to be indemnified out of the trust property is the first charge thereon, and it has priority to any charge created upon it by the *cestui que trust*. And, consequently, the right of a trustee of a public company to be indemnified out of the property has priority over the debenture creditors. *Re Blackley*, 35 Beav. 449.

4. A trustee has a primary charge (in priority of the general creditors) to be recouped, out of the life estate of a deceased tenant for life, the amount of trust money wrongfully received by him, and for the costs of suit. *Williams v. Allen*, 32 Beav. 650.

5. Under a marriage settlement the trustees were empowered, at the request of the husband and wife, to invest the trust fund in the purchase of real estate, and to resell the same. In exercise of this power the trustees, at the request of the husband and wife, bought certain real estate at a price which exceeded the whole of the trust fund, the husband promising to provide the balance out of his own moneys. The husband could not fulfil his promise, and C. P., one of the trustees, at the request of the husband and wife, borrowed the sum necessary to complete the purchase from a bank, and deposited with them the title deeds of the estate. C. P. died, and the husband was unable to repay the loan. In an action brought by the bank for an account and the realisation of their security, and for administration of C. P.'s estate:—Held, that the trust estate was entitled to a first charge upon the real estate purchased for the full amount of the trust fund; that, subject to such charge, the estate of C. P. was entitled to be indemnified out of such real estate for the amount borrowed by him, and actually invested in or about the purchase, and to enforce such indemnity by sale of such real estate without the consent of the husband and wife; the bank being entitled to stand in the place of C. P. as against the trust estate for the amount due to them. *Re Pumfrey, Worcester City & County*

Banking Co. v. Blich, 22 L. R., Ch., D., 255; 52 L. J., Ch., 228; 48 L. T. 516; 31 W. R. 195.

Priority and Lien in Respect of Costs.] See XXXI. XIX. post.

IX. OTHER MATTERS.

6. A trustee held shares in a company on trust for an adult *cestui que trust*. He had applied for them at the request of the *cestui que trust*, who paid the money due to the company on the application and allotment. The trustee executed a transfer of the shares to the *cestui que trust*, and the latter sent it to the company for registration, but the directors refused to register it, and when an order was made to wind up the company the name of the trustee remained on the company's register as the holder of the shares. No further call had been made on them. The trustee brought an action against the *cestui que trust*, claiming an indemnity against liability on the shares. There was no evidence to show whether calls were likely to be made in the winding-up:—Held, that the action was a mere *quia timet* one, and that it was premature and could not be maintained. *Ranelagh (Lord) v. Hayes* (1 Vern. 189) not followed. *Hughes-Hallett v. Indian Mammoth Gold Mines Co.*, 22 L. R., Ch. D., 561; 52 L. J., Ch., 418; 48 L. T. 107; 31 W. R. 285.

7. Where a trustee is required to make a transfer of a fund to new trustees, and he alleges that he has a lien for charges (though he may have a right, under the Act of Parliament under which he acts, or by agreement, to recover payment), he has no right to interpose any delay in the way of making the transfer in respect of his alleged claim. *Wilson v. Parker*, 10 Jur. 979.

8. Legacies in trust for the testator's son for his own use and benefit, provided no misfortune in business shall in the meantime have happened to him, so as to deprive him or his family of the benefit of it, the testator declaring his intention, his son's fortune being amply sufficient by this fund to form a certain and permanent provision for him or his family; but in case he fail in business at any time before the age of thirty-two, then in trust for the support of him, his wife, and children, as the trustees think proper, so long as he shall labour under the effects of any misfortune in trade: but as soon as he shall be freed and absolutely discharged from the effects of any misfortune or failure in trade, then (but not before) to be paid to him; otherwise, the interest to be continued to be paid for the support of him, his wife, and children, for his life; and if, at his death, he shall be under any difficulty from misfortune or failure in business, in trust for his wife and children according to his appointment by will, and if he shall leave no widow or child according to his disposition. There was a considerable settlement. The son, in the twenty-eighth year of his age, being discharged under a deed of composition, the legacy was decreed to him, the trustees and his children not opposing it; but the Court observed, that if he should not be discharged, as in case it should end in a bankruptcy, the trustees would not be indemnified. *De Mierre v. Turner*, 5 Ves. 306.

XXVIII. Release.

- I. *By Court*, 7084.
- II. *By Cestui que Trust*, 7084.
- III. *To One of Several Trustees*, 7085.
- IV. *On Transfer of Funds to Cestui que Trust or Co-trustee*, 7085.

I. BY COURT.

1. On motion, reference directed to inquire whether defendant, a trustee, remains accountable for any acts done by him as trustee, and, if not, to settle release. — *v. Osborne*, 6 Ves. 455.

II. BY CESTUI QUE TRUST.

2. Where the defendants were surviving partners, and executors and guardians of their deceased partner:—Held, that the *cestuis que trustent* were not barred by the lapse of thirty years, nor by partial releases executed on insufficient knowledge of the partnership affairs and state of accounts, from calling for inquiry and account, and claiming a share in the profits arising from the estate of deceased having been continued and used in the partnership, although during successive changes in the firm. *Semble*, time is only a bar in cases of trust when there has been a direct and independent dealing between the trustees and *cestuis que trustent*, and upon full information and examination of all the documents and evidence after that relation has terminated. *Wedderburn v. Wedderburn*, 2 Keen 722; 4 Myl. & Cr. 41; 8 L. J., N. S., Ch., 177; 3 Jur. 596.

3. A release by *cestuis que trustent* to trustees after a breach of trust, and whilst ignorant thereof, is invalid. *Munch v. Cockrell*, 5 Myl. & C. 179; 9 Sim. 339; 9 L. J., N. S., Ch., 153; 4 Jur. 140; 3 *id.* 36.

4. Releases given to trustees by their *cestuis que trustent* in respect of breaches of trust set aside on the ground of the releases having been obtained by the improper influence of the person for whose benefit the breaches of trust have been committed, and of the *cestuis que trustent* not having had independent professional advice in the matter of such releases. *Lloyd v. Attwood*, *Attwood v. Lloyd*, 5 Jur., N. S., 1322; 3 De G. & J. 614.

Although *cestuis que trustent* acting by an independent solicitor, to whom all the facts of the case are known, may be bound by a release given to their trustees under the advice of that solicitor, it rests upon the trustees to show that the *cestuis que trustent* acted in relation to such release by an independent solicitor. *Ib.*

Where *cestuis que trustent*, in ignorance of their rights, give a release to their trustees, even a deed of confirmation, also executed under the same circumstances, will operate nothing. *Ib.*

Two ladies, entitled to a trust fund which had been improperly lent by the trustees to A., who stood towards those ladies in *loco parentis*, were induced by A., not long after their coming of age, to execute releases to the trustees, taking from him a security

for the money, which security was known by him to be worthless. No direct communication took place between the ladies and the trustees, nor did the trustees render any account to them, but the ladies were represented in the transaction by B., a solicitor, who was known to the trustees to have been for years the confidential adviser of A., and the transaction was conducted by B. and A.'s solicitors. B. was never, in fact, authorised by the ladies themselves to act for them, but was nominated by A., and the ladies did not at the time consider him to be acting for them:—Held, that under the circumstances the trustees could not avail themselves of the releases. *Ib.*

5. A deed of compromise executed by *cestui que trust*, with the representatives and creditors of a deceased trustee, guilty of a breach of trust, rescinded, and co-trustees declared responsible. *Walker v. Symonds*, 3 Swan. 2.

6. Where the trustee (a solicitor) came to a final settlement of the account with his *cestuis que trustent*, and a general release was executed, the account containing credits for his professional bills of costs, which were perused by an independent solicitor, acting for the *cestuis que trustent*:—Held, that the defendant was entitled to the benefit of the release; and, in the absence of any fraudulent advantage having been taken over ignorant parties, the plaintiffs were bound by it. *Stanes v. Parker*, 9 Beav. 385; 10 Jur. 603.

7. A release executed by an infant to the trustee of all demands in respect of the trust:—Held, not to be a bar to a suit by the same *cestui que trust* against the trustee, although such suit was not brought until seven years after the *cestui que trust* had attained twenty-one. *Overton v. Banister*, 3 Hare 503; 9 Jur. 906.

8. The Court looks with considerable jealousy at a release executed by a young lady, at or shortly after attaining twenty-one, upon a settlement of accounts between her and her trustees. *Parker v. Blowam*, 20 Beav. 295.

A suit for impeachment of such a release must be instituted quickly. *Ib.*

Observations on the jealousy with which the Court looks at a release executed by a person who has just come of age, and on the effect of the particular circumstances under which the release is given. *Ib.*

9. A release was executed in 1859 by two ladies in favour of the trustees of will under which the ladies were residuary legatees. The ladies and their husbands applied on summons to have the release set aside on the ground that they had no independent advice, and had acted in ignorance of the fact that they were residuary legatees, instead of, as they had supposed, entitled to legacies only, and had been induced to give an absolute release in consideration of a sum far less than that to which it turned out they were entitled. The evidence in support of their claim was uncontradicted:—Held, that the release could not be set aside on the materials before the Court. *Re Garnett, Gandy v. Macaulay*, 32 W. R. 474.

10. A sum of money charged upon lands was, by a marriage settlement, assigned to trustees, to pay the interest to A., the husband, for his life, and after his death to pay the wife a jointure of 200l. a year; provided that

it should be lawful for A., with the consent of the trustees in writing, to call in the fund, and lay out and dispose of the same in the purchase of an estate of inheritance or freehold, for a term of at least three lives, or of a lease for a term of years, whereof ninety-nine years shall be unexpired, or otherwise advantageously, which purchase or disposal, when so made, should be settled and vested to the several uses, trusts, intents, and purposes thereinbefore mentioned in respect to the said sums. A portion of the fund was paid to the surviving trustee, who lent it to A., on a release being executed by A. and the wife B. and C. their son, and acknowledged by her:—Held, after the death of A., in a suit by B. to replace the trust fund, that the release as to her was inoperative. *Smithwick v. Smithwick*, 12 Ir. Ch. R. 181.

1. When a breach of trust has been committed, from which a trustee alleges that he has been released, it is incumbent upon him to show that such release was given by the *cestui que trust* deliberately and advisedly, with full knowledge of all the circumstances, and of his own rights and claims against the trustee. *Farrant v. Blanchford*, 1 De G. J. & S. 107; 9 Jur., N. S., 423; 32 L. J., Ch., 237; 11 W. R. 294; 7 L. T., N. S., 770. Reversing 11 W. R. 178.

2. Personal estate was by settlement vested in trustees for R., a married woman, for life, without power of anticipation; and in case there should be no issue of the marriage, in case M., her husband, should survive her, as she should by deed or will appoint, and in case she should survive, for her absolutely. W., the acting trustee of the settlement, at the instance of the wife, applied the property in discharge of her husband's liabilities. M. died, and by R.'s request the trustee took no steps to realise his assets. R. married again after the lapse of some years, and in her marriage settlement recited her wish to give credit to W. for all payments made by the trustees at her request:—Held, that R. had lost her right to make the trustee liable for his breaches of trust. *Rutherford v. Maziers*, 13 Ir. Ch. R. 204.

3. By a marriage settlement of 1832, real and personal estate of H., the intended wife, was conveyed to trustees in trust for R., the intended husband for life, and after the death of the survivor of R. and H. in trust for the children of the marriage, as R. and H. or the survivor should appoint, and in default of appointment for the children equally. The trustees allowed R. to obtain possession of the trust fund, which he mixed with moneys of his own, and in 1861 one of the trustees commenced a suit to compel him to replace the fund. By arrangement of the trustees with R., he and H., by deed of the 25th September 1861, irrevocably appointed the fund equally among the children, four of whom were of age, and one (the plaintiff) a minor. On the following day the four adult children, and two years afterwards the plaintiff, when of age, executed a deed releasing the trustees from the trusts of the settlement. The children executed the release by the direction of their father, without any professional advice or assistance, and in ignorance of its contents or effect, and of their rights under the settlement.

R. from time to time paid sums of money for the plaintiff; he purchased for the plaintiff a commission in the army, paid for his outfit, etc., made him an adequate yearly allowance, and paid a large sum for his promotion. No one of the sums so advanced was equal in amount to the plaintiff's share of the trust fund, nor was there any evidence that it was stated at the time of the advances, or understood between the plaintiff and R., that they were made out of the trust fund in R.'s hands:—Held, first, that the release should be set aside; second, that R.'s position was that of a debtor to his five children for their respective shares of the trust fund; third, that the sums advanced being respectively less in amount, that the plaintiff's share was not a satisfaction of it *pro tanto*, and that R. was not entitled to credit for them. *Reade v. Reade*, 9 L. R., Ir., 409.

III. TO ONE OF SEVERAL TRUSTEES.

4. A release to one trustee in respect of a breach of trust committed in the investment of part of the trust funds:—Held, to be a release to the other trustee, the release operating as an acceptance of the securities upon which the funds had been invested. *Blackwood v. Borrowes*, 2 Con. & L. 459; 4 Dr. & War. 441.

IV. ON TRANSFER OF FUNDS TO CESTUI QUE TRUST OR CO-TRUSTEE.

5. Trustees have a right to some sort of discharge from their *cestuis que trustent*, not, perhaps, a release, unless the instrument creating the trust was under seal. *Re Wright*, 3 Kay & J. 419.

6. Trustee of stock, on transferring the stock to his *cestui que trust*:—Held, under the circumstances of the case, entitled to an acknowledgment by the *cestui que trust* of the stock being received in full of all demands, though not entitled to a release under seal. And inasmuch as the *cestui que trust* declined to make the acknowledgment, the Court directed a general administration account to be taken of the real and personal estate of the testator from whose real and personal estate the stock was derived, although no account but a mere transfer of the stock was prayed by the bill, and no open unsettled account suggested by the answer. *Chadwick v. Heatley*, 2 Colly. 137; 9 Jur. 504.

7. A trustee paying the trust money in strict accordance with the tenor of the trusts is not entitled to a release by deed; *secus*, if he is called upon to depart from the strictly expressed trusts. *King v. Mullins*, 1 Drew. 308.

Where a trust was created by parol for A. for life, and to provide for her funeral expenses, remainder to her two children and the tenant for life, and remainderman called for payment:—Held, that the trustee might lawfully insist on a release under seal. *Id.*

8. Trustees, on receipt from other trustees of trust moneys, are not bound to execute a release; all that can be required from them is a written acknowledgment of the receipt of the money. *Re Cater*, 25 Beav. 366.

XXIX. Payment into and out of Court.

- I. *Order for*, 7086.
- II. *Voluntary*, 7089.
- III. *Payment Out*, 7089.
- IV. *Under Trustee Relief Acts*. See TRUSTEE RELIEF ACTS.
- V. *By Executors*. See EXECUTOR AND ADMINISTRATOR, XVI.
- VI. *Effect on Powers of Trustees*. See VIII. II. 5 (b) ante—IX. IV. ante.—TRUSTEE RELIEF ACTS, I. VII.

I. ORDER FOR.

1. *In What Cases*, 7086.
2. *On Admissions in Answer*, 7087.
3. *On Other Admissions*, 7089.
4. *Practice*, 7089.
5. *Disobedience to Order*, 7089.

1. In What Cases.

1. A party having a contingent interest in a trust fund may, in a proper case, have it brought into court for his protection, but he must show some sufficient ground for it. *Ross v. Ross*, 12 Beav. 89.

Motion to pay trust fund into court refused, on the ground that there was no allegation of danger, and that the fund might, if necessary, be sufficiently protected by a distringas. *Ib.*

2. A residuary sum of stock, standing in the names of trustees, the dividends of which were paid by them to the parties entitled thereto, ordered to be transferred into court to the credit of the cause, on the application of a party entitled to a mere contingent interest in the fund, and notwithstanding that all the parties entitled to vested interests therein were satisfied with the conduct and custody of the trustees, and opposed the application. *Bartlett v. Bartlett*, 4 Hare 631.

3. Right of a party, entitled contingently in remainder, to have the trust fund brought into court at the hearing, though there be no imputation against the trustees. *Governors' Benevolent Institution v. Rushbridger*, 18 Beav. 467.

4. When a court of equity traces out trust money in the hands of a person who has not *prima facie* a right to hold it, that money must be paid into court. *Leigh v. Macaulay*, 1 Y. & Coll. 260; 4 L. J., N. S., Exch. Eq., 37.

5. Trust fund which, under a power in marriage settlement, had been lent, decreed to be paid into court, the trustees representing it to be in danger. *Payne v. Collier*, 1 Ves. J. 170.

6. The testatrix, shortly before her death, expressed a wish that H., one of her trustees, should have the loan of the trust fund for a reasonable period. F., the other trustee, accordingly allowed H. to possess himself of the fund, agreeing that it should remain on his personal security for a year. Long after the expiration of that period, on motion, H. was ordered to pay the sum into court within a month, or find sufficient security. *Foster v. Hewitt*, 1 Jur. 839.

7. Where a trustee of a residue had trans-

ferred consols into his own name, and had permitted his *cestui que trust* to receive the dividends for a series of years under a power of attorney, and had died without further earmarking the fund, and his next-of-kin refused to meddle in the matter:—Held, that there was sufficient evidence to entitle the *cestui que trust* to have the money paid into court, and to have an order that she should be paid the dividends till further order. *Re Thornton*, 9 W. R. 475.

8. By settlement, moneys were directed to be laid out on Government or real securities; the trustees having lent the money to the husband on bond, were ordered, on motion, to pay the money into court. *Collis v. Collis*, 2 Sim. 365.

9. In a suit for the administration of trust property, the Court, on an application by the parties beneficially interested, and where there was no imputation against the trustees, ordered the trust money to be paid into court. *Robertson v. Scott*, 14 L. T., N. S., 187.

10. Party ordered to pay money into court in which he claimed the sole beneficial interest, he being also a trustee of the fund. *Inman v. Whitley*, 5 Jur. 287.

11. Testator, having a debt secured on lands, gives the mortgage-money to the mortgagor and desires that he will give a reversionary interest therein to a third person; the mortgagor, selling the estate, shall bring the mortgage-money into court for the use of the devisee, subject to the life estate. *Lewis v. King*, 2 Bro. C. C. 600.

12. Two trustees were authorised to invest trust money in their names on good security. One trustee improperly invested 1,500*l.* on mortgage of leaseholds in his own name; the other had declined to act any longer. The security realised 21*l.* only. The trustee was on motion ordered to pay the difference into court. *Bourne v. Mole*, 8 Beav. 177.

13. Court refused to order dividends received before bill filed of stock, purchased by the old Government of Switzerland, to be paid into court by the trustees on application of the present Government without having the attorney-general made a party. *Dolder v. England (Bank of)*, 10 Ves. 352.

14. Purchaser (a trustee, acting on behalf of himself and others, his co-trustees, and of the *cestuis que trustent*) ordered to pay purchase money into court; the agreement having been entered into in the name of himself alone; upon affidavits, that the plaintiffs (the vendors) had no notice of his acting for others, and of acts of ownership committed since possession given to him under the agreement, in opposition to the answer, alleging notice, and denying any acts of ownership by himself, or by any other person, to his knowledge. *Crutchley v. Jerningham*, 2 Meriv. 502.

15. A solicitor who had received money for his client in her capacity of administratrix, and who had notice of the rights and claims of other next-of-kin, and who claimed to be in some sort a trustee of the fund, was nevertheless, on the petition of his client, ordered to bring the money into court and to pay the costs of the petition. *Re Beoke*, 18 Beav. 462.

16. Although the mere existence of a discretionary power in trustees over a fund affords

no reason why the Court should not order payment of the fund into court, unless such payment into Court would interfere with the exercise by the trustee of such discretion; yet where it appeared that trustees were about, in the due exercise of a discretionary power, to deal with a fund, the Court refused to order payment into court, although the trustees had not actually parted with the fund. *Talbot v. Marshfield*, 2 Dr. & Sm. 285.

1. Trustees authorised a firm of solicitors (one of whom, W., was a trustee) to draw the trust fund out of a bank. W. drew it out and misapplied it. The trustees were, on interlocutory application, ordered to pay the amount into court. *Ingle v. Partridge*, 32 Beav. 661; 32 L. J., Ch., 813.

Three trustees sold out trust funds, and the produce was paid to one alone. The other two were, on motion, ordered to pay the amount into court. *Ib.*

2. The trustees of a settlement, having invested the settled funds on a mortgage security, which turned out insufficient, and it not appearing that they took due precaution to ascertain whether the security was sufficient, were ordered to pay into court the whole amount of the trust funds, taking upon themselves the security. By the decree in the court below they were declared liable to pay so much only as the mortgaged premises, when sold, should prove insufficient to answer. *Lockhart v. Reilly*, *Reilly v. Lockhart*, 3 W. R. 227; 25 L. J., Ch., 697.

2. On Admissions in Answer.

3. A defendant, who admits in his answer the possession of property upon a trust, will be ordered to pay it into court, although he sets up a claim to it, if, upon the facts disclosed in the answer, the Court is satisfied that this claim is not well founded. *Del Pont v. De Tastet*, 2 L. J., Ch., 140.

4. Where defendant admits by answer that there is trust money in his hands, Court will always, on interlocutory application, order payment into court; so where executor is debtor of testator at latter's death. *Rothwell v. Rothwell*, 2 Sim. & S. 217.

Defendant, who had covenanted to pay a sum of money to trustees of his marriage settlement, but had omitted so to do, ordered on motion in suit for performance of trusts to pay money into court. *Ib.*

5. When a plaintiff claims to be entitled in a particular character to a fund in the hands of a trustee, and the trustee by his answer says he does not know whether the plaintiff fills that character or not, the plaintiff cannot have the fund brought into court in the suit. *Dubless v. Flint*, 4 Myl. & C. 602.

6. The Court refused, upon an interlocutory application by a party claiming as *cestui que trust*, to order money alleged to be trust money, and admitted to be in the hands of the defendant, to be paid into court, where the defendant, under circumstances stated on the record, claimed a title to the money for his own benefit, and did not, by his answer, admit his liability to pay it. *Knight v. Haythorne*, 4 Jur. 360.

7. In a suit against trustees for breach of trust, one of them admitted that the funds had been sold out, by means of a power of attorney executed by him for the purpose, as he stated, of investing it on more advantageous securities; but he stated he was not concerned in the receipt of the produce, but he had been informed that it had been received by his co-trustee, or by J. M. by his permission. The settlement contained a power to vary the investments:—Held, that there was not, on the answer, a sufficient admission to justify an interlocutory order on this trustee for payment of the money into court. *Meyer v. Montrou*, 4 Beav. 343.

8. An order upon motion for payment of money into court proceeds upon the admissions of the defendant, and evidence cannot be resorted to. Three trustees admitted that trust money was standing in their joint names, but one only specified the amount:—Held, that this was insufficient to found an order for its payment into court. *Boschetti v. Pomer*, 8 Beav. 98; 14 L. J., N. S., Ch., 63; 8 Jur. 1085.

9. The bill stated that some of the plaintiffs were children of another plaintiff, and that they and certain defendants were the only children of the marriage. The answers did not deny the statement, but merely stated that the defendants did not know whether these were all the children, and did not raise any objection for want of parties on this ground. There was no evidence of the relationship between the plaintiffs:—Held, at the hearing, that a case was made for inquiry as to this, and for payment into court of the trust fund. *Fowler v. Reynal*, 2 De G. & Sm. 749; 13 Jur. 649. And see 3 Macn. & G. 500; 21 L. J., N. S., Ch., 121; 15 Jur. 1019.

10. A trustee, charged with misapplication of trust moneys, admitted by his answer that he had misapplied three sums, and set forth a debtor and creditor account, in which he credited himself with, amongst others, those three sums, and also with a fourth sum, which was equally inadmissible, but which turned the balance of the account in his favour. On a motion for payment of the three sums into court:—Held, that the plaintiff not having in his motion challenged the fourth sum, the motion could only be granted to the extent to which the answer admitted a balance after striking those three items out of the discharge. *Nokes v. Seppings*, 2 Ph. 19; 1 Coop. C. C. 194; varying the decree below.

11. A trustee admitted he had sold out trust stock, but he stated that he had invested the produce in other securities. A motion was made before decree, that he might re-purchase the stock and transfer it into court:—Held, that the Court could make no such order. *Futter v. Jackson*, 6 Beav. 424.

12. In order to justify an order for payment into court of a trust fund, it is sufficient that the trustee's answer contains an admission of such a *prima facie* title in the plaintiff as to afford a reasonable expectation of the plaintiff succeeding at the hearing in making out his title. *Whitmore v. Turquand*, 1 John. & H. 296.

Therefore where, by the answer of a trustee of a composition deed, it was admitted that the fund had been for five years in his hands,

that some creditors had acceded within the time limited by the deed, but that the plaintiff had neither acceded nor refused to accede, an order was made for payment of the fund into court. *Ib.*

1. Where one of two trustees admits by his answer that a certain fund is in the hands of himself and his co-trustee, but uses such language as is admitted to import that he dealt with it, although the expression is ambiguous the Court will, on motion on the answer, order payment into court of such fund. *Pinos v. Beattie*, 5 W. R. 616.

2. Testatrix devised her real and bequeathed her personal estate to A. and B. upon certain trusts, and appointed A., B., and C. executors of her will. B. and C. alone proved. On bill filed by C. alone—alleging that A. had not proved, that B. was mentally incapacitated, and that A. declined to act in the trusts, and also alleging that A. and his partner G., who was no party to the suit, were indebted to the estate of the testatrix, and praying for the administration of trusts of the will for the usual accounts, and for the appointment of new trustees in the place of A. and B.—A. put in his answer, stating that he declined to act in the trusts, and substantially admitting that he and his partner were indebted to the estate of the testatrix. Thereupon C. moved that A. and his partner might pay into court the amount admitted to be due by A. and his partner to the estate, and although G., the partner of A., was no party to the record.—Ordered accordingly. *White v. Barton*, 18 Beav. 192.

3. Under a trust deed for the benefit of the creditors of W., dated in 1849, a dividend had been paid in 1852 of 10s. in the pound, the trustees postponing for that purpose their claims for costs at the time. Afterwards C. filed his bill to have the trusts carried out by the Court. The trustees allowed a balance in their hands, upon which they claimed to have this sum brought into court.—Held, that the Court would not, under the circumstances, deprive the trustees of the possession of this fund. *Chaffers v. Headlam*, 17 Jur. 754; 22 L. J., Ch., 1038.

4. A trustee admitted the whole of a trust fund, to a considerable amount, to be in his hands. The conduct of the trustee being proper, the Court will not, on an application by one of several *cestuis que trustent*, order payment into court of more than the aliquot share of the particular *cestui que trust* making the application. *Hamond v. Walker*, 3 Jur., N. S., 686.

Semble, the Court has, on such an application by any single *cestui que trust*, authority to order the whole fund to be brought into court, if the Court shall so think fit. *Ib.*

5. On a motion by the executor of a legatee for the transfer into court by trustees of sums of stock admitted by their answer to be standing in their names, no fraud or misconduct on the part of the trustees being alleged:—Held, following *Bartlett v. Bartlett* (4 Hare 631), that the stock should be transferred. *Marryatt v. Marryatt*, 2 Eq. Rep. 1138; 2 W. R. 576; 23 L. J., Ch., 876.

The Court will not, under the above circumstances, order sums of money in the hands of trustees to be paid into court. *Ib.*

In an administration suit by the executor of a legatee against the testator's trustees and executors, the other legatees are not necessary parties. *Ib.*

Where there is no controversy as to facts, trustees will be ordered to transfer stock into court on motion. *Ib.*

Semble, not necessary to serve the *cestuis que trustent*. *Ib.*

6. Unless there is a distinct admission, or circumstances proved which raised the presumption that certain moneys are trust moneys, the Court will not interfere by injunction to order such moneys to be paid into court before the hearing of the cause where there is a doubtful case to be tried at such hearing. *Turkey (Bank of) v. Ottoman Co.*, 14 W. R. 819; 14 L. T., N. S., 884.

7. Trustees, who had a sum of money standing in their names at their bankers', signed an order directing the bankers to honour the cheques of any two of them, or of Messrs. G. & Co., their solicitors. W., who was one of the trustees, and of the firm of G. & Co., drew out the money and applied it to his own use. Upon a bill against the trustees:—Held, on an admission of these facts by the co-trustees, that they must pay the money into court. *Ingle v. Partridge*, 32 L. J., Ch., 813; 32 Beav. 661.

8. By a marriage settlement in 1856, property was settled to the separate use of the wife for life, without power of anticipation, with remainders over. In 1866 the wife left her husband, and he instituted a suit against her in the Divorce Court for restitution of conjugal rights. Judgment was given against the wife with costs. The wife withdrew from the jurisdiction, and declined to obey the judgment. In 1870 the husband procured from the Divorce Court a writ of sequestration against the separate property of the wife for the costs of the suit. In October 1869 dividends and interests on the settled property fell due, and were received by one of the trustees, who retained them in his hands. In December 1869 a hostile suit was instituted by the wife against the trustee to compel the payment of the dividends and interest, and for the removal of the trustee, but not asking for the general administration of the fund. The trustee admitted that he had in his hands the greater part of the entire fund. A few days after his answer the trustee filed a bill in the Rolls Court for the administration of the trusts of the settlement. On motion by the wife, in the first of the two suits, that the trustee might be ordered to pay into court the entire sum admitted by him to be in his hands:—Held, that regard being had principally to the restraint on anticipation contained in the settlement, the money ought to be paid into court notwithstanding the writ of sequestration, and notwithstanding that the wife's bill had not prayed the general administration of the trust fund. *Miller v. Miller*, 18 W. R. 750.

9. Motion by infant *cestuis que trustent* that their trustee might bring a fund into court allowed where, although he had not by his answer admitted their title, he had not denied it. *Symonds v. Jenkins*, 34 L. T., N. S., 277; 24 W. R. 512.

In a suit against a trustee for breach of trust and consequent loss of trust funds, he

stated that he did not know, and could not set forth as to his belief or otherwise, whether the plaintiffs were the only children of S., or whether the eldest was seventeen years or the youngest two years of age, as alleged by the bill, or whether it was a fact that there had been no child who had attained twenty-one:—Held, that the title of the plaintiffs was sufficiently admitted to entitle them to have the fund brought into court. *Id.*

1. Where the admissions made by the answer show the defendant to be a trustee of money, a mere formal denial of the fact will not prevent him from being ordered upon motion to bring the money into court. *Hagell v. Currie*, 2 L. R., Ch., 448; 15 W. R. 605; 16 L. T., N. S., 309.

3. On Other Admissions.

2. Trust funds may be ordered to be brought into court by the trustee, an accounting party, upon admissions contained in letters written before action brought that he has received the money, and a recital to that effect contained in the settlement, his execution of which as trustee has been proved, although there is no formal admission in his pleadings or affidavits that he has received and holds the money. *Hampden v. Wallis*, 27 L. R., Ch. D., 251; 51 L. T. 357; 32 W. R. 977.

4. Practice.

3. The prayer of a bill for the removal of a trustee was, that he might be removed and the trust fund transferred into the names of new trustees, and that the parties beneficially interested for life, and in remainder in the fund, "might, upon being served with a copy of the bill, be bound by all the proceedings in the cause." Upon notice of motion to transfer the fund into court, which had been served upon the trustees only:—Held, that the parties beneficially interested ought to be served with notice of the application before the Court could make the order. *Lewellin v. Cobbold*, 17 Jur. 1111; 1 Sm. & G. 572.

5. Disobedience to Order.

4. When a trustee is ordered to transfer a fund of consols admitted to be due from him and subsequently default is made, a writ of attachment will issue. *Digby v. Turner*, 21 W. R. 471; 28 L. T., N. S., 296.

II. VOLUNTARY.

5. Money in the funds belonging to wards of the Court cannot be transferred into the name of the Accountant-General, to the credit of the cause, until the account is taken by a Master and his report made. This does not mean that such a transfer cannot be made, but that it could not operate as an acquittance and discharge of the trustees until they had passed their accounts. *Bencroft v. Rich*, 1 Bro. C. C. 56.

6. E. became a nun, and went into a convent abroad, and assigned all her property to trust-

tees for the benefit of a Roman Catholic congregation:—Held, that she was not *civiliter mortua*, or in such a position as would justify the trustees of a fund to which she was entitled in paying the fund into court, and that the Court on her petition would order payment of the fund to her trustees. *Re Metcalfe*, 10 Jur., N. S., 287; 33 L. J., Ch., 308; 12 W. R. 538; 10 L. T., N. S., 78.

7. *Semble*, a trustee is always justified in transferring the trust fund into court. *Re Croyden's Trust*, 19 L. J., N. S., Ch., 172; 14 Jur. 54.

8. Trustees, between whom and their several *cestuis que trustent* disputes have arisen as to the amounts actually due to them respectively, are justified in paying into court, to the separate account of each *cestui que trust*, the sum to which they believe him to be entitled, and may have their costs of making such payment out of the respective funds. *Re Wright*, 3 Kay & J. 419.

9. *Semble*, trustees are always justified in not paying money into court; it may turn out that there was no occasion for them to do so. *Mountain v. Young*, 18 Jur. 769.

III. PAYMENT OUT.

10. Where an estate has been completely administered, the Court will, in general, order the funds to be paid out to the trustees, and will not interfere with their discretion where they are agreed. *Butler v. Withers*, 1 John. & H. 333.

11. The Court will never order payment out of a fund in court to a sole trustee in the absence of any parties interested in the estate, unless such estate is substantially represented. *Re Roberts*, 7 Jur., N. S., 818; 9 W. R. 758.

12. In the absence abroad of one of several trustees the Court may order a sum of money under its control to be paid to the other trustees, without requiring the absent trustee to join in giving the receipt by power of attorney. *Clark v. Fenwick*, 42 L. J., Ch., 320

XXX. Receiver.

- I. *Appointment. In General*, 7089.
- II. *On Breach of Trust*, 7090.
- III. *On Disclaimor*, 7091.
- IV. *Where Trustee Abroad*, 7091.
- V. *Discharge of*, 7091.
- VI. *In Case of Executors*. See EXECUTOR AND ADMINISTRATOR, XVIII.
- VII. *When a Trustee may be appointed a Receiver and General Practitioner as to Receivers*. See PRACTICE (RECEIVER).

I. APPOINTMENT. IN GENERAL.

13. The 3 & 4 Vict., c. 105, s. 21, does not authorise the appointment of a receiver in a case of constructive trust; therefore the Court refused to appoint a receiver where the

interest of the consor of a judgment in a lease had been evicted for non-payment of rent, and a new lease had been granted to a third party under circumstances which would constitute the new lease a graft. *Casidy v. Hopkins*, 10 Ir. Eq. R. 208.

1. Receiver ought not to be appointed where there is a trustee with power of entry and distress. *Burton v. Monkhouse*, Coop. 41.

2. Where the payment of rents, in consequence of disputes among the trustees, had been permitted to fall into arrear, on a bill filed by the plaintiff, who was entitled to the rents and profits for her life, against the trustees, the Court ordered a receiver to be appointed, and the costs of the suit to be paid by the trustees. *Wilson v. Wilson*, 2 Keen 249.

3. The Court refused to appoint a receiver of a charity estate against a corporation as trustees. *Att.-Gen. v. Stafford (Mayor)*, Barnard. 33.

4. Receiver of a West India estate applied for by one of the parties entitled to a charge thereon against the trustee, refused, notwithstanding the estate was depreciated in value, and incumbrances thereon were increasing, the management of the trustee not appearing to be improper. *Barkley v. Reay (Lord)*, 2 Hare 308.

5. Where an heir had, by decree, been substituted as trustee to execute a devise to charity, upon his laches, an account was decreed, and receiver appointed. *Att.-Gen. v. Bowyer*, 3 Ves. 714.

6. Executor and trustee becoming bankrupt, a receiver was appointed, though testator knew the commission had issued. *Langley v. Hamk*, 5 Madd. 46.

7. A receiver will be appointed where an executrix and trustee is bankrupt. *Gladdon v. Stoneman*, 1 Madd. 143. n.

8. There being some disagreement between three trustees, the majority acted alone and took securities in their own names, omitting the name of the dissentient trustee:—Held, that the plaintiff, who was interested in the trust property, was entitled to a receiver. *Swale v. Swale*, 22 Beav. 584.

9. In an administration suit, where an order had been made that the trustees of the estate of the testator in the cause should continue to receive the rents and profits and proceeds of the estate, and keep down the annuities bequeathed by his will, and from time to time pass their accounts in chambers, and pay in their balances, an order appointing a receiver was made in chambers, by a Vice-Chancellor personally, upon the application of some of the beneficiaries, upon the ground that the trustees had made default in passing their accounts. The trustees and other parties opposed the application:—Held, that this was a matter connected with the management of property within the 15 & 16 Vict., c. 80, s. 26, and that the judge had jurisdiction to make the order in chambers. *Booth v. Coulton*, 16 W. R. 683.

II. ON BREACH OF TRUST.

10. A husband contracted for a lease of some premises, and he afterwards induced the

trustees of his marriage settlement, who held moneys for the separate use of his wife, without power of anticipation, to act in breach of their trust, and to purchase the property. The property was conveyed to the trustees, and, by a deed executed by the husband and wife, it was declared that it should be held for their indemnity and on the trusts of the settlement. The husband laid out very considerable sums of money in buildings and repairs, and, with the consent of the wife, was permitted to receive the rents. After some years, disputes arose; the trustees insisted on receiving the rents, and proceeded at law to enforce their rights; whereupon the husband filed a bill against the trustees and his wife, claiming a lease under the agreement, and asking for a sale of the property, and for the application of the produce, first, in replacement of the trust funds, and afterwards, in reimbursing the plaintiff his outlay. A motion for a receiver was refused with costs. *Wiles v. Cooper*, 9 Beav. 294; 15 L. J., N. S., Ch., 129.

11. Where by one deed of settlement a fund and estates of the wife were settled to her for life, remainder in trust for the children of the marriage, and by another deed the husband settled a rent-charge on his estates in trust for the wife for life, she, after her husband's death, obtained, by fraud and concealment of the settlement, the fund to be transferred to her, and assigned her life interest in her estates to a party with notice of the fraud:—Held, that the rents of her estates and the rent-charge were liable to be applied in replacing the fund, and a receiver appointed. *Woodyatt v. Gresley*, 8 Sim. 180.

12. Where property has been administered and applied without complaint, according to the uniform course of management, for a long series of years, the Court will not, by an interlocutory order, disturb the possession upon the ground that such application is a breach of trust, unless it is perfectly clear that the party in whom the property is vested is a mere naked trustee, and has not, even to a limited extent, any of the rights or interests of an owner. A motion for appointment of a receiver of the estates vested in the Irish Society, at the instance of one of the London company, claiming a beneficial interest in the income of the estates, was therefore refused. *Skinner's Co. v. Irish Society*, 1 Myl. & C. 162.

13. Receiver refused, though as between parties who stood in the relative situation of *cestui que trust* and trustee, and though the latter, against whom the receiver was prayed, admitted that he had purchased the trust property, the ground of the decision being, though the case was one of suspicion, that the Court could not interfere till the purchase was actually set aside. *George v. Evans*, 4 Y. & Coll. 211.

14. Where a portion of a trust fund had been lost, that is *primâ facie* a breach of trust, and a sufficient ground for the appointment of a receiver on an interlocutory application. *Evans v. Coventry*, 5 De G. M. & G. 911.

Held, also, that objections to the bill on the ground of misjoinder, multifariousness, or want of parties, were no answer to such an application. *Ib.*

III. ON DISCLAIMER.

1. Where one of two trustees of real estate declines to act, the Court will appoint a receiver on behalf of infant *cestuis que trustent*, but with liberty to either of the trustees to offer himself. *Tait v. Jenkins*, 1 Y. & Coll. C. C. 492.

2. Where there are several trustees, the disclaimer of some of them is not alone a sufficient ground for the appointment of a receiver, without the consent of those who remain. *Browell v. Reed*, 1 Hare 434; 11 L. J., N. S., Ch., 272; 6 Jur. 530.

3. Receiver appointed before answer in a case of a devise to four trustees, of whom two declined to act, all parties being before the Court, and consenting. *Brodie v. Barry*, 3 Meriv. 695.

IV. WHERE TRUSTEE ABROAD.

4. Receiver appointed of a Government pension, the trustee being out of the jurisdiction. *Noad v. Backhouse*, 2 Y. & Coll. C. C. 529; 12 L. J., N. S., Ch., 446; 7 Jur. 808.

5. Receiver appointed, upon an alienage in trust, in possession, who resided abroad, and had not appeared to the bill. *Malcolm v. Montgomery*, 2 Moll. 500.

• A receiver appointed over lands in Ireland conveyed by a trust deed, the trustee not being before the Court, and although the trustee had an interest in his own right, being one of the creditors to be paid off, and appeared upon the pleadings as in possession. *S. C.* 1 Hog. 93.

6. A receiver appointed of real and personal estate where the devisee in trust and personal representatives were in Jersey, and therefore out of the jurisdiction. *Smith v. Smith*, 10 Hare (App.) lxxi.

V. DISCHARGE OF.

7. A receiver, who had been appointed in consequence of the misconduct and incapacity of trustees under a will, discharged upon the appointment of new trustees by the Court. *Bainbridge v. Blair* 3 Beav. 421.

XXXI. Costs, Charges, and Expenses.

- I. *General Principles*, 7091.
 - II. *Misconduct and Breach of Trust. In General*, 7091.
 - III. *Wilful Misconduct*, 7093.
 - IV. *Mistakes*, 7094.
 - V. *Breach of Trust without Loss*, 7095.
 - VI. *Unsubstantiated Charges of Breach of Trust or Fraud*, 7095.
 - VII. *Refusing to give Accounts or Information*, 7095.
 - VIII. *Refusing to Convey or Transfer the Trust Fund*, 7096.
 - IX. *Disclaimer or Refusal to Act*, 7098.
 - X. *Acting on Opinion of Counsel*, 7098.
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XI. *Defaulting Trustee. Bankruptcy*, 7099.

XII. *Where Settlement Set Aside*, 7100.

XIII. *Separate Defences and Separate Sets of Costs*, 7100.

XIV. *Rights of Co-trustees Inter se*, 7101.

XV. *Indemnity for, to Trustee by Cestui qui Trust*, 7101.

XVI. *Of Trustees Acting as Solicitors, or Otherwise in a Professional Character*, 7102.

XVII. *Rights of Trustee. Other Cases*, 7105.

XVIII. *Rights of Other Persons*, 7107.

XIX. *Lien for and Priority*, 7107.

XX. *What Fundliable for Payment of*, 7107.

XXI. *Taxation*, 7108.

See also Preceding Subdivisions.

XXII. *Practice on Allowance of. Further Consideration*, 7110.

XXIII. *Appeal for by Trustees. See PRACTICE (COSTS)*.

XXIV. *Of Charity Trustees. See PRACTICE (COSTS)*.

XXV. *Of Executors. See EXECUTOR AND ADMINISTRATOR, XXXIV*.

XXVI. *Under Trustee Acts. See TRUSTEE ACTS, I. I. 1 (c)—I. v. 9—II. XVI.—IV. VI*.

XXVII. *Under Trustee Relief Acts. See TRUSTEE RELIEF ACTS, III*.

XXVIII. *Of Removal or Appointment of New Trustees. See XV. III. 3 (a) ante—XVI. I. 6 ante*.

I. GENERAL PRINCIPLES.

8. As a general rule, trustees have a right to their costs out of the estate; but the application of the rule depends upon the conduct of the trustees under their strict observance of the duties of their trust. *Beer v. Tapp*, 31 L. J., Ch., 513; 10 W. R. 277; 6 L. T., N. T., 269.

9. Trustee seeking direction and indemnity of Court as to execution of trusts, is always allowed his costs, unless act required to be done leads to no responsibility, and motives of trustee are obviously vexatious. *Curtis v. Chandler*, 6 Madd. 123.

10. Trustees who file a bill for the administration of a testator's estate, are entitled to their costs, however small the estate may be, and however small the risk in administering the estate. *Hodgkinson v. Gilbert*, 19 L. J., N. S., Ch., 424.

11. Costs of course, out of the fund to agents, receivers, and trustees, who have accounted fairly, and paid money into court. Costs cannot be given to a college individually, nor as a corporation, unless proved so. *Att.-Gen. v. London (City of)*, 1 Ves. J. 246; 3 Bro. C. C. 171.

12. A trustee is entitled to be reimbursed out of the trust property all the charges and expenses incurred in the execution of the trust, and in this the Court will always deal liberally with a trustee acting *bond fide*. *Courtney v. Rumley*, 5 Ir. B., Eq., 99.

II. MISCONDUCT AND BREACH OF TRUST. IN GENERAL.

13. Considering the importance of securing intelligent, competent, and responsible persons

to act as trustees, it is not the practice of the Court to visit trustees with costs, except when they act from interested motives, or intentionally and wantonly conduct themselves in a vexatious and oppressive manner. *Noble v. Maymott*, 14 Beav. 471; 20 L. J., N. S., Ch., 61.

1. Matters of personal or private feeling cannot be considered in a question either of merits or of costs, as between trustee and *cestui que trust*; and therefore a trustee, who deems himself to be or is assailed, by imputations cast upon him by his *cestui que trust*, is not justified in refusing to do an act which his trust requires, until he receives an apology from the *cestui que trust*; and if he refuses, from want of such apology alone, to do an act which his duty as trustee requires, he will be liable to the costs of a suit brought to enforce the performance of such duty. *Moore v. France*, 9 Hare 299; 20 L. J., N. S., Ch., 468; 15 Jur. 1188.

2. Trustee is entitled to costs, unless he acts from motives of caprice or obstinacy. *Taylor v. Glanville*, 3 Madd. 176.

3. Costs refused to a trustee, setting up a trust different from what it really was; but general misconduct, etc., is not a sufficient ground. *Ball v. Montgomery*, 2 Ves. J. 191; 4 Bro. C. C. 339.

4. Trustees neglecting their trust not entitled to their costs. *England v. Downs*, 6 Beav. 279.

5. Where trustee by neglect occasions the suit, no costs are given him, but against him, of course. *O'Callaghan v. Cooper*, 5 Ves. 117; *Caffrey v. Darby*, 6 Ves. 488.

6. The right of a trustee to his costs, like that of a mortgagee, is a matter of contract, and is not in the discretion of the judge, although he may be deprived of them for misconduct. The mere fact that a trustee denies that he is indebted to the estate, and on taking the accounts turns out to be indebted, is no reason for depriving him of the costs. *Turner v. Hancock*, 20 L. R., Ch. D., 303; 51 L. J., Ch., 517; 46 L. T. 750; 30 W. R. 480.

7. Trustee ordered to pay costs on misconduct. *Danson v. Parrot*, 3 Bro. C. C. 236.

8. A trustee misbehaving himself ordered to pay costs out of his own pocket, and not out of the trust estate. *Lloyd v. Spillet*, 3 P. W. 347. S. P. *Fell v. Lutwidge*, Barnard. 314.

9. If a bill be filed against a trustee for an account to which he submits by an answer, though, on taking the account, he be found in debt, yet he shall not pay costs unless he has misbehaved himself. *Secus*, if he controverts the account; there, if found in arrear, he shall pay interest and costs. *Parrot v. Treby*, 1 Eq. Abr. 125; Pre. Ch. 254.

10. Trustee not deprived of costs for slight misconduct, in respect of which he is charged with interest. *Sammes v. Rickman*, 2 Ves. J. 36.

11. Trustees and executors do not necessarily lose their costs because charged with interest. *Woodhead v. Marriott*, C. P. C. 62.

12. If a trustee has not misconducted himself, even though the Court punish him, as by making him pay interest on funds in

his hands, yet he shall get the costs of the suit; but if his account be greatly reduced in the office, he shall not get the costs of passing it. *Foxier v. Andrews*, 2 J. & L. 199; 7 Ir. Eq. R. 595.

13. Trustees, who were directed to sell an estate as soon as conveniently might be after their testator's death, refused, by the desire of one of the parties interested, an offer of 6,600*l.* for the estate; but they afterwards sold it for 3,600*l.* The Court charged them with the loss, but gave them their costs, as their conduct had not been wilful nor perverse. *Taylor v. Tabrum*, 6 Sim. 281; 1 L. J., N. S., Ch., 189.

14. Trustee how far charged with interest and costs and profits of a farm carried on by aid of testator's personal estate. *Killick v. Flewney*, 4 Bro. C. C. 163.

15. A trustee who has purchased the trust property, and sold it at a profit, and who has been compelled by a suit in equity to refund that profit, will not, except under circumstances affecting him with moral fraud, be charged with the costs of the suit. *Baker v. Carter*, 1 Y. & Coll. 250; 4 L. J., N. S., Exch. Eq., 12.

16. Relief on a bill charging default against trustee, who had changed the fund, and the trust fund secured, but costs given to the trustee against the plaintiff and the fund; the rule that trustee not having acted regularly shall pay costs being subject to be qualified where, though the conduct was irregular, the motive was not corrupt. *Fitzgerald v. O'Flaherty*, 1 Moll. 347.

17. Where the misapplication of the funds of a public body had gone on for a great length of time, and no imputation was cast upon the trustees, they, though removed, were allowed their costs out of the fund; this, however, not to be a precedent for cases, which should be defended afterwards, where the same point should arise. *Att.-Gen. v. Drummond*, 2 Con. & L. 98; 3 Dr. & War. 162.

18. When the costs or expenses claimed have been incurred through the misconduct or negligence of the trustee, he will not be allowed them; but the fact of his having been unsuccessful in litigation, either as plaintiff or defendant, will not, in the absence of misconduct, disentitle him to be reimbursed his costs. *Courtney v. Rumley*, 6 Ir. Eq. Rep. 99.

19. A trustee, against whom a bill had been filed for breach of trust, after decree declaring him liable and ordering accounts to be taken, paid 4,000*l.* into court. On taking accounts it was found that the sum of 1,200*l.* more was still owing from the trustee.—Held, that he was liable for the costs of taking the accounts as well as for the costs up to decree. *Payne v. Parker*, 17 W. R. 640.

20. Trustees were directed by a will to place the trust moneys in the public funds, or on some good and approved freehold or leasehold securities, at interest. The trustees, acting *bonâ fide*, had, in 1828, upon the report of a surveyor (who had valued the property at 3,500*l.*, and the annual rental at 175*l.*), lent 2,600*l.*, part of the trust moneys, upon a mortgage, with powers of sale, of the valued property, and which consisted of four freehold messuages, at the time in an unfinished state,

the actual yearly rent of which being only 105*l*. The mortgagor having become insolvent, the trustees sold the property in 1836, which then realised less than the amount lent by 353*l*. 4*s*. 2*d*., and that sum was lost to the estate. In a suit by a *cestui que trust*, the Court declined to charge the trustees with the loss, and allowed them their costs of suit, and their costs, charges, and expenses. *Jones v. Lewis*, 3 De G. & Sm. 471; 13 Jur. 877; 18 L. J., Ch., 430.

1. On a decree against several trustees for breach of trust, the costs of suit are decreed against all, without regard to the degrees of culpability, but for the greater security for their payment. *Lawrence v. Bowle*, 2 Ph. 140; 1 Coop. C. C. 241.

2. Generally, where trustees are guilty of a breach of trust, they must pay the costs of a suit to repair it. *Byrne v. Norcott*, 13 Beav. 336.

3. On a mortgagee of settled estates requiring to be paid off, or to have the interest increased, the tenant for life proposed a new mortgagee at the same rate. The trustees insisted on being the proper persons to carry the transaction into effect, and procured another mortgagee, but at a higher rate; and in order to raise the expenses thereby incurred, they proceeded to sell the estate under the ordinary powers of sale and exchange in the settlement, whereupon the tenant for life filed a bill to restrain the sale:—Held, that the conduct of the trustees was unjustifiable, and that they ought to pay all the costs of the suit. *Marshall v. Sladden*, 4 De G. & Sm. 468; 7 Hare 428; 19 L. J., N. S., Ch., 57; 14 Jur. 106.

4. When in an action for administration of trusts the plaintiff makes a special case of breach of trust in relation to the property, not depending upon a mere point of construction, the rule is that, the breach of trust being established, the trustee must bear the costs of the action so far as it relates thereto. *Bell v. Turner*, 47 L. J., Ch., 76.

5. Costs of administration suit given to an executor, though charged with the consequences of an improper investment. *Knott v. Cottes*, 16 Beav. 76; 16 Jur. 762.

6. Where a trustee, at the request of the *cestui que trust*, a married woman, and tenant for life of the fund for her separate use, sold out the trust fund, and invested it on an improper security:—Held, in a suit by such tenant for life against the trustee to have the trust fund replaced in a proper state of investment, that no costs ought to be given, as between the plaintiff and the defendant, on either side:—Held, also, that the costs of the parties entitled in remainder were to be paid by the plaintiff. *Mant v. Leith*, 16 Jur. 302; 21 L. J., Ch., 719; 15 Beav. 524.

7. Where a trustee commits a breach of trust and dies, and his heir incurs costs in unsuccessfully defending an action of trespass brought in consequence of steps taken by him to obtain possession of freeholds lost by reason of such breach, he was allowed such costs. *Melling v. Melling*, 6 W. R. 121.

8. Trustees having committed breach of trust by granting longer leases than they had power by deed to do, the fact of *cestui que trust* receiving rents from the lessees, in ignorance

of the invalidity of the leases, does not operate as a new agreement. But account only directed from filing of bill, without costs to plaintiff. *Bones v. East London Waterworks*, 3 Madd. 373.

9. A trustee in a will which directed money to be lent at such a rate of interest as the trustees should think reasonable, by consent of his co-trustee, keeps it at 4 per cent. Ordered to pay 5, and the executors to pay the costs of taking the accounts as to that interest. *Forbes v. Ross*, 2 Bro. C. C. 430.

III. WILFUL MISCONDUCT.

10. Interest and costs decreed against a steward upon fraud, wilful concealment, etc., and in such cases generally there is no limitation of time. *Hardwicke v. Vernon*, 14 Ves. 504.

11. Where trustees for infants persisted in unnecessary litigation, they were ordered to pay the costs personally. *Campbell v. Campbell*, 2 Myl. & C. 25.

12. If trustee files bill, and brings *cestui que trust* before the Court for his own private interest, he shall pay whole costs of suit. *Henley v. Philips*, 2 Atk. 48.

13. Where trustees, throughout transactions in reference to trust estates of a wife, endeavoured to aid the husband in defeating the wife's enjoyment of her separate estate:—Held, that the decree was right in ordering those trustees and W. B. to pay the costs of the suit, the same having been rendered necessary by the unfounded claims of the husband, improperly recognised and supported by those two trustees. Held, also, that the husband and the two trustees hostile to the wife were properly ordered to pay the costs of the parties interested in remainder under the settlement, and who were not necessary parties to the suit, inasmuch as they, on the part of the husband, set up the claim to a tenancy for life in the timber-money, which raised a question (however untenable) in which the other persons entitled in remainder were interested. *Bagot v. Bagot*, 10 L. J., N. S., Ch., 116.

14. Where a trustee executed a deed of declaration of trust in favour of the wife, falsely reciting that the fund was the wife's separate property, and which was afterwards set aside as in fraud of creditors, the Court refused to give the trustee his costs. *Turquand v. Knight*, 14 Sim. 643; 9 Jur. 546.

15. By settlement, a trustee was required, immediately after the marriage, to compel payment of a sum of money secured by a covenant in the deed; he neglected to do so even when required to call it in, and allowed the interest to fall into arrear; he was held liable to pay the costs of a suit instituted to compel him to perform the trusts. *Kirby v. Mash*, 3 Y. & Coll. 295; 8 L. J., N. S., Exch. Eq., 33; 3 Jur. 221.

16. In a suit by the legatee of the vendor, against the devisees in trust of the purchaser, for payment of part of the purchase money not payable by the contract till the death of the vendor, the trustees were decreed to pay the costs out of their own estate, because they had occasioned the suit by unfounded doubts which

they had raised as to whether the plaintiff was entitled absolutely or for life only. *Burrows v. Greenwood*, 4 Y. & Coll. 251; 5 Jur. 384.

1. So, where rents were allowed to fall into arrear in consequence of disputes between the trustees, the Court compelled them to pay the costs of a suit by the tenant for life. *Wilson v. Wilson*, 2 Keen 249.

2. Where trustees for sale purchased through a trustee at an under-value, though without fraud, and by auction, and the *cestui que trust* were infants, and therefore incapable of discharging the trustees, the relief as to a re-sale was given with costs against them; but as to the other part of the case, with regard to accounts that must have been taken, they must have their costs, as they would have been entitled to them in the ordinary case. *Sanderson v. Walker*, 13 Ves. 601. And see *Hall v. Hallet*, 1 Cox 134, 141.

3. A trustee unreasonably resisting the claims of his *cestui que trust* ordered to pay the costs of the suit. *Price v. Loaden*, 21 Beav. 508.

4. If trustees, by wilful neglect of their duty, render a suit for the administration of the estate under their charge necessary, they will be ordered to pay the costs of it. *Jefferys v. Marshall*, 19 W. R. 94; 23 L. T., N. S., 548.

5. A trustee filing an administration suit against his *cestui que trust* in order to avoid a bill against himself for an account which he had neglected to render, was not made to pay costs, but the carriage of the decree was given to the *cestui que trust*. *Naylor v. Smith*, 15 W. R. 528.

6. Trustees raising a charge of fraud, and taking no steps to satisfy themselves when they might easily do so, will not be allowed their costs of the discussion in court, if upon the evidence the Court considers there was no reasonable ground of suspicion. *Cockcroft v. Sutcliffe*, 2 Jur., N. S., 323; 25 L. J., Ch., 313; 4 W. R. 339.

Lands being limited to a father for life, with an exclusive power of appointment among his children, remainder over, the two eldest sons, being of full age, and desirous of being established in the world, set up in business as millers in partnership. At their request the father joined the partnership. In order to procure capital for the business, the father appointed the lands to his two sons exclusively, and joined with them in mortgaging the fee for 800*l.*, which was placed to the credit of the partnership generally, other property belonging to the father, of the value of 600*l.*, being included in the security. There were five other children, three of whom were still infants, and two of age. These two had confirmed the transaction. There was no evidence of any bargain or any *mala fides* on the part of the father, or any advantage except such as he derived from the produce of the mortgage being employed in the trade in which he was a partner:—Held, that it was a good appointment; and it appearing that the trustees had taken no trouble to inquire into any of the circumstances attending the same, but treated it at once as a fraud on the power, no costs, charges, or expenses were allowed to them since filing the bill. *Ib.*

Unnecessary evidence having been gone into by the trustees as to the bankruptcy of the father seventeen years back, they were ordered to pay

so much of the costs of the suit as were occasioned by such evidence. *Ib.*

7. Trustee disallowed the costs of an improper answer. *Eddowes v. Eddowes*, 30 Beav. 603.

8. On a marriage, the father of the wife purchased 1,000*l.* consols, and the same was vested in trustees to pay the dividends to the wife for her life; and then trusts were declared for the children of the marriage, under which the Court had decreed, in a former suit, that the only child of the marriage, a daughter, took a vested interest. This daughter married J. M., and died in the lifetime of the mother, leaving J. M. her surviving. J. M. did not take out administration to the effects of his deceased wife, and afterwards died:—Held, that his executors were entitled to the 1,000*l.* consols, and that the representatives of the wife were not entitled. One of J. M.'s executors, who was a defendant, having colluded with the other defendant, the Court gave costs against both of them. *Platt v. M'Dougall*, Tambl. 390; 9 L. J., Ch., 150.

9. A trustee of a marriage settlement, who allowed a sum of 350*l.* to remain in the hands of a trading firm for a period exceeding fifteen years after the death of the tenant for life, but who eventually, and before the bill was filed, paid the principal, with 5*l.* per cent. interest:—Held, liable to account with annual rests, and also to the costs of the suit. *Jones v. Fowall*, 21 L. J., Ch., 725.

10. A trustee, with power to invest the trust property in leasehold or chattel personal securities, or upon the personal security of any person, advanced, at the request of his *cestui que trust*, some of the property to two ladies on the security of mortgages (with the usual covenants) of a leasehold house in which the ladies were living, and of the furniture in it. The trustee was also the lessor of the house. The mortgagors became insolvent, paid no rent, and no part of the principal or interest on the loan. The trustee, as lessor, determined the lease by entry, and then sold all his interest in the leasehold premises and the furniture; but he thereby so mixed up the trust property with his own that it was impossible to distinguish the one from the other, or to pronounce with certainty how much of the proceeds of the sale was his, and how much belonged to the *cestui que trust*. The advance had been made at 5*l.* per cent. After some delay, the trustee replaced the principal money of the loan, but invested it against the wishes of his *cestui que trust* in 3*l.* per cent. consols, the dividends on which, however, were paid to them:—Held, that the trustee was bound to make good to the trust estate the whole of the money advanced on the loan, with all interest due thereon at the rate of 5*l.* per cent. per annum, to be computed up to the date of the decree; and that he must pay the costs of the suit. *Cook v. Addison*, 38 L. J., Ch., 322; 7 L. R., Eq., 466; 17 W. R. 480; 20 L. T., N. S., 212.

IV. MISTAKES.

11. Where a trustee committed a breach of trust from a mistake of his powers, he was made to pay costs. *Powlett (Earl) v. Herbert*, 1 Ves. 297.

1. Where, under the trusts of a doubtful will, the tenant for life, who was also a trustee, neglected to make proper investments, she was held chargeable with interest at 4 per cent. only, and the decree was made without costs. *Mousley v. Carr*, 4 Beav. 49; 10 L. J., N. S., Ch., 360.

2. Trustees who had acted *bonâ fide*, though upon an erroneous construction of a will, not ordered to pay costs. *Harper v. Munday*, 2 Jur., N. S., 1197.

V. BREACH OF TRUST WITHOUT LOSS.

3. Where improper application of a trust fund was of a small part, and promptly offered to be restored, and no imputation, trustee not disentitled to costs, a suit being necessary for another purpose of the trust. *Fitzgerald v. Pringle*, 2 Moll. 534.

4. A trustee was declared liable for a breach of trust, and was ordered to pay the costs up to the hearing. He complied with the decree:—Held, that he was entitled to the costs of his subsequent proceedings for clearing and distributing the fund. *Hewitt v. Foster*, 7 Beav. 348; 8 Jur. 769.

5. Trustees had lent money on a technically insufficient security. In the Master's office, they entered into evidence to prove its sufficiency, but failed; and they afterwards presented a petition for calling in and investing the money. This was done, and no loss occurred:—Held, that the trustees were entitled to their costs of both proceedings. *Royds v. Royds*, 14 Beav. 45.

6. When trustees in good faith invest on a security not in strictness justified by the instrument creating the trust, but which is practically secure, and from which no loss to the trust fund occurs, they will not be decreed to pay the costs of a suit to compel them to bring in the fund so invested. In this case the Court refused the trustees their costs, and directed the petitioner's costs to be paid out of the fund. *Fitzgerald v. Fitzgerald*, 6 Ir. Ch. R. 145.

VI. UNSUBSTANTIATED CHARGES OF BREACH OF TRUST OR FRAUD.

7. A bill contained allegations of great fraud against trustees, which all failed. The trustees were removed; but not, however, on the ground of misconduct:—Held, that they were entitled to the costs of the whole suit. *Passingham v. Sherborn*, 9 Beav. 424.

On a devise to two trustees, with a leasing power, and that they might become lessees, one declined to act, and the other became lessee, and he was afterwards removed by order of the Master of the Rolls, at the instance of the *cœtui que trust*, on the ground of the inconsistency of the characters of trustees and lessees:—Held, to have been properly dismissed. An action having been brought to try the question of injury to the estate and mismanagement, and on the account taken a balance having been found due to the trustees, and the charges of breaches of covenant having been abandoned at the hearing:—Held, that the trustees were entitled to the costs of the suit. *Id.*

8. Where fraudulent charges are made against trustees, and inquiries into the truth of them are directed by the Court, if in the result it is proved that such charges were unfounded, the costs consequent upon the investigation will be thrown upon the party making them. *Bartlett v. Wood*, 30 L. J., Ch., 614; 9 W. R. 817; 4 L. T., N. S., 692.

9. On a bill filed by C. against A. and B., alleging that F. would have made a higher offer if the negotiations had been continued, and charging the trustees with the consequent loss to the estate:—Held, that the trustees could not, under the circumstances, be made liable, and that they ought to be allowed the usual trustees' costs of the suit. *Selby v. Bowie*, 1 N. R. 420; 11 W. R. 559; 8 L. T., N. S., 18.

10. The trustees of a will agreed to settle disputes with the surviving partner in a firm of which the testator had been a member by selling the testator's share to him at a certain price. They then filed a bill to have this agreement sanctioned; a decree was made accordingly, and the sale carried out. Some years afterwards some of the residuary legatees, who were infants, filed a bill by their next friend to set aside the decree on the ground that the compromise was an improper one, and that it had been entered into, and the decree sanctioning it obtained, by the personal fraud of one of the trustees. This trustee answered separately; and at the hearing Lord Romilly dismissed the bill with costs, being of opinion that the compromise had been beneficial and the decree sanctioning it properly obtained. The next friend could not pay the costs, and the trustee applied by summons in a suit for the administration of the testator's estate to have them taxed as between solicitor and client and paid out of the estate:—Held, that the trustee was entitled to be paid his costs out of the estate, as he had defended the suit for the benefit of the estate, though he had at the same time defended his own character. *Walters v. Woodbridge*, 7 L. R., Ch. D., 504; 47 L. J., Ch., 516; 26 W. R. 469; 38 L. T., N. S., 83. Reversing 20 W. R. 520.

11. One of two tenants for life under a settlement brought an action, claiming to have the trusts executed by the Court. The statement of claim alleged that the surviving trustee had committed a breach of trust, and asked to have new trustees appointed in the place of him and a deceased trustee. The settlement contained a power to appoint new trustees, exercisable by the tenants for life. The plaintiffs' income had always been regularly paid to him. At the trial the charges against the trustee were abandoned, and it was admitted that there was no ground for his removal:—Held, that the plaintiff was entitled to judgment for the execution of the trusts, but that, the action being unnecessary, he must pay the costs of it up to and including the trial. *Fane v. Fane*, 13 L. R., Ch. D., 228; 49 L. J., Ch., 200; 41 L. T. 551; 28 W. R. 348.

VII. REFUSING TO GIVE ACCOUNTS OR INFORMATION.

12. Owners of a privateer acting for themselves and the crew, in the sale of the prizes,

having neglected to render accounts, and delayed the distribution of the proceeds, charged with interest on the balances, and costs. *Pearce v. Green*, 1 Jac. & Walk. 135.

The first duty of an agent, receiver, trustee, or executor, is to be constantly ready with his accounts, and neglect in this is a ground for charging him with interest. *Ib.*

1. Repeated applications were made to a trustee requiring to know in what way certain legacies given by the will of a testator, and in which certain parties had life interests, had been invested. To these applications the trustee gave evasive answers:—Held, that he must individually pay the costs of a suit to secure those legacies. *Grierson v. Astle*, 3 L. T., N. S., 288.

2. A trustee refused to render sufficient accounts of a legacy bequeathed to a married woman for life, with remainder to her children, on the ground that the legatees wished to deal with the legacy in a manner inconsistent with the terms of the will, and stated her intention of retiring from the trusts by payment of the legacy into court:—Held, in a suit by the legatees, that the trustee was not justified in such refusal, and must pay the costs of the suit. *Henry v. Macdonald*, 15 W. R. 165.

3. Where trustees for creditors neglected, on the application of a creditor, to furnish an account of the trust estate, and the creditor filed a bill, to which the trustees put in an answer, setting forth an account substantially correct, the Court made the acting trustee pay the plaintiffs costs to the hearing, but gave both trustees their subsequent costs out of the estate. *Springett v. Dashwood*, 2 Giff. 521; 3 L. T., N. S., 542.

4. When trustees refused information and an account of the property to the plaintiffs, who had an interest in the estate, and other proceedings had subsequently been taken whereby the costs of the suit were greatly increased, the trustees were directed to pay the costs of the suit up to the hearing, as if it had been an ordinary administration suit, and as to the rest of the costs each party to bear his own. *Talbot v. Marshfield*, 3 L. R., Ch., 622; 19 L. T., N. S., 223.

5. An executor or trustee is bound, in the absence of very strong reasons to the contrary, to render the accounts of his testator's estate to the solicitor of the residuary legatee; and if he pertinaciously refuse to do so, will be ordered to pay the costs up to the hearing of a suit to have the accounts taken, although such suit may embrace other matters. *Kemp v. Burn*, 1 N. R. 257; 4 Giff. 348; 11 W. R. 278.

6. Trustee, under deed of trust, by a former petition upholding the trust and praying to annul flat, and failing, but consenting to have the account against him taken on that petition by reference, ordered to pay costs of that petition, and to pay balance in his hands, under trust deed, to assignees, with interest at 4 per cent. from date of order of reference, although there was no evidence of interest having been made. Costs of reference to be paid by estate. *Exp. Harding*, 4 Dea. & Ch. 793.

7. Where, after applications to see trusteeship accounts were refused, a bill was filed for the administration of real and personal estate, and the trustees by their answer denied that

there was anything due from, but that a balance was due to, them, and that the prosecution of the suit could lead to no useful result, as there was no estate remaining unapplied, but that they were ready to account on being paid their costs, and the chief clerk certified that a balance was due from the trustees, the Court considered the conduct of the trustees, who had had the management of the estate, unsatisfactory; ordered them to pay the balance due, with interest at 4l. per cent., and directed them to pay all the costs of the suit, excepting the costs of the proceedings in reference to the real estate, the charge in the bill that the testator had real estate not having been proved by the plaintiff. *Eglin v. Sanderson*, 8 Jur., N. S., 329.

VIII. REFUSING TO CONVEY OR TRANSFER THE TRUST FUND.

8. A trustee, refusing to pay a legacy without the direction of the Court in a case which admitted of no doubt, was refused his costs, but was not made to pay the costs of the suit, because he might have acted from ignorance, and not from any improper motive. *Knight v. Martin*, 1 Russ. & M. 70; Taml. 237.

9. A bill for a specific performance of an agreement was made necessary by a trustee refusing to join in the conveyance. The Court being of opinion that the trustee ought to pay all the costs of the suit, the decree was, that the plaintiff should pay the costs of all the other defendants (although he had a decree against them), and recover over the whole costs from the defendant, the trustee. *Jones v. Lewis*, 1 Cox 199.

10. Trustees, who had declined to transfer a fund to an assignee, on the ground of an alleged fraud in the assignment, were held entitled to costs as between solicitor and client, although the assignment was decreed to be carried into execution; there being some circumstances of suspicion attending the assignment, particularly at variance between the consideration expressed in the deed and the actual consideration. *Whitmarsh v. Robertson*, 1 Y. & Coll. C. C. 715; 11 L. J., N. S., Ch., 404; 6 Jur. 921.

11. The wife of a testator having disposed of a moiety of his real estate by her will, purporting to be in exercise of the power given her by his will, her executor claimed to be entitled to receive a moiety of the proceeds of the testator's real estate from the trustees of his will, which claim they refused, on the ground that the codicil did not revoke the power given by the will, although they were previously advised, by the opinions of two counsel, which they concealed from the executor of the wife, that it did:—Held, that they were liable to pay the costs of a suit instituted by the executor of the wife to recover a moiety of the proceeds of the testator's real estate, so far as it was rendered necessary by their conduct. *Ankers v. Sandford*, 4 Jur. 817.

12. A man may be a trustee of land in such a sense as that the Court will direct him to convey the legal estate without considering him entitled to trustee's costs and allowances. *Carter v. Carter*, 4 Jur., N. S., 63.

1. Trustees of a term, the trusts of which had been put an end to by the *cestui que trust*:—Held, entitled to their costs of a suit to compel an assignment of the term to the purchaser of the property, on the ground that full and accurate information had not been tendered them before bill filed. *Holford v. Phipps*, 3 Beav. 434; 10 L. J., N. S., Ch., 209.

2. Trustees who have unsuccessfully resisted the claim of the assignees from the *cestui que trust* to have a term merged:—Held, entitled to trustees' costs. *Holford v. Phipps*, 4 Beav. 475.

3. A party to whose name a trust fund has been transferred by mistake is entitled to the sanction of the Court before he joins in any transfer, and to his costs. *Dunkin v. Ward*, 1 Jur. 735.

4. It is the duty of the Court to protect trustees to the utmost in exercising every reasonable caution, and requiring full proof; yet if a trustee, after having received full evidence of the title, perseveringly persist in withholding the fund from the party entitled to it upon grounds which wholly fail, and especially where a part of those grounds is a claim in which that trustee is himself interested, the Court will not allow him so to conduct himself without paying the costs of such a mode of proceeding. *Frost v. Hamilton*, 6 Jur. 525.

5. Trustees of the separate estate of a married woman decreed to pay the costs of a suit instituted to compel them to transfer the fund into her name. *Thorby v. Yeats*, 1 Y. & Coll. C. C. 438; 6 Jur. 939.

6. An heir-at-law, claiming as such, was put to prove, and did prove his pedigree, as stated in his bill in detail:—Held, that the Court might and ought to decide without a jury; and it appearing that the evidence of heirship was, previously to the institution of a suit, submitted to the defendants, the trustees, and was such as they ought to have been satisfied with, the Court gave the plaintiff the costs of the suit as against the trustees, including the expenses of the genealogical evidence. *Lancashire v. Lancashire*, 1 De G. & Sm. 288; 11 Jur. 1024.

7. An unmarried lady transferred a sum of stock to trustees for herself. The letter supposed to contain the terms of the trust was lost, and no evidence was given of its contents. After the marriage of the lady, the husband and wife demanded a transfer of the fund, which the trustees refused to make without the direction of the Court, unless the fund should be settled for the benefit of the wife and her issue:—Held, that the trustees ought to have transferred the fund without suit, and must, therefore, pay the costs. *Penfold v. Bouch*, 4 Hare 271.

8. By a post-nuptial settlement, property in the funds, belonging to the wife, was settled in trust for the husband and wife for their lives, and then for such of their children in such parts, etc., as the wife should by deed or will appoint. There were four children. The husband died, and the wife appointed the whole fund, and assigned her life interest therein to the eldest (a daughter), who had attained the age of twenty-one, but who, together with the other children, was living with her mother. A trustee, refusing to join in the transfer of

the fund, pursuant to the appointment, was not allowed his costs of a suit brought against him by the daughter to compel the transfer, though, under all the circumstances of the case, he was not decreed to pay the costs of the suit. *Campbell v. Home*, 1 Y. & Coll. C. C. 664; 7 Jur. 365.

9. Where a trustee refused to re-convey trust property until the *cestui que trust* had apologised for an alleged imputation on the trustee, the costs of a suit for re-conveyance, occasioned by such refusal, were directed to be paid by the trustee. *Moore v. Franco*, 9 Hare 299; 20 L. J., N. S., Ch., 468; 15 Jur. 1188.

10. A *cestui que trust* will have to pay his own costs if he institutes proceedings against his trustee for payment of a sum due unless every feasible means have been adopted by him to obtain payment without suit. *Aylmer v. Winterbottom*, 4 Jur., N. S., 19.

11. An executrix of a deceased and sole trustee having declined to receive and pay the dividends on stock standing in the name of the trustee, the *cestui que trust* filed a bill against her for the appointment of new trustees, a transfer of the trust fund, and payment of a dividend:—Held, that the executrix was entitled to her costs out of the fund. *Legg v. Mackrell*, 2 De G. F. & J. 551; 4 L. T., N. S., 568. Reversing 1 Giff. 165; 5 Jur., N. S., 1154.

12. Where a married woman is entitled to a life interest to her separate use, under her marriage settlement, her receipt alone to be a sufficient discharge, that is not a restraint upon anticipation; but where the trustees, upon the clause, as to the separate receipt, consider it so far doubtful that they refuse to pay either to the married woman or her assignee, and a bill is filed, they are still entitled to their costs in priority. *Ross v. Sharrod*, 11 W. R. 356; 1 N. R. 419.

13. Trustees refusing to recognise an appointment made by their *cestui que trust*, a tenant for life, in favour of his two sons, on the ground that such appointment is fraudulent from some supposed benefit resulting to the appointor, will not be allowed their costs of a suit to compel a conveyance of the legal estate where all taint of fraud is distinctly disproved by the evidence, and the trustees have contented themselves with taking counsel's opinion without taking any steps to inform themselves as to the circumstances. *Cockcroft v. Cockcroft v. Sutcliffe*, 4 W. R. 339; 25 L. J., Ch., 313; 2 Jur., N. S., 323.

14. Where, upon the sale of an estate by the equitable owner, the party having the mere legal estate refused to convey unless the *cestuis que trustent* of the proceeds (declared by a deed of even date) were made parties to the conveyance:—Held, that he could not justify such refusal; but, as he appeared to have acted *bonâ fide* under advice which misled him, the Court would not charge him with costs of the suit occasioned by his refusal. *Angier v. Stannard*, 3 Myl. & K. 566; 3 L. J., N. S., Ch., 216.

15. By settlement made on the marriage of Mr. and Mrs. A., a fund was vested in trustees, upon trust, after the death of the survivor, for the child or children, or remoter issue of the marriage, as Mr. and Mrs. A. should jointly

appoint, and in default, as the survivor should appoint. The only child of the marriage was a son, born in 1835. Mrs. A. died without having joined in the exercise of the power of appointment. In 1856 Mr. A. appointed that the fund should, after his own death, go to his son; and soon after the execution of that appointment Mr. A. and his son jointly applied to the trustees to transfer the fund into their joint names. About three months before the son attained twenty-one, Mr. A. wrote to the trustees, saying that it was the wish of himself and his son that a portion of the trust fund, amounting to six-sevenths of it, should be transferred into his own name only. The trustees laid a case before counsel for opinion as to the course they ought to adopt; and he advised that if certain requisitions were complied with, they might safely make the transfer to Mr. A. and his son without suit. All the requisitions mentioned by counsel were complied with; but the trustees refused to make the transfer without the direction of the Court. Mr. A. and his son then filed a bill for the purpose of obtaining a transfer of the trust fund into their joint names, and praying that the trustees might be ordered to pay the costs of the suit; and Stuart, V.-Ch., made a decree for such transfer, but directed the costs of the suit to be paid by Mr. A. and his son. Upon an appeal as to costs:—Held (affirming 3 Jur., N. S., 609; 5 W. R. 699), that the trustees were entitled to their costs of the suit; but the appeal was dismissed without costs. *King v. King*, 4 Jur., N. S., 721; 27 L. J., Ch., 29; 6 W. R. 85; 1 De G. & J. 663.

Where, in transactions between a father and a son who has just attained twenty-one, more especially when such transactions had their inception before the son attained that age, trustees act *bonâ fide*, and from no improper motive, for the protection of the interests of the son, the Court is bound to give them its support. *Semble. Ib.*

1. A trustee of two separate funds held not entitled to require from the *cestui que trust* of both funds a covenant of indemnity in respect of dealings with one of the funds before paying over the other fund, as to which there was no question; and the trustee was made to pay the costs of a suit instituted by the *cestui que trust* to obtain payment of the latter fund without any such indemnity. *Price v. Loaden*, 21 Beav. 508.

2. A legatee immediately upon attaining twenty-one required payment of a pecuniary legacy to which she then became entitled. The trustees of the will, who had stock to answer the legacy, were supplied with evidence of the legatee's age and identity, and that she was unmarried, but, acting on representations made by the legatee's brother, they required that they or one of them should have a personal interview with the legatee for the purpose of explaining her rights, and guarding her against the influence of her mother and stepfather with whom she was residing; and they proposed, unless such interview were granted, to pay the legacy into court under the Trustee Relief Act. The legatee having brought an action to recover the legacy:—Held, that the trustees were not justified in withholding or delaying payment

of the legacy, and they were ordered to pay the costs of the action. *De Burgh v. McClinch*, 11 L. R., Ir., 220.

See also XVII. v. ante.

IX. DISCLAIMER OR REFUSAL TO ACT.

3. Trustee who had not acted, putting in a full answer, disallowed the costs of such vexatious answer, and order made at the hearing to tax and allow the costs only of such answer as would have been necessary and proper. *Martin v. Perass*, 1 Moll. 146.

4. A trustee who was required by the bill to answer certain interrogatories answered them and disclaimed:—Held, that he was only entitled to the costs of the disclaimer. *Murphy v. O'Shea*, 8 Ir. Eq. R. 329; 2 J. & L. 422.

5. Where the representative of a deceased trustee made a suit necessary by a wanton refusal to act in the trust, and to receive the dividends of the trust fund:—Held, she was entitled to the costs of a bill filed to remove her and appoint other trustees. *Legg v. Mackrell*, 2 De G. F. & J. 551; 4 L. T., N. S., 568. Reversing 1 Giff. 165; 5 Jur., N. S., 1154.

6. A person named a trustee in a deed, who declines to accept the office, is in the situation of any other defendant against whom a bill is dismissed, and can only have his costs, etc., between party and party. *Norway v. Norway*, 2 Myl. & K. 278; 4 L. J., N. S., Ch., 111, 163.

7. The Court will not allow costs to a trustee who, after having acted, declines to perform the trusts reposed in him, and thereby renders a suit for the appointment of a new trustee necessary. *Howard v. Rhodes*, 1 Keen 581; 6 L. J., N. S., Ch., 196.

8. Pending a suit to displace A. B. (a trustee) for misconduct, he under a power appointed C. D. a new trustee. C. D. had notice that the *cestui que trust* complained of irregularities in the trusts, and that A. B. was about to leave the country for a long while. At the hearing, A. B. and C. D. (he not objecting) were discharged from the trust:—Held, that C. D. was entitled to no costs. *Peatfield v. Benn*, 17 Beav. 522; 23 L. J., Ch., 497.

See also XXI. i. (b) infra.

On Retirement or Removal of Trustee.] See XV. III. 3 (a) *ante*.

X. ACTING ON OPINION OF COUNSEL.

9. If counsel undertake to say they consider trustees would not have acted safely without taking the opinion of the Court, *semble*, the Court will not give costs against them, though in a clear case. *Exp. Young, Re Shanks or Goven*, Mont. & Ch. 599.

10. It is not necessarily sufficient to entitle trustees to their costs of a suit that they have acted under the advice of counsel. *Devey v. Thornton*, 9 Hare 232; 22 L. J., N. S., Ch., 163.

11. *Semble*, where a trustee, on a doubtful

point, has taken the opinion of counsel, which is directly opposed to that of counsel taken by the opposite party, but the trustee offers to be guided by the opinion of a third counsel, on a case stated on instructions approved by both parties, he is entitled to his costs of a suit under which a decree is made against him, directing him to do an act which his counsel advised him he was not bound to do, and especially where the trustee was not permitted to inspect the case and opinion of counsel taken by the other party. *Pool v. Pass*, 1 Beav. 600; 8 L. J., N. S., Ch., 323.

A trustee is entitled to the costs of taking the opinion of counsel for his guidance. *Id.*

1. On the marriage of K. and T., his wife, funds were assigned to trustees to invest, and during the joint lives of husband and wife to pay the income in manner mentioned; and after the death of either, to pay the income to the survivor for life; and after the death of the survivor, to hold the moneys in trust for all or one of the children or child or remoter issue of K. and T., as they during their joint lives, or as the survivor, should by deed or will appoint. T. died in 1836, leaving K. and one son, who attained the age of twenty-one in May 1856, surviving. K. and T. did not exercise the power of appointment; but K., after the death of T., by deed-poll, after reciting the power, appointed that after his death the trust moneys should be paid to his son, his executors, administrators, and assigns. Soon after the execution of the deed-poll the father and son applied to the trustees to transfer into their joint names the mortgage securities, and to deliver to them the title deeds; but the trustees (after taking the opinion of counsel, who advised them, upon conditions, to transfer the funds) declined to comply with the application otherwise than under the direction of the Court:—Held, that it was the duty of the trustees to protect the son's interests, and that they were not bound to adopt counsel's opinion; but as the son wished the funds to be transferred into the joint names of himself and his father, a decree to that effect was made, and the plaintiffs ordered to pay the costs of the suit. *King v. King*, 4 Jur., N. S., 609; 5 W. R. 699. Affirmed 27 L. J., Ch., 29; 1 De G. & J. 663; 27 L. J., Ch., 29; 4 Jur., N. S., 721; 6 W. R. 85.

XI. DEFAULTING TRUSTEE. BANKRUPTCY.

2. The official assignee of a defaulting trustee, whose assets had been distributed:—Held, not entitled to costs. *Williams v. Nixon*, Beav. 472; 9 L. J., N. S., Ch., 269.

3. Upon a bill to establish a lien upon real securities in respect of the trusts of a fund improperly applied by a trustee who afterwards became bankrupt, when it appeared that there was a possibility of an interest in the assignee in bankruptcy after the trust was satisfied, and he did not disclaim until the hearing:—Held, that he is not entitled to his costs. *Allan v. Sugden*, 10 Jur., N. S., 459; 10 L. T., N. S., 492.

4. In a suit to administer the estate of a testator, an executor had retained balances in his hands, and had subsequently become

bankrupt:—Held, that he was entitled to his costs, although he was charged with interest on the balances in his hands from time to time:—Held, also, that he was entitled to have his costs out of the estate, and that they were not to be set off against what should be found due from him in respect of interest on the balances in his hands. *Cotton v. Clark*, 16 Jur. 879.

5. A suit was instituted against an executor and a trustee under a will for an account. On the hearing, a decree for a reference to take accounts of the real and personal estate was directed. He afterwards became bankrupt, and the suit was continued as against his assignees under the bankruptcy:—Held, that he was entitled to the costs of suit as between solicitor and client from the date of his bankruptcy, and also the costs of his appearance on a petition for a vesting order in new trustees. *Turner v. Mollinew*, 9 W. R. 252; 3 L. T., N. S., 687.

6. A defaulting trustee is entitled to his costs of a suit for the execution of the trusts incurred after his bankruptcy, or after the registration of a creditors' deed executed by him under the Bankruptcy Act 1861. *Bowyer v. Griffin*, 9 L. R., Eq., 340; 30 L. J., Ch., 159; 18 W. R. 227.

7. Where the trustee of a settlement became bankrupt shortly after the commencement of an action for the execution of the trusts, and an order was made for payment by him into court of a sum of money certified to be due from him to the estate, he was held entitled to his costs of the action, though he was not to receive them until he had made good his default. *Bowyer v. Griffin* (9 L. R., Eq., 340) considered. *Lewis v. Trask*, 21 L. R., Ch. D., 862.

8. In an administration action one defendant was an executor. He was a defaulting trustee under a settlement. After the action was commenced he was adjudicated bankrupt, and a trustee in bankruptcy was appointed and made a defendant:—Held, that the defaulting trustee was entitled to be paid his costs incurred after his bankruptcy. *Bowyer v. Griffin* (9 L. R., Eq., 340) followed. *Clare v. Clare, Re Clare*, 21 L. R., Ch. D., 865; 51 L. J., Ch., 553; 46 L. T. 851; 30 W. R. 789.

9. Where, after the commencement of an administration action against a defaulting executor or trustee, he becomes bankrupt, and, under s. 49 of the Bankruptcy Act 1869, his debt remains undischarged by the bankruptcy, he is not entitled to be paid any of his costs of the action, whether incurred before or after the bankruptcy, until he has made good his default. But where the debt of the defaulting executor or trustee has been discharged by his bankruptcy—as where the bankruptcy has taken place prior to the Bankruptcy Act 1869; or where, after the bankruptcy, his debt remaining undischarged, he renders services in the action in his character of executor or trustee, he is entitled to be paid his costs incurred subsequently to his bankruptcy, though his prior costs must be set off against his debt. *Lewis v. Trask* (21 L. R., Ch. D., 862) followed. *Clare v. Clare* (21 L. R., Ch. D., 865) not followed. *Re Basham, Hannay v. Basham*, 23 L. R., Ch. D., 195; 52 L. J., Ch., 408; 48 L. T. 476; 31 W. R. 743.

XII. WHERE SETTLEMENT SET ASIDE.

1. A voluntary settlement, made by an insolvent, being set aside at the suit of the assignee, the Court refused to order the trustee of the settlement to pay the plaintiff his costs, but gave no costs against the plaintiff. *Townsend v. Westcott*, 4 Beav. 58; 5 Jur. 748.

Costs given against a trustee, under the trust-deed, which was held revoked, where he had also a beneficial interest and insisted on its validity. *Id.*

2. Where a settlement is set aside the trustee has no right to his costs as a matter of right, there being no contract in existence; and therefore, if costs are given against him, he has no right of appeal. *Dutton v. Thompson*, 23 L. R., Ch. D., 278; 52 L. J., Ch., 661; 31 W. R. 596; 49 L. T. 109.

XIII. SEPARATE DEFENCES AND SEPARATE SETS OF COSTS.

3. If trustees separate in defence, they are only entitled to divide amongst them altogether the reasonable costs of one answer as against the fund, and the absence of one trustee out of the jurisdiction, it appears, makes no difference. The executor of mortgagor who has proved cannot have costs out of the surplus of the real estate. Whether a person named executor, but not having proved or acted as a necessary party, and by whom his costs are to be paid, *quære*. *Nicholson v. Falkner*, 1 Moll. 555.

4. The two co-heiresses of a trustee, who lived at a distance from each other, were made parties to a suit for enforcing the performance of marriage articles. They submitted to act as the Court might direct, and defended separately:—Held, they were entitled to two sets of costs. *Aldridge v. Westbrook*, 4 Beav. 212; 10 L. J., N. S., Ch., 363.

5. Trustees in same interest will be allowed the costs of separate answers if the Master finds the circumstances justified them in so answering. *Dudgeon v. Cornley*, 2 Con. & L. 422. S. C. *nom.* *Dudgeon v. Corley*, 4 Dr. & War. 158.

6. One of two trustees having declined to transfer the fund to the surviving husband, who was his wife's administrator, and having severed in his defence in a suit to obtain a transfer, was allowed no costs. *Allen v. Thorp*, 7 Beav. 72; 13 L. J., N. S., Ch., 5.

7. Where trustees put in separate answers, and appeared by different solicitors, on the ground that in that case they filled different characters, the Court gave them all costs as between solicitor and client. *Kampf v. Jones*, C. P. C. 13.

8. Trustees appeared separately; one lived in a distant part of the country. The Court declined making any special order as to costs. *Wiles v. Cooper*, 9 Beav. 298; 15 L. J., N. S., Ch., 129.

9. Trustees and their *cestuis que trustent* and next-of-kin in the same interest, severing in their defences, entitled only to one set of costs, although stated (at the bar, but not by the answers) to reside in parts of the country

remote from each other. *Farr v. Sheriffs*, 4 Hare 528; 15 L. J., N. S., Ch., 89; 10 Jur. 630.

10. Defendants (trustees), who had severally filed similar demurrers, instead of joining in one demurrer, not allowed the costs of the demurrers, although successful. *Cooke v. Courtown (Lord)*, 6 Ir. Eq. R. 279.

11. Two trustees severed in their defence; one was charged with misconduct, but not the other. The Court allowed only one set of costs, and gave the whole of them to the innocent trustee. *Webb v. Webb*, 16 Sim. 55; 17 L. J., N. S., Ch., 13.

12. Where several persons are made defendants in respect to a joint fiduciary character only, or if any beneficial interest which they may have does not conflict with their duty, they ought not to sever in their defences; otherwise one set of costs only will be allowed them. *Gaunt v. Taylor*, 2 Beav. 346; 4 Jur. 166.

13. A trustee who refuses to join in the answer of his co-trustee, and does not put in an answer differing from that of his co-trustee, is not entitled to his costs. *Young v. Scott*, 1 Jones 71.

14. The rule that where a joint fiduciary character exists, a joint defence should be always adopted, is too general. It does not apply where the joint parties are liable to account, and incur responsibility. *Read v. Sparkes*, 1 Moll. 8.

15. Where the bill was dismissed with costs, the Court referred it to the Master to inquire whether it was necessary for parties, trustees, and *cestui que trust*, appearing by same solicitor, to file separate answers. *Woods v. Woods*, 5 Hare 229.

16. A trust fund, consisting of a debt from the estate of a testator, was recovered in a creditors' suit by the *cestui que trust*, in which suit the two trustees of the fund were defendants. The two trustees (for reasons which were not denied to be sufficient) appeared separately; and one of them dying before the cause was heard on further directions, it was:—Held, that he had acquired no lien for his costs on the trust fund in court; and the petition of his personal representative that his costs might be taxed, and provided for out of the fund, was refused, with costs. *Malins v. Greenway*, 7 Hare 391; 17 L. J., N. S., Ch., 26, 331; 18 L. J., N. S., Ch., 154; 12 Jur. 66, 319.

17. Trustees severing even as defendants are not allowed more than one set of costs without some very special reason. *Hughes v. Key*, 20 Beav. 395.

18. A hostile claim was filed for an account and administration against three trustees, only one having ever acted, and the acting trustee resided in a different part of England from the other two. No unreasonable conduct was proved against the acting trustee:—Held, that he was justified in appearing separately from his two co-trustees; and a double set of costs was allowed. *Cummins v. Bromfield*, 3 Jur., N. S., 657.

19. Two trustees (A. and B.) were ordered to pay a sum of money into court; this was paid by A. alone. They had severed in their defences, and obtained but one set of costs. B.'s share of the costs was ordered to be paid

to A. by way of contribution. *Prince v. Hine*, 27 Beav. 345.

1. Two trustees, who severed in their defences, were allowed one set of costs only. *Course v. Humphrey*, 26 Beav. 402; 5 Jur., N. S., 615; 28 L. J., Ch., 327.

One of them, by his answer, imputed misconduct to the other, which rendered it necessary for him to sever, and he asked for the whole costs. The Court being unable, on the answers, to determine the question, left the division to the Master. *Id.*

2. One set of costs being allowed to trustees who had severed in their defences, the division of it was left to the Taxing Master. *Att.-Gen. v. Wyville*, 28 Beav. 464.

3. Where one of two trustees, not the acting trustee, took a power of attorney from one of the *cestui que trustent*, and acted on her behalf, and claimed a payment in her right; and afterwards, on a suit being instituted by another *cestui que trust*, severed in his defence from the acting trustee, alleging that he knew nothing of the accounts:—Held, that only one set of costs could be allowed. *Hodson v. Cash*, 1 Jur., N. S., 864.

A trustee is not justified in severing in his defence on either of these grounds: 1. That he did not know what the accounts were, or what had been done by his co-trustee; he ought to have inquired, and not severed unless he found something wrong. 2. That he was solicitor for one of the *cestui que trustent*, and held her power of attorney, that being a position which a trustee ought not to accept. *Id.*

4. The trustees of a will agreed to settle disputes with the surviving partner in a firm of which the testator had been a member by selling the testator's share to him at a certain price. They then filed a bill to have this agreement sanctioned; a decree was made accordingly, and the sale carried out. Some years afterwards some of the residuary legatees, who were infants, filed a bill by their next friend to set aside the decree on the ground that the compromise was an improper one, and that it had been entered into, and the decree sanctioning it obtained, by the personal fraud of one of the trustees. This trustee answered separately; and at the hearing Lord Romilly dismissed the bill with costs, being of opinion that the compromise had been beneficial and the decree sanctioning it properly obtained. The next friend could not pay the costs, and the trustee applied by summons in a suit for the administration of the testator's estate to have them taxed as between solicitor and client and paid out of the estate:—Held, that the trustee was entitled to be paid his costs out of the estate, as he had defended the suit for the benefit of the estate, though he had at the same time defended his own character. *Walters v. Woodbridge*, 7 L. R., Ch. D., 504; 47 L. J., Ch., 516; 38 L. T. 83; 26 W. R. 469. Reversing 20 W. R. 520.

XIV. RIGHTS OF CO-TRUSTEES INTER SE.

5. A large balance was found due jointly from a trustee and the representatives of a deceased trustee; but costs were given to both

when such balance had been paid. It being admitted that no part of it could be recovered from the estate of the deceased trustee:—Held, that the surviving trustee, on payment by him of the share of the deceased trustee, was entitled to a lien for it on the costs awarded to the representatives. The Court ordered such costs to be carried over to a separate account, with liberty to apply. *Birks v. Muoklethwait*, 33 Beav. 409.

6. A trustee refused to join his co-trustee in suing to recover trust property, and put in an answer. He was disallowed costs. *Gompertz v. Kenseit*, 41 L. J., Ch., 382; 13 L. R., Eq., 369; 20 W. R. 313; 26 L. T., N. S., 95.

7. Where two co-executors of a trustee, one of them a solicitor, were jointly liable in respect of a breach of trust committed by their testator, the solicitor having had the sole management of the trust estate, and having resorted to vexatious means to evade legal proceedings, an order was made, as between him and his co-trustee, that the latter was entitled to recover from him the whole costs of the action. *Price v. Price*, 42 L. T. 626.

8. Where there were two trustees, one of whom was a solicitor, and entrusted by the other with the management of the trust estate, to which, by his negligence, loss accrued, as between the two trustees, the solicitor-trustee:—Held, bound to reimburse his co-trustee all the costs, charges, and expenses properly incurred by the latter in suits and other proceedings rendered necessary by such negligence of the former. *Lockhart v. Reilly*, 25 L. J., Ch., 697; 3 W. R. 227.

9. Though a solicitor who accidentally (or upon separate retainers) represents two or more parties ought to distinguish the charges incurred for each separate party, yet where there is a joint retainer (or by trustees not severing in their defence) he can enforce the whole bill of costs incurred against either of the parties. *Watson v. Row*, 43 L. J., Ch., 664; 18 L. R., Eq., 680.

Two trustees gave a joint retainer in a suit to administer the trust estate. One became insolvent, and was indebted to the estate:—Held, that the surviving trustee should have the whole costs of himself and his co-trustee allowed out of the estate without any set-off in respect of the estate. *Id.*

See also Preceding Subdivision.

XV. INDEMNITY FOR, TO TRUSTEE BY CESTUI QUE TRUST.

10. A *cestui que trust*, using trustee's name as co-defendant, ordered to give latter security for costs. *Annesley v. Simson*, 4 Madd. 390.

11. A *cestui que trust*, about to file a bill, should apply to his trustee to become a co-plaintiff, indemnifying him against costs. If he refuses, he must abide his own costs, as a defendant. If he is not applied to, plaintiff must pay his costs. *Reade v. Sparkes*, 1 Moll. 8.

12. Where, by the terms of a marriage settlement, it was declared that a trustee should stand possessed of a debt, upon trust, in the first instance, to call in or compel payment of

such debt, unless the *cestuis que trustent* consented to its remaining outstanding, and the trustee is requested by the *cestuis que trustent* to call in the debt, he is not entitled to an indemnity from them previous to his bringing an action, if necessary, for the same; and a trustee, under such circumstances, was made to pay the costs of a suit made necessary by his neglecting to bring the action. *Kirby v. Mash*, 3 Y. & Coll. 295; 8 L. J., N. S., Exch. Eq., 33; 3 Jur. 221.

1. A receiver appointed to collect in assets, and to bring actions in the name of an executrix, must give security to indemnify the executrix on account of such actions. *Taylor v. Allen*, 2 Atk. 213.

XVI. OF TRUSTEES ACTING AS SOLICITORS, OR OTHERWISE IN A PROFESSIONAL CHARACTER.

1. *Auctioneers and Brokers*, 7102.
2. *Bankers*, 7102.
3. *Solicitors*, 7102.
4. *Surveyors*, 7105.

1. Auctioneers and Brokers.

2. A. by deed assigned to B. timber and stock in trade, upon trust to sell and apply the money arising from the sale in paying the expenses of preparing for, making, and completing such sale or sales, "including the usual auctioneer's commission, and otherwise incidental to the aforesaid trusts." B. was auctioneer, and had been employed as such by A.:—Held, that the words appeared to have been inserted to provide for B. being employed in the sale, and that B. was entitled to charge his commission. *Douglas v. Archbutt*, 2 De G. & J. 148; 4 Jur., N. S., 315; 27 L. J., Ch., 271; 6 W. R. 306.

3. An assignee of a mortgage, being one of a firm of auctioneers, sells under a power contained in the mortgage deed, and charges for personal trouble and commission. On the question whether he was entitled to those charges:—Held, that so far as and when he was mortgagee in possession he was a trustee, and the rule of equity applied, and he was therefore not entitled to charge for personal trouble during that period. *Mathison v. Clarke*, 3 W. R. 2; 3 Drew. 3; 24 L. J., Ch., 202; 18 Jur. 1020; 3 Eq. Rep. 127.

4. A broker, having taken an assignment of several cargoes in trust to sell them on their arrival, and, out of the proceeds, to repay himself the amount of his advances, took possession of some of the cargoes, and sold them under the power in the deed, while the rest were sold under an order made in a suit instituted by him to enforce his security, by which it was directed, that they should be sold by him in such manner and at such time as he and the receiver in the cause should agree, and in the event of their differing, then as the Master should direct:—Held, that, in the latter sales he was entitled to the usual commission allowed to brokers employed by the Court, but that in the former he was not

entitled to any commission, having sold as trustee. *Arnold v. Garner*, 2 Ph. 231; 16 L. J., N. S., Ch., 329; 11 Jur. 339.

2. Bankers.

5. Where bankers become also trustees, they are not entitled, in the absence of any contract, either express or implied, to make a profit of their fiduciary duties, by employing themselves as bankers, and by advancing, in that character, to their *cestuis que trustent*, money to be repaid with compound interest. *Crosskill v. Bower*; *Bower v. Turner*, 32 L. J., Ch., 540; 8 L. T., N. S., 135.

The trustees were held not to be legally entitled to claim more than simple interest at 5 per cent. per annum on sums advanced by them. *Id.*

3. Solicitors.

6. A trustee, who is a solicitor, is entitled to be repaid such costs, charges, and expenses only as he has properly paid out of pocket; and it makes no difference in this respect that the instrument creating the trust may have directed that the trust-moneys should be applied (*inter alia*) in payment of all expenses, disbursements, and charges to be incurred, sustained, or borne by the trustee in professional business, journeys, or otherwise, and that the trustee might retain all reasonable costs, charges, and expenses which he might sustain or be put unto, such costs, charges, and expenses to be reckoned, stated, and paid as between attorney and client. *Moore v. Froud*, 3 Myl. & C. 45; 6 L. J., N. S., Ch., 372; 1 Jur. 663.

7. A solicitor who is trustee is not entitled to charge for his professional services, which must be assumed to have been rendered in his character of trustee; but under a contract entered into he may be entitled to his professional charges. *Re Sherwood*, 3 Beav. 338; 10 L. J., N. S., Ch., 10; 4 Jur. 982.

8. Where a trustee acts as solicitor in the trust matters, he is only entitled to costs out of pocket, although the rule is not inflexible, and, under special circumstances, the Court may authorise compensation by a fixed salary, but not by making the usual professional charges. *Bainbrigge v. Blair*, 8 Beav. 588; 14 L. J., N. S., Ch., 405; 9 Jur. 765.

9. A trustee, who was a solicitor, came to a final settlement of accounts with his *cestuis que trustent*, and thereupon a general release was executed. In the accounts, the trustee had taken credit for bills of costs for professional services, to which, under the general rule, he was not entitled. The *cestuis que trustent* were assisted on the occasion by an independent solicitor, who perused the bills, and settled and attested the release:—Held, under the circumstances, that the trustee was entitled to the benefit of the release. *Stanes v. Parker*, 9 Beav. 385; 10 Jur. 603.

10. Unless there be an agreement for the purpose, a trustee who is a solicitor is not entitled to charge his *cestui que trust* more than the money out of pocket for his services in carrying on suits in relation to and managing the trusts. *Gomley v. Wood*, 3 J. & L. 678; 9 Ir. Eq. R. 418.

1. A solicitor, who accepts a trust under a will or settlement, is not entitled to charge for work and labour done by him as a solicitor in executing the trust. *New v. Jones*, 1 H. & T. 631. n.; 1 Macn. & G. 668. n.

2. The rule that a solicitor, being also a trustee and a party to a cause, is not entitled to charge costs except costs out of pocket, does not extend beyond the case of his acting as solicitor for himself alone. *Cradock v. Piper*, 17 Sim. 41. Affirmed 1 Macn. & G. 664; 1 H. & T. 617; 19 L. J., N. S., Ch., 107; 14 Jur. 97.

Under an order to tax costs generally, or to tax costs as between solicitor and client, the taxing masters are at liberty to take notice of the fact that the solicitor is also a trustee, and to apply the rule accordingly. *Id.*

3. The costs of a defendant trustee, notwithstanding he was a solicitor, ordered to be taxed as between solicitor and client. *York v. Brown*, 1 Colly. 260; 8 Jur. 567.

4. On a settlement of account between a cestui que trust and trustee (a solicitor), the latter charged for professional services in the trust; a release was executed, but the cestui que trust not having had any independent professional assistance on the occasion, the Court relieved him from the professional charges, beyond costs out of pocket. *Todd v. Wilson*, 9 Beav. 486; 15 L. J., N. S., Ch., 450; 10 Jur. 626.

5. A trustee who acts as solicitor for himself is entitled to his full costs against parties who unsuccessfully endeavour to set aside the trust deed. *Pince v. Beattie*, 9 Jur., N. S., 1119; 11 W. R. 979; 9 L. T., N. S., 315; 2 N. R. 546.

6. The rule that a solicitor trustee acting in the trust shall not be allowed profit costs is not restricted to cases of express trust, but applies to an executor or trustee, though there be no express trust. *Pollard v. Doyle*; *Kearns v. Doyle*, 1 Dr. & Sm. 319; 6 Jur., N. S., 1139; 9 W. R. 28; 3 L. T., N. S., 432.

Profit costs disallowed to an executor who had acted as his own solicitor, upon an objection taken by a creditor who was a party to the suit. *Id.*

7. The trustee of the separate property of a married woman acted as her attorney in three several suits instituted in relation to the trust property. In the first of these suits he was not a party; in the others he was:—Held, that in the first suit he was entitled to his costs as between solicitor and client, but in the two others only to costs out of pocket. *Fraser v. Palmer*, 4 Y. & Coll. 515.

8. A decree in a redemption suit directed that solicitors who were mortgagees, and who acted for themselves, should be allowed their principal, interest, and costs, and the Master allowed full costs. A motion for an order to review the taxation, on the ground that the costs out of pocket only ought to have been allowed, was refused, but without costs, there having been no objection to the form of the decree at the hearing. *Price v. McBeth*, 10 Jur., N. S., 579; 33 L. J., Ch., 460.

9. A cestui que trust agreed that her trustee, if he acted as solicitor in a suit, should receive full costs. A bill was delivered on the 18th February, and on the 8th March the solicitor ceased to act. After discussion as to the

amount, and having received other professional advice, the client paid the bill on the 22nd May, a deduction being made therein. On an application being made within twelve months, the Court refused to order a taxation. *Re Wyche*, 11 Beav. 209.

10. A solicitor, who was one of the executors of a testator, paid himself out of the assets a bill for business done for the testator. Twenty-six years after the death of the testator, and ten years after the death of the solicitor, a decree was made directing the usual accounts of the testator's personal estate. The executor of the solicitor, in bringing in his accounts under the decree, inserted the bill of costs as one of his items of discharge:—Held, that although as between solicitor and client the bill was no longer subject to taxation, yet, as against the executor, the persons beneficially interested were entitled to question its amount as an item of discharge, but that an order referring it for taxation was not proper, the right course being to direct the Taxing Master to state whether any items objected to were fair and proper to be allowed, and to what amount. *Allen v. Jarvis*, 4 L. R., Ch., 616; 17 W. R. 943; 21 L. T., N. S., 280.

Executors. 11. Whether an executor, being a solicitor and acting as such in the administration of the estate, by bringing or defending suits or otherwise, is entitled to an allowance for costs in respect of his professional labour, beyond costs out of pocket, and if so, whether as between solicitor and client, *quære*. *Carmichael v. Willson*, 4 Bli., N. S., 146. See S. C. 2 Dow & Cl. 51.

Where an attorney is an executor, and carries on or defends suits relative to the assets, if he acts fairly in them, he is to be paid like any other attorney. S. C. *nom.* *Carmichael v. Willson*, 2 Moll. 537.

12. A solicitor was appointed executor, and was to be at liberty to charge for his professional services:—Held, that he was only entitled to charge for services strictly professional, and not for matters which an executor ought to have done, without the intervention of a solicitor, such as for attendances to pay premiums on policies, attendances at the bank to make transfers, and attendances on proctors, auctioneers, legatees, and creditors. *Harbin v. Darby*, 28 Beav. 325; 6 Jur., N. S., 906; 29 L. J., Ch., 622; 8 W. R. 512.

13. The solicitor for the plaintiff in a mortgage suit, being also a co-plaintiff, as executor of the mortgagee is only entitled to the costs out of pocket. *Macartney v. Dickey*, 16 Ir. Ch. R. 409.

14. K., a solicitor, was appointed an executor, and in that capacity filed a bill to satisfy a judgment debt. He afterwards claimed the costs of the suit as between solicitor and client. This was opposed by the judgment creditor, a party to the suit, who contended that K. was only entitled to costs out of pocket, he having acted as his own solicitor in the cause, and standing in the position of a constructive trustee. The Master allowed K. the costs he claimed, but on motion to vary the Master's certificate:—Held, that K. was not entitled to profit costs; that an executor, though there be no express trust, comes within the rule which disentitles a trustee to have

profit costs as between solicitor and client. *Pollard v. Doyle*, 6 Jur., N. S., 1139; 9 W. R. 28; 3 L. T., N. S., 432; 1 Dr. & Sm. 319.

Partners.] 1. Where one of the two partners was a trustee under a will:—Held, that the firm could only charge the testator's estate for costs out of pocket. *Collins v. Carey*, 2 Beav. 149.

2. Trustees can only be allowed costs out of pocket for professional business transacted by a firm one of whom is a trustee, though the business be done by one of the partners who is not a trustee. *Christophers v. White*, 10 Beav. 523.

3. The rule that a trustee shall make no profit of his trust does not extend to his partner, and therefore where a trustee, being a solicitor, employed his partner professionally in the matter of the trust, upon the terms of such partner being alone entitled to the profits, the Court allowed the professional charges. *Clack v. Carlon*, 7 Jur., N. S., 441; 30 L. J., Ch., 639; 9 W. R. 568; 4 L. T., N. S., 361.

4. In a suit by a trustee against his co-trustee, a solicitor, and the parties beneficially interested under a will, some of them being infants, the costs of all parties had been ordered to be taxed and paid. It appeared that the defendant trustee, the solicitor, had conducted his defence by his partner. The Taxing Master allowed the solicitor trustee costs out of pocket only:—Held, that the rule which had allowed to solicitor trustees costs out of pocket only being well established, the Court would not, with reference to the question of costs, inquire whether the conduct of the suit by the partner of the solicitor trustee was beneficial for all parties, though no party objected to such inquiry, but that all costs beyond those out of pocket must be disallowed. *Lyon v. Baker*, 5 De G. & Sm. 622.

5. A solicitor, who was partner in a firm, was a trustee under a will. The firm was employed by his co-trustee, who was sole *cestui que trust*, to act in the administration of the estate out of court:—Held, to be entitled only to costs out of pocket. *Broughton v. Broughton*, 3 W. R. 130; 2 Sm. & Gif. 422; 24 L. J., Ch., 190; 3 Eq. Rep. 131. And on appeal, 3 W. R. 602; 5 De G. M. & G. 160; 1 Jur., N. S., 965; 25 L. J., Ch., 250.

Acting for a body of Trustees of whom he is one.] 6. The rule that a solicitor, being also a trustee and a party to a cause, is not entitled to charge costs, except costs out of pocket, does not extend beyond the case of his acting as solicitor for himself alone. *Craddock v. Piper*, 17 Sim. 41; 1 Macn. & G. 664; 7 H. & Tw. 617; 19 L. J., N. S., Ch., 107; 14 Jur. 97.

Application of the rule to the case of a solicitor acting for a body of trustees, of whom he himself was one. *Ib.*

Under an order to tax costs generally, or to tax costs as between solicitor and client, the taxing masters are at liberty to take notice of the fact that the solicitor is also a trustee, and to apply the rule accordingly. *Ib.*

7. The rule which allows a solicitor, being also a trustee and a party to a cause, to charge full costs where he acts in the suit for a body

of trustees, of which he himself is one, does not apply to the case of a solicitor being a trustee and acting as solicitor for himself and his co-trustees in the administration of the trust estate out of court. *Lincoln v. Windsor*, 9 Hare 158; 20 L. J., N. S., Ch., 531; 15 Jur. 765.

8. Where one of a set of trustees is a solicitor, and by the direction of his co-trustees acts professionally in matters relating to the trust estate (such business being done out of court, and not in a cause in Chancery), he will not be allowed any remuneration for professional services, but only be entitled to costs out of pocket. *Broughton v. Broughton*, 5 De G. M. & G. 160; 1 Jur., N. S., 965; 25 L. J., Ch., 250; 3 W. R. 602. Affirming 3 Eq. Rep. 131; 2 Sm. & G. 422; 24 L. J., Ch., 190; 3 W. R. 130.

Where one of a set of trustees is one of a firm of solicitors, and the firm act, by the direction of the trustees, professionally in the matters of the trust estate (such business being done out of court, and not in a cause in Chancery), the firm will not be allowed any remuneration for their professional services, but only be entitled to costs out of pocket. *Ib.*

Craddock v. Piper (1 Macn. & G. 664), remarked upon. *Ib.*

The principle of the general rule applicable to such cases explained. The case of *Craddock v. Piper* (1 Macn. & G. 664), and, in connection with it, that of *Lincoln v. Windsor* (9 Hare 158), remarked upon. *Ib.*

9. Employing a professional person implies an undertaking to remunerate him, but the inference may be rebutted. *Manson v. Baillie*, 2 Macq. H. L. Ca. 80.

Six trustees appointed one of their own body, a solicitor, to act, with an allowance "of his necessary charges and expenses, and a reasonable gratification." He had an interest in the estate; those who appointed him had not. He contended, however, that they were responsible for the expenses incurred by him in attempting to realise the property for his own benefit, and that he was himself to be absolved from all participation in that responsibility:—Held, that he was wrong. *Ib.*

10. A., one of four trustees under a mortgage deed, who was also a solicitor, entered into an agreement with another solicitor, T., that in the event of his not doing the trust business himself, by reason of his being a trustee, T. should do it as his agent, upon the ordinary terms. T. did the business for the trustees accordingly, and paid over to A. his estimated share of the profits. Subsequent incumbancers who were interested in the equity of redemption presented a petition, under the 38th section of the 6 & 7 Vict., c. 73, to have a bill taxed, when the Master taxed as between principal and agent, upon the footing of the agreement between A. and T. Upon petition by T. to amend the taxation:—Held, that the principle upon which the Taxing Master had proceeded was correct, and that A.'s co-trustees were entitled to the benefit of the agreement for their *cestui que trustent*, namely, the parties interested in the equity of redemption. *Re Taylor*, 18 Jur. 666; 23 L. J., Ch., 857; 2 W. R. 249.

4. Surveyors.

1. When testator declared that "his trustees should be entitled to receive all costs, charges, and expenses, fees to counsel, and for advice and for professional assistance and loss of time," one of the trustees, who was a land surveyor, was held entitled to compensation for loss of time. *Willis v. Kibble*, 1 Beav. 559.

2. A testator gave all his residuary real and personal estate to trustees, upon trust for his wife for life; and after her death he directed that a just and true valuation should be made of "all his freehold and leasehold estates, stocks, funds, and securities, and other residuary personal estate," and directed the same to be divided, or considered as divided, into seven equal parts, and then disposed thereof; and the testator directed that A. B., one of his executors, who was a surveyor by profession, "should be entitled to charge, and should be allowed all reasonable charges, as a surveyor, in valuing his said freehold and leasehold estates, and in letting the same, and in collecting the rents, or otherwise in the management of his said estates, whenever requested or instructed so to act by his co-trustees":—Held, that this latter clause applied solely to the valuation and management of the freehold and leasehold estates, and that A. B. was not entitled, under this clause, to make any charges in respect of valuations made by him of the residuary personalty after the death of the testator's widow. *Knott v. Cottes*, 16 Jur. 752.

XVII. RIGHTS OF TRUSTEE. OTHER CASES.

3. A party becoming a trustee under a deed creating interests adverse to interests already existing may be liable to costs in a suit instituted to enforce such pre-existing interests in the trust property. *Heap v. Tonge*, 9 Hare 105; 20 L. J., N. S., Ch., 661.

4. An action of covenant was brought against a trustee, who lodged the amount claimed in court, and filed a bill of interpleader, which was dismissed with costs on demurrer:—Held, he was entitled to have the money returned without deducting the costs. *Doyle v. Dumoncel*, 11 Ir. Eq. R. 517.

5. Trustees having mixed balances of the trust estate with their own moneys, and used them in their own business, although authorised to invest the trust funds in good private securities:—Held, liable to the costs of an unnecessary inquiry as to the state of the testator's family. *Westover v. Chapman*, 1 Colly. 177.

6. Testator, by his will, gives the rents of his real property to his wife for life, and bequeaths the bulk of his personal property to her absolutely, constituting her sole executrix, and directs that certain trustees shall, as soon as conveniently may be after his decease, convert all the convertible residue of his personal estate into money, and invest it in Government or real securities, and pay the dividends to his wife for life. The ultimate trusts, both of the real and residuary personal property, are in favour of persons who are not *in esse* or not ascertained. Twenty years elapse, during which the trustees leave the widow in the possession and management of the whole

property, and then the surviving trustee files a bill against her for an account. It appears in the suit that she has paid all the testator's debts to an amount exceeding the amount of personalty not specifically bequeathed, but that she has left some of the assets outstanding, and claims to be a purchaser of those assets, in part satisfaction of the moneys which she had overpaid:—Held, that whatever might be her right at law as a purchaser of those assets upon a plea of *plene administravit* her right as a purchaser in equity is not absolute, but subject to the rules of equitable administration; and, consequently, that, the bill being filed on reasonable grounds, the surviving trustee is entitled to the costs of the suit; but held, under the circumstances of the case, that he is not entitled to costs as between solicitor and client. *Haarn v. Wells*, 1 Colly. 323.

7. Testatrix, having certain sums of stock standing in the joint names of herself and A., B., and C., bequeaths the same to A., D., and B. on certain trusts, and directs C. within six months after her decease to execute and deliver to the executors of her will a deed declaring that he, C., his executors, administrators, and assigns, would thenceforth stand and be possessed of the sums of stock respectively and the dividends on the trusts in her will mentioned, and she appointed A., D., and B. executors. C., having executed the deed, filed a bill to have the rights declared and the trusts executed. On the question as to costs, whether C. ought not to have transferred the funds into the names of A., D., and B. without suit:—Held, that he was a co-trustee of the funds, and could not safely transfer them to A., D., and B., without the sanction of the Court. *Iredell v. Iredell*, 18 Beav. 202.

8. Where a suit was not occasioned by the claim of a trustee to the trust property, and the costs had not been increased by that claim, the costs of the trustee were allowed. *Ritson v. Stordy*, 1 Jur., N. S., 771.

9. Where an infant defendant had married without obtaining the consent of the Court, funds in court in her name were ordered to be paid to her husband with her consent, no settlement having been made. The trustees of the fund, who appeared without having been served, were not allowed their costs. *Bennett v. Biddles*, 10 Jur. 534.

10. Where plaintiff's bill for specific performance of an agreement for sale was dismissed, plaintiff must pay the costs, though he was only a trustee for sale. *Edwards v. Harvey*, Coop. 40.

11. It not being clear, whether the legal estate in the realty passed by the codicil of the survivor of the two trustees, or descended to his heir, the costs of making such heir a party to a suit, brought by the executors of such surviving trustee against the *cestuis que trustent*, were given to the plaintiffs. *Greenwood v. Wakeford*, 1 Beav. 576; 8 L. J., N. S., Ch., 333.

12. Assignee in insolvency being obliged to obtain a decree in the execution of his trust, costs of persons necessarily brought before the Court were ordered to be paid out of the fund, not personally by the plaintiff. *Spinner v. Spinner*, 2 Moll. 473.

1. P. invested money in consols in the names of herself and her granddaughter B., and subsequently filed a bill for the purpose of making B. a trustee of the fund, and for a transfer. The bill was after the death of P. dismissed. On petition to have the costs of the defence paid out of the fund, an order was made for that purpose; but a difficulty having occurred in the registrar's office, his honour directed the fund to be brought into court, a sufficient sum to be raised for the payment of costs, and the dividends to be accumulated for the benefit of the infant. *Re Pitt*, 1 Jur., N. S., 1155. See also *Hepworth v. Seale*, 1 Jur., N. S., 698.

2. A suggestion by the trustees of a fund that the administrator of one of the *cestuis que trustent* who, in that character, was entitled to a distributive share of the fund, had unfairly obtained the letters of administration under which he claimed such share, is no defence in this court to the claim of the administrator, nor is it a defence for trustees to suggest that a deed, under which the plaintiff derives his title from the *cestuis que trustent*, was founded on mistake, or is otherwise subject to be displaced; for it is contrary to the course of the Court to direct an inquiry as to the validity or invalidity of a deed upon a suggestion in the answer of defendants, the trustees of the fund to which it relates, where the ascertainment of the validity or invalidity of the deed is not essential to the safety of the defendants; and the fact of a bill having been filed to set aside the deed under which the claim is made, or exclude the fund in question from its operation, is not a ground upon which the trustees can resist the legal title to receive the fund; for the Court cannot give the plaintiff in such other suit the benefit of an injunction to protect the fund upon the suggestion in the answer of the trustees; but the existence of such other suit entitles the trustees to retain such a portion of the trust fund as may be sufficient to answer their costs of such other suit. *Devey v. Thornton*, 9 Hare 222; 22 L. J., N. S., 163.

3. By settlement, dated in 1846, executed on the marriage of S., a debt of 1,200*l.*, due to her from the firm of Q., H., & Co., was assigned to N. and H. (H. being a member of the firm of Q., H., & Co.) as trustees, upon trusts for the benefit of S. and her family. It was provided that the money should be left with Q., H., & Co. until S. gave notice to the trustees to withdraw it, when they were within three months to recover it, and invest elsewhere; but so long as it should remain in the hands of Q., H., & Co. with the permission of S., the trustees, nor either of them, were not to be responsible for the sufficiency of the security. There was no power in the deed to change trustees. The husband died soon after. In November 1851, Q., H., & Co. stopped payment. In January 1852, S. gave notice to the trustees to recover the money. N. thereupon demanded the money, but was informed of the stoppage, and offered a compromise. The bill was brought to enable the trustee to act, he having no express power to accept a compromise. The *cestuis que trustent* refused to accept it, and the money being ordered to be paid into court, it was ultimately paid in:—Held, that H. was not entitled to receive any costs of the suit out of the fund, but under the

circumstances, he was not ordered to pay any costs. *Norton v. Steinkopf*, 18 Jur. 720.

4. Agreement for a lease of a farm, referred to a paper containing the terms, bill for specific performance according to such clauses as had been read to the plaintiff; parol evidence to prove that was refused, and the bill dismissed. Bill being dismissed without costs as a hard case, parties made trustees without their knowledge, and as such being necessary parties to the bill, cannot have costs against plaintiff, but left to their remedy against their principal; otherwise, perhaps, if plaintiff had prevailed, because then those costs might have been given over against other defendants. *Brodie v. St. Paul*, 1 Ves. J. 326.

5. A filed a bill against B., praying that C. might be declared a trustee for him of a farm, and that an account of the profits of the farm might be taken, A. offering to allow for the sums advanced or expended by C., and to pay to C. what, if anything, should be found due on taking the account. C., by his answer, denied that he was a trustee, and stated that the carrying on of the farm had been attended with considerable loss. At the hearing A.'s counsel waived the account which he had asked for, but Wood, V.-Ch., declared C. to be a trustee for A., and gave to A. costs up to the hearing, and directed the accounts to be taken. A. appealed from so much of the decree as directed the accounts, but the appeal was dismissed without costs, and the decree was varied by giving A. leave to apply for his costs subsequently to the hearing, on his paying C. what should be found due to him on taking the account. *Kendall v. Masters*, 29 L. J., Ch., 805.

6. The costs of trustees in resisting the enforcement of orders improperly made against them in a suit not warranted by the practice of the Court of Chancery will be ordered to come out of the trust fund. *Muskerry v. Sheffington*, 3 L. R., H. L., 144.

7. To a bill filed in 1873 to establish the validity of certain appointments made under a power contained in a will, the trustees were made defendants and were interrogated, and put in a long answer, alleging that the appointments were a fraud on the power. When the new procedure under the Judicature Act came into operation, the cause was a pending suit, in which replication had not been filed nor notice of motion given before the 2nd November 1875. A motion by the plaintiff that the evidence might be taken by affidavit, on the ground that, although none of the affidavits were sworn until after the 2nd November, the greater part of the cost of preparing them had been incurred before that time, was successfully resisted by the trustees, but the costs of the motion were reserved. At the hearing the trustees consented to a decree without any evidence being gone into:—Held, that although the trustees were entitled to the usual trustees' costs of the suit, they, under the circumstances, must pay the costs of their own answer. *Patterson v. Wooller*, 54 L. T., N. S., 415.

Held, also, that the trustees, having unjustly and unreasonably opposed the motion for taking the evidence by affidavit, must pay the costs of that motion. *Id.*

Held, that the trustees could not be ordered

to pay the costs incurred by the plaintiff in bringing the witnesses up to town for the hearing. *Ib.*

1. Trustees who had recovered judgment for money due to the trust against a defendant were not allowed to set off costs payable by them to the defendant in respect of a petition in the matter of the trust, as the defendant was a trustee for his solicitors in the petition to the extent of their lien. *Re Harrauld, Wide v. Walford*, 52 L. J., Ch., 435; 48 L. T. 352; 31 W. R. 518. But see S. C. on appeal 53 L. J., Ch., 505; 51 L. T. 441.

XVIII. RIGHTS OF OTHER PERSONS.

2. Person made party to suit only for protection of trustees is entitled to his costs out of trust fund. *Hicks v. Wrench*, 6 Madd. 93.

3. Where a *cestui que trust*, having a life interest only, is declared entitled to his costs out of the fund property, the Court will not give him a mere lien on it to be enforced by subsequent proceedings, but will direct an immediate sale for the purpose of defraying them. *Burkett v. Spray*, 1 Russ. & M. 113.

4. The time for which a receiver was appointed having expired, and the *cestui que trust* having, in the absence of the trustee, entered into possession of the estates, subject to the payment of an annuity, and having omitted to pay the same:—Held, that the costs of an application to the Court for a direction for payment by the *cestui que trust* in possession of the annuity were payable out of the estate. *Devaynes v. Noble*, 8 L. J., N. S., Ch., 256.

5. A married woman was entitled to an estate for life for her separate use, without power of anticipation, with power to consent to varying the investment of the trust fund. She sanctioned the investment on an improper security:—Held, that she was not entitled to the costs of a suit instituted by her against the trustee to repair the breach of trust, and was liable to pay the costs of the other defendants. *Mant v. Leith*, 16 Jur. 302; 21 L. J., Ch., 719; 15 Beav. 524.

XIX. LIEN FOR AND PRIORITY.

6. Trustees' costs have priority over the claims of a mortgagee claiming under their *cestui que trust*. *Rose v. Sharrook*, 1 N. R. 419.

Where a married woman is entitled to a life interest to her separate use under her marriage settlement, her receipt alone to be a sufficient discharge, that is not a restraint upon anticipation; but where the trustees, upon the clause, as to the separate receipt, consider it so far doubtful that they refuse to pay either to the married woman or her assignee, and a bill is filed, they are still entitled to their costs in priority. S. C. *nom. Rose v. Sharrod*, 11 W. R. 356.

7. Trustees for sale on decease of a tenant for life having a prior legal estate:—Held, not to have any lien upon the property in respect of the costs of an abortive sale attempted by them during the tenancy for life, or of pro-

ceedings against them at law and in equity in reference thereto, notwithstanding such sale was attempted upon the solicitation of the tenant for life, and with the consent and approbation, and by the direction of the *cestuis que trustent*, one of whom was *sui juris*, the shares of the others, who were married women, being settled to their separate use without power of anticipation. *Leedham v. Chawner*, 4 Kay & J. 458.

8. Where a trustee is required to make a transfer of a fund to new trustees, and he alleges that he has a lien for charges (though he may have a right, under the Act of Parliament under which he acts, or by agreement, to recover payment), he has no right to interpose any delay in the way of making the transfer in respect of his alleged claim. *Wilson v. Parker*, 10 Jur. 979.

XX. WHAT FUND LIABLE FOR PAYMENT OF.

9. The trustees of a settlement applied to be discharged from their trust, on the ground of the unexpected responsibility thrown upon them by the repeated charges and annuities to which the tenant for life had subjected his interest, and also stating, which was admitted, that they had applied to the tenant for life to appoint new trustees in their room, which he had failed to do:—Held, that the costs of obtaining the discharge should be paid out of the interest of the tenant for life. *Coventry v. Coventry*, 1 Keen 758; 6 L. J., N. S., Ch., 275.

10. A trustee, acting *bonâ fide*, and with the concurrence of the heir-at-law, under a will which was supposed to be valid as to real estate, but which afterwards turns out to be invalid, is entitled to be indemnified out of the personal estate. *Edgecumbe v. Carpenter*, 1 Beav. 171; 6 L. J., N. S., Ch., 17.

11. If an estate is devised to A. and his heirs on trust to sell, etc., and A. devises it, the costs of getting the legal estate out of his devisee must be borne by A.'s estate. *Cooke v. Cramford*, 13 Sim. 91; 11 L. J., N. S., Ch., 406; 6 Jur. 723.

12. Under a direction by will to accumulate and lay out a certain sum of money in the purchase of land to be settled to uses thereby declared, the costs of the investment are to be paid out of the particular sum directed to be invested. *Gwyther v. Allen*, 1 Hare 506.

13. The trustee of a marriage settlement invested the trust moneys, with the consent of the husband, who had a life interest under the settlement, in an unauthorised security. On the trustee's death, his widow, as his administratrix, became trustee, and, on ascertaining that the settlement fund was in great danger of being lost, instituted an action for administration of the trusts of the settlement, under which the greater part of the trust fund was recovered. It was contended, on the authority of *Haldenby v. Spofforth* (9 Beav. 195), that the plaintiff was entitled to her costs of the action:—Held, that that case must be understood to decide that the representative of a defaulting executor is entitled to costs out of the executor's assets, not out of the assets of the original testator whose

estate is being administered. *Gurney v. Gurney*, 48 L. T. 529.

Held, accordingly, that the plaintiff could not be allowed to retain her costs of the action as against the *cestuis que trustent*, though she was entitled to her costs, charges, and expenses as trustee other than those of the action. *Id.*

1. An action to carry into execution the trusts of a fund having been instituted unnecessarily by the beneficial owner of one out of six shares, the other beneficiaries, who had not been served with notice of or attended proceedings in the action, or derived any benefit therefrom, received payment of their shares in full from the trustee pending the action:—Held, that the costs of the action were to be borne by the plaintiff's share alone. *Re Chennell, Jones v. Chennell*, 47 L. J., Ch., 80. Affirmed 8 L. R., Ch. D., 492; 26 W. R. 595; 38 L. T., N. S., 494.

2. By a will an annuity was given, and a legacy was directed to be accumulated by trustees, for the benefit of an infant. The trustees, being in possession of the whole of the testator's estate, applied all the rents and profits in payment of the annuity. A suit was instituted for the payment of the legacy and for administration of the estate. The estate proved insufficient to pay all the costs of the plaintiff and of the defendants, trustees; therefore only part of the costs of the latter was ordered to be paid out of the estate, and the whole costs of the plaintiff out of the remaining moneys. *Beer v. Tapp*, 31 L. J., Ch., 513; 10 W. R. 277; 6 L. T., N. S., 269.

3. A. had become indebted to B., and had agreed under a letter of license to pay the amount by monthly instalments. B. assigned the benefit of this debt to C. on the occasion of a loan to him. C. thereupon gave notice to A. of the assignment. B. was obliged to proceed against C. for the repayment of the loan, and required A. to make the payment of the instalments to him (B.), and he filed a bill against C. and A. for an account. One instalment had been paid by C. to A. after notice:—Held, that A. was entitled to retain his costs of suit out of the next instalments as they became due, the amount to be added to the original debt due from B. to C. *Aplin v. Cates*, 3 L. T., N. S., 288.

4. Devisees of lands in trust for charitable purposes, having sold part of those lands, under the provisions of the London Bridge Acts, were held not entitled to their costs out of the fund arising from the sale, although the will creating the trust directed that the estate should defray the expenses of defending the trust property. *Exp. Tongood, Re London Bridge Acts*, 1 Y. & Coll. 588. S. C. *nom. Exp. Thorogood*, 5 L. J., N. S., Exch. Eq., 97.

5. Where question arises on interest in a trust fund, separated from general residue, the costs must come out of the particular fund; and having been given by decree, as specifically prayed by bill, out of the general personal estate, the decree, although affirmed in other respects, was corrected in that particular, being considered as relief prayed, and therefore not within the rule against appeal for costs only. *Jenour v. Jenour*, 10 Ves. 562.

6. A court of equity will not interfere at

the instance of a remainderman in cases of permissive waste, either by injunction or to give satisfaction against an equitable tenant for life in possession. Testator, by his will, directed his trustees, after payment of the expenses of keeping his estates in repair, and all such costs as "my said trustees shall expend or be put unto by means of the trusts hereby reposed in them," to pay out of the overplus rents and profits certain sums, and after payment thereof, to pay the rents to A. and B. successively for life, with remainder to trustee to preserve, with remainder to the first and other sons of B. successively in remainder, and the several heirs male of the bodies of such sons. On a bill filed by the trustees at the instance of one of the remaindermen in tail, against the second tenant for life, for the purpose of making him accountable for permissive waste:—Held, that the costs of the trustees, whose bill was dismissed, ought to be paid out of the corpus, and not out of the rents and profits of the estate. *Ponys v. Blagrove*, 4 De G. M. & G. 448; 24 L. J., Ch., 142.

7. Executors and trustees having appropriated a legacy, and divided the residue:—Held, that the costs of a suit to secure the particular legacy must be paid thereout. *Governesses' Benevolent Institution v. Rushbridger*, 18 Beav. 467.

8. By marriage settlement property was vested in trustees for the wife in trust for her sole and separate use, the trustees being authorised to reimburse themselves, out of the moneys which should come to their hands under the trusts, all expenses to be incurred in the execution of the trusts, or by reason of any matter whatsoever relating to or connected therewith. The wife filed a bill to make the trustees liable for a breach of trust and to have new trustees appointed. The bill was dismissed as to the breach of trust, but a receiver was appointed:—Held, that the trustees were entitled to receive their costs of the suit out of the income of the trust funds in the hands of the receiver since the decree. Plaintiff's next friend having become insolvent, the proceedings were stayed. *D'Oochner v. Scott*, 24 Beav. 239.

XXI. TAXATION.

See also Preceding Subdivisions.

1. *As Between Party and Party*, 7108.
2. *As Between Solicitor and Client*, 7109.
3. *Other Cases*, 7110.
4. *On Application of Cestui que Trust*. See SOLICITOR, XVI. x. 2.

1. As Between Party and Party.

- (a) *In General*, 7108.
- (b) *On Disclaimer*, 7109.

(a) In General.

9. Where the costs of a trustee are directed to be taxed, that means as between party and party; but where a trustee has expended

money by reasonably and properly taking opinions, and procuring directions that are necessary for the due execution of his trust, he is entitled not only to his costs, but also to his charges and expenses, under the head of just allowances. *Fearns v. Young*, 10 Ves. 184.

Trustees, however, in Chancery, on application, generally obtained costs as between attorney and client. *Id.*

1. Costs to a defendant, a mere trustee by consignment of goods, as to plaintiff in bills of interpleader, not as between attorney and client; but according to the course of the Court as between party and party. *Dunlop v. Hubbard*, 19 Ves. 205.

2. Where a bill is dismissed against a trustee, and there is no estate to be administered, he only has costs as between party and party. *Saunders v. Saunders*, 3 Jur., N. S., 727.

(b) On Disclaimer.

3. A person named a trustee in a deed, who declines to accept the office, is in the situation of any other defendant against whom a bill is dismissed, and can only have his costs as between party and party. *Norway v. Norway*, 2 Myl. & K. 278; 4 L. J., N. S., Ch., 111, 163.

4. A trustee, who after disclaiming is continued as party to the hearing, is entitled to costs only as between party and party. *Bray v. West*, 9 Sim. 429.

5. A trustee disclaiming at the bar has his costs only as between party and party. *Bulkeley v. Eglington (Earl)*, 1 Jur., N. S., 994.

6. Where the name of a party appears upon documents as a trustee, and he is therefore made a defendant, but asserts by his answer that he never accepted the trust nor acted, he is entitled to costs as between party and party. *Heap v. Jones*, 5 W. R. 106.

7. *Semble*, a disclaiming trustee is entitled only to costs as between party and party. *Legg v. Mackrell*, 1 Giff. 165; 5 Jur., N. S., 1145. But see *S. C.* 4 L. T., N. S., 568; 2 De G. F. & J. 551.

2. As Between Solicitor and Client.

8. Costs as between solicitor and client allowed to the archbishop and bishop when made parties to a suit respecting the validity of the election of a vicar. In what case trustees are allowed costs only as between party and party. *Edenborough v. Canterbury (Archbishop)*, 2 Russ. 93.

9. Persons nominated trustees by an instrument which, being void, passes no trust fund, not allowed costs as between solicitor and client. *Mohun v. Mohun*, 1 Swan. 201.

10. A person named a trustee without his knowledge, and in that character a party to the suit, having never accepted the trust, is entitled to his costs as between solicitor and client. *Sherratt v. Bentley*, 1 Russ. & M. 655.

11. Trustees who had declined to transfer a fund to an assignee on the ground of an alleged fraud in the assignment were:—Held, entitled to their costs as between solicitor and client, although the assignment was decreed to be carried into execution, there being

some circumstances of suspicion attending the assignment, particularly a variance between the consideration expressed in the deed and the actual consideration. *Whitmarsh v. Robertson*, 1 Y. & Coll. C. C. 715; 11 L. J., N. S., Ch., 404; 6 Jur. 921.

12. A trustee who had committed a breach of trust was held entitled to the general costs of the suit as between solicitor and client, but was directed to pay as between party and party the costs relating to the inquiry arising out of the breach of trust. *Pride v. Fooks*, 2 Beav. 430; 9 L. J., N. S., Ch., 234; 4 Jur. 213.

13. A suit was instituted against an executor and a trustee under a will for an account. On the hearing, a decree for a reference to take accounts of the real and personal estate was directed. He afterwards became bankrupt, and the suit was continued as against his assignees under the bankruptcy:—Held, that he was entitled to the costs of suit as between solicitor and client from the date of his bankruptcy, and also the costs of his appearance on a petition for a vesting order in new trustees. *Turner v. Mollinew*, 9 W. R. 252; 3 L. T., N. S., 687.

14. Where a bill is dismissed with costs as against trustees, the Court having no estate under its control, and payment of an alleged claim is asked out of the residue of the testator's estate, there is not such a speciality as to induce the Court to give the trustees of such estate their costs as between solicitor and client. *Saunders v. Saunders*, 5 W. R. 479.

15. When a defaulting trustee against whom a bill is filed becomes bankrupt, and the suit is prosecuted against him after his bankruptcy, he is entitled to his costs incurred after bankruptcy, and that as between solicitor and client. *Bonyer v. Griffin*, 18 W. R. 227; 9 L. R., Eq., 340.

16. The costs of a defendant trustee, notwithstanding he was a solicitor, ordered to be taxed as between solicitor and client. *York v. Brown*, 1 Colly. 260; 8 Jur. 567.

17. Testator, by his will, gives the rents of his real property to his wife for life, and bequeaths the bulk of his personal property to her absolutely, constituting her sole executrix, and directs that certain trustees shall, as soon as conveniently may be after his decease, convert all the convertible residue of his personal estate into money, and invest it in Government or real securities, and pay the dividends to his wife for life. The ultimate trusts, both of the real and residuary personal property, are in favour of persons who are not *in esse* or not ascertained. Twenty years elapse, during which the trustees leave the widow in the possession and management of the whole property, and then the surviving trustee files a bill against her for an account. It appears in the suit that she has paid all the testator's debts to an amount exceeding the amount of personality not specifically bequeathed, but that she has left some of the assets outstanding, and claims to be a purchaser of those assets, in part satisfaction of the moneys which she had overpaid:—Held, that whatever might be her right at law as a purchaser of those assets upon a plea of *plene administravit*, her right as a purchaser

in equity is not absolute, but subject to the rules of equitable administration; and, consequently, that the bill being filed on reasonable grounds, the surviving trustee is entitled to the costs of the suit; but, held, under the circumstances of the case, that he is not entitled to costs as between solicitor and client. *Hearn v. Wells*, 1 Colly. 323.

3. Other Cases.

1. A mere trustee is only allowed an answer of one skin and a guinea for previous expense. *Parsons v. Potter*, 2 Hog. 281.

2. Trustee, or next friend of infant, is entitled to fair expenses beyond taxed costs, under the head of just allowances. *Fearn v. Younge*, 10 Ves. 184.

3. A trustee shall be allowed his full and necessary costs, and shall not be confined in his account to the costs taxed of course, in obtaining a decree. *Amand v. Bradbourne*, 2 Ch. Ca. 138.

4. Where, on a motion, affidavits of great length were filed by the plaintiff complaining of the conduct of the trustees, and by the trustees vindicating their conduct, the Court, in acceding to the application of the plaintiff, ordered that none of the parties be allowed their costs of any of the affidavits used on the motion. *Horner v. Wheelwright*, 2 Jur., N. S., 367.

5. A. B. was entrapped into becoming a trustee; but it was agreed that he should be discharged. He consulted counsel as to the liability he had incurred, and instructed him to prepare proper deeds for his protection. It was discovered that a breach of trust had been committed previously to his becoming trustee, and counsel prepared a bond and release for A. B.'s protection, but which were never executed, in consequence of a suit having been instituted by A. B. to set the matter right:—Held, overruling the decision of the Taxing Master, that, under an order to tax A. B.'s costs, charges, and expenses of and incidental to the trust, A. B. was entitled to the costs of the draft bond and release, though they had never been used. *Stephens v. Newborough (Lord)*, 11 Beav. 403; 17 L. J., N. S., Ch., 332; 12 Jur. 319.

6. When a trust fund is reduced to 500l. before the filing of the bill, the Court will only allow costs according to the county court scale. *Ali v. Forrester*, 21 L. T., N. S., 819.

XXII. PRACTICE ON ALLOWANCE OF FURTHER CONSIDERATION.

7. If the decree at the hearing make no provision for the costs of a trustee, the Court will not entertain any petition in respect of them at the hearing on further directions. *Malins v. Greenway*, 7 Hare 391; 18 L. J., N. S., Ch., 154.

8. A trustee not appearing at the hearing, a decree was made against him, with leave to show cause against it. He then set down the cause again, and prayed his costs of the suit, on paying the costs of the day, which were granted, the Master of the Rolls saying, that his having paid the costs of the day placed

him *rectum in curia*. *Norris v. Norris*, 1 Cox 183.

9. Upon the death of one of three trustees, no provision having been made for his costs, his executors, by consent, without a revivor, appeared for the purpose of claiming his costs. *Kampf v. Jones*, C. P. C. 13.

10. Where a bill is dismissed without costs so far as it seeks to charge trustees with wilful default, the Court may by its order upon further consideration give the defendants the whole of their costs. Also, a sum advanced by the trustees and disallowed by the chief clerk's certificate may be allowed by the order on further consideration. *Massey v. Massey*, 17 L. T., N. S., 233.

TURNPIKE.

See also HIGHWAY.

I. TOLLS, 7110.

II. REPAIR, 7111.

III. INJURY TO, 7112.

IV. SALE OF, 7112.

I. TOLLS.

11. Trustees of a turnpike road were authorised to let the tolls, upon giving certain notice of their intention to do so, and the notice was to state the amount which the tolls produced during the preceding year, clear of the expenses of collecting:—Held, that this direction was sufficiently complied with, where the notice merely stated the amount received by the trustees during the preceding year, although during part of that time, the tolls were let for a greater sum than they had actually produced, and no expenses were allowed for collecting during that part of the year. *Newman v. Ring*, 15 L. J., N. S., Ch., 365.

12. Where the trustees of a road had advertised tolls to be let by auction, subject to certain special conditions as to the mode of sale, inconsistent with the regulations prescribed by the General Turnpike Act, 3 Geo. 4, c. 126, s. 55, the terms of the sale giving a reserved bidding to the trustees, and there was only one bidder at the sale, when, the minute-glass having been thrice turned, as prescribed by the Act, the trustees declared their intention to make their reserved bidding:—Held, that the bidder was not entitled to specific performance; but his bill was dismissed without costs. *Levy v. Pendergrass*, 2 Beav. 415.

13. The trustees of a turnpike road acting under a general and special Act, lease the tolls of a particular district, upon which tolls there is a mortgage, it being stated when the tolls are let that a certain gate would be moved and the tolls taken in future under the then new (special) Act. Lists are affixed to the toll gates, and the gate in question is moved. Up to the time of the gate being so moved, the lessee takes the tolls under the general Acts, and since that time according to the scale put up by the trustees, and likewise takes a full toll at two gates, including that which had

been moved, where before the gate was moved full toll was not taken, and only half toll could be taken at one gate under the affixed scale. The trustees then give notice of a meeting to consider the propriety of reducing so much of the tolls as were in excess of those previously taken at the gates in question; the lessee attends the meeting, and objects to such proposition; the meeting is adjourned, and the lessee files a bill, and moves for an injunction to restrain the trustees from making any order reducing or altering the tolls, on the ground that the trustees are bound by the lease not to prejudice the plaintiff's rights, and that the mortgagees must have notice under the Acts of Parliament regulating turnpike roads:—Held, first, that trustees of a turnpike road, being public officers, are not debarred from varying the tolls, because they lease them. Next, that what was intended to be done was only to restore the previously existing state of the tolls, and was, although a detriment to the plaintiff, *damnum sine injuria*. It could not be assumed that the trustees were neglecting their duty, and therefore not giving notice to the mortgagees rather showed that no reduction was intended. Motion refused with costs. *North v. Thompson*, 5 W. R. 176.

1. If a turnpike keeper levy an extra toll, and upon adjudication by two magistrates (under the Bath Act) it is determined that the toll was not due, the money may be recovered back in an action for money had and received, and notice of action need not be given; for where a power is given to justices to determine, it is final, unless an appeal is expressly given. *Parsons v. Blandy*, Wightw. 22.

2. A. made a voluntary assignment of turnpike bonds to B. in trust for himself for life, and after his death for his nephew. He delivered the bonds to B., but did not observe the formalities required by 3 Geo. 4, c. 126, s. 81, to make the assignment effectual:—Held, on his death, that no interest in the bonds passed by the assignment, and that B. ought to deliver them to his executors. *Searle v. Law*, 15 Sim. 95.

3. Money secured on mortgage of turnpike tolls is an interest in land and within the Statute of Mortmain; but there is another sort of toll which gives no right at all in the land, and that is a toll thorough. *Knapp v. Williams*, 4 Ves. 430. n.

4. A mortgage of turnpike tolls is an interest in land within the Mortmain Act, 9 Geo. 2, c. 36. *Ashton v. Langdale (Lord)*, 4 De G. & Sm. 402; 15 Jur. 868; 20 L. J., Ch., 234.

5. Turnpike tolls are within the Statute of Limitations, 3 & 4 Will. 4, c. 27, and consequently more than six years' arrears of interest are recoverable on a mortgage of them. *Mellish v. Brooks*, 3 Beav. 22; 9 L. J., N. S., Ch., 362; 4 Jur. 739.

6. Trustees of a turnpike-road being desirous of obtaining an Act authorising the making a new road connected with the former, the plaintiff agreed to advance 2,000*l.* for the purpose of making the new road, upon having the payment secured by a mortgage of the tolls of both roads. The trustees obtained an Act which authorised the making of the new road, repealed the Act under which the old was made, and placed both roads under one system of management, treating them for most purposes as one road. By this Act it was provided,

that the tolls of the old road should be applied, first, in paying the expenses of obtaining the Act; secondly, in paying the interest on mortgages of the tolls receivable under the old Act; thirdly, in repairing the old road; and, fourthly, in paying the principal of the old mortgages. And that the tolls of the new road should be applied, first, in paying the expenses of obtaining the Act; secondly, in making and repairing the new road; thirdly, in paying the interest of money borrowed on the tolls of the new road; and, fourthly, in paying the principal of moneys borrowed under the repealed Act, or borrowed on the tolls of the new road. The plaintiff advanced 2,000*l.*, and a mortgage was made to him of the tolls, toll-houses, etc., in such a form that it was doubtful whether it extended to the tolls of the new road:—Held (affirming 3 Jur., N. S., 128), on construction of the Act, that it did not take away the power of mortgaging given by the General Turnpike Act (3 Geo. 4), c. 126, s. 81; that the trustees, therefore, had power to mortgage the tolls of the old road as well as the new road, for moneys borrowed for the purposes of the new road, and that the plaintiff, having advanced his money on the faith of having a security on both roads, was entitled in equity, if not at law, to a security on the tolls of the old road as well as of the new. *Crewe (Lord) v. Edleston*, 1 De G. & J. 93; 3 Jur., N. S., 1061.

A mortgage of turnpike tolls and toll-houses, which are in lease, and are subject also to other mortgages, may apply to have a receiver appointed, instead of taking steps to obtain possession at law. *Id.*

II. REPAIR.

Liability for. 7. The Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict., c. 77) by s. 13 enacts that any road which has "between the 31st of December 1870 and the date of this Act ceased to be a turnpike road, and any road which, being at the time of the passing of this Act a turnpike road, may afterwards cease to be such, shall be deemed to be a main road; and one-half of the expenses incurred from and after the 29th of September 1878 by the highway authority in the maintenance of such road shall, as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area by the county authority of the county in which such road is situate out of the county rate." The corporation of the borough of Rochdale was the highway authority of the Rochdale highway area. Under ss. 47—50 of the Towns Improvement Clauses Act 1847 (10 & 11 Vict., c. 34), the obligation to repair all public highways within the area of the "town" was imposed upon the corporation, and the turnpike trustees were forbidden to collect any toll or lay out any money on any road within that area. By a local Act in 1872 the boundaries of the borough were enlarged and all the provisions of the Acts relating to the "town" were made applicable to the enlarged area of the borough. The effect was that further portions of the turnpike roads were for the first time brought within the area of the borough and within the operation of the Towns Improvement Clauses Act 1847:—Held, that

these further portions being only parts of turnpike roads, had not ceased to be "turnpike roads" and were not to be deemed to be "main roads," within s. 13 of the Highways and Locomotives (Amendment) Act 1878; and that the county authority was not liable to pay half the expenses of their maintenance. *Lancaster JJ. v. Rochdale (Mayor)*, 8 L. R., App. Cas., 494; 49 L. T. 368; 32 W. R. 65. Reversing, 8 L. R., Q. B. D., 12; 51 L. J., M. C., 1; 45 L. T. 425; 30 W. R. 130.

1. The Highways and Locomotives (Amendment) Act 1878, s. 13, provides for the maintenance of roads which have since the 31st of December 1870 ceased to be turnpike roads. A provision in Turnpike Acts coming into operation before the 31st of December 1870, that turnpike trustees shall not spend money or levy toll upon certain portions of turnpike roads, does not prevent such portions of the roads from being still turnpike roads on the 31st of December 1870, within the meaning of s. 13 of the Highways and Locomotives (Amendment) Act 1878. An agreement under the Local Government Act 1858 (21 & 22 Vict., c. 98), s. 41, made before the 31st of December 1870, between turnpike trustees and a corporation, under which the turnpikes upon certain portions of turnpike roads were removed, and the repair of such portions was undertaken by the corporation, does not operate to make such portions cease to be part of a turnpike road, and therefore these portions also come under the operation of the Highways and Locomotives (Amendment) Act 1878, s. 13. *West Riding Justices v. Reg.*, 8 L. R., App. Cas., 781; 32 W. R. 253; 49 L. T. 786; 53 L. J., M. C., 41.

Damage caused by. 2. The trustees appointed under a public road Act are not responsible for an injury occasioned by the negligence of the men employed in making or repairing the road. *Duncan v. Findlater*, 6 Cl. & F. 894; 1 Rob. 911.

The funds raised by such Act cannot be charged with compensation for such an injury, the persons employed on the road being in the situation of servants to the trustees. *Ib.*

III. INJURY TO.

3. The trustees of a turnpike road which passed over a hill were empowered to lower it when necessary. They applied to restrain an adjoining freeholder from making a tunnel under the road, on the ground that it would obstruct the future improvement of the road. The Court, however, held that it had no authority to interfere, and refused the application. *Cunliffe v. Whalley*, 13 Beav. 411.

IV. SALE OF.

4. It is no defence to a suit for specific performance against trustees of a turnpike road, that the land they have contracted to sell is liable to pre-emption by the owner of the adjoining land under the General Turnpike Act (3 Geo. 4), c. 126, s. 39, even where the offer required has not, through inadvertence, been made to such owner, and it is in evidence that the owner insists on his right, the pur-

chaser making no objection to the title, and being content to take such estate as the trustees could convey. *Barrett v. Ring*, 2 Sm. & G. 43.

ULTRA VIRES.

See COMPANY, IV.—V.—VI. III.

UMPIRE.

See ARBITRATION, IV.

UNAUTHORISED PROCEEDINGS.

See PRACTICE (APPEARANCE)—SOLICITOR, IV.

UNCLAIMED DIVIDENDS.

See BANKRUPTCY, XXVIII. iv.—STOCK AND SHARES, I.

UNCLAIMED FUNDS IN COURT.

See STOCK AND SHARES, I.

UNCONSCIONABLE BARGAINS.

See FRAUD—HEIRS EXPECTANTS AND REVERSIONERS.

UNDERCLERK.

See PRACTICE (OFFICERS OF COURT).

UNDERLEASE.

See LANDLORD AND TENANT—VENDOR AND PURCHASER, VI. VI. 3.

UNDERTAKING.

See PRACTICE (APPEARANCE, REGISTRAR, SERVICE).

UNDERWRITER.

See INSURANCE.

UNDUE INFLUENCE.

See FRAUD—WILL.

UNIFORMITY.

See ROMAN CATHOLIC—TOLERATION ACT.

UNION, TRADE.

See TRADE, VI.

UNIVERSITY.

See also CHARITY, IX.—COPYRIGHT.

1. Jurisdiction of Oxford allowed. *Temple v. Foster*, Cary 65. S. P. *Cotton v. Mannering*, id. 73.

2. The Chancellor's court in Oxford hath not jurisdiction of matters of freehold. *Stephens v. Berry*, 1 Vern. 212.

3. Person having privilege of Oxford loses it when joined defendant with another. *White v. Longher*, Cary 55.

4. The provisions in the statutes of the University of Oxford prohibiting a professor from directly or indirectly teaching, or dogmatically asserting, anything repugnant to the Catholic faith, are to be read by the context, and do not extend to any book published by such professor in his private capacity, and not used by him in his official teaching. *Pusey v. Jonett*, 1 N. R. 488.

A power conferred by an University statute, of banishing heretics in general, is not to be abridged by the institution, in a later part of the same statute, of a test for heresy—that test being applicable only to a particular class of persons. *Id.*

The Church Discipline Act does not debar a university judge from trying a resident clergyman for a breach of university law, notwithstanding such breach may also constitute an ecclesiastical offence. *Id.*

5. A member of a corporation cannot institute a suit against the governing body of the corporation, unless there is also an infringement of a personal or a proprietary right, or an injury to him as an individual. It must be by the corporation itself, or by information by the attorney-general, if it is for an injury to the public. *McCormac v. Queen's University*, 15 W. R. 733. And see *Prestney v. Colchester (Mayor)*, 21 L. R., Ch. D., 111; 51 L. J., Ch., 805.

The loss of a monopoly of university degrees is not a personal injury. *Id.*

USAGE.

See BANKRUPTCY, XIX. xvi.—CUSTOM—TICK EXCHANGE—TRADE, IV.

USES AND TRUSTS.

— *Executory Uses and Interests.* See POWER —VESTED CONTINGENT AND FUTURE INTERESTS—WILL.

See also TRUSTS.

USHER.

See PRACTICE (OFFICERS OF COURT).

USUAL COVENANTS.

See LANDLORD AND TENANT, I. vii.—VENDOR AND PURCHASER, XV. iv.

USUAL POWERS.

See TRUSTS, V. ix.

USURY.

— *Proof on Usurious Contracts.* See BANKRUPTCY, XXIV, xxxvii.

See also HEIRS EXPECTANTS AND REVERSIONERS.

- I. GENERAL PRINCIPLES, 7113.
- II. REPEAL OF USURY LAWS. EFFECT, 7114.
- III. USURIOUS TRANSACTIONS.

- 1. *Annuities*, 7115.
- 2. *Annuities with Insurance*, 7115.
- 3. *Bills with Collateral Security*, 7115.
- 4. *Bonds*, 7116.
- 5. *Commission of Agents*, 7116.
- 6. *Mortgages*, 7117.
- 7. *Partnership*, 7119.
- 8. *Stock, Re-transfer of*, 7119.
- 9. *Trade Custom*, 7120.

IV. DISCOVERY, 7120.

V. TERMS OF RELIEF, 7120.

I. GENERAL PRINCIPLES.

6. A court of equity will not differ from the courts of law in the exposition of the Statute of Usury, though it often varies in the remedies given, and in their application. A question of usury is a mere question of law, and, therefore, in equity, to be considered in the same light as in the Court of Common Law and as if an

action had been brought on the bond. *Moore v. M'Kay*, Beat. 287; 2 Moll. 137.

Usury is a conclusion of law, resulting from the facts and circumstances attending each transaction. There must be forbearance. Usury is taking more than the law allows upon a loan, or for forbearance of a debt. To make a contract usurious, it must be apparent upon the face of it, or by evidence, that the intent of the parties in the creation of it was, by means of shift or device, to take more than legal interest for the loan or forbearance of money. Equity cannot sift the facts and circumstances of contracts more astutely, to prevent evasion of the Statute of Usury, than courts of law do. Whatever may be the ostensible case, they inquire, whether the dealing was substantially a loan and forbearance of money, with more interest or profit than the law prescribes. Where there was no obligation to pay money advanced, there could be no forbearance; consequently the profit derived from the use of the money was not usurious. *S. C. Beat. 288.*

1. Distinction between jurisdictions in equity and in bankruptcy in setting aside securities affected by usury. In bankruptcy the party is not, as in the other case, left a creditor for what was actually advanced. *Benfield v. Solomons*, 9 Ves. 84.

2. Usury is taking more than the law allows upon a loan or for forbearance of a debt. *Spurrer v. Mayors*, 1 Ves. J. 527; 4 Bro. C. C. 28.

To make a contract usurious, intention of forbearance for exorbitant interest must appear. *Ib.*

3. The Court does not relieve against an usurious contract, so as to make the principal lost, as well as interest. *Pitt v. Cholmondeley*, 2 Ves. 567.

4. Assignees of a bankrupt are not compellable to pay what is really due on a transaction attended with usury, under the general jurisdiction in bankruptcy: it is otherwise where they apply to a court of equity by a bill to be relieved. *Exp. Skip*, 2 Ves. 489.

5. There is no usury where there is a risk. *Exp. Wilson, Re Bates*, 2 Jur. 98.

6. An agreement may be perfectly equitable, although it is usurious, but if it is usurious, the law determines it, and its *bona fides* cannot avail it. *Brophy v. Holmes*, 2 Moll. 1.

7. If usurious interest is not contracted for, the security is not invalidated by subsequently taking usurious interest. *Exp. Jennings*, 1 Madd. 331.

8. *Quare*, whether a promise to pay an usurious debt made after certificate, as a consideration for further loan, vitiates a security extending to the old debt and the new loan. *Exp. De Grouchy, Re Butler*, 3 Mont. & A. 22; 2 Dea. 79; 6 L. J., N. S., Bky., 3.

9. If a bargain was really for an annuity, though bought at ever so low a price, it is no usury; if on the foot of borrowing, and lending money, otherwise. *Chesterfield (Earl) v. Janssen*, 1 Atk. 340.

Where there is a borrowing of money, a device to have more than the legal rate of interest is within the Statutes of Usury. *Ib.*

If there be a loan of money with more than legal interest, and a casualty goes to the interest only, it is usury; *secus*, if it goes to the principal and interest. *Ib.*

S., a man of intemperate habits, aged thirty, in order to pay tradesmen's bills, and other debts, for 5,000*l.* in hand, bound himself in the penalty of 20,000*l.* to pay 10,000*l.* on the death of *M.*, a lady, aged 78, if he survived her. *M.* died, aged 84, and *S.* survived her two years; at *M.*'s death, a new bond was entered into, with the same penalty for the payment of 10,000*l.* and interest; and *S.* executed a warrant of attorney to empower judgment to be recorded against him in King's Bench, which was done accordingly; 2,000*l.* were paid by *S.* in about five months from the death of *M.* Before his death, *S.* devised the residue of his personal estate, after paying debts, etc., to his son, a minor. The plaintiffs, his guardians and executors in trust, brought a bill to be relieved against defendant's demands as an unconscionable bargain and usurious contract. The Court relieved plaintiffs against the penalty and judgment, by directing defendant to deliver up the second bond to be cancelled, and to acknowledge satisfaction on the judgment upon being paid by plaintiffs what should be due at law, but would not give him costs, as there was *probabilis causa litigandi*, and defendant's case far from favourable. *Ib.* 301.

10. A testator directed that one of his residuary legatees should be answerable for all debts due to him from the father of the legatee. A debt, though usurious, must be deducted from the legatee's share. *Stanton v. Knight*, 1 Sim. 482.

II. REPEAL OF USURY LAWS. EFFECT.

11. The repeal of the usury laws does not affect the power of a court of equity to review and set aside usurious transactions where they are founded on fraud. *Honley v. Cook*, 8 Ir. R., Eq. 571.

Accordingly, a series of deeds, charging sums advanced by a money-lender with exorbitant interest, on the borrower's estates, which were ample security, was set aside, save to the extent of securing the actual advances, with moderate interest; the deeds containing unprecedented clauses, such as authorizing a sale without notice, and empowering the lender to pay off existing charges (which bore interest at 6*l.* per cent. only), and to charge 20*l.* per cent. thereon, and other clauses of a similar character; the Court being of opinion that the clauses were introduced by the fraud and device of the money-lender without the knowledge of the borrower, who was unprotected by proper professional advice. *Ib.*

12. The repeal of the usury laws, and the alteration of the law as to reversionary interests (effected by 31 Vict., c. 4) have not altered the onus imposed upon all who deal with expectant heirs and reversioners of proving that their dealings have been fair and reasonable, and of thus rebutting the presumption of fraud which may arise from the nature of a bargain, and the circumstances and conditions of the contracting parties. *Aylesford (Earl) v. Morris*, 28 L. T., N. S., 541; 8 L. R., Ch., 484; 42 L. J., Ch., 546; 21 W. R. 424. And see *O'Rorke v. Bolingbroke*, 2 L. R., App. Cas., 814; 26 W. R. 239. *Tyler v. Yates*, 6 L. R., Ch., 665; 40 L. J., Ch., 768; 25 L. T. 284; 19 W. R. 909.

III. USURIOUS TRANSACTIONS.

1. *Annuities*, 7115.
2. *Annuities with Insurance*, 7115.
3. *Bills with Collateral Security*, 7115.
4. *Bonds*, 7116.
5. *Commission of Agents*, 7116.
6. *Mortgages*, 7117.
7. *Partnership*, 7119.
8. *Stock, Re-transfer of*, 7119.
9. *Trade Custom*, 7120.

1. Annuities.

1. As to averments necessary to support a plea of usury. *Wortley v. Pit*, 1 Ves. 164.

Plea, 2,000*l.* lent on condition to pay in a year 200*l.* and the principal, or 250*l.* per annum during borrower's life, not an usurious contract. *Ib.*

2. The owner of a leasehold for fifty years unexpired, in consideration of 300*l.*, granted an annuity of 45*l.* charged on the leasehold, and assigned the latter to secure the annuity, and the annuitant covenanted at any time, on payment of 300*l.*, and on getting six months' notice, to re-convey:—Held, on a re-hearing, that this was an usurious transaction. *Kenny v. Lynch*, 9 Ir. Eq. R. 530; 2 J. & L. 319; 8 Ir. Eq., R. 207.

3. If A., his necessities requiring an advance of 1,000*l.*, obtain it from B., upon a bargain that, in consideration of it, A., his executors and administrators, shall pay B., etc., an annuity of 80*l.* per annum for a term of seventy years, commencing immediately, the annuity to be secured by the covenant of A., binding himself personally, and after his death his assets generally, the transaction is usurious, and bad on that ground, unless upheld by those provisions of the legislature which have recently, as to certain cases, repealed or relaxed the usury laws. *Belcher v. Vardon*, 2 Colly. 162; 14 L. J., N. S., Ch., 427; 9 Jur. 546.

4. Where an annuity is granted for a term of years to be paid half-yearly, and at the same time promissory notes are given by the grantee for the payment of each half-year's annuity when it becomes due, and it appears that the several half-yearly payments will repay the purchase-money with interest exceeding the rate of 5 per cent., the transaction is usurious. *Fereday v. Wightwick*, 1 Russ. & M. 45; Tam. 250.

5. A. applied to B. to lend him 400*l.* on mortgage of certain leasehold houses, but B. refused. It was then agreed that A., in consideration of the 400*l.*, should grant to B. two annuities of 21*l.* each for forty years, to be issuing out of the houses:—Held, that the transaction was usurious. *Chillingworth v. Chillingworth*, 8 Sim. 404; 6 L. J., N. S., Ch., 223; 1 Jur. 304.

2. Annuities with Insurance.

6. The circumstance of the re-payment of the purchase money of an annuity being secured by an insurance on the life of the grantor, and the grantor having covenanted to pay the premiums, does not bring the case within the Statute of Usury. *Manly v. Hawkins*, 1 Dr. & Wal. 363.

7. Covenant from the grantor in an annuity-deed, that, at his own expense, he would effect an insurance upon the lives for which the annuity was granted, to the amount of the purchase money, for the grantee's benefit, is not usurious nor a shift to avoid the statute. *French v. Morgan*, 2 Moll. 493.

8. The grant of an annuity for the grantor's life is not void, though it appear that, by the agreement between the parties, a portion of the annuity was to be employed in maintaining an insurance for the grantor's life, *semble*. *Byrne v. Kinnefack*, 1 Hog. 184.

3. Bills with Collateral Security.

9. A loan on bills of three months, on which more than 5 per cent. interest is allowed, is not taken out of 3 & 4 Will. 4, c. 98, s. 7, by taking collateral security. *Exp. Knight, Re Pownall*, 2 Mont. & A. 568; 1 Dea. 459; 5 L. J., N. S., Bky. 20.

10. Where two bills of exchange, upon which, were it not for the provisions of the 3 & 4 Will. 4, c. 98, s. 7, an usurious interest was taken, had become due, and the holder declared, that unless a security was handed to him, he would sue the acceptor upon the bills, whereupon a deposit of an annuity-deed, issuing out of lands, was made by the acceptor:—Held, that such deposit was not invalid on the ground of usury. *Bell v. Coleman*, 9 Jur. 974.

Held, also, that this transaction having taken place prior to the passing of the 2 & 3 Vict., c. 37, it could not be affected by the provisions of that statute. *Ib.*

11. Where the bankrupt had borrowed 1,600*l.* upon a bill for three months, renewable, at his option, for three other months, till the expiration of eighteen months, the original proposal having been for a loan for that time, and the bankrupt agreed verbally to pay interest at the rate of 10½ per cent. per annum upon each of such bills:—Held, upon proof tendered on one of such bills, that it was a transaction protected by 3 & 4 Will. 4, c. 98, s. 7. *Exp. Terrewest, Re Poynter*, Mont. & Ch. 351; 4 Dea. 144; 9 L. J., N. S., Ch., 6; 3 Jur. 994. Reversing Mont. & Ch. 146; 3 Dea. 590; 8 L. J., N. S., Bky., 46.

12. Advances made upon promissory notes not having more than twelve months to run, although further secured upon leaseholds by a contemporaneous agreement:—Held, to be within the protection of the 2 & 3 Vict., c. 27, s. 1. *Exp. Warrington*, 3 De G. M. & G. 159; 17 Jur. 430; 22 L. J., Bky., 33.

Held also, that even if this were not so, such of the promissory notes as had not more than three months to run were within the 3 & 4 Will. 4, c. 98, which does not mention land, and that this enactment was not repealed or affected by the 2 & 3 Vict., c. 27. *Ib.*

13. Where money is advanced at usurious interest on the security of bills of exchange, having only three months to run, such advance is protected, and the bills themselves are valid under the 3 & 4 Will. 4, c. 98, s. 7, and though a warrant of attorney to confess judgment may be taken at the same moment on which judgment is the next day entered up and registered under the 1 & 2 Vict., c. 110, so as to become a charge on the lands of the debtor, the trans-

action is not thereby rendered invalid under the proviso of the 1st section of the 2 & 3 Vict., c. 37. *Lane v. Horlock*, 5 H. L., Ca., 580; 2 Jur., N. S., 289; 25 L. J., Ch., 253; 4 W. R. 408. Reversing 2 W. R. 487; 1 Drew. 587; 17 Jur. 983; 22 L. J., Ch., 985.

The 2 & 3 Vict., c. 37, does not repeal the 3 & 4 Will., c. 98, s. 7. *Id.*

H. had received from L. money advanced on the security of bills of exchange. In October 1843 he wanted a further advance, which L., after inquiring into the value of his real estate, consented to make, on consideration that three months' bills should be given for the amount (usurious interest included), and that a warrant of attorney to confess judgment, which L. should be at liberty to enter up immediately, should also be executed. All this was done, and judgment was entered up on the following day, and the judgment registered. The bills given in October 1843 were not paid when they became due in January 1844, and others were then substituted for them. These were also dishonoured. A sale of H.'s estate took place, under a mortgage, executed to a prior creditor, who received more than would satisfy his claim:—Held, that L. was entitled to maintain a bill against him, and that he was liable to pay over so much of the surplus in his hands as would satisfy L.'s judgment. *Id.*

1. J. T., having deposited with his banker the title deeds of freehold and leasehold estates to secure any balance which might be found due to them, became indebted in a large sum, and afterwards executed a mortgage of real and personal estates to secure the sum of 5,500*l.*, and interest thereon at 5*l.* per cent., with a power of sale in default of payment. J. T., on the same day, gave the bankers a warrant of attorney to confess judgment for that sum. The money not having been paid within the time specified, possession of the personal estate, etc., was taken under a writ of *fi. fa.*, and the whole sold by auction. The proceeds under the execution not being sufficient, a sale of the real estate under the power was threatened, but prevented by W. S., a friend of J. T., paying to the bankers the sum alleged to be due. The title deeds of the estates were transferred to W. S., and a memorandum given by the bankers, stating that the accounts upon which the balance arose should be made out, and explanations given if required. The bill filed by J. T. charged the bankers with having overcharged him with interest on the accounts. The Master found that the mortgage had been satisfied, and that the bankers had charged J. T. with discount upon bills at a higher rate than 5*l.* per cent. Upon the construction of stat. 2 & 3 Vict., c. 37, and following the authorities of *Lane v. Horlock* (1 Drew. 587) and *Exp. Warrington* (3 De G. M. & G. 159):—Held, that all excess of interest charged above 5*l.* per cent. for discounting bills payable at more than three months from date, or having more than three months to run, must be disallowed. *Thomas v. Cooper*, 18 Jur. 688; 2 Eq. Rep. 1185.

2. In 1853 money was borrowed at usurious interest, and secured by a bill of exchange at six months, and by a judgment entered up and registered. The bill was continually renewed till 1856, when the lender filed a bill against the subsequent assignee of leaseholds belong-

ing to the borrower, claiming a judgment lien on the leaseholds:—Held, that the judgment was void as against the land under the 2 & 3 Vict., c. 37, but is not void *in toto*. *Bond v. Bell*, 4 Drew. 157; 3 Jur., N. S., 1290; 27 L. J., Ch., 233; 2 Eq. Rep. 1185.

4. Bonds.

3. Where an action was brought on bonds, and a cognovit was given in the action, and judgment entered up for the principal and interest then due:—Held, that it was not competent to the representatives of the obligor, at the distance of ten years afterwards, in a suit for the administration of the obligor's assets, to question the validity of the bonds on the ground of usury. *Berrington v. Evans*, Younge 276.

4. A revolted colony of Spain, not recognised as an independent state by Great Britain, executed bonds at 6 per cent. interest as securities for a loan. P., acting in collusion with B., a holder of the bonds in England, by falsely representing that he had purchased some of them, induced the plaintiff to become a purchaser:—Held, on demurrer, that the bonds were not usurious, as it did not appear by the bill that the contract for the loan was made, or the amount of it to be paid, in this country; that P. & B. would have been answerable to the plaintiff for losses sustained upon his purchase, but that, as the original contract was made with a government not acknowledged by Great Britain, the Court could not relieve him. *Thompson v. Powles*, 2 Sim. 195.

5. Bottomry not within the Statute of Usury, because a real risk is run. *Chesterfield (Earl) v. Janssen*, 2 Ves. 143. And see this case more generally as to usury, 1 Atk. 350.

Bottomry bonds may be so constructed as to be an evasion of the statute against usury, as well as any other contract. *Id.* 341.

6. Bonds given for instalments made up of principal and interest, being the consideration of a purchase or assignment of real and personal estate, though they necessarily carry interest, are not usurious. *Tarleton v. Backhouse*, Coop. 231.

7. On a loan, upon security of an equitable deposit and bond, which appeared on the face of it to be usurious, an action was brought, and the plaintiff failed at law, but having filed his bill alleging that the bond had been erroneously prepared, the Court, being satisfied of the error, decreed the bond to be rectified, and an account of what was due. *Hodgkinson v. Wyatt*, 9 Beav. 566. And see S. C. at law, 4 Q. B. Rep. 749.

5. Commission of Agents.

8. Charge by bill broker in the country of $\frac{1}{2}$ per cent. commission in respect of bill payable in London not usurious. *Exp. Henson*, 1 Madd. 114.

9. A bill broker, in order to get a bill discounted at 4 per cent., takes upon himself the responsibility of indorser, and charges his principal 5 per cent. discount, which is the lowest sum at which he could have done the business, except for his indorsement:—Held, that although he also charged $\frac{1}{2}$ per cent. for his trouble, etc., it was not usury, and that he was entitled to do so for his *del credere* commission. *Exp. Goss*, 2 Dea. & Ch. 240.

1. A reasonable commission beyond legal interest for extra incidental charges, as upon agency in the remittance of bills, not usurious. *Baynes v. Fry*, 15 Ves. 120.

2. The charge of 10 per cent. for commission besides the legal interest, on a loan of money, is not usurious, if it is referrible to trouble and expense *bonâ fide* incurred by the lender; although he may not be a banker, or a person engaged in trade, or although the money lent is his own, and not that of other persons. *Exp. Gwyn*, 2 Dea. & Ch. 12; 1 L. J., N. S., Bky., 73.

3. A covenant in a mortgage of property in the West Indies on the part of the mortgagor, to consign the produce of the estate to the mortgagee to be sold on commission for the mortgagor; and to take all such plantation stores as may be wanted for the use of the estate from the mortgagee, is not usurious. A mortgagee is entitled to the benefit of such a covenant, and to charge a commission on the sale of the produce consigned to him. On the assignment by a mortgagee, the cost of supplies and contingencies furnished to the plantation previously to the assignment, but paid for subsequently by the assignee, may be added to the mortgage debt and charged against the estate. *Sayers v. Whitfield*, 1 Knapp. 133.

4. A. & Co. were general merchants, bankers, and commission agents, at Montreal, and their course of trade consisted principally in procuring and advancing to colonial dealers supplies of goods, cash, and negotiable securities, as required, from time to time, by their customers, to support them in their dealings, returns being made by them, after some interval of time, at their convenience, in the freight of produce, and in the payment of cash and negotiable securities. In the accounts they kept with C. and D. there was kept a column on both sides for interest from the time the payment was made or due; and, at the periodical close of the account, A. & Co. made a charge for their commission, calculated upon the balance due, and afterwards upon the cash advances:—Held, that it did not appear from the accounts that the charge for commission was a cloak for usury, but was to be treated as a *bonâ fide* compensation for the labour and inconvenience in conducting such business. *Pollok v. Bradbury*, 8 Moo., P. C., 227.

6. Mortgages.

Interest.] 5. Mortgagor gives second mortgage for what is due for the principal and interest on first mortgage, and also for interest upon interest due on the first mortgage; *quare* if second mortgage void as founded on usury. *Sackett v. Bassett*, 4 Madd. 58.

6. Where the interest due upon a mortgage had become in arrear, and in the mortgagee's account of arrears rests were made from time to time, on which interest was calculated, and ultimately a general account of all arrears calculated on the footing of those rests was signed by the mortgagor, and confirmed by a deed executed by him three years afterwards, for securing re-payment of the balance to the mortgagee:—Held, that these transactions were not usurious, and that the mortgagee was liable for the balance. *Blackburn v. Warwick*, 2 Y. & Coll. 92; 6 L. J., N. S., Exch. Eq., 17.

7. An agreement made upon the occasion of the intended transfer of a mortgage, that the interest of the mortgage money at 5 per cent. (to be reduced to 4 per cent. if paid within a limited time) should run from the date of the proposed transfer, being the date of the deed of transfer, although, owing to the mortgagor being then unprepared to procure the execution of that deed, the mortgage money, which was then ready to be advanced, was not actually advanced until a subsequent time:—Held, not to be usurious, less than 5 per cent. having in fact been taken, the transaction being *bonâ fide*, and there having been no absolute reservation of more than 5 per cent., but only a reservation from the burthen of which the mortgagor might at his option have discharged himself. *Long v. Storie*, 9 Hare 542; 21 L. J., N. S., Ch., 521; 16 Jur. 340.

8. mortgaged certain hereditaments to N. for 7,500*l.*, and his equity of redemption to C. for 5,000*l.* L. afterwards agreed to take a transfer of both mortgages, and to advance a sum of 12,500*l.* for that purpose, at interest at 5 per cent., reducible on prompt payment to 4 per cent. The transfer of the first mortgage not being ready to be executed, through the default of S., at the time appointed, L. advanced the 5,000*l.* at once, and took a transfer of the second mortgage; and at the same time S. signed a memorandum, acknowledging that the remainder of the money was ready (which was the case), and agreeing that interest on the first mortgage, when transferred to L., should run as from the date of that agreement, and that the deed of transfer of the first mortgage should bear date on that day. The deed of transfer of the first mortgage was not in fact executed, nor the 7,500*l.* paid over to N., until nearly six weeks afterwards:—Held, that the transaction was nevertheless good under the 12 Ann., c. 16. *Ib.*

Semble, a transaction not void in the first instance, and from which the borrower has the power to free himself by the payment of the principal and legal interest within a limited time, is not afterwards to be avoided because the borrower cannot, after the limited period, free himself without paying more than 5 per cent. *Ib.*

8. Covenant, before the Usury Act, reducing the rate of interest, to pay 6 per cent. is not prejudiced by the Act, but interest turned into principal by the course of the Court, was directed to carry interest at 5 per cent. only from the passing of the Act. *Interest*, by course of the Court, discretionary. *Astley v. Powis*, 1 Ves. 483.

9. If a mortgage be drawn for 5 per cent., and the mortgagee takes 6, it would be void on the word "take" in the 12 Ann., stat. 2, c. 16, s. 1. *Adlington v. Cann*, 3 Atk. 154.

10. A customer applied to his bankers to lend him 4,000*l.* at 5 per cent., which the bankers agreed to do. He then asked the bankers what balance he was expected to keep with them; they answered that he must not keep less than 1,000*l.*, upon which the customer said, "Very well, they might leave it to him." The customer paid into and drew out from the banking-house in one year various sums amounting to 108,000*l.*:—Held, that under these circumstances the loan was not usurious. *Exp. Geddes, Re Holthouse*, 3 Dea. & Ch. 638; 1 Mont. & A. 385.

1. Agreement by A. to purchase houses from B. for 431*l.* 10*s.*; possession to be given, and 200*l.* paid immediately, the rest with interest at Michaelmas; but if not then paid, A. to pay, in lieu of interest upon the same, a clear rent of 42*l.* per annum, out of which was to be deducted interest for the 200*l.* paid, not usurious. *Spurrier v. Mayou*, 1 Ves. J. 527; 4 Bro. C. C. 28.

2. Where title deeds were originally deposited to secure an advance of money at usurious interest, but without any written memorandum, and afterwards a further advance was made upon the promissory note of the depositor, also at usurious interest, and it was subsequently agreed by parol that a mortgage should be executed of the premises comprised in the deeds for both debts, with interest at 5*l.* per cent. per annum;—Held, upon motion *ex parte* (the defendant not appearing), to take *pro confesso* a bill praying a foreclosure or sale of the premises comprised in the deeds, that though the original deposit was void under the usury statutes, and the deeds had thenceforth remained in the possession of the plaintiff, yet the subsequent parol agreement constituted a valid equitable mortgage by deposit to secure both debts, just as if the deeds had been returned to the defendant, and re-delivered by him to the plaintiff upon the occasion of such agreement being entered into. *James v. Rice*, 18 Jur. 818; 23 L. J., Ch., 819; 5 De G. M. & G. 461; 2 Eq. Rep. 746.

[Redemption.] 3. W. lends to B. 200*l.* on the bond of B. and W., bearing interest at 5 per cent., and at the same time purchases from B. the rent-charges for lives of 50*l.* per annum for 800*l.* with a covenant that B. should be at liberty to re-purchase the rent-charge on giving three months' notice, and paying 350*l.* and all arrears of interest; W. and B. execute their joint and several bonds to W. in the penal sum of 700*l.* conditional for the payment of 350*l.* and for the regular payment of the rent-charge:—Held, to be a security for the loan of 200*l.* and 800*l.*, on the ground that W. was at all events secured by a bond for 700*l.*; but neither the right of re-purchase, nor the additional sum of 50*l.* to be paid thereupon, would have been sufficient to turn the transaction into a loan. *Verner v. Winstanley*, 2 Sch. & Lef. 393.

4. Bill praying re-assignment of lease, and stating a clause in assignment of power of redemption on paying a sum larger than the legal interest, added to original sum given, and in default thereof a foreclosure, is not demurrable on the ground of usury. *Metcalf v. Brown*, 5 Price 560.

5. A., a pawnbroker, sold to B. his trade and business, and stock in trade, and all profits, benefits, advantages, and emoluments resulting therefrom, for 600*l.*, which sum was allowed to remain in the purchaser's hands, and for which he was to pay A. 30*l.* a-year, as secured by deed. By a lease of the premises on which the business was carried on, bearing even date with the deed securing the payment of 30*l.* a-year, the rent reserved on the premises was 120*l.* B. became bankrupt; and when A. sought to put his debt on the file, the premises were sworn not to have been worth more than 60*l.* It was held, that the additional 60*l.*, unaccounted for, did not necessarily make the origi-

nal transaction between the parties usurious, so as to prevent A. from filing his proof against B.'s estate, but that the 60*l.* a-year above the rent might well be put down to the account of certain "facilities" afforded by A. to B., and which were in the nature of "goodwill," although "goodwill" was not expressed in terms to have been sold. *Exp. Lynn, Re Torrey*, 5 Jur. 1089.

In such a case as that above stated, there is not any usury, unless the assignee can show that a greater part of the 150*l.* a-year than 30*l.* is for the interest of the 600*l.* left in the purchaser's hands; and it lies with the assignee to show this, and not with the creditor seeking to put his debt on the file; but see *Exp. Campbell, Re Bromer* (2 Rose 51). *Id.*

6. In a foreclosure suit the Master was to state incumbrances and their priorities. A claim was carried in in respect of an usurious bargain, which he disallowed altogether. The claimant excepted, and the other incumbrancers, who were co-defendants, then contended that the transaction was void *ab initio*, though no objection to the security was taken upon the pleadings. The Court allowed the amount actually advanced by the claimant with interest as a debt, and would not permit the other incumbrancers as co-defendants to contest the validity of his security. *Mansfield (Earl) v. Ogle*, 3 W. R. 299; 24 L. J., Ch., 450; 1 Jur., N. S., 415. But on appeal:—Held, that the Master was right in disallowing the claim, although no objection had been taken to the usurious security on the pleadings. 8. C. 3 W. R. 557; 24 L. J., Ch., 450; 1 Jur., N. S., 603; 3 Eq. Rep. 907.

A person lent money to a remainderman upon the security of his reversion, upon condition that, if the tenant for life died within five years, the money repaid should be double that which was lent, and, if the tenant for life lived beyond five years, the money repaid should be treble that which was lent. Although it was not impossible that the tenant for life might live so long that the lender would receive no more than his principal with lawful interest, yet:—Held, that the transaction was a colourable evasion of the usury laws and void. *Id.*

7. *Semble*, that an agreement between A. and B., that A. should sell a leasehold interest in lands to B., and that B. should advance a certain sum of money to A., who should build a house of greater value upon the lands, and that B. should demise the lands and house to A. at a certain rent, calculated at the rate of 9 per cent. on the money to be advanced, with liberty to A. to fine down the rent at 9 per cent., is not usurious. *Domling v. Legh*, 3 J. & L. 716; 9 Ir. Eq. R. 413.

8. A., a builder, being lessee of lands for terms of seventy years for building purposes, signed an agreement in writing, whereby in consideration of moneys to be advanced to him by B. for building, he agreed to assign the leases to B., subject to the ground rents and to the several conditions therein contained, and to take the under-leases from B. (when the houses should be completed) for the whole of the terms, wanting ten days, at a rent that should amount to 8 per cent. upon the money to be advanced, such rents to commence from the time of the respective advances. By a sub-

sequent document, signed by A., in which he acknowledged certain advances, and stated that he had built two shops; after repeating the above agreement, he added, "It is also agreed that I am to have the privilege of selling the two shops, provided I repay you the amount advanced on the shops, and all interest due thereon, to the day you assign the lease or leases to me or my nominee":—Held, that these agreements were usurious. *Belcher v. Vardon*, 2 Colly. 162; 14 L. J., N. S., Ch., 427; 9 Jur. 546.

Leases to Mortgagee.] 1. A contract between mortgagor and mortgagee for a lease to be granted by the former, in consideration of forbearance, is usurious. *Gubbins v. Creed*, 2 Sch. & Lef. 218.

2. A lease for 999 years made by mortgagor to mortgagee, set aside; the policy of the law upon which the Statutes of Usury are founded not permitting such a transaction between persons standing in the relation of the mortgagor and mortgagee. And this, *semble*, although the lease was made at a fair value. *Webb v. Horke*, 2 Sch. & Lef. 661.

3. A fee-farm grant or lease of mortgaged premises from mortgagor to mortgagee at a fixed annual rent, is among that description of transaction at which courts of equity look with great jealousy. *Hicks v. Cooke*, 4 Dow 24.

7. Partnership.

4. Deed by which A., B., and C., partners in trade, in consideration of 4,000*l.* paid to them by D., in augmentation of their capital, agree to admit him into partnership with them for a term: it was agreed that A. should receive in lieu of profits a clear sum of 550*l.* per annum, and all the property of the concern was charged with the payment of this sum quarterly, and of the 4,000*l.* at the determination of the partnership. A., B., and C. were to pay rent, taxes, wages, and the other outgoings out of the trade, which was to be carried on by them and in their names only, and D. was not to be required to attend to it. D. was at liberty to retire on giving twelve months' notice, and on his retiring, or at the end of the term, the 4,000*l.* and the arrears (if any) of the 550*l.* per annum were to be paid to him by A., B., and C. by instalments, to be secured by their bonds, and they were to indemnify him from the debts of the partnership:—Held, that this deed was not usurious. *Fereday v. Hordern*, Jac. 144.

5. Agreement between two traders, that one shall advance the fund and the other superintend the business; the profit to be equally divided, but the entire loss, if any, to be borne by the latter; not usurious but *nudum pactum* as to the last clause, and such an agreement ought to be construed as constituting a partnership, the loss to be borne as well as the profits shared equally. An agreement may be perfectly equitable, although it is usurious. But if it is usurious, the law determines it, and its *bona fides* cannot avail it. *Brophy v. Holmes*, 2 Moll. 1.

6. A. lends B. money to enable him to commence business at 5 per cent. interest. After the loan B. agrees to pay to A. one-eighth of the annual profits by monthly payments, which

offer A. accepts, and B. accordingly makes several monthly payments, for which A. gives B. receipts on account:—Held, that the balance of the principal and interest due from B. to A. was a good petitioning creditor's debt, not arising out of a partnership, nor affected by usury. *Exp. Briggs*, 3 Dea. & Ch. 367; 1 Mont. & A. 46.

7. The Frugal Investment Association was formed in 1845, and was certified under the 4 & 5 Will. 4, c. 40. Its objects were to advance the society's funds to its members, and to accumulate them, and to divide the profits periodically. The advances were made by putting up a share at one of the meetings for competition among the members, and the member offering the highest premium for it was entitled to that share, and as many more, to the number of twenty, as he chose to take at the same premium. For each share so taken he was to pay the premium agreed upon, and also 8*s.* a month for 100 months (during which time only the society was to exist) as redemption money; and on these conditions he might have an immediate advance of 100*l.*, the full value of his share, on giving security for the repayment of it, together with such premium and redemption money. He was also entitled to participate in the general profits of the society. B. became a member, and obtained an advancement of five shares, at premiums of 71*l.* for three, and 73*l.* for the other two; and he gave security as required, and received an advance of 500*l.* B. died, and on the society pressing for payment of the moneys so secured to them, B.'s executrix filed a bill against them, alleging that the transaction was usurious, and the society illegal, and claiming to redeem the security on repayment of the 500*l.* with legal interest only:—Held, on the authority of *Silver v. Barnes* (6 Bing. N. C. 180), that the transaction, being between partners, was not usurious. *Burbridge v. Cotton*, 5 De G. & Sm. 17; 21 L. J., N. S., Ch., 201; 15 Jur. 1070.

8. Stock, Re-transfer of.

8. Contract for re-payment of a debt with legal interest, or, at the option of the creditor, to transfer so much stock as it would have produced on the day it was payable, void as usurious, the principal and interest being secured, with a chance of a rise of the stock: not therefore like a contract to replace stock absolutely which might fall. *Barnard v. Young*, 17 Ves. 44.

9. One agrees to lend 1,000*l.* at 5 per cent., and for that purpose sells 1,000*l.* South Sea annuities, which, being under par, did not produce 1,000*l.*; he advances the money so produced, and takes mortgage for 1,000*l.*:—Held, a shift within the Statute of Usury; and the difference between the price at which the stock was sold ordered to be repaid, on a bill brought after a decree for foreclosure, and the whole money allowed in the account taken under that decree. *Moore v. Battie*, Amb. 371.

10. C. being indebted to G. in 1,000*l.* agreed to transfer within a given time 100*l.* per annum, long annuities, at the then price, and in the meantime pay G. the dividends, and that the debt of 1,000*l.* should constitute part of the purchase-

money. The stock was not purchased at the time, and there was a rise in the price of stocks. The agreement held not usurious or within the Stock Jobbing Acts. *Clark v. Giraud*, 1 Madd. 511.

1. A contract of loan which gives the lender the option of claiming either a sum of money or a certain amount of stock for re-payment of the principal is usurious. *Johnson v. Williamhurst*, 1 L. J., Ch., 112.

2. A executed a bond and mortgage to B., to secure 2,000*l.* lent to him by B., with interest at 5 per cent., B. having sold out a sum of stock to enable him to make the loan, the dividends of which exceeded the interest of 2,000*l.* at 5 per cent. A. afterwards agreed, in consideration of her letting the 2,000*l.* continue secured at interest as aforesaid, to transfer to her, when requested so to do, the amount of the stock sold out; or at her option to pay to her a sum of money sufficient to re-purchase it, in the meantime to pay to her the amount of the dividends of it instead of the interest of the 2,000*l.* :—Held, that the agreement was additional to and not substitutional for the bond and mortgage, and was therefore usurious. *Powney v. Blomberg*, 14 Sim. 179; 13 L. J., N. S., Ch., 450; 8 Jur. 746.

3. In 1816 A. transferred 10,000*l.* Three per Cent. to B., which he sold, and, after retaining 6,000*l.*, repaid the surplus to A. Concurrently, B. gave to A. a bond conditioned for the repayment of 6,000*l.*, and 5 per cent. interest, and he wrote to A. engaging to replace the 6,000*l.* in the Three per Cent. In 1822, B. admitted his obligation to restore to A. the stock sold out. The Court, in 1852, considering that the contract was for restoring the stock, and that A. had not the option of taking stock or money, held that the contract was not usurious. *Godard v. Lethbridge*, 16 Beav. 529.

9. Trade Custom.

4. Under an agreement to take off a discount above 5 per cent., for prompt payment, though, according to the custom of the trade, the creditor cannot, upon failure, charge more than 5 per cent. *Exp. Aynsworth*, 4 Ves. 678.

5. A custom in Liverpool for the banker to strike a balance every quarter, and send the account to the merchant, and then to make that balance carry interest for the next quarter, is not usury. *Callet v. Walker*, 2 Anstr. 495.

6. Where sums of money advanced, and to be advanced, are secured by deed, and the dealings then contemplated by the parties are tainted with usury, the deed is wholly void as a security, although the legal debt is not impeached. A. employs B. as a calico printer, and before the accounts for printing become due, from time to time advances him various sums of money, charging him, besides interest, with 1½ per cent. as a trade premium, which it was customary for persons in the same trade to take under the like circumstances. A. was also in the habit of paying debts owing by B. to other persons before they became due, when A. deducted the usual discount, but charged B. with the full amount, besides interest and the trade premium above mentioned. *Semble*, that both these modes of dealing were usurious; they were however at best of so suspicious a

nature, that the Court declined to make an order for the sale of the property under the deed, but directed an action of ejectment to be brought by A. against the assignees. A., having succeeded upon the trial, applied for the costs of the petition, which the Court under these circumstances declined to grant, the petition being against the judgment of the commissioners. *Exp. Millington*, 3 Dea. & Ch. 298; 1 Mont. & A. 114.

7. An agreement between two houses in the habit of dealing with each other, that either party should pay interest to the other on the balance which might be due from it in the course of trade, is an agreement for a loan of money within the usury laws. *Exp. Guillebert, Re Trye*, 3 Mont. & A. 455; 2 Dea. 509; 7 L. J., N. S., Bky., 25.

IV. DISCOVERY.

8. Bill not suggesting wilful usury, but that defendant had miscomputed interest received by him, and praying discovery as to the fact. Plea thereto overruled. *Anon.*, 2 Eq. Abr. 70. S.P. *Bosanquet v. Dashwood*, Forrest. 38; *id.* 534.

9. Where Statute of Limitations had run against recovery of penalty for usury, the usurer cannot protect himself from discovery, by demurrer founded on liability of subjecting himself to forfeiture. *Talbot v. Smith*, 1 Ridgw. L. & S. 360.

10. On a bill to set aside an usurious contract defendant may demur to a discovery of what interest he agreed to take, for he cannot set forth that without discovering the very interest he has taken. *Chauncey v. Tahourden*, 2 Atk. 393.

In the case of money lost at gaming, and paid, possibly this Court will refuse relief; the plaintiff in equity being *particeps criminis*. *Ib.*

V. TERMS OF RELIEF.

11. Demurrer to a cross bill to have an usurious security delivered up, not offering to pay the sum really due, allowed. *Mason v. Gardiner*, 4 Bro. C. C. 436.

12. If it be necessary to have the assistance of a court of equity to set aside an usurious contract, it must be on the terms of paying what is fairly due, with legal interest. *Scott v. Nesbitt*, 2 Cox 183; 2 Bro. C. C. 641.

13. Bill to stay proceedings at law and discover usury, charging an agreement to take, but not the taking, usurious interest, and not offering to pay the amount, which the plaintiff by bill admitted legally due, is demurrable. *Whitmore v. Francis*, 8 Price 616.

VACATION.

See PRACTICE (VACATION).

VALUATION.

- *Of Annuities.* See ANNUITY, XII.—BANKRUPTCY, XXIV. I. 4.
- *Sale at.* See VENDOR AND PURCHASER, V.

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1. In General.

1. The defendant on the 6th June offered in writing to sell his farm for 1,000*l.*, but the plaintiff offered 950*l.*, which the defendant, on the 27th June, after consideration, refused to accept. On the 29th the plaintiff, by letter, agreed to give 1,000*l.*, but there appeared to be no assent on the part of the defendant, though there had been no withdrawal of the first offer:—Held, that there was no binding contract within the Statute of Frauds. *Hyde v. Wrenoh*, 8 Beav. 334; 4 Jur. 1106.

2. Bill against a remainderman for the specific performance of an agreement by the tenant for life, dismissed, the agreement not having been so finally concluded that either party might have had it specifically executed. *Low v. Swift*, 2 Ball & B. 529.

3. M., by letter addressed to G., proposed to sell to him premises at the price of 5,000*l.* M. had no legal title to the premises, and, at an interview at the office of F., who was M.'s solicitor, G. refused to give more than 4,800*l.* M. said he would not give any title but that which he would himself get under a family arrangement, and, as to the offer of 4,800*l.*, he said he would not take less than 5,000*l.*, and that there was an end to the matter. Subsequently, at the same interview, G. said he would give 5,000*l.* F., in answer to G., who asked should not some writing be drawn up, said he could not allow M. to enter into a contract at that moment, nor advise G., in the

absence of his solicitor, to agree to the conditions which he, F., would think necessary for M.'s protection. The parties separated; G. under the impression that there was, M. under the impression that there was not, an acceptance by G. of M.'s original proposal, and a concluded agreement between them:—Held, that G. could not sustain a bill for specific performance. *Gradwell v. Maguire*, 6 Ir. R., Eq., 477.

1. Where a letter contains the entire terms of an agreement for purchase of lands, it is not necessary for the plaintiff to prove that he accepted the terms: if it required the plaintiff to supply a term in the agreement, there must be a special acceptance in writing supplying that term, in order to take the case out of the Statute of Frauds. *Boys v. Ayerst*, 6 Madd. 316.

2. An iron company, owners of a private railway, desirous of connecting their line with other railways by means of a branch line, applied to the landowners, and to O. and his mortgagees, for wayleaves through their lands; and an offer in writing was made to them in March 1843, by O. and his mortgagees, of a wayleave through their lands, by a leave of sixty years, by the payment of triple damages yearly. There was no express acceptance by the company of the offer. The iron company assigned all their interest to a railway company who was to construct the line. In October 1843 the proposed line was staked out over the lands of O., and in July 1844 (all the other landholders being settled with) the works were commenced; and in 1845 the line was open for traffic. In June 1844 the mortgagees of O., under the power of sale, sold and conveyed the property, including the land on which part of the line was formed, to B., who sold to S. From 1844 to 1847 unsuccessful negotiations had been pending between the parties for settling the quantum of the yearly rent; and in 1847 S. brought ejectment against the company. The company then filed a bill to stay proceedings at law, and for specific performance, alleging acceptance of the offer of March 1843, by the acts of the company in staking out and making their line in accordance with the offer, and praying that the Court would determine the quantum of rent to be paid:—Held, that the acts of the company did not amount to an acceptance of the offer so as to make it a contract binding the land, and the bill was dismissed. *Meynell v. Shutees*, 2 Jur., N. S., 737; 25 L. J., Ch., 257; 3 W. R. 535. Affirming 3 Sm. & G. 101; 1 Jur., N. S., 80.

An offer to sell land, to be binding upon the person making it, must be accepted within a reasonable time. *Id.*

If the person making the offer die, become bankrupt, or sell, before acceptance of the offer, the land is not bound. *Id.*

The scope of the bill being for specific performance of an alleged contract:—Held, that the plaintiffs were not entitled to relief on the principle of quieting possession. *Id.*

3. A., being entitled to certain lands in fee, granted annuities out of them to B., to secure moneys advanced by him. A. subsequently agreed to sell the lands to C., in order to redeem the purchase money and leasehold interest under eviction, representing to him

that B. would join in the conveyance. A. executed the conveyance to C., but he refused to allow A. to get the purchase money until B. would discharge the lands of the annuities, which B. refused to do unless he were paid off. A. subsequently sold the lands to B., who had notice of the prior deed. On a bill filed by C., to set aside the sale to B.:—Held, that by C.'s conduct the contract was incomplete, notwithstanding that the deed was executed, and that A. had a full right to sell to another. *Leader v. Ahearn*, 2 Con. & L. 534; 4 Dr. & War. 495.

4. A. B. was authorised by the defendant to make a proposal of sale of some land to the plaintiff, but to be accepted within a week. The plaintiff wrote to A. B. within that time, accepting the offer, but A. B. did not communicate the acceptance to the defendant until long after:—Held, that there was a valid contract, which was not destroyed by the neglect of A. B. to communicate the acceptance to the defendant. *Wright v. Bigg*, 15 Beav. 592.

5. Unless a valid acceptance be given, within a reasonable time, to a written offer to sell an estate, it will be treated as abandoned. *Williams v. Williams*, 17 Beav. 213.

6. An offer for the sale of land was sent by the vendors to the purchaser upon certain terms. No acceptance of such offer came from purchaser, but only a request to be furnished with draft contract. A draft was sent, and nothing further was done in the matter for two months, when the vendors wrote to say that they treated the proposed sale as entirely off:—Held, the vendors had a right to refuse to proceed with the proposed sale. *Runnens v. Robbins*, 11 Jur., N. S., 631; 13 W. R. 979; 11 L. T., N. S., 717; 3 De G. J. & S. 88.

7. Where the proposed vendor wrote: "I have let this house to you (the proposed purchaser) on the following terms, etc." (stating the terms at length), to which he replied, "At the risk of being thought capricious and irresolute, I have to ask you if you will for a pecuniary consideration allow me to withdraw from my obligation to take your house and farm," etc., and in the subsequent correspondence the proposed purchaser referred to his "engagement," etc.:—Held, that the contract could be inferred from the tenor of this correspondence with certain telegrams taken together, and specific performance decreed accordingly. *Coupland v. Arrowsmith*, 18 L. T., N. S., 755.

8. A tenant in common of leaseholds in a negotiation for their purchase offered by letter to send an abstract of title, but the terms of the contract were too uncertain to bind his co-tenant; neither such offer, nor his refusal to disclose the lessor's title, will entitle the purchaser to specific performance. *Mason v. Tyler*, 27 L. T., N. S., 371.

9. An intended vendor of freehold property, who had bought under stringent special conditions, instructed her solicitor, in conformity with his own advice, to sell the property subject to the same or similar conditions as or to those under which she had bought. Acting under this limited authority, the solicitor gave the necessary instructions by letter to a house agent, whom at a personal interview on the same day he expressly forbade to sign

anything, saying that any contract would have to be prepared by the solicitor's firm. An intended purchaser, by letter handed to the agent, agreed to give the price which the agent was authorised to accept (not, however, simply accepting the terms of the prior letter), and at the time requested an acceptance of this offer by the agent in writing, a request to which the agent declined to accede, giving as his reason the prohibition under which he was from entering into any contract. The intended vendor at this stage of the proceedings repented of her intention to sell, but was willing to proceed if the solicitor was of opinion that she could not honourably recede. A personal interview having taken place between him and the intended purchaser, who declined to give up the intended purchase, the solicitor wrote to the intended purchaser a letter saying that his firm were instructed to proceed with the sale, and adding that the draft contract was being prepared, and would be forwarded for approval. Disputes having subsequently arisen, and the intended purchaser having filed a bill for specific performance:—Held, first, that at the date of the letter of the intended purchaser to the agent no contract was in existence, and that that letter, coupled with the prior letter of the solicitor to him, did not amount to a sufficient memorandum in writing of the terms of a contract. *Clinnook v. Ely (Marchioness)*, 4 De G. J. & S. 638; 6 N. R. 1; 11 Jur., N. S., 329; 13 W. R. 597; 12 L. T., N. S., 251. Reversing 13 W. R. 176; 11 L. T., N. S., 536.

Held, secondly, that the letter of the solicitor to the intended purchaser was no recognition of the fact that there had been a complete sale, and did not amount to an acceptance of the terms stated by the intended purchaser in his letter to the agent, but merely to either a conditional acceptance of the intended purchaser's terms, subject to a draft contract being agreed to, or an expression of unwillingness to continue the interrupted negotiation, and for that purpose to prepare a form of agreement. *Id.*

Held, thirdly, that if the letter of the solicitor of the intended purchaser had had the effect which the Court decided that it had not, it would not have been binding on the intended vendor, as being beyond the authority vested by her in her solicitor. *Id.*

An agreement is the result of the mutual assent of two parties to certain terms: and if it is clear that there is no consensus, what may have been written or said becomes immaterial. S. C. 4 De G. J. & S. 638.

As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his agent lawfully authorised, there exist all the materials which a court of equity requires to make a legally binding contract. *Id.*

But where to a proposal or an offer an assent was given subject to a provision as to a contract:—Held, that the stipulation as to the contract was a term of the assent, and there was no agreement independent of that stipulation. *Id.*

1. A bill was filed by a principal against an agent to enforce specific performance of an agreement which was alleged to have been

entered into for the purpose of settling certain matters in dispute between them. The principal had, prior to the alleged agreement, charged the agent with having committed various frauds upon him, and all these matters were to have been disposed of by the agreement. In the bill all these charges of fraud were repeated as substantive allegations, and the defendant went into evidence to rebut the charges:—Held, that the evidence did not show that any concluded agreement had been come to between the parties. *Forester v. Read*, 19 W. R. 114; 6 L. R., Ch., 40; 24 L. T. 79.

2. A plaintiff filed a bill for a specific performance of an agreement into which he had entered with the defendant. The parties disputed the construction of one of the clauses in the agreement, the defendant swearing that his intention at the time of executing the agreement was not according to the construction contended for by the plaintiff. The Court was of opinion that the defendant's construction was plainly the correct one, but independently of that, being satisfied that there had been no concord between the parties, dismissed the bill. *Griffin v. Coleman*, 28 L. T. 493.

3. Specific performance of an agreement, whereby a railway company agreed to construct and maintain a siding on land, was decreed, although the owner of the land had previously entered into negotiations with the company for compensation in respect of the breach of the agreement. *Green v. West Cheshire Railway Co.*, 13 L. R., Eq., 44; 41 L. J., Ch., 17; 25 L. T. 409; 20 W. R. 54.

4. Two of the plaintiffs were the legal owners of a leasehold interest in a house, and claimed 37l. from the defendant for the use and occupation of it during the three last months of their term. They authorised him to pay this amount to another of the plaintiffs, who was owner of the reversion. She called on the defendant, who expressed his willingness to pay her the money, though he did not make any actual tender of it, but she refused to receive it, and demanded more. The plaintiffs then sued the defendant for the use and occupation, and claimed 238l. The defendant paid 37l. into court:—Held, that as soon as the defendant expressed to the agent his readiness to pay the 37l. there was a concluded agreement between him and the plaintiffs for that amount, and that the plaintiffs could not recover more. *Gretton v. Mess*, 7 L. R., Ch. D., 839; 38 L. T. 506; 26 W. R. 607.

Held, also, that the defendant was entitled to the costs of the action from the time of the payment into court. *Id.*

5. Circumstances in the conduct of two parties may establish a binding contract between them, although the agreement, reduced into writing as a draft, has not been formally executed by either. *Brogden v. Metropolitan Railway Co.*, 2 L. R., App. Cns., 666.

6. In such a case the word "approved," written by one of the parties at the end of the draft agreement, must be taken as an approval of the substance of the draft, and not, as in the case of a conveyancer's or solicitor's draft, an approval of the mere form. *Id.*

7. B. had for some years supplied a railway company with coals. At last it was suggested

by B. that a contract should be entered into between them. After their agents had met together the terms of agreement were drawn up by the agent of the company and sent to B. B. filled up certain parts of it which had been left in blank, and introduced the name of the gentleman who was to act as arbitrator in case of differences between the parties, wrote "approved" at the end of the paper, and signed his own name. B.'s agent sent back the paper to the agent of the company, who put it in his desk, and nothing farther was done in the way of a formal execution of it. Both parties for some time acted in accordance with the arrangements mentioned in the paper. Coals were supplied and payments made as therein stated, and when some complaints of inexactness in the supply of coals, according to the terms stated in the paper, were made by the company, there were explanations and excuses given by B., and the contract was mentioned in the correspondence, and matters went on as before. Finally disagreements arose, and B. denied there was any contract which bound him in the matter:—Held, that these facts, and the actual conduct of the parties, established the existence of such a contract, and there having been a clear breach of it, B. must be held liable upon it. *Ib.*

B. was a chief partner in a partnership of three persons. The word "approved" written by him and signed with his name was treated as an assent binding on all the partners (whose names were mentioned in the paper), although the usual form of signature of the partnership was that of "B. & Sons." *Ib.*

A mere mental assent to the terms stated in a proposed contract would not be binding, but acting upon those terms, by sending coals in the quantities at the prices mentioned in it, amounted to sufficient to show the adoption of the writing previously altered and sent, and to constitute it a valid contract. *Ib.*

The onus of showing that both parties had acted on the terms of an agreement which had not been, in due form, executed by either, lies upon the party who rests his case on that circumstance. *Ib.*

1. Where a court has to find a contract in a correspondence, and not in one particular note or memorandum formally signed, the whole of that which has passed between the parties must be taken into consideration. *Hussey v. Horne-Payne*, 4 L. R., App. Cas., 311; 48 L. J., Ch., 846; 41 L. T. 1; 27 W. R. 585.

Per Lord Selborne:—The observation stated in *Jervis v. Berridge* (8 L. R., Ch., 351; 42 L. J., Ch., 518; 21 W. R. 96; 27 L. T., N. S., 436), that "the Statute of Frauds is a weapon of defence, not offence, and does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties," affirmed. *Ib.*

See also LANDLORD AND TENANT, I. i. 1.

2. Withdrawal of Proposal.

2. A. signed a memorandum of agreement, by which he agreed to sell to B. and C. all his interest in a partnership business on a certain

valuation, "this purchase being contingent upon B. and C. being able to agree on the purchase with the rest of the retiring partners." The memorandum was not then signed by B. and C., who proceeded to negotiate with the other partners for the purchase of their interests. A fortnight after signing the memorandum A. wrote to B. and C., withdrawing from his offer, on the ground that they had not complied with the condition alleged to have been verbally made by him that they should accept within a week. Letters passed, in which B. and C. did not state that they had accepted the offer, or that they considered A. as irrevocably bound, but that they had not as yet been able to complete the negotiations. They subsequently signed their acceptance upon the memorandum of agreement:—Held, that there had been no such acceptance by B. and C. before A. had withdrawn from his offer, as to constitute a binding agreement against him for the sale of his partnership interest of which specific performance could be enforced, or so as to preclude him from his right to the partnership account. *Horsfall v. Garnett*, 6 W. R. 387.

3. When an offer in writing is made by the owner to sell an estate on specified terms, and this is unconditionally accepted, there is a binding contract, which neither party can vary, but the owner is entitled at any time before his offer has been definitively accepted to add any new terms to his proposal. If these be refused, the treaty is at an end. *Honeyman v. Marryat*, 21 Beav. 14; 3 W. R. 502; 1 Jur., N. S., 867. And see S. C. 6 H. L. Ca. 112; 4 Jur., N. S., 17; 26 L. J., Ch., 619.

4. An offer to sell property may be withdrawn before acceptance without any formal notice to the person to whom the offer is made. It is sufficient if that person has actual knowledge that the person who made the offer has done some act inconsistent with the continuance of the offer, such as selling the property to a third person. *Dickinson v. Dodds*, 2 L. R., Ch. D., 463; 34 L. T., N. S., 607; 24 W. R. 594; 45 L. J., Ch., 777. Reversing 34 L. T., N. S., 191.

Semble, that the sale of the property to a third person would of itself amount to a withdrawal of the offer, even although the person to whom the offer was first made had no knowledge of the sale. *Ib.*

Semble, that the acceptance of an offer to sell constitutes a contract for sale only as from the time of the acceptance. The contract does not relate back to the time when the offer was made. *Ib.*

On Wednesday A. signed and delivered to B. a memorandum in these words: "I hereby agree to sell to B. certain freeholds for 800l." Then followed a postscript, also signed by A.: "This offer to be left over until Friday, 9 o'clock a.m." On Thursday A. entered into a contract to sell the freeholds to C. On Friday morning, before 9 o'clock, B., who had become aware that A. had entered into a contract for the sale of the property to C., but had received no notice of such contract from A., handed to him a written acceptance of the offer, which A. refused to receive, saying that the property was already sold. On a bill by B. for specific performance:—Held, that the memorandum signed by A. was a mere offer,

which he was entitled to withdraw at any time before acceptance; that it was too late for B. to accept the offer after he had become aware that A. had entered into a contract to sell the property to another person, and that the bill must, therefore, be dismissed with costs. *Id.*

3. Acceptance whether Simple or Conditional.

1. Contract by letter thus:—I will give 16,000*l.*; answer, I will not take less than 17,000*l.*; answer returned, I will give 17,000*l.*:—Held, not agreement within statute. *Popham v. Eyre*, Loft. 786.

2. Specific performance of agreement agreed upon an offer by letter, which was forthwith accepted by another letter in reply. *Ford v. Compton*, 2 Bro. C. C. 32.

3. In order to constitute an agreement by letter, the answer to the written proposals must be a simple acceptance of the terms proposed without the introduction of any new or different terms. *Holland v. Ayre*, 2 Sim. & S. 194.

4. A proposal by a purchaser to take the remainder of a lease, was answered by letter, which, after acceding to the proposal, added, "We hope to give you possession at half-quarter day":—Held, that the addition did not introduce a new term, but that the acceptance was unconditional. *Clive v. Beaumont*, 1 De G. & Sm. 397; 13 Jur. 226.

5. Letters will not constitute an agreement which the court will specifically perform, unless the answer is a simple acceptance, without the introduction of a new term. *Wright v. St. George*, 12 Ir. Ch. R. 226.

6. The defendant, on the 6th June, offered in writing to sell his farm for 1,000*l.*; but the plaintiff offered 950*l.*, which the defendant, on the 27th June, after consideration, refused to accept. On the 29th the plaintiff, by letter, agreed to give 1,000*l.*, but there appeared to be no assent on the part of the defendant, though there had been no withdrawal of the first offer:—Held, that there was no binding contract within the Statute of Frauds. *Hyde v. Wrench*, 3 Beav. 334; 4 Jur. 1106.

7. Where a letter contains the entire terms of an agreement for purchase of lands, it is not necessary for the plaintiff to prove that he accepted the terms; if it require the plaintiff to supply a term in the agreement, there must be a special acceptance in writing, supplying that term, in order to take the case out of the Statute of Frauds. *Boys v. Ayerst*, 6 Madd. 316.

8. The Court will not enforce the specific performance of a contract constituted by a proposal on one side, and an acceptance on the other, unless the acceptance is unqualified and unconditional. *Oriental Inland Steam Navigation Co. v. Briggs*, 10 W. R. 125; 5 L. T., N. S., 477.

Therefore, when B. had written to the directors of a company, applying for an allotment of shares and undertaking to sign the articles of association, and the secretary of the company in reply had informed him by letter that the directors had allotted him the shares, adding that the articles of association must be signed, or, in default, that the shares

would be forfeited, and a bill was filed by the company against B., who had declined to sign the articles of association, stating the contract, and praying that B. might be compelled to sign the articles, and such acceptance of the shares as the Court might think necessary—a demurrer to the bill was allowed. *Id.*

9. A letter allotting shares stated that the allotment money must be paid on the 21st March, and punctual payment was requisite, and that the bankers were instructed not to receive payment after that day without interest at 10 per cent.:—Held, that this addition relative to interest was not an introduction of a new term. *Re Imperial Land Company of Marseilles, Harris's case*, 7 L. R., Ch., 587; 41 L. J., Ch., 621; 26 L. T. 781; 28 W. R. 690.

10. A, the agent of an intending purchaser of leaseholds, wrote to B., the vendor's agent, that he "could give him 50*l.* for the lease, plant, etc., if accepted at once." B., in reply, asked A. to allow the offer to remain open for twenty-four hours, in order that he might submit it to his employer. On the following day he wrote to A., "I am directed to accept your offer of 50*l.* for the lease, etc. . . . I shall be here at 11 to 11.30 to-morrow morning to sign contract." A. did not reach B.'s office until 12 o'clock. B. had waited for him until 11.45, and then sold the property to a third party:—Held, that the letters continued a binding contract, and specific performance was enforced against the vendor. *Branson v. Stammers*, 28 W. R. 180.

11. A letter, accepting an offer to purchase an estate on the terms stated in an advertisement, added a sum for deposit, and a day for completing the purchase. No reply was given to this letter:—Held, that there was no complete contract on which to sustain a bill for specific performance. *Honeyman v. Marryatt*, 6 H. L. Ca. 112; 4 Jur., N. S., 17; 26 L. J., Ch., 619.

A. offered to purchase an estate for 25,000*l.* The vendor accepted the offer, subject to the terms of a contract being arranged between their solicitors, and requiring a deposit of from 1,200*l.* to 1,600*l.* The vendor's solicitor afterwards sent a draft of agreement to A.'s solicitor for perusal, reciting the payment of the 1,500*l.* deposit money on the day of the date of the agreement, which was left blank, and before it was returned wrote a letter stating that unless the agreement was completed and the deposit paid before a particular day named by him, the vendor would consider the treaty at an end. A.'s solicitor wrote in answer that he approved the agreement on his client's behalf save as to the amount of the deposit money, and requesting further time to complete. The vendor's solicitor then enlarged the time for completion, again stating that unless the 1,500*l.* deposit money was paid by the day then specified, the vendor would proceed to the sale of the property. The money not being paid upon that day, the vendor's solicitor immediately wrote that the treaty was at an end. A few days afterwards A. tendered the 1,500*l.*, and offered to agree to the terms of the draft as originally furnished. This offer was refused. Upon demurrer to bill for specific performance:—Held, that there was no concluded contract between the parties; that before the terms originally pro-

posed were accepted the vendor had a right to fix a time for the payment of the deposit money, and make time of the essence of the contract; and the demurrer was allowed. S. C. 1 Jur., N. S., 857; 21 Beav. 14; 3 W. R. 502.

1. A. wrote to B. offering to sell him an estate for 37,500*l.*, or a part of the estate for a less sum, and added a postscript reserving the right to remove the materials of a house. B. replied: "I beg to acknowledge the receipt of your letter stating that you are willing to accept 37,500*l.* for the whole of your freehold land at N. I hereby accept your terms as above, and agree to pay you the said sum of 37,500*l.* for your land":—Held, by Jessel, M. R., that this was an acceptance of the terms in A.'s letter, including the postscript. *Hussey v. Horne-Payne*, 8 L. R., Ch. D., 670; 47 L. J., Ch., 751; 38 L. T. 543; 6 W. R. 703. And see S. C. 4 L. R., App. Cas., 311; 48 L. J., Ch., 846; 41 L. T. 1; 27 W. R. 585.

2. The owners of land, in answer to a written offer to buy it, wrote saying they had received the offer, and added, "which offer we accept," and now hand you two copies of conditions of sale which we have signed; we will thank you to sign same, and return one of the copies to us":—Held, that this was not an unqualified acceptance, and did not make a contract. *Crossley v. Maycock*, 11 L. R., Eq., 180; 43 L. J., Ch., 379; 22 W. R. 387.

4. Acceptance subject to Approval of Title.

3. A. made a written offer to B. to sell him property at a certain price, and B. wrote in reply, and accepted the offer, "subject to the title being approved by our solicitors":—Held, that the words "subject to the title being approved by our solicitors" was a new term introduced by B., which, not having been acceded to by A., there was no concluded contract. *Hussey v. Horne-Payne*, 47 L. J., Ch., 751; 8 L. R., Ch. D., 670; 26 W. R. 703; 38 L. T., N. S., 543. Reversing 47 L. J., Ch., 519; 26 W. R. 532; 38 L. T., N. S., 341. And see S. C. 5 L. R., App. Cas., 311; 48 L. J., Ch., 846; 27 W. R. 585; 47 L. T. 1.

Held, also, that where such a term is assented to, it makes the solicitor the judge whether or not a proper title is deduced, and, if he acts *bonâ fide* and reasonably, the Court will not interfere, although his objections to the title may not be well founded in law. *Id.* Per Cotton, L. J.

Per the Lord Chancellor:—*Quære*, whether the addition, in a written document, of the words "subject to the title being approved by our solicitor," could affect a contract for the sale of land, otherwise complete in itself. S. C. in Dom. Proc.

Quære, whether the proper meaning of such words is more than that the title offered is not to be accepted without investigation, and that objections made on such investigation would be subject to the decision of a legal tribunal. *Id.*

4. A contract for the purchase of a lease stated that it was made "subject to the approval of the title by the purchaser's solicitor":—Held, that, in the absence of *mala fides* or unreasonableness on the part of the pur-

chaser or his solicitor, the vendor could not enforce specific performance of the contract if the purchaser's solicitor disapproved of the title. *Hudson v. Buck*, 7 L. R., Ch. D., 683; 38 L. T., N. S., 56; 47 L. J., Ch., 247; 26 W. R. 190.

A sale of a leasehold house was subject to approval of the purchaser's solicitor. The house and another was included in one lease, at one rent, and subject to restrictive covenants as to the whole:—Held, that (the vendor not having proved that he could obtain an apportionment of the rent and covenants) the purchaser could rescind. *Id.*

5. Acceptance subject to Consent of Third Parties.

5. A contract for the sale of land provided, that one party was to be consulted on any houses proposed to be built thereon by the other, and in case of difference, that A. and B., or their nominees, should have power to decide any such question. There having been no decision:—Held, that the Court could not specifically perform the contract. *Tillett v. Charing Cross Bridge Co.*, 26 Beav. 419; 5 Jur., N. S., 994; 28 L. J., Ch., 863.

6. Where a contract is made which both parties to it know at the time cannot be carried out without the act or consent of a third party, and that act or consent is done or given by the third party within a reasonable time, and he does nothing inconsistent with such act or consent, want of mutuality at the time of contract is no bar to its performance. *Blackburn Union v. Brooks*, 26 W. R. 57.

6. Reference to a Further or Formal Agreement.

7. Specific performance of an agreement that appeared to be only a preliminary foundation for a future agreement, refused. *Robertson v. Londonderry (Marquis)*, 2 L. J., N. S., Ch., 137.

8. A's agent wrote to B., "I am directed to offer you for the premises 3,000*l.*," etc. B. replied, "We accept your offer. If you approve of the enclosed, sign the same, and we will, on the receipt of the deposit, sign you a copy." B. filed a bill for specific performance, and A. did not produce the enclosure:—Held, that the two letters constituted a valid contract, intended to be carried into effect by the enclosure; and that, though it did not appear that the inclosure had been approved of, still that this did not affect the prior valid contract. *Gibbins v. North-Eastern Metropolitan Asylum District (Board of Management)*, 11 Beav. 1; 17 L. J., N. S., Ch., 5; 12 Jur. 22.

9. Letters may be sufficient to constitute a binding contract, though they refer to the intended execution of a more formal instrument. *Thomas v. Dering*, 1 Keen 729; 6 L. J., N. S., Ch., 267; 1 Jur. 211, 427.

10. M. D., a married woman, having separate property, offered by letter to give C. M. 15,000*l.* for the next presentation afterwards to the living of B. C. M. replied by letter, saying that he accepted the proposal: "An article, as is usual in such cases, to be drawn

up between us to the above effect, in which I will undertake to make out a good title to the satisfaction of any counsel you may appoint; this preliminary matter, however, cannot be arranged till Mr. C., my solicitor, returns to town." Before the article was executed the living became vacant, upon which C. M. refused to perform the agreement: M. D. died, bill was filed by her heir-at-law against C. M., for a specific execution of the agreement:—Held, that the contract, although in letters, was final and complete, the thing to be bought and the sum to be given, being distinctly stated in the proposal, and explicitly accepted in the answer thereto, and ought to be specifically performed. *Dowling v. Maguire*, Ll. & G. temp. Plunk. 1.

1. Agreement in writing for sale of estate, binding, though signed only by vendor, and followed by direction to attorney to prepare proper agreement for both parties to sign. *Foble v. Freeman*, 9 Ves. 351.

2. If there is a signed paper signed by an agent duly authorised thereto, which paper, though agreeing to do something, leaves the subject-matter of the agreement unexplained, but refers to another paper which contains the full particulars of the explanation, the two may be connected together, so as to constitute a contract valid under the Statute of Frauds. *Ridgway v. Wharton*, 6 H. L. Ca. 238; 27 L. J., Ch., 46; 4 Jur., N. S., 173; 5 W. R. 804; 2 Eq. Rep. 839. And see S. C. 3 De G. M. & G. 677.

The contract so constituted by the act of A.'s duly authorised agent will be binding on A., though the second paper may have been sent by the agent to A.'s solicitor to put it into form, provided that the agent and the person with whom he was dealing agreed that it should be sent for that purpose, but not otherwise. The act of sending such a paper to a solicitor to have the matter reduced into form affords generally cogent evidence that the parties do not intend to bind themselves till it is reduced into form. *Id.*

W. was owner of G., leased to M., under whom B. occupied it for some years. In 1849 B. applied to W. for a lease to G. to himself from 1852, when the original one to M. would expire. W. referred R. to C., his agent, and between them there were interviews and correspondence, which resulted in the specification of terms, which were sent as instructions by C. to W.'s solicitor to prepare a lease. Both W. and C. denied that the one had given, or the other received, authority to conclude a binding agreement, though some evidence on the part of R. went to show that the terms for the intended lease had been finally settled so as to constitute an agreement:—Held, that there was no concluded binding agreement. *Id.*

If contracting parties agree on terms of which there is sufficient evidence, but contemplate in addition a more formal document, it becomes a question of intention merely whether they intend it as a memorial of the terms already agreed on, or as the instrument by which alone they meant to be bound. *Id.*

3. Where a person proposing to sell an estate receives an offer, and his estate agent answers, "he has authorised us to accept the offer, subject to the terms of a contract being

arranged between his solicitor and yourself," the answer does not constitute a complete contract, and the vendor is at liberty to add other terms, and on their non-acceptance, to break off the treaty. *Honeyman v. Morryat*, 6 H. L. Ca. 112; 26 L. J., Ch., 619; 4 Jur., N. S., 17; 21 Beav. 14; 3 W. R. 502; 1 Jur., N. S., 857.

4. A testator gave to each of his sons an option to purchase an estate, and required a formal agreement to be executed within two months from receiving the offer to purchase. A. accepted by letter within the two months, and offered to execute a formal agreement:—Held, that the letter was such a contract as would be enforced in equity even if the formal agreement was not executed in time. *Austin v. Tannev*, 15 W. R. 1.

5. Plaintiff and defendant being in treaty for the sale of lands of the defendant, the latter made an offer in writing that plaintiff should pay off an incumbrance on the lands, and that therefore the deeds should be lodged with the plaintiff, who should be let into possession on paying balance of purchase-money to defendant. This offer was declined. Soon after (on the 2nd October) the parties met and for the first time agreed on the amount of the purchase-money. Defendant then handed to plaintiff a writing signed by defendant specifying the denominations and quantities of the premises, the price and deposit, but with no mention of the plaintiff's name, or of an expression of intention to sell. No deposit was paid. Defendant shortly afterwards consulted plaintiff by letter as to letting the land, but required references from plaintiff before any agreement of sale should be signed by defendant. The defendant afterwards declined to complete, and pleaded the statute of frauds in answer to plaintiff's bill for specific performance:—Held, that the writing of the 2nd October did not alone, or in connection with the previous and subsequent correspondence, constitute a sufficient memorandum in writing within the statute. *Skelton v. Cole*, 1 De G. & J. 587.

6. A party directed his agent to buy a lease of a house for 3,200*l.*, and sign an agreement. This agent wrote to the agent of the owner, offering 3,200*l.* The owner wrote across the last-mentioned letter, "I agree to sell my house upon these terms;" and thereupon the agent of the owner wrote to the agent of the other party, "My employer will take your offer;" and added, "Make an appointment to meet to draw the agreements." The day following, the agent of the purchaser said that his employer had closed on another house:—Held, that the letters constituted a contract to buy, and specific performance was decreed, with costs. *Conley v. Watts*, 17 Jur. 172; 22 L. J., Ch., 591.

A. and his agent attended an auction for the sale of a house, at which certain conditions of sale were exhibited, and with which they became acquainted. A. afterwards, through his agent and the agent of the vendor, purchased the same house:—Held, that the particulars of sale were not incorporated with the purchase, and therefore not binding on the purchaser. *Id.*

7. A vendor instructed her solicitors to sell a house, subject to stipulations, for a

fixed sum; and an intending purchaser agreed to give the sum. After some delay, the solicitors of the vendor wrote to the purchaser to say, that they had "been instructed to proceed with the sale to you of these premises. The draft contract is being prepared, and will be forwarded to you for approval in a few days":—Held, first, that this acceptance was conditional upon the terms of the draft contract being agreed to. *Chinnock v. Ely (Marchioness)*, 11 Jur., N. S., 329; 13 W. R. 597; 12 L. T., N. S., 251; 4 De G. J. & S. 638; 6 N. R. 1. Reversing 13 W. R. 176; 11 L. T., N. S., 536.

Held, secondly, that if such acceptance had been unconditional, it would not have been binding upon the vendor, as it would have been *ultra vires* the solicitors. *Fowle v. Freeman* (9 Ves. 351) distinguished. S. C. 6 N. R. 1.

1. B. by letter offered to sell a piece of land to A. at a certain price. The letter concluded, "there will be the usual clauses in a contract, and some limitations as to the length of the title to be shown, and other minor details":—Held, that this offer, with the acceptance of it in writing, did not constitute a contract which the Court could enforce, owing to the uncertainty as to the clauses to be inserted, and as to the length of title to be shown. *Rummens v. Robins*, 3 De G. J. & S. 88; 14 L. T., N. S., 717; 13 W. R. 979; 11 Jur., N. S., 631.

2. A memorandum that A. had paid to B. 50*l.* as a deposit, in part payment, of 1,000*l.* for the purchase of a house, the terms to be expressed in an agreement to be signed as soon as prepared:—Held, not a sufficient agreement in writing. *Wood v. Midgley*, 5 De G. M. & G. 41; 23 L. J., Ch., 553; 2 W. R. 301; 2 Eq. Rep. 729. Reversing 2 W. R. 185; 2 Sm. & Giff. 115, 121.

Held, also, that a promise by a contracting party to sign a written agreement, when prepared, does not prevent his insisting on the Statute of Frauds as a defence. *Id.*

3. Specific performance of an agreement "subject to a contract to be settled," or "subject to a proper contract," will not be enforced. *Harvey v. Barnard's Inn (Principal)*, 50 L. J., Ch., 750; 45 L. T. 280; 29 W. R. 922.

4. Plaintiff was the lessee of vaults in the city of London under a lease granted by the Mayor and Corporation of London and the Mercers' Company. The defendant company entered into a negotiation for the purchase of the lease. The secretary of the company wrote to the house agents acting for the plaintiff a letter in which he said that the directors thereby offered to purchase the vaults for 2,500*l.* cash, and to take over a mortgage for 3,500*l.* on the lease, these terms to include the lease, goodwill, fixtures, etc. The house agents answered as follows: "In reply to your letter of the 7th inst. we are now instructed to accept the offer therein contained, and will forward contract as soon as we obtain it from the solicitor." Differences subsequently arose respecting the time when possession should be given, and eventually the plaintiff brought an action against the defendants claiming damages for breach of contract. *Malins, V.-Ch.*, held that the letters contained

a binding contract between the parties:—Held, that no binding contract had been entered into, first, because the name of the vendor had not been disclosed or a sufficient description given so as to satisfy the Statute of Frauds; and, secondly, because the letters mentioned only what was the property to be purchased and the price to be given for it, but left the other necessary terms of the agreement, such as the time when possession was to be given, to be settled by a formal contract to be prepared by a solicitor in the ordinary way. *Donnison v. People's Café Co.*, 45 L. T. 187.

5. Where the vendors of land, in a letter acknowledging the receipt of an offer by intending purchasers, wrote as follows:—"Which offer we accept, and now hand you two copies of conditions of sale," and therewith inclosed a formal agreement with conditions of a special character:—Held, that the acceptance was only conditional, and that there was no final agreement of which specific performance could be enforced as against the purchasers. *Crossley v. Maycock*, 18 L. R., Eq., 180; 43 L. J., Ch., 379; 22 W. R. 387.

6. A builder sent in the plaintiff's agent a tender to execute certain works for a certain sum. The agent replied by letter accepting the tender, and adding, "The contract will be prepared by," etc.:—Held, that there was a contract binding upon the builder; the additional words merely suggesting a convenient mode of carrying out their intention. *Lewis v. Brass*, 26 W. R. 152.

7. When the cardinal points of a proposed contract are definitely agreed upon by letters, the mere fact that in the course of the correspondence reference has been made to a more formal agreement, or subsidiary non-essential stipulations, will not deter the Court from considering the agreement arrived at by the letters as concluded. *Cayley v. Walpole*, 22 L. T., N. S., 900; 18 W. R. 782.

8. A. wrote "to confirm" a previous verbal offer of 6,000*l.* for property. B. accepted the offer in writing, coupled with the words, "I will send draft contract in due course":—Held, there was no contract contained in the writings. *Vale of Neath Colliery Co. v. Furness*, 45 L. J., Ch., 276; 24 W. R. 631; 34 L. T., N. S., 231.

9. The defendant placed a leasehold property in the hands of a house agent for sale. The plaintiff wrote to the agent, "In reference to J.'s property in Fleet Street, I think 800*l.* for the lease, fixtures, etc., is about what I should be willing to give. Possession to be given me within fourteen days from date. This offer is made subject to the conditions of the lease being modified to my solicitor's satisfaction." Shortly afterwards the agent wrote back, "We are instructed to accept your offer of 800*l.* for these premises, and have asked J.'s solicitor to prepare contract." The required modification in the lease was procured:—Held, that, notwithstanding the reference to a future contract, the two letters constituted a complete contract. *Bonnerell v. Jenkins*, 8 L. R., Ch. D., 70; 47 L. J., Ch., 758; 26 W. R. 294; 38 L. T., N. S., 81.

When an offer in writing is accepted in writing, the mere reference in the document accepting the offer to the preparation of a

more formal contract does not amount to the introduction of a new term. *Id.*

1. No action lies upon an agreement to buy a lease, and sign a "formal contract" when approved by the purchaser's solicitor, in the event of such solicitor not approving of it, unless the approval is withheld *malá fide* or unreasonably. *Bartlett v. Greene*, 30 L. T. 553.

G. on 25th November signed a letter addressed to B.'s agent, whereby G. agreed to buy the lease of a house of B. for a certain price, the purchase to be completed before Christmas then next, and "a formal contract to be signed" by G. "when prepared" by the solicitors of B. and "when approved" by the solicitors of G. A draft agreement prepared on behalf of B. was materially altered by the solicitors of G., and B.'s solicitors declining to accept such alterations, the bargain went off:—Held, that no action was maintainable upon G.'s letter. *Id.*

2. The plaintiff wishing to sell a medical practice, with the lease of the house where it was carried on, placed it on the books of a medical agent. This led to negotiations with the defendant. The premiums asked for the practice and for the lease were stated in a letter from the agent to the defendant, but no time for completing the purchase was mentioned. The defendant replied in a letter to the agent accepting the terms offered, and adding that he should be ready to pay the deposit money "on receipt of corrected agreement," and at the same time he wrote to the plaintiff personally, also accepting the terms offered, and adding, "I shall trust to you to give me the best introduction you can during three months and afterwards, if necessary." The plaintiff replied, thanking the defendant for acceding to his terms, and saying that "it would be his aim as well as his duty to give him an effectual introduction to his patients." A formal agreement was drawn up, but never signed, and after some further correspondence the defendant refused to complete the purchase:—Held, that inasmuch as the time for the commencement of the purchase was left uncertain, and the stipulation as to the three months' introduction was not agreed to, and as the parties contemplated a formal agreement, there was no binding contract between the parties, and the action was dismissed. *May v. Thomson*, 20 L. R., Ch. D., 705; 51 L. J., Ch., 917; 47 L. T. 295.

3. A vendor and purchaser had agreed by parol upon the sale of a house at a specified price. The purchaser, by arrangement, wrote a letter to the vendor confirming his offer, repeating the terms, and requesting a reply. The vendor's solicitor replied, stating that he was instructed to carry out the sale of the house according to the purchaser's letter, but adding, "There are some details to be embodied in a contract of sale which I will prepare and forward for your approval and signature":—Held, that the latter words as to details to be embodied, qualified the otherwise unconditional acceptance of the offer in the purchaser's letter, and that there was not a sufficient memorandum in writing within the 4th section of the Statute of Frauds. *Ball v. Bridges*, 30 L. T. 430; 22 W. R. 552.

4. In reply to a telegram from an intending purchaser, offering 1,200l. as the purchase-

money of lands, with respect to which negotiations for a sale had been previously pending, the vendor telegraphed: "Accept your offer of 1,200l., subject to letter, and agreement to be sent to your solicitor." A draft contract of sale was subsequently furnished to the purchaser's solicitor; but, owing to differences as to the details, such as the commencement of the title, registry searches, etc., the treaty was broken off by the vendor:—Held, that the vendor's acceptance by telegram, being expressly made subject to a further agreement to be entered into between the parties, did not amount to a concluded contract, specific performance of which the intending purchaser was entitled to enforce. *Brien v. Swainson*, 1 L. R., Ir., 135.

5. Where the parties have come to a final agreement, and one of the terms is that such agreement shall be embodied in a formal contract, the agreement may be enforced, even though such formal contract has not been executed. Several persons interested in a particular piece of land, authorised, by agreement among themselves, one of their number, W., to dispose of it. The land was divided into lots, and a plan of the lots made, and certain conditions, on which the land might be let or sold, were printed on the plan. M., an intending purchaser, made inquiries of W. as to the sale of certain lots. W. expressly informed him that he must purchase subject to the conditions stated on the plan. One of these conditions required that a purchaser should execute a contract embodying the conditions. M. offered to purchase these lots at a price which he named. W. promised to lay his offer before "the proprietors" (without naming or describing them), and very shortly afterwards wrote to M. that he had done so, and (stating the conditions) that the proprietors had accepted his offer; adding, that in reducing the price they had taken into consideration his intention of soon building on the land, an intention which of course they wished to encourage. W. added that he had instructed the solicitors to forward to M. the agreement for purchase. There was, in fact, nothing in the conditions which bound a purchaser to build, though there were provisions which assumed that he might do so, and which, in such a case, regulated the mode of proceeding. M. wrote back, in answer, that he could not be bound to build at any given time, or at all; that the subject had better be reconsidered, unless W. was prepared to leave him to do as he might think best. W. replied that the acceptance of the offer was without condition, and that M. was free to do what he might think best. M. afterwards declined to complete the purchase:—Held, that what had taken place by the correspondence constituted a complete contract between the parties; that under such circumstances the execution of a formal deed was not necessary; that the reference to it in W.'s letter did not suspend or any way affect the contract; and that M. was bound specifically to perform his contract of purchase. *Rositer v. Miller*, 3 L. R., App. Cas., 1124; 48 L. J., Ch., 10; 39 L. T. 173; 26 W. R. 865. Reversing 5 L. R., Ch. D., 648; 37 L. T. 14; 25 W. R. 890; 46 L. J., Ch., 737. Affirming 46 L. J., Ch., 228; 36 L. T., N. S., 304; 25 W. R. 890.

1. By a written agreement the defendant agreed with the plaintiff to take a lease of a house for a certain term at a certain rent, "subject to the preparation and approval of a formal contract." No other contract was ever entered into between the parties:—Held, that there was no final agreement of which specific performance could be enforced against the defendant. *Winn v. Bull*, 7 L. R., Ch. D., 29; 47 L. J., Ch., 139; 26 W. R. 230.

II. INTERCONNECTED DOCUMENTS.

2. An agreement having been made and reduced into writing, but not signed, and letters having passed between the parties referring to the agreement in which the defendant had said, "his word should be as good as any security he could give," this takes it out of the Statute of Frauds, and he shall be compelled to perform the agreement. *Tunney v. Crowther*, 3 Bro. C. C. 318. See this case, *id.* 161.

3. A letter to a solicitor, with directions for preparing the conveyance of a purchase described generally as the land bought of A., not specifying the term, is not sufficient evidence of a contract within the Statute of Frauds. *Rose v. Cunningham*, 11 Ves. 550.

4. Whether letters referring to other letters which have been suppressed, but not containing in themselves certain terms of agreement, can be made the foundation of a specific performance, *quære*. *Collet v. Butler*, 8 Swan. 402.

5. A written notice, signed, referring to a written proposal not signed, and made several years before, may be so connected with it as to render the two documents a contract within the Statute of Frauds sufficiently signed. *Lewry v. Dufferin*, 1 Ir. Eq. R. 281.

6. A., by public advertisement, offers land to be let for three lives, or thirty-one years; and proposals having been made by bond and accepted, an agreement is executed between B. and the agent of A., authorised to contract for him, for a lease of the lands, in which agreement the term for which the lease is to be made is not mentioned. A. is not bound to perform this contract, there being no evidence in writing of the term to be demised. There being no reference in the agreement to the advertisement, parol evidence cannot be received to connect the one with the other, so as to ascertain the term. *Clinan v. Cooke*, 1 Sch. & Lef. 22.

If one written instrument refers to another written instrument, parol evidence may be admitted to show what was the thing so referred to. *Id.* 33.

7. A note or memorandum in writing, made subsequently to, but evidencing a previous parol contract, is sufficient, within s. 4 of the Statute of Frauds, 29 Car. 2, c. 3. *Bradford v. Roulston*, 8 Ir. Ch. R. 468.

8. When a memorandum in writing, signed by the parties to be charged, refers to another document in writing, it may be proved by parol evidence that a certain document is the one referred to. *Morris v. Wilson*, 6 Jur., N. S., 168.

When an agent contracts it may be proved by parol evidence who is his principal. *Id.*

9. A paper was signed by a duly authorised agent; it contained an agreement to do a certain thing, but not any explanation of the necessary details; but it referred to another paper, which did contain them:—Held, that the two might be connected together, by parol evidence, so as to constitute an agreement sufficient within the Statute of Frauds. *Ridgway v. Wharton*, 6 H. L. Ca. 238; 27 L. J., Ch., 46; 5 W. R. 804; 2 Eq. Rep. 839. And see *S. C.* 5 De G. M. & G. 677.

10. E. P. W. made a parol agreement to sell her share in certain leasehold property to J. S. at the price of 200l. The only evidence in writing of the terms of the contract consisted of two documents; a receipt as follows, "September 22nd, 1882.—Received of J. S., one pound of my share in the B. property, the sum of 200l.—(Signed) E. P. W.," and a letter dated the 19th March, 1883, the material part being: "Mr. Studds—Sir, If the balance of 199l. on account of the purchase of my share of the property be not paid on or before the 22nd inst., I shall consider the agreement (made September 22nd, 1882) not any longer binding":—Held, first, that the documents being connected constituted a sufficient note or memorandum in writing of the contract; and, secondly, assuming that there was no reference in one document to connect it with the other, the terms contained in the parol contract being the same as the terms contained in the two documents, there was a sufficient note or memorandum in writing to satisfy the Statute of Frauds. *Studds v. Watson*, 33 W. R. 118.

11. The memorandum or note of an agreement required by the 4th section of the Statute of Frauds must be a memorandum of an agreement complete at the time the memorandum is made. *Munday v. Asprey*, 13 L. R., Ch. D., 855; 49 L. J., Ch., 216; 28 W. R. 347.

A letter from an alleged purchaser inclosing and referring to a draft conveyance in which it was recited that he had agreed to purchase land:—Held, not to be a memorandum of a completed agreement. *Id.*

12. A vendor and a purchaser being in treaty for the sale and purchase of an estate, the vendor wrote to his solicitor, stating that the purchaser had agreed to purchase his estate for 60,000l., and requested him to settle an agreement on that basis for them to sign, adding that he had given to the purchaser a copy of this letter, not signed, as a memorandum. The purchaser subsequently wrote to the vendor's solicitor, inquiring when he would forward to him the draft of the agreement relative to the purchase he had concluded with the vendor for his estate in that county. Prior to the execution of the conveyances the purchaser made his will, by which he devised the subject-matter of the treaty to trustees upon certain trusts:—Held, that, at the date of his will, the purchaser had a devisable interest in the estate. *Morgan v. Holford*, 1 Sm. & G. 101; 17 Jur. 225.

A letter signed by the purchaser, not containing the terms of the contract, but, on a fair view of the evidence, referring (though not in terms) to a memorandum containing them:—Held, sufficient within the Statute of Frauds. *Id.*

Semble, a purchaser who has made, but not signed, a contract, the terms of which are proved, and which is signed by the vendor, has a devisable interest in the subject-matter. *Id.*

1. The plaintiff claimed specific performance of a contract to purchase a house and premises sold by auction. After the sale the auctioneer signed the following memorandum at the foot of the conditions: "The property duly sold to A. Shardlow, butcher, Pinxton, and deposit paid at close of sale," and he also signed this receipt: "Pinxton, March 29th, 1880. Received of A. Shardlow, the sum of 21*l.* as deposit on property purchased at 420*l.* at Sun Inn, Pinxton, on the above date. Mr. G. Cotterell, owner." The Statute of Frauds was set up in defence. The conditions contained no description of the property sold, but posters had been put up describing the property to be sold on the 29th March, at the Sun Inn:—Held, that the word "purchased" was enough to connect the receipt with the conditions of sale, though not with the poster. That the description in the receipt and conditions was sufficient to satisfy the Statute of Frauds. *Shardlow v. Cotterell*, 30 W. R. 143; 20 L. R., Ch. D., 99; 51 L. J., Ch., 353; 45 L. T. 572. Reversing 18 L. R., Ch. D., 280; 50 L. J., Ch., 613 44 L. T. 549; 29 W. R. 737.

2. Where Court has to find a contract in a correspondence, and not in one particular note or memorandum formally signed, the whole of that which has passed between the parties must be taken into consideration. *Hussey v. Horne-Payne*, 4 L. R., App. Cas., 311; 48 L. J., Ch., 846; 27 W. R. 585; 45 L. T. 1.

Reference to Plans.] See II. 5 *infra*.

See also LANDLORD AND TENANT, I. I. 3.

III. VAGUENESS AND UNCERTAINTY.

3. Specific performance decreed of an agreement, though an uncertain one. *Allen v. Harding*, 2 Eq. Abr. 17.

4. A., on the marriage of his daughter to B., covenants that B. shall have his land called C. for 1,500*l.* less than any other, and afterwards devises the premises to his grandson for life, with remainder over, and dies. The Court refused specific performance by reason of uncertainty and want of mutuality of it. *Bromley v. Jefferies*, 2 Vern. 415; Pre. Ch. 138.

5. Equity will not decree a specific execution upon a contract, the terms of which are uncertain as to its extent, nor will equity decree specific execution against a party not lawfully competent to execute the contract. *Harnett v. Yielding*, 2 Sch. & Lef. 549.

6. If there be uncertainty as to the terms of an agreement, it cannot be carried into execution, even though reduced to writing. *Lindsey v. Lynch*, 2 Sch. & Lef. 7.

7. *Semble*, that where a date has not been specified in the agreement, although intended to be so, as that at which an important obligation is to arise, this would of itself be, on the ground of uncertainty, an adequate reason for not enforcing the contract. *Fitzpatrick v. Nolan*, 1 Ir. Ch. R. 671.

8. An agreement to give so much of a thing as may be necessary for a specified purpose confers a right of a nature known to the law, and is not open to the objection of uncertainty. Under an agreement to give so much of a specified piece of land as may be necessary for a specified purpose, when the quantity has been determined the right of selecting the position of the piece to be given belongs to the promisee. If the promisor, however, had any objection to the promisee's selection, and made a reasonable offer in lieu thereof, the Court might listen to it. But it is not reasonable to wish to interpose a road between a burial ground and the church to which it is to belong. *Rumble v. Heygate*, 18 W. R. 749.

9. When part of an agreement is to do certain acts upon certain contingencies, equity will not decree a specific performance. *Gervais v. Edwards*, 2 Dr. & War. 80; 1 Con. & L. 242; 4 Ir. Eq. R. 555.

Decreeing the parties to bind themselves by covenant to do those acts when the contingencies happened, would be decreeing a specific performance, not of the agreement in specie, but of an agreement to do those acts. *Id.*

Courts of equity will not act in decreeing specific performance unless they can perform the very thing in the terms specifically agreed upon. *Id.*

10. Land was sold by the mortgagees to B., consisting of a circular plot, surrounded by a ring called the Park Drive. It was stipulated that, if used for building, villas of a certain size were to be built; that the ground between the villas and the Park Drive should be laid out in lawn or pleasure grounds down to the Park Drive; that a footpath of the width of fifteen feet should be laid out round the whole of the northern, southern, and western boundaries of the said land. The Park Drive round the circular piece belonged to B.; the part outside had originally been his, but, with a small exception, had been sold by him:—Held, that the condition about the footpath was too vague to be enforced, and that the purchaser was not bound to make it, and could not be restrained from using the land in any way inconsistent with making it. *Taylor v. Gilbertson*, 2 Drew. 391.

11. In a contract for sale, lands were described as partly freehold and partly leasehold. The title-deeds did not clearly define the boundaries and extent of the two properties; but the uncertainty did not arise from an instrument incapable of legal construction in that respect:—Held, that such an uncertainty was not an objection to a decree for specific performance. *Monro v. Taylor*, 3 Macn. & G. 713; 8 Hare 51; 21 L. J., N. S., Ch., 525.

12. A. agreed to sell to B. a house and land, with a clause that in the event of there being any coals or iron stone under the land, a royalty of so much per ton was to be paid thereon; and that any mines required to be left by a certain railway company were to be paid for the same as if gotten, out of the money received for them from the railway company. The Court refused to enforce specific performance of this agreement. *Wilkinson v. Wootton*, 3 Drew. 210.

13. An agreement for the sale of lands,

which shows on the face of it that the parties are not agreed as to the terms of the contract between them, and as to the commencement of the title, does not express the intention of the parties with such certainty that a court of equity will enforce performance of it. *Rummens v. Robins*, 11 Jur., N. S., 631; 13 W. R. 979; 3 De G. J. & S. 88.

The plaintiff entered into an oral agreement with the defendants for the purchase of a piece of land, and it was agreed that the latter's solicitors should send him a letter for the purpose of reducing the terms into writing. They accordingly wrote, specifying price and other terms, and added—"There will be the usual clauses in a contract, and some limitations as to the length of title to be shown, and other minor details"—Held, that there was such great uncertainty introduced into the contract by this passage as to render it in effect no agreement at all, and a demurrer to a bill by the purchaser for specific performance was allowed, and leave to amend refused. *S. C. 14 L. T.*, N. S., 717.

Subsequently to this letter the defendants' solicitors sent to the plaintiffs' agent a draft contract, which was not accepted nor in any manner acknowledged by the plaintiff for about ten weeks, when, in answer to the defendant's intimation that they treated the contract as entirely off, the plaintiff replied, that he insisted on the purchase being completed.—Held, that in view of this delay, the defendants were fully entitled to revoke the contract. *Id.*

1. After negotiations for the purchase of tithes, in which the terms were discussed, but not finally settled, the vendor wrote to his solicitor a letter, which contained the following passage:—"Previously to paying the amount" (then followed the illegible word) "for tithes, glebe, etc., it would be advisable to have information as to title," etc.—Held, that this letter did not amount to a note or memorandum in writing of a contract for the sale of lands, within the Statute of Frauds. *Savile v. Kinnaird*, 11 Jur., N. S., 195.

2. A. agreed to sell an estate to B. for 3,000*l.*, "and the further sum of 20*l.* per cent. on any sum the property might realise above that sum at the sale by auction advertised to take place" the next day. B. withdrew the estate from the sale.—Held, that the contract was sufficiently certain, and might be enforced. *Langstaff v. Nicholson*, 25 Beav. 160.

3. An agreement for the purchase of a lease, which does not mention the length of the term granted by the lease, is void for uncertainty and cannot be enforced. *Southern v. Harriman*, 15 W. R. 487.

4. Where an agreement is in its terms so uncertain as to raise a doubt as to its true effect, whether to be considered as a purchase of premises or a lease, a demurrer will lie to a bill for a specific performance of it. *Dolling v. Evans*, 15 L. T., N. S., 604.

E., holding a lease of four cottages, agreed to underlease them to D. for the whole term, less a reversion of a few days, and signed the following receipt: "Received of D. the sum of 10*l.* as part purchase-money of 390*l.* of four cottages" (describing them), "the lease and counterpart to be paid for by Mr. D."—Held, that the receipt was not a

sufficient memorandum to satisfy the Statute of Frauds. *S. C. 36 L. J., Ch.*, 474.

5. Specific performance of an agreement between four persons, regulating the right to all their future inventions, refused, on the following grounds: first, that it was too vague and uncertain as to its duration; secondly, that it involved a contract for personal services of an uncertain duration; thirdly, the want of mutuality in regard to one of the stipulations; and, fourthly, that the position of the parties had been materially varied by the assignment by one, to a stranger, of all his interest under the agreement. *Firth v. Ridley*, 33 Beav. 516.

6. S., a corn merchant carrying on business in the immediate vicinity of the defendants' line of railway, signed an agreement, whereby, in consideration of receiving from the defendants yearly, during so long as he should carry on business at his then establishment, a free pass over their line, he promised, so long as the scale of charges of the defendants and of a certain canal company bore the same proportion to each other which they then did, to have his corn carried by the defendants in preference to the said canal company. Subsequently, at the request of the defendants, he made a money payment, by way of nominal consideration, for the said pass, which the defendants after the lapse of some years ultimately refused to renew. Upon his bill for specific performance of the said agreement (which had never been executed by or on behalf of the said railway company)—Held, that the agreement was unilateral in its nature and uncertain in its terms, and could not be specifically enforced. A general demurrer for want of equity accordingly allowed. *Sturge v. Midland Railway Co.*, 6 W. R. 233; 4 Jur., N. S., 273.

7. The plaintiffs alleged that a concession to take telegraph wires across the Azore Islands, which was granted to W. by the Portuguese government in 1857, was sold by him to them in the same year; but that no time for the completion of the agreement was ever fixed, and it was verbally agreed that the consideration for the same should not be paid until the ratification of the concession by the Portuguese government should have been obtained. This the plaintiffs had not succeeded in obtaining. They also alleged that, in July 1860, an intending company obtained a concession from the French government to carry telegraph wires across French territory between Spain, Portugal, and France and America; and that, after negotiation in December 1864, it was agreed between the plaintiff and the company, "that upon the concession being perfected by the Portuguese government," the plaintiff should sell to the intending company all his right and title to the Portuguese concession for 80,000*l.*, to be paid as therein mentioned; and both parties were to use their best endeavours, jointly and severally, to perfect the concession. The plaintiffs alleged that the intending company was attempting to question the validity of their title, and that W., and also the intending company, were entering into an agreement with the Portuguese government for a new concession, and prayed for an injunction to restrain them from proceeding with any

application to the Portuguese government, and also that the agreement of 1857 might be performed under the direction of the Court, and for other relief. Demurrer allowed, on the ground of vagueness in the terms of the agreements of 1857 and 1864. *European and American Submarine Telegraph Co. v. Elliot*, 12 L. T., N. S., 416.

1. Contract for the sale of an estate, vendor reserving "the necessary land for making a railway" through the estate to P. In a suit by the purchaser for specific performance:—Held, that the reservation was void for uncertainty and that the contract could not be enforced. *Pearce v. Watts*, 20 L. R., Eq., 492; 44 L. J., Ch., 492; 23 W. R. 771.

Held, also, that though the defence was raised by answer and not by demurrer, the bill must be dismissed with costs. *Id.*

2. Litigation of a complicated character was carried on both in this country and in Peru, between the plaintiff and the defendant, and also two sons of the plaintiff, who had acted as his agents. An agreement was afterwards signed in England between the plaintiff and the defendant, whereby it was agreed that a patent, standing in the name of the plaintiff, but the right to which was claimed by the defendant, should be held for their mutual benefit, the defendant to pay 100% towards the expenses of taking out the patent. The plaintiff agreed to "raise" all proceedings here and in Peru by the plaintiff and his sons, each party paying his own costs, "it being agreed that all claims between the defendant and the plaintiff and his sons are settled up to this date; the eight pianofortes in litigation in Peru to be delivered up by the defendant to the plaintiff, or his representatives." The differences continuing, the defendant was suing the plaintiff at law. The plaintiff filed a bill for specific performance of the agreement. By a letter of the plaintiff's solicitor, it appeared that the plaintiff intended that a release should be executed by the defendant and himself, and also by his sons. The defendant demurred:—Held, that the agreement was such an one as the Court would decree the performance of; and that it was not bad on any of the grounds urged, viz., neither for uncertainty, nor for want of mutuality, nor for that the Court could not enforce some of the stipulations, nor for that adequate remedy and compensation could be had at law. *Marsh v. Milligan*, 3 Jur., N. S., 979.

3. Specific performance refused from ambiguity of contract. Purchaser, having insisted on one construction of contract, not permitted to compel vendor to convey upon the terms that vendor originally offered. *Clowes v. Higginson*, 1 Ves. & B. 524.

4. A. contracts with B. to sell a manor described as "The Manor of Stoke Fleming, an extensive parish with the right of free warren, etc., a fine range of sporting over about 3,000 acres, embracing nearly the whole parish of Stoke Fleming, and all the lord's rights in the soil and timber of the wastes, minerals, etc." By one of the conditions of sale, the purchaser was precluded from requiring the vendor to define the boundaries of the manor. At the date of the contract for sale the manor was supposed to be co-extensive with the parish. B., the purchaser, alleging

that the purchase only included a few strips of waste land and a disputed right of sporting over other lands, proposed to cancel the sale. A. refused to accede to that course, and thereupon B. pressed for further information respecting A.'s actual rights in the manor. A., in endeavouring to satisfy the queries of B., discovered that the manor extended beyond the limits of the parish and included valuable pieces of land situate without the parish; he then insisted that the conveyance should be confined to the manorial rights within the parish, which proposal B. would not agree to; and upon a bill filed by B. for specific performance of the contract, as including the whole manor:—Held, that it was not a contract for the sale and purchase of a property of uncertain quantity and value, but that the terms of the contract were ambiguous; and both parties at the date of the contract being in error as to what was included therein, the Court would not compel the performance of it in the manner contended for by B. so as to include property not intended to be sold by the vendor. *Bazendale v. Seale*, 24 L. J., Ch., 385; 1 Jur., N. S., 581.

5. The plaintiff wishing to sell a medical practice, with the lease of the house where it was carried on, placed it on the books of a medical agent. This led to negotiations with the defendant. The premiums asked for the practice and for the lease were stated in a letter from the agent to the defendant, but no time for completing the purchase was mentioned. The defendant replied in a letter to the agent accepting the terms offered, and adding that he should be ready to pay the deposit money on receipt of corrected agreement, and at the same time he wrote to the plaintiff personally, also accepting the terms offered, and adding, "I shall trust to you to give me the best introduction you can during three months and afterwards, if necessary." The plaintiff replied, thanking the defendant for acceding to his terms, and saying that "it would be his aim as well as his duty to give him an effectual introduction to his patients." A formal agreement was drawn up, but never signed, and after some further correspondence the defendant refused to complete the purchase:—Held, that inasmuch as the time for the commencement of the purchase was left uncertain, and the stipulation as to the three months' introduction was not agreed to, and as the parties contemplated a formal agreement, there was no binding contract between the parties, and the action was dismissed. *May v. Thomson*, 20 L. R., Ch. D., 705; 51 L. J., Ch., 117; 47 L. T. 295.

See also LANDLORD AND TENANT, I. 1. 2.

IV. STATUTE OF FRAUDS.

1. *Interests in Land. What are*, 7039.
2. *Signature. What is*, 7039.
3. *Signature by One Party only*, 7041.
4. *Name or Description of Parties. Sufficiency*, 7041.
5. *Identification or Description of Subject-Matter. Sufficiency*, 7042.
6. *Description of Interests contracted to be Sold*, 7044.

7. *Completeness of Terms of Contract*, 7144.
8. *Communications Addressed to Third Parties*, 7145.
9. *Admission of Contract by Answer*, 7146.
10. *Other Cases*, 7147.
11. *Part Performance*. See LANDLORD AND TENANT, I. v.—SPECIFIC PERFORMANCE, VI.—PRACTICE (EVIDENCE).
12. *Parol Variation*. See LANDLORD AND TENANT, I. IV.—SPECIFIC PERFORMANCE, VIII.
13. *Contracts by Agents*. See IV. *post*.
14. *How Plead*. See PRACTICE (PLEADING).

1. Interests in Land. What are.

1. Agreement for an abatement of rent of lands is within the Statute of Frauds. *O'Connor v. Spaight*, 1 Sch. & Lef. 306.

2. Advowsons are rents within Statute of Frauds, but an annuity in fee not a personal inheritance. *Stafford (Earl) v. Buckley*, 2 Ves. 177.

3. The benefit of the vendor's lien for purchase money unpaid may be assigned by parol to a third party, *semble*. *Dryden v. Frost*, 3 Myl. & C. 670; 1 L. J., N. S., Ch., 235; 2 Jur. 1030. Reversing on this point S. C. 1 Jur. 580.

4. A partnership agreement between A. and B. that they shall be jointly interested in a speculation for buying, improving for sale, and selling lands, may be proved without being evidenced by any writing signed by, or by the authority of, the party to be charged therewith, within the Statute of Frauds, and such an agreement being proved, A. or B. may establish his interest in land, the subject of the partnership, without such interest being evidenced by any such writing. *Dale v. Hamilton*, 5 Hare 369; 16 L. J., N. S., Ch., 126; 11 Jur. 163. And see S. C. on appeal, 2 Ph. 266; 16 L. J., N. S., Ch., 397; 11 Jur. 574.

An agreement between B. and C. was communicated by one of the parties to A. after applications in writing from A., for the signature of the other parties to a memorandum expressing his interest as a partner in the transaction relating to the land, the subject of the agreement, and the Court held that the agreement so communicated must be taken, not as an original proposal, but as an acknowledgment of a pre-existing right in A., and that A. might avail himself of the acknowledgment, notwithstanding the agreement between B. and C. was *res inter alios acta*, and notwithstanding A. objected to some of the terms in that agreement, as not truly expressing his partnership contract. *Ib.*

5. In the course of the proceeding before an arbitrator, the parties agreed by parol that the arbitrator shall determine as to a lease to be granted. Such an agreement is within the Statute of Frauds, and the award having directed a lease to be made, cannot be enforced. *Walters v. Morgan*, 2 Cox 369.

6. Bill to carry into execution on a parol agreement between solicitors, that there should be a decree of foreclosure, that the estate should be sold, the mortgagee paid her principal and interest, and the remainder to the mortgagor, dismissed at the Rolls as

within the Statute of Frauds. On appeal, evidence of the agreement read *de bene esse*, but the decree affirmed. *Cow v. Peele*, 2 Bro. C. C. 334.

7. If two neighbours agree that one should take a lease of houses for the benefit of both, the other shall have the benefit, though the agreement is not in writing; and defendant's plea of the Statute of Frauds was ordered to stand for an answer with liberty to except, and the benefit of it saved to the hearing. *Atkins v. Rowe*, Mos. 39.

8. An agreement to charge hereditaments with the value of property which has been lost through the wrongful act of a third person must be in writing, as being within the 4th section of the Statute of Frauds; but it may be taken out of the statute by a deposit of title-deeds. *Whitmore v. Farley*, 43 L. T. 192; 28 W. R. 908.

9. A. and B. being severally in treaty for a purchase of a house and land, agree by parol that A. shall desist, and that B. shall purchase, and let A. have part of the ground which he wanted at a reasonable price. B. purchases, and refuses to perform the agreement. This being a parol agreement, is within the provision of the Statute of Frauds. *Lamas v. Bayly*, 2 Vern. 627.

10. A customer, in July, borrowed 200*l.* from his bankers upon the terms of a verbal agreement that the loan should be repaid out of the rent of a farm which would become due to him at Michaelmas. The money was advanced by the bankers, and the customer then gave them a letter addressed by him to the tenant of the farm, by which he authorised and requested the tenant, when his Michaelmas rent became due, to pay 200*l.* to the bankers. The letter contained no reference to the loan, and did not show that any consideration had been given for the authority. The bankers sent the letter to the tenant. The customer was adjudicated a bankrupt upon an Act of Bankruptcy committed in August:—Held, that as the rent was an interest in land, the agreement was one of which, by virtue of s. 4 of the Statute of Frauds, could not be proved by parol evidence, and that therefore the letter could alone be looked at. And that the letter amounted only to a revocable authority to pay the rent to the bankers, and that it was revoked by the bankruptcy. *Exp. Hall, Re Whitting*, 10 L. R., Ch. D., 615; 48 L. J., Bky., 79; 27 W. R. 315; 40 L. T. 179.

11. An agreement to become partners in a colliery which was to be demised upon royalties, and the royalties to be divided in certain proportions, is an interest in land within the Statute of Frauds, 29 Car. 2, c. 3, and must be in writing, signed by the parties. *Cuddick v. Skidmore*, 3 Jur., N. S., 1185.

Receipts signed by the party sought to be charged, which partly disclosed the nature of the agreement:—Held, not sufficient to take the case out of the statute. *Ib.*

2. Signature. What is.

12. A. alters the draft with his own hand; this is not a signing to take it out of the Statute of Frauds, though the seller afterwards executes a conveyance, and being in

Middlesex it is caused to be registered. *Hawkins v. Holmes*, 1 P. W. 770.

1. Contract for land within 4th section of Statute of Frauds, by letter signed by vendor combined with his proposal by note to third person specifying price. *Western v. Russell*, 3 Ves. & B. 187.

2. If the defendant himself writes the agreement for the purchase of a leasehold house, and states his own name in the third person as "Mr. A. B. has agreed," this is a good contract within the Statute of Frauds, though he does not otherwise sign the agreement. *Proper v. Parker*, 1 Russ. & M. 625.

3. J. R. Bridges, having five freehold houses, but no other property, in Cable Street, Liverpool, agreed to sell them to J. Bleakley for 248*l.*, and thereupon drew up the following memorandum in his own handwriting:—"July 26th, 1839. John Bleakley agreed with J. R. Bridges to take the property in Cable Street for the net sum of 248*l.* 10*s.*."—Held, that the agreement was sufficiently signed by the vendor. *Bleakley v. Smith*, 18 Sim. 150.

4. Agreement to purchase established upon a correspondence referring to the terms of such agreement. Parol evidence is admissible to explain the subject-matter of an agreement, although not to vary the terms. Provided the name be inserted in an instrument in such a manner as to have the effect of authenticating it, the requisition of the act with respect to signature is complied with, and it does not matter in what part of the instrument the name is found. *Ogilvie v. Foljambe*, 3 Meriv. 53. And see *Child v. Comber*, 3 Swan. 423. n.

5. The mere circumstance of the name of the party being written by himself in the body of a memorandum of agreement for a lease will not constitute a signature within the meaning of the Statute of Frauds. *Stokes v. Moore*, 1 Cox 219.

6. The mere circumstance of the name of a party being written by himself in the body of a memorandum of agreement will not of itself constitute a signature. It must be inserted in such a manner as to govern, or to have the effect of authenticating, the whole instrument. *Caton v. Caton*, 36 L. J., Ch., 886; 2 L. R., H. L., 127.

Words of reference have not the effect of bringing up a signature, and giving it a signification and effect different from that which the signature has in the original place where it is found. *Id.*

Where, therefore, the name of the party against whom specific performance was sought to be enforced appeared in different parts of the paper, but only in such a way that, in each case, it merely referred to the particular part where it was found, and that part was in the form of reference or description, and not of promise or undertaking:—Held, that the paper did not constitute a contract signed within the provisions of the Statute of Frauds. *Id.*

7. *Quære*, whether the words "approved by me, J. S.," affixed to certain memoranda, by way of approval of an arrangement in which the party is interested, is a signing within the Statute of Frauds. *Parker v. Smith*, 1 Colly. 608.

8. Whether a note written in the third person, "Mr. T. proposes," etc. (making an

offer to purchase), being accepted, amounts to a contract in writing signed within the Statute of Frauds, *quære*. *Morison v. Turnour*, 18 Ves. 175.

9. A letter containing proposed terms of a contract between A. B., the sender, and the sendee, written out by the sender, upon paper bearing a printed heading, "Memorandum from A. B.," was held to be a sufficient note in writing to charge A. B. A memorandum of a contract is sufficiently signed within the 4th section of the Statute of Frauds if it contains the terms of the contract and the name of the party charged, and is given by him to the other party under circumstances which show a recognition of the name as it stands for his own. *Tourret v. Cripps*, 48 L. J., Ch., 567; 27 W. R. 706.

10. An affidavit made in Chancery is a sufficient writing within the statute. *Barkworth v. Young*, 4 Drew. 1; 2 Jur., N. S., 34; 26 L. J., Ch., 153; 5 W. R. 156.

11. Where there is a complete agreement in writing, and a person who is a party and knows the contents subscribes as a witness only, he is bound by it, for it is a signing within the Statute of Frauds. *Welford v. Beasley*, 3 Atk. 503.

12. On the treaty for the under-lease of a house, the agent for plaintiff tendered an unconditional agreement to be signed, to which the defendant attached his name and initials in pencil, subject to the condition of there being nothing unusual in the covenants of the original lease. The defendant subsequently discovered that there was a nuisance which would prevent his occupation of the house, but which was unknown to the plaintiff, and he therefore abandoned the treaty:—Held, that under these circumstances the Court would try the case strictly between the parties, and in the absence of actual evidence that the agent had direct or implied authority to accede to the pencil additions, would not bind the plaintiff, and that until the latter had assented to the alterations, the agreement was only a proposal and might be abandoned by the defendant. The bill was dismissed with costs. *Lucas v. James*, 7 Hare 410; 18 L. J., N. S., Ch., 329; 13 Jur. 912.

13. A letter from a mother to her son beginning "My dear Robert," and concluding "Your affectionate mother," is not signed so as to constitute a binding agreement on the part of the mother within the intent of the Statute of Frauds. It is not enough to identify; there must be a signing, *i.e.*, either an actual signature of the name, or something intended by the writer to be equivalent to a signature, as a mark by a marksman, etc. *Selby v. Selby*, 3 Meriv. 2.

Illiterate Person making Mark. 14. An agreement annexed to conditions of sale by auction, to which D. (an illiterate person) had put his mark, stating that D. had purchased from S., the vendor, for the sum of 250*l.*, the premises mentioned in the annexed particulars, subject to the conditions of sale, is a good memorandum in writing within the 4th section of the Statute of Frauds. *Dyas v. Stafford*, 7 L. R., Ir., 690.

By Agents.] See IV. II. *post*.

By Auctioneers.] See III. IV. *post*.

3. Signature by One Party only.

1. A. sold houses to B., and a note was made by A. of the agreement, but it was only signed by B. Decreed, that both parties were bound. *Hutton v. Gray*, 2 Ch. Ca. 164.

2. Agreement in writing for sale of estate, binding, though signed only by vendor, and followed up by direction to attorney to prepare proper agreement for both parties to sign. *Fowler v. Freeman*, 9 Ves. 351.

3. *Semble*, the signature of the party to be bound is sufficient to satisfy the Statute of Frauds so as to enable the Court to enforce specific performance. *Field v. Boland*, 1 Dr. & Wal. 37.

4. Agreements signed by one party only, enforced against the other. *Hall v. Butler*, 1 Eq. Abr. 20.

5. There is no provision in the Statute of Frauds to prevent the specific execution of an agreement signed only by one of the parties. *Ormond v. Anderson*, 2 Ball & B. 370.

6. An agreement signed by one party only is sufficient to charge him within Statute of Frauds. *Seton v. Slade*, 7 Ves. 265.

7. An agreement may be enforced in equity, although not binding on both parties at the time of its being signed; it is sufficient if signed only by one party and accepted and acted on by the other. *Dowell v. Den*, 1 Y. & Coll. C. C. 344; 12 L. J., N. S., Ch., 158; 7 Jur. 117.

8. Specific performance of a contract, not signed by the party enforcing it. *Backhouse v. Mohun*, 3 Swan. 434.

9. The written undertaking of one party will be enforced, although the other party is not mutually bound by writing. *Palmer v. Scott*, 1 Russ. & M. 391; Tam. 488; 8 L. J., Ch., 127.

10. *Quære*, whether, where a contract signed by one party only, he is not at liberty to recede from it till the other party has done some act to bind himself. *Martin v. Mitchell*, 2 Jac. & Walk. 428.

Semble, a contract signed by one party only, may be enforced by the other, as the filing a bill makes it binding on that party. *Id.* 426.

Semble, under contract by husband and wife for sale of wife's estate, Court will not decree him to procure her to join. *Id.* 425.

11. Contract for the purchase of tithes not signed by the party chargeable:—Held, under the circumstances, to have been taken out of the Statute of Frauds. *Blackford v. Kirkpatrick*, 6 Beav. 232; 12 L. J., N. S., Ch., 108.

4. Name or Description of Parties. Sufficiency

12. During parol negotiations for the purchase of an estate, the vendor wrote to the purchaser's solicitor, proposing that the solicitor's "client" should advance a sum to pay off a mortgage on the property. After further parol negotiations as to the terms, they were agreed upon by parol, and the vendor signed and handed to the purchaser a written statement of the particulars of the property and of the price. On the following day he signed and addressed to the purchaser a letter containing the following passages: "I am about

to relet the land at P. for another year, concluding you will agree to it. . . . The Lady-day rents will be mine, and the Michaelmas yours":—Held, that signed statement of particulars was not a sufficient memorandum in writing, the purchaser's name not being mentioned in it, and that the defect was not supplied by the correspondence. *Skelton v. Cole*, 1 De G. & J. 587.

13. A receipt given by the auctioneer's clerk to D. three days after the action, and signed by the clerk, acknowledging payment of part of the purchase-money for "Lot 4, Mr. John Stafford's property," is not such a memorandum in writing as would bind the vendor within s. 4 of the statute:—*Semble*, that the name of the auctioneer printed on the back of the particulars and conditions of sale is sufficient to bind the vendor. *Dyas v. Stafford*, 7 L. R., Ir., 590.

14. Where a memorandum of agreement did not contain the name of the vendor, but his name was referred to in a subsequent letter written by the purchaser:—Held, that this was a sufficient reference within the Statute of Frauds. *Warner v. Willington*, 3 Drew. 523; 2 Jur., N. S., 433; 25 L. J., Ch., 662.

15. Conditions of sale stated that the vendors were trustees, but did not name or otherwise describe them. The contract of sale was signed by the purchaser's agent, and confirmed by the auctioneers, as agents for the vendors. An abstract was delivered to the purchaser, entitled with the names of the vendors, and the purchaser's requisitions were headed with the vendor's name. On an objection that the vendors were not named in the particulars or conditions of sale, or in the contract signed on behalf of the purchaser by his agent:—Held, that the abstract might be referred to for the purpose of curing the defect in the contract. *Bourdillon v. Collins*, 19 W. R. 556; 24 L. T., N. S., 344.

16. In order to satisfy the requirements of the Statute of Frauds, the note or memorandum of an agreement for the sale of real estate must contain either the names of the contracting parties or such a description of them that there cannot be any fair dispute as to their identity. *Potter v. Duffield*, 18 L. R., Eq., 4; 43 L. J., Ch., 472; 22 W. R. 585.

The term "vendor" is not of itself a sufficient description of one of the contracting parties. *Id.*

Real estate was put up for sale under particulars and conditions of sale which did not disclose the vendor's name, but stated that B. was the auctioneer. The purchaser of one of the lots signed a memorandum acknowledging his purchase; and B. signed at the foot of this memorandum another in these terms, "Confirmed on behalf of the vendor, B.":—Held, that the memorandum did not sufficiently show who the vendor was. *Id.*

17. On the sale of real estate by auction the particulars stated that the property was put up for sale by "the proprietor." No further description of the vendor was given in the particulars or conditions. The auctioneer signed a memorandum in his own name, by which he agreed that "the vendor on his part should in all respects fulfil the conditions of sale mentioned in the particulars." On a bill for specific performance by the purchaser:—Held, that on the particulars and memorandum

there was a sufficient description of the vendor within the 4th section of the Statute of Frauds. *Sale v. Lambert*, 43 L. J., Ch., 470; 18 L. R., Eq., 1; 22 W. R. 478.

1. An agreement for the sale of real estate did not disclose the name of the vendors, but it appeared therefrom that the vendors were a company in possession of the property offered for sale, and that they had carried on operations thereon:—Held, that the vendors were sufficiently described to satisfy the Statute of Frauds. *Commins v. Scott*, 20 L. R., Eq., 11; 44 L. J., Ch., 563; 32 L. T., N. S., 420; 23 W. R. 498.

2. The particulars of sale of a leasehold house stated that it was the property of Admiral F., deceased, and that the sale was by direction of his executors, not naming them. A memorandum of the sale, indorsed on the particular, was signed by the auctioneers as agents "for the vendors." Admiral F. was a domiciled Scotchman, and had, by a testamentary instrument in the Scotch form, named seven persons, and the acceptors of them, as executors. Two only accepted office, and confirmation was granted to them subsequently to the contract of sale:—Held, that the contract was valid, and specific performance of it decreed at the suit of the executors. *Hood v. Barrington (Lord)*, 6 L. R., Eq., 218.

3. A contract for the sale of land in which the vendor is not named, but is stated to be "a trustee selling under a trust for sale," is sufficient within the Statute of Frauds. *Catling v. King*, 5 L. R., Ch. D., 660; 46 L. J., Ch., 384; 25 W. R. 550; 36 L. T., N. S., 526.

4. In conditions of sale the vendor was described as "legal personal representative of L. D." At the date of the contract the vendor was not L. D.'s legal personal representative; there was no person filling that character. But the vendor was the only person in a position to become "legal personal representative," and he subsequently took out letters of administration to L. D.'s estate. The purchaser objected to the title on this ground:—Held, that the objection failed; that the latent ambiguity being raised by parol evidence could be got rid of by parol evidence, and that there was a valid contract. *Towle v. Topham*, 37 L. T., N. S., 308.

5. Plaintiff was the lessee of vaults in the city of London under a lease granted by the Mayor and Corporation of London and the Mercers' Company. The defendant company entered into a negotiation for the purchase of the lease. The secretary of the company wrote to the house agents acting for the plaintiff a letter in which he said that the directors thereby offered to purchase the vaults for 2,500*l.* cash, and to take over a mortgage for 3,500*l.* on the lease, these terms to include the lease, goodwill, fixtures, etc. The house agents answered as follows: "In reply to your letter of the 7th inst. we are now instructed to accept the offer therein contained, and will forward contract as soon as we obtain it from the solicitor." Differences subsequently arose respecting the time when possession should be given, and eventually the plaintiff brought an action against the defendants claiming damages for breach of contract. *Malins, V.-Ch.*, held that the letters contained

a binding contract between the parties:—Held, that no binding contract had been entered into, first, because the name of the vendor had not been disclosed or a sufficient description given so as to satisfy the Statute of Frauds; and, secondly, because the letters mentioned only what was the property to be purchased and the price to be given for it, but left the other necessary terms of the agreement, such as the time when possession was to be given, to be settled by a formal contract to be prepared by a solicitor in the ordinary way. *Donnison v. People's Café Co.*, 45 L. T. 187.

6. An offer in writing to take a lease of a theatre, signed by the intending lessees and attested by the lessor's agent, but not naming the lessor and only addressed to him as "Sir," followed by an acceptance in writing by the agent, addressed to and received by the intending lessees, but likewise not naming the lessor, which letter was not signed by them nor referred to in any other writing, is not an agreement in writing within the Statute of Frauds so as to entitle the lessor to have the same specifically performed. *Williams v. Jordan*, 6 L. R., Ch. D., 517; 26 W. R. 230; 46 L. J., Ch., 681.

7. An estate was offered for sale in lots shown upon a plan on which various conditions were printed, one of which was that each purchaser would be required to sign a contract embodying the conditions, and providing for the completion of the purchase at the expiration of a period of not more than two months from the date of the contract. M. made a verbal offer to W., the agent of the owners, to purchase certain lots for 1,000*l.* W. informed him that he must purchase subject to the conditions, and promised to lay his offer before the proprietors. Shortly afterwards W. wrote to M. saying that the "proprietors" accepted his offer to purchase the specified lots for 1,000*l.*, subject to the conditions on the plan, and that he had requested the solicitors to forward to M. the agreement for purchase. M. replied by letter that his offer had better be reconsidered unless he was left at liberty to build or not as he pleased. W. replied by letter that the acceptance by the proprietors was not conditional, and that M. would be at liberty to build or not. The contract was sent to M., but he refused to sign it, or to proceed with the purchase:—Held, that the word "proprietors" was sufficient to identify the vendors within the Statute of Frauds, and that specific performance must be decreed. *Rosnier v. Miller*, 5 L. R., Ch. D., 648; 46 L. J., Ch., 228; 36 L. T., N. S., 304; 25 W. R. 890. Affirmed on this point, 5 L. R., Ch. D., 648; 46 L. J., Ch., 737; 25 W. R. 890; 37 L. T., N. S., 14; 39 L. T., N. S., 173; 3 L. R., App. Cas., 1124; 26 W. R. 865; 48 L. J., Ch., 10.

5. Identification or Description of Subject-Matter. Sufficiency.

In General. 8. An agreement in writing for sale of a house, did not by description ascertain the particular house, but it referred to the deeds as being in the possession of a person named in the agreement. The Court held the

agreement sufficiently certain; it could be ascertained by an inquiry before the Master that the deeds in the possession of the person named referred to the house in question. *Owen v. Thomas*, 3 Myl. & K. 353; 3 L. J., N. S., Ch., 205.

1. A house and premises were put up for sale by auction under conditions of sale which did not contain any description of what was sold, but were so expressed that it could be inferred from them that the subject of sale was real estate. A. Shardlow became the purchaser. After the sale the auctioneer signed and gave to him the following memorandum at the foot of the conditions: "The property duly sold to A. Shardlow, butcher, Pinxton, and deposit paid at close of sale," and at the same time signed and gave to him the following receipt: "Pinxton, March 29th, 1880. Received of Mr. A. Shardlow the sum of 21l. as deposit on property purchased at 420l., at 'Sun Inn,' Pinxton, on the above date. Mr. G. Cotterell, owner":—Held, that the receipt, memorandum, and conditions contained a sufficiently definite description of the property sold to enable the Court to receive parol evidence of what the property consisted, and that the Statute of Frauds was no defence to an action by the purchaser for specific performance. *Shardlow v. Cotterell*, 20 L. R., Ch. D., 90; 51 L. J., Ch., 353; 45 L. T. 572; 30 W. R. 143. Reversing 18 L. R., Ch. D., 280; 50 L. J., Ch., 613; 44 L. T. 549; 29 W. R. 737.

Held, by Jessel, M. R., and Bagge, L. J., that the receipt alone without the memorandum and conditions was a memorandum sufficient to satisfy the requirements of the statute. *Id.*

2. A decree for specific performance of a contract to purchase land made against a public company, the contract being made out by reference to proceedings taken under the compulsory powers of the company's act. *Inge v. Birmingham, Wolverhampton, & Stour Valley Railway Co.*, 2 W. R. 22; 2 Eq. Rep. 80; 3 De G. M. & G. 658.

3. Held, under the circumstances of the case, that a party having agreed to purchase premises stated to be partly freehold and partly leasehold could not, in the absence of fraud, concealment, or misrepresentation, on the part of the vendor, resist a specific performance of his contract merely on the ground that the exact position of the boundary line between the freehold and leasehold portions could not be ascertained; and that this would be so even assuming, for the purpose of argument, that a vendor who contracts to sell property partly freehold and partly leasehold is, in the absence of specific stipulations, to be considered as bound to show what part is freehold and what leasehold. *Monro v. Taylor*, 3 Macn. & G. 713; 21 L. J., Ch., 525.

Specific performance of a contract for the sale of property, partly freehold and partly leasehold, will not be refused on the ground that the boundaries of the two portions are not distinctly defined. *Semble. Id.*

4. One of three trustees, acting as if absolute owner, entered into a contract to sell the entirety of a freehold property (in one-fifth part of which he had a beneficial interest), describing the property as "The Jolly Sailor, offices, etc." The other trustees, afterwards, refused to concur in the sale. The vendee

having brought an action for specific performance of the contract:—Held, that the subject-matter of the contract was sufficiently defined, as the vagueness (if any) about the meaning of the words "Jolly Sailor, offices, etc.," might be removed by an inquiry at chambers. *Naylor v. Goodall*, 47 L. J., Ch., 53; 26 W. R. 162; 37 L. T., N. S., 422.

5. Held, also, that the contract for the sale of the entirety could not be enforced, and the property being trust property, it could not be enforced against the defendant as to his one-fifth share only. *Id.*

6. The words "the property," in reference to a colliery, are not sufficient description of the colliery plant and stock on which to found an action for specific performance. *Valle of Neath Colliery Co. v. Furness*, 34 L. T., N. S., 231; 45 L. J., Ch., 276; 24 W. R. 631.

7. The words "the mill property, including two cottages in E. village," are a sufficient description of the subject-matter of a contract to take the case out of the Statute of Frauds, though part of the property is not in the parish of E. *Murray v. Spicer*, 15 W. R. 332; 5 L. R., Eq., 527; 37 L. J., Ch., 505.

8. A vendor of leasehold premises wrote a letter to her solicitor stating: "I have closed with Mr. W. for this place":—Held, a sufficient memorandum in writing within the Statute of Frauds, and that parol evidence was admissible to show what "this place" was. *Waldron v. Jacob*, 5 Ir. R., Eq., 131.

By Reference to Plan. 9. Where an agreement expressly refers to a plan, as an existing document forming a term in the contract, evidence is admissible for the purpose of identifying the plan; but unless the evidence of identity is clear and satisfactory, specific performance of such an agreement will be refused. *Hodges v. Horsfall*, 1 Russ. & M. 116.

10. A testator by his will, dated in 1832, devised certain estates, including M. In 1835 he entered into a written agreement (unstamped) with A. and B. for the sale of M. The purchasers paid a deposit, entered into possession, and received the rents and profits until 1838, when the survivor (who was the heir-at-law of the other) became bankrupt. The assignees abandoned all interest under the agreement, and the testator became the purchaser of M., being treated as having an equitable lien for the purchase-money. The agreement referred for the parcels to an accompanying map or plan, and to a schedule which showed their extent. The testator died in 1843, and this was a suit to establish the will. The Master found that the map or plan was lost:—Held, that the agreement for sale was a valid contract, notwithstanding the loss of the map or plan, and that it was never stamped. Held, also, that it was a revocation of the will; but the heir-at-law must exhaust all means of information as to the lost map or plan before the Court will deal with the contract without reference to the plan of which it forms a part. *Andrew v. Andrew*, 3 W. R. 337.

11. A. agrees by letter and verbally to take land on a building lease, and a rough draft is prepared, and fair copy and plan made, after which a new clause is inserted at A.'s request, and agreed to by the defendant's (the land-

owner's) solicitor, all along acting for him; after which, A. having called for completion of the agreement, the solicitor declines to complete. On bill filed for specific performance, and demurrer for want of equity:—Held, that as no copy of the agreement was signed, and as it clearly appeared that the plans had still to be settled, and therefore the premises were not defined, the demurrer must be allowed. *Adams v. Wheatley*, 3 W. R. 96.

1. A memorandum of an agreement for sale signed by the vendor referred to the property as "The Jolly Sailor, offices, etc., with all the rights and privileges as per plan," and on the back was indorsed "Mr. Moseley," (the vendor's solicitor)—"Please put on the number in the plan." There were two plans, and the lot comprising the Jolly Sailor in one plan was not identical in number or contents with that containing the Jolly Sailor in the other plan.—Held, that the memorandum was sufficient within the Statute of Frauds, the plan intended having been identified by the vendor in cross-examination. *Naylor v. Goodall*, 26 W. R. 162; 37 L. T., N. S., 422; 47 L. J., Ch., 53.

2. By a contract B. agreed to sell, and C. to purchase, 200 acres of land or thereabouts, more or less, parts of the lands delineated in a plan thereunto annexed, and thereon coloured brown. It turned out that the marked land contained much less than the 200 acres, and the measurement was extended beyond the lands delineated. C. filed a bill for specific performance of the agreement with the extended measurement. B. demurred for want of equity:—Held, that the demurrer must be allowed, as the additional lands were not comprised in the agreement. *Bellaney v. Knight*, 10 W. R. 289; 5 L. T., N. S., 785.

3. Drainage commissioners agreed to sell a property to D. The contract did not refer to any plan, but the agents who signed it for the parties signed at the same time the following memorandum written upon a plan of the property:—"Plan of Property sold to and purchased by D. 23rd Oct., 1874. N.B.—The property included in the purchase is edged with red colour":—Held, that the plan was sufficiently incorporated, and that the description in the contract was controlled by it. *Nene Valley Drainage Commissioners v. Dunkley*, 4 L. R., Ch. D., 1.

4. On a purchase by reference to a ground plan an infringement of the rule *cujus est solum ejus est usque ad cælum* is sufficient to avoid the contract between vendor and purchaser. *Pope v. Garland*, 4 Y. & Coll. 394; 10 L. J., N. S., Exch. Eq. 13.

6. Description of Interests contracted to be Sold.

5. An agreement to sell land, not expressing what interest in it, construed to mean the whole of the interest of the vendor. *Bower v. Cooper*, 2 Hare 408; 11 L. J., N. S., Ch., 287; 6 Jur. 681.

6. Construction of contract for sale of leasehold, whether for vendor's interest therein, or a good title to the leasehold. *Anderson v. Higgins*, 1 J. & L. 718.

7. The Court will not assume that a pur-

chaser has agreed to purchase the vendor's interest, whatever it may be, unless the language of the agreement is clear. *Southern v. Harriman*, 14 W. R. 487.

An agreement for the purchase of a lease, which does not mention the length of the term granted by the lease, is void for uncertainty, and cannot be enforced. *Id.*

8. An agreement by a vendor to sell "all his estate and interest" in certain premises, is *prima facie* good; and does not necessarily mean an agreement to sell an estate in fee simple, but may mean an equity of redemption only. *Priddle v. Wood*, 4 N. R. 320.

9. The lessee of a house put it up for auction subject to certain conditions of sale, one of which was that the purchaser should not require the lessor's title, but the property was bought in. Afterwards the defendant authorised his agent to offer a price for the lease of the house. The agent wrote a letter to the agent of the vendor, offering the price fixed; the vendor's agent replied, accepting the price for the house, and asking that a time might be appointed to draw the agreements. In neither of these letters was the nature of the vendor's interest mentioned:—Held, in a suit by the vendor for specific performance, first, that the letters formed a valid contract for the purchase of the lease; and, secondly, that the contract was general, and not subject to the conditions of sale under which the property had been put up to auction. *Cowley v. Watts*, 1 W. R. 218, 484; 22 L. J., Ch., 591; 17 Jur. 172; 20 L. T. 75.

10. An agreement was in the following words: "A. agrees to pay 625*l.* for the cottage and stable, B. paying the expenses of the lease held by Mr. C.—signed, A." :—Held, that such an agreement was not sufficient within the Statute of Frauds. *Cox v. Middleton*, 2 Drew. 209; 23 L. J., Ch., 618.

11. A., to whom the owner of a quarry had agreed to grant a lease, agreed on behalf of himself and all persons interested to sell the quarry to B., and "that the lease agreed to be granted by the lessor should be granted as B. might direct." B. having refused to complete the purchase, A. brought an action for specific performance, and in his statement of claim stated his agreement with the owner of the quarry as well as the memorandum of agreement with B., and alleged that B. was aware of the nature of A.'s interest in the quarry, and had accepted the title. B. demurred, on the ground that the memorandum was not sufficient within the Statute of Frauds:—Held, that it was sufficient, but that a defence founded on the Statute of Frauds could not since the Judicature Acts be raised by demurrer. *Morgan v. Worthington*, 38 L. T., N. S., 443.

7. Completeness of Terms of Contract.

12. Specific performance may be decreed of agreement founded on letters and notes, if fully and completely settled in all points. *Popham v. Eyre*, Lofft. 801.

13. Where from letters a contract can be specifically and explicitly defined, Court will decree performance, but not otherwise. *Gordon v. Trevelyan*, 1 Price 64.

1. Agreement not enforced on a letter unless it contain the full terms of the agreement. *Clerk v. Wright*, 1 Atk. 12.

2. In order to form a contract by letter, of which the Court will decree a specific performance, nothing more is necessary than that the amount and nature of the consideration to be paid on one side and received on the other should be ascertained, together with a reasonable description of the subject-matter of the contract. It is the clearly established doctrine that the Court will carry into execution an agreement so constituted. It is not necessary to be satisfied that the parties actually meant the same thing, provided a clear assent be given to a certain proposition arising *de facto* out of the terms of the correspondence. *Kennedy v. Lee*, 3 Meriv. 441.

3. No specific performance of an agreement by letters unless, upon a fair interpretation, concluded; if doubtful whether more than treaty, to be left to law. *Huddleston v. Briscoe*, 11 Ves. 591.

Agreement for the sale of an estate, the result of a correspondence by letters, good within the Statute of Frauds. *Id.* 588.

4. Contract for land by letters, sufficient within the Statute of Frauds; not specifically executed, unless upon a fair interpretation importing a concluded agreement, and not doubtful whether only treaty. *Stratford v. Bosworth*, 2 Ves. & B. 341.

5. An offer by letter to sell or buy a business cannot be carried into effect unless from the whole letter taken together an inference can be drawn from which the material terms of the contract can be ascertained. In the absence of that it amounts but to an offer to treat, as nothing can be supplied by conjecture. *Cooper v. Hood*, 28 L. J., Ch., 212.

6. Equity has jurisdiction to compel the specific performance of a complete contract, but cannot supply any term not agreed on. *Ormond v. Andersen*, 2 Ball & B. 369.

7. The Court cannot, when called on to decree specific performance of an agreement, direct any act to be done whereby the agreement itself, if not already legally binding, can be made so. *Leominster Canal Co. v. Shrewsbury & Hereford Railway Co.*, 3 Jur., N. S., 930.

8. The contract on which an immediate decree for specific performance is sought, must have been complete in all its essential parts before the filing of the bill. *Adams v. Broke*, 1 Y. & Coll. C. C. 627.

9. The memorandum or note of an agreement required by the 4th section of the Statute of Frauds must be a memorandum of an agreement complete at the time the memorandum is made. *Munday v. Asprey*, 13 L. R., Ch. D., 855; 49 L. J., Ch., 216; 28 W. R. 347.

A letter from an alleged purchaser inclosing and referring to a draft conveyance in which it was recited that he had agreed to purchase land:—Held, not to be a memorandum of a completed agreement. *Id.*

10. At a sale by auction on the 10th August, 1880 (an announcement of which, endorsed on the particulars and conditions, had the auctioneer's name printed at foot), D. signed a memorandum appended to the particulars and conditions, acknowledging that he had "this day purchased from Mr. Stafford,

the vendor, by public auction, subject to his approval, the premises mentioned in the annexed particulars, for the sum of 250*l.*, subject to the conditions of sale also annexed hereto"; but there was no signature by the vendor, nor any subsequent adoption of the contract under his hand. At the time of sale D. paid a portion of the purchase-money in cash, and for the balance of the stipulated deposit he gave his I O U. Three days afterwards D. paid a further sum on account of the deposit, and was handed a receipt, dated the 13th August 1880, signed by the auctioneer's clerk, on behalf of "Michael Crooke" (the auctioneer), and acknowledging that he had "received from Mr. Dyas (the purchaser) 30*l.* sterling, which, with 20*l.* paid 10th August, makes 50*l.* deposit on his purchase, 84*l.*, Mr. John Stafford's property." The vendor's solicitor subsequently wrote to D. recognising the sale, furnished him with copies of the title-deeds, and approved of the draft conveyance to him, which, however, the vendor refused to execute; whereupon D. having brought an action for specific performance:—Held, that there was no agreement enforceable against the defendant, as the contract of the 10th August having been made expressly "subject to his approval," the memorandum of that date only amounted to a proposal, and did not constitute a note in writing, within the Statute of Frauds; there not being then in fact any contract in existence that subsequent parol approval by the defendant or his agents could not have the effect of altering the character in which his name appeared in the memorandum, so as to convert it into an authentication of a contract; and that the auctioneer's name at foot of the endorsement on the particulars and conditions merely authenticated the announcement of the sale. *Dyas v. Stafford*, 9 L. R., Ir., 520. Reversing 7 L. R., Ir., 590.

Held, also, that the receipt of the 13th August did not satisfy the statute. *Id.* Affirming 7 L. R., Ir., 590.

11. Where a court has to find a contract in a correspondence, and not in one particular note or memorandum formally signed, the whole of that which has passed between the parties must be taken into consideration. *Hussey v. Horne-Payne*, 4 L. R., App. Cas., 311; 48 L. J., Ch., 846; 27 W. R. 585; 41 L. T. 1.

Per Lord Selborne:—The observation stated in *Jervis v. Berridge* (8 L. R., Ch., 360), that "the Statute of Frauds is a weapon of defence, not offence, and does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties," affirmed. *Id.*

8. Communications Addressed to Third Parties.

12. Agreement by letter to third person to sell sufficient to take case out of the Statute of Frauds. *Seagood v. Meale*, Pre. Ch. 561; 1 Stra. 426. And see *Child v. Comber*, 3 Swan. 423. n.

13. There have been cases where a letter written to a man's own agent, and setting forth the terms of an agreement as concluded

by him, has been deemed to be a signing within the Statute of Frauds, and agreeable to the provisions of it. *Welford v. Beazley*, 3 Atk. 503.

1. After certain negotiations for a purchase between the agents of the vendor and purchaser, a letter was written to the vendor by his agent, stating that the purchaser had agreed by his agent to purchase the property (which was sufficiently identified) at a certain price. The vendor frequently wrote to his agent in reference to the transaction, such letters being communicated to the purchaser's agent. Drafts were prepared and signed by the vendor's agent in approval, but the vendor died before the sale was completed.—Held, that there was a binding contract within the Statute of Frauds, of which the Court would decree specific performance. *Carpenter v. Churchill*, 2 W. R. 364.

2. B. files a bill stating that on his marriage with his late wife no portion was given to her, but that her father Y. had promised and contracted with B. that he would, at his death, leave to his daughter an equal share of his property with his other children; that the marriage took place on the faith of such promise; that there were four children, one of whom died an infant and unmarried; that B.'s wife died leaving two children, who were infants and still living, and had lived with and been brought up by their aunt at Y.'s house; that B., wishing to take his children under his own protection, Y. applied for a commission of lunacy against him, and in answer to an affidavit filed by B., filed an affidavit stating the words he used upon B.'s marriage to be, that his daughter should, at his death, share with the rest of his children; and that Y. died, leaving considerable personal property. B., under the circumstances, claimed to have the promise made on his marriage specifically performed, and prayed an account and payment of an equal third of Y.'s residuary estate. On demurrer for want of equity and parties to this bill: the demurrer for want of equity, overruled; but that for want of parties, for that the personal representative of the wife was a necessary party, allowed, with leave to amend. *Barkworth v. Young*, 5 W. R. 156; 26 L. J., Ch., 153; 3 Jur., N. S., 34; 4 Drew. 1.

3. A., being entitled to certain lands, proposed to his solicitors, who were also the solicitors of certain trustees, to sell to such trustees the lands in question. The proposal was made by a series of letters written by A. to his solicitors, and such letters were replied to by the solicitors. The proposal having been agreed to on behalf of the trustees, a petition was presented to the Court praying for a reference as to the title, and an order was made in the terms of the prayer. A. died before anything further took place.—Held, that there was no binding contract for the purchase of the lands in question. *Shrewsbury (Earl) v. Shrewsbury (Countess)*, 18 Jur. 397.

4. On bill for specific performance of parol agreement to let lands, evidence that defendant had suffered his wife to receive money from the plaintiff in consideration of fines (he being incapable of receiving them), and had written a letter to a third person acknowledging the demise, and stating that he was ready to make leases:—Held, sufficient to take case

out of statute. *Hartley v. Wilkinson*, 1 Ridgw. L. & S. 357.

5. A. and B. having entered into a verbal treaty for the purchase of certain premises belonging to A., and not being able to agree as to the amount of the purchase-money, A. addressed a letter to C., a third person, stating that he would take a certain sum from B. for the premises, reserving a small portion of the same for his sister, if C. approved of it. B. subsequently lodged the sum named by A. with C., of which lodgment C. made a memorandum on A.'s letter, with a remark that it was "a great price":—Held, that C. must be considered the agent of A., and that as he had signed the contract acknowledging the receipt of the purchase-money, A. was bound to perform the agreement. *Field v. Boland*, 1 Dr. & Wal. 37.

6. The executrix of a lessee agreed to sell to A. the residue of her term (except a day) and the fixtures on the premises for 400*l*. This agreement was entered into by the executrix without advice, and there was no written memorandum of it except by a letter written by the executrix to her own solicitor a few hours afterwards. Subsequently the landlord, knowing that there had been a negotiation, if not an agreement, between the executrix and A., agreed with her for the purchase of the residue of the term for 550*l*. A., on hearing of this, offered the executrix, if she would complete her contract with him, 1,000*l*. as purchase-money, and indemnity against any proceedings on the part of the landlord. She accepted the offer, and demised the premises to A. for the whole term, wanting a day:—Holding that the landlord was entitled to a specific performance of his agreement, not only against the executrix, but against A., *quære*, whether the letter to the solicitor was a sufficient memorandum in writing within the meaning of the Statute of Frauds, etc. *Goodwin v. Fielding*, 4 De G. M. & G. 90.

9. Admission of Contract by Answer.

7. A court of equity will decree a specific execution of a parol agreement, if it be set forth in the bill, and confessed by answer. *Symondson v. Tweed*, Pre. Ch. 374.

8. If on a bill brought to have execution of a parol agreement, the defendant, by answer, confesses the agreement without insisting on the Statute of Frauds, etc., the Court will decree an execution, because no danger of perjury. *Croyston v. Banes*, Pre. Ch. 208.

9. Equity will decree performance of parol agreement, if it is admitted in the answer, or if material and unequivocal acts have been done in part performance. *Gunter v. Halsey*, Amb. 586.

10. Defendant, by answer admitting agreement, may, if he insist on the Statute of Frauds, have benefit of it at hearing. *Cooth v. Jackson*, 6 Ves. 17, 37.

11. Whether an agreement by parol, but confessed in the answer, shall be executed though not in writing. *Hosier v. Read*, 9 Mod. 86.

12. In a bill for the specific execution of an agreement, the plaintiff may abandon the

agreement, and may, by amended bill, seek to have the benefit of an agreement admitted in the answer, and by charging that the allegations in the original are equally applicable to the agreement in the amended bill, may refer to them without repeating them, and thereby obtain all the benefit of the evidence stated as applicable to the first agreement. *Willis v. Evans*, 2 Ball & B. 228.

See also LANDLORD AND TENANT, I. 1. 4.

10. Other Cases.

1. When a person has contracted for the purchase of land by an agreement, the terms of which are partly written and partly verbal, and has obtained possession upon performance of the written terms, to attempt to retain possession and refuse to perform the verbal terms amounts to a fraud. *Jervis v. Berridge*, 27 L. T., N. S., 436; 42 L. J., Ch., 518; 8 L. R., Ch., 351; 21 W. R. 96.

A. signed a contract for the purchase of land from B., and on the same day transferred the benefit of the contract to C. by a memorandum in which some of the terms of the transfer were not expressed. C. entered into possession under the memorandum, but refused to perform the terms which were not expressed therein. A. filed a bill for cancellation of the memorandum, alleging that C.'s conduct amounted to fraud; and C. on demurrer contended that he was not guilty of fraud, inasmuch as under the Statute of Frauds the unwritten terms of the transfer were not binding upon him:—Held, that C.'s contention could not be sustained. *Id.*

2. *Semble* per Lord Selborne:—The observation stated in *Jervis v. Berridge* (8 L. R., Ch., App., 360), that "the Statute of Frauds is a weapon of defence, not offence, and does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties," affirmed. *Hussey v. Horne-Payne*, 4 L. R., App. Cas., 311; 48 L. J., Ch., 846; 27 W. R. 585; 41 L. T. 1.

V. OTHER CASES.

3. A particular writing for the purchase of an estate, no writing within the Statute of Frauds, unless the party purchased by it, or that it was not shown him at the time of purchase, so that if that contains more than the words of the conveyance will in strictness carry, the purchaser cannot compel specific execution of the residue on the particular. *Cass v. Waterhouse*, Pre. Ch. 29.

4. Filing a bill, held to be sufficient evidence of plaintiff's assent to an agreement of which the bill seeks to enforce specific performance. *Agar v. Biden*, 2 L. J., N. S., Ch., 3.

5. Effect of an agreement to sell land not then the property of the vendor, but which afterwards became his. *Morse v. Faulkner*, 3 Swan. 429.

6. It is no objection to a mutual contract between A. and B., for the one to buy or sell

from or to the other of them his interest in certain property, that at the time of that contract there existed a conditional agreement by one of them with a third party to sell the whole property to him. *Cartwright v. Insole*, 16 L. T., N. S., 445.

7. Evidence on which the Court might decree the specific performance of an alleged agreement, according to one construction of a writing, which was of doubtful meaning, where a conveyance, according to a different construction, had been executed by the vendor, and accepted by the purchaser. *Humphries v. Horne*, 3 Hare 277.

8. Suggestions made by a vendor or purchaser as to the course which might be adopted for the purpose of obviating difficulties in the completion of a contract, are not to be taken as an abandonment of the original contract, and the substitution of a new one. *Monro v. Taylor*, 8 Hare 61. Affirmed 3 Macn. & G. 713; 21 L. J., N. S., Ch., 525.

II. Assignment of Contract to Purchase.

9. A parol agreement for a purchase and possession delivered, decreed to be performed against a subsequent purchaser with notice, who had a conveyance and had paid this money. *Butcher v. Stapely*, *Butcher v. Butcher*, 1 Vern. 363.

10. Notice to a vendor of an assignment by the purchaser of an uncompleted contract does not constitute the vendor a trustee for the assignee of the contract. *McCreight v. Foster*, 39 L. J., Ch., 792; 5 L. R., Ch., 604; 18 W. R. 905; 23 L. T., N. S., 224.

A vendor of land may receive the balance of the purchase-money, and convey the estate to the purchaser, without regard to the receipt of a notice that the purchaser had agreed to assign the contract. *Id.*

A vendor agreed to sell leaseholds which were under a heavy rent, and received part of the purchase-money. The purchaser afterwards agreed to assign to a bank, if required, the contract for the purchase by way of security for money advanced, and the bank gave notice of this agreement to the vendor. The bank afterwards refused to advance to the purchaser the money required to complete, but this was not known to the vendor. The purchaser, after the time fixed for the completion, paid the balance of the purchase-money, the vendor executed an assignment, and the purchaser assigned to an assignee without notice of the security to the bank:—Held, that the vendor was entitled to complete without giving notice to the bank, and that the bank had no remedy against him. *Id.*

11. Trustees under restrictions for sale agreed to sell land for B. for a purpose understood between the parties, though not embodied in the agreement. Pending the negotiation, B., with knowledge of the restrictions, entered into a sub-contract to sell the land for a purpose at variance with the trusts. This arrangement

was concealed from the vendors until after the signing of the original contract, and they then refused to complete:—Held, that the agreement could not be enforced. *Trappes v. Cobb*, 17 L. T., N. S., 236.

1. Notice to a person under contract to sell an estate that his vendee has agreed to make a valid assignment of the contract, if so requested, does not put the vendor upon inquiry whether his vendee has been requested to make, or has made, such valid assignment, nor will it compel the vendor to refuse to execute conveyance to the vendee, who, upon the payment of the purchase-money, demands the conveyance, nor even excuse the vendor for making such a refusal. *Shaw v. Foster*, 42 L. J., Ch., 49; 20 W. R. 907; 27 L. T., N. S., 281; 5 L. R., H. L., 321.

The persons who claim to have the benefit of the assignment must give distinct notice to the vendor of their claim, and of their readiness to put themselves in the vendee's position for the completion of the contract. *Id.*

F. contracted to sell to P. leasehold property. P. having paid to F. part of the purchase-money, deposited with a bank the contract in order to secure a debt due by him to the bank, thereby creating an equitable charge on his interest under the contract, and F. received and accepted a formal notice of this charge. Subsequently F. assigned the legal estate in the premises to P. in such a manner as to enable P. to defeat the bank's charge, which he did by assigning the premises to a purchaser without notice:—Held, that the rule of equity that a vendor of an estate is, after the making of the contract of sale, a trustee for the purchaser, did not to apply to this case, and that J. was not liable to make good the loss occasioned to the bank by such assignment. *Id.*

2. P., in 1867, agreed to sell to M. a plot of land, the purchase to be completed in five years or earlier at M.'s option. P. had previously agreed to sell an adjoining plot to M. The plaintiff was employed by M. to build on the first plot, and M. became indebted to him on that account. M. then agreed to sell the first plot to the plaintiff. P. then told the plaintiff that both contracts must be completed together, and no offer having been made by the plaintiff to complete both contracts, P. and M. sold and conveyed both plots to H.:—Held, that the plaintiff had no equity to have his sub-contract performed. *Croftree v. Poole*, 12 L. R., Eq., 13; 40 L. J., Ch., 468; 24 L. T. 895.

3. An equitable interest under a contract of purchase may be the subject of sale; the sub-contract converts the original vendee into a trustee of his equitable interest for his vendee, who acquires the same rights which he had to the benefits to be derived under the primary contract. Such sub-contracts are not within the doctrine of champerty and maintenance. *Wood v. Griffith*, 1 Swan. 56.

4. Bill for specific performance of an agreement to purchase, against the original vendee and an assignee of his contract, dismissed as against the former, the plaintiff being held, by delivery of abstract and offer to execute a conveyance, to have accepted the latter as purchaser. *Quare*, if the bill had been filed

against the original purchaser only. *Holden v. Hayn*, 1 Meriv. 47.

Derivative Purchaser as a Party to Suits for Specific Performance.] See SPECIFIC PERFORMANCE. XII. III.

Under Sales by the Court.] See XXIV. VII. *post*.

See also LANDLORD AND TENANT, I. 1. 13.

III. Sales by Auction.

- I. *Authority of Auctioneer*, 7148.
- II. *Verbal Declarations by Auctioneer*, 7149.
- III. *Biddings*, 7149.
- IV. *Signature of Contract*, 7151.
- V. *Auctioneer as Party to Suit*, 7152.
- VI. *Deposit, Commission, and Other Cases*—XXIV. *post*. See AUCTION AND AUCTIONEER.
- VII. *Liability of Trustees and Executors for Acts of*. See EXECUTOR AND ADMINISTRATOR.—TRUSTS.

I. AUTHORITY OF AUCTIONEER.

5. Where a vendor made a *bond fide* mistake as to the authority which he had given to the auctioneer, and the property was knocked down to a purchaser for a less sum than the vendor considered that he had instructed the auctioneer to sell at, the Court refused to decree specific performance of the contract at the instance of the purchaser. *Day v. Wells*, 7 Jur., N. S., 1004; 9 W. R. 857.

Semble, that a vendor cannot, after real estate has been knocked down at an auction, and before the signature of the written contract, revoke the authority of the auctioneer. S. C. 30 Beav. 220.

6. W. having casually mentioned to S., an auctioneer and land agent, that he had three properties, one being at B., all of which he would be willing to sell, S. replied, that from the description B. would be worth 600*l.*, and that he had other property in the same neighbourhood to sell by auction at the end of the month, which would be a good opportunity. On a subsequent occasion, S., having viewed the property, informed W. that he thought it would not fetch more than 300*l.*; and accordingly, W. not being willing to attend to the business, his brother and partner fixed the reserve price at 250*l.* W. then withdrew one of the other lots from the sale. The printed particulars and conditions of sale were sent to W.'s office a day or two before the sale. The B. estate was knocked down at 330*l.* W. then refused to complete, alleging that he had never authorised S. to sell at that price, and that his price was 700*l.*:—Held, that W. had by his acts bound himself to the sale. *Pike v. Wilson*, 1 Jur., N. S., 59.

As to the authority of an auctioneer to draw up conditions of sale, *quare*. *Id.*

7. Though the auctioneer at a sale by auction is the agent of the purchaser, yet he is not his agent for all purposes, and there is no reason why he may not sell property of

which he is himself the owner. *Phint v. Woodin*, 9 Hare 618; 16 Jur. 719.

1. A trader in prison employed an auctioneer to sell goods, who sent him the proceeds by the defendant. The trader became bankrupt by lying two months in prison:—Held, that the assignees could not recover from the defendant, who was a mere money bearer, the money he had received and paid over. *Coles v. Wright*, 2 Rose 110; 4 Taunt. 198.

Receipt of Purchase-money by on Sales by the Court.] See XXIV. v. 1 *post*.

II. VERBAL DECLARATIONS BY AUCTIONEER.

2. Verbal declarations of an auctioneer at the time of sale, not to be received in contradiction to the printed particulars; but *quære*, as to the effect of personal information of a mistake in the particular. *Ogilvie v. Poljambe*, 3 Meriv. 53.

3. Parol evidence of declarations of auctioneers at sale, warranting quantity, received as defence to bill for specific performance on ground of fraud, though not for purpose of enforcing specific performance. *Winch v. Winchester*, 1 Ves. & B. 375.

4. Parol evidence in aid of a specific performance upon the sale of the estate by auction; to explain, by declarations of the auctioneer, an ambiguity on the face of the particular, by a general claim for a separate valuation of the timber, and also special provisions as to the timber upon certain lots, the agreement, signed on the back of the particular, binding the purchaser, defendant, "to a strict fulfilment of this article, and to abide by the condition and declarations made at the sale," rejected: distinction, where evidence is to resist a specific performance. *Higginson v. Clowes*, 15 Ves. 616.

Though a paper, as the particular upon a sale by auction, may by reference be engrafted into a contract within the Statute of Frauds, that will not authorise the introduction of parol evidence to show what part was read. *Id.* 522.

5. In August 1878 the defendant Berridge offered for sale by public auction a lease of the public-house before mentioned. By the conditions of sale it was provided that "the lease to be granted shall contain the covenants, clauses, and provisions, and be in the form or to the effect set forth in the draft lease which will be produced on the sale and may be seen at the office of the auctioneers for seven days previous to the day of sale," and that "the property is presumed to be correctly described; but, as the premises may be viewed and the draft lease inspected at the office of the auctioneers, the purchaser shall be deemed to have bought with full knowledge of the contents thereof; and no error, misdescription, or omission in the particulars shall annul the sale, and no compensation shall be required for any such error, misdescription, or omission." There was no reference either in the conditions of sale or in the draft lease to the existence of any right of way from the garden of the public-house to Hampstead Heath; but, at the time

of the sale, the auctioneer *bond fide*, but without any authority from Berridge, and acting entirely upon an inference drawn by himself from the appearance of the premises, and believing that there was a right of way through the same and over the private road and so to Hampstead Heath, stated publicly that there was such a way, and spoke of it as enhancing the value of the premises:—Held, that the evidence of what passed at the time of the sale was admissible as against the vendor; but that no action could after the completion of the purchase be maintained against him to recover compensation for this innocent misrepresentation by the auctioneer. *Brett v. Clowser*, 5 L. R., C. P. D., 376.

III. BIDDINGS.

1. *In General*, 7149.
2. *Agreements not to Bid*, 7149.
3. *Puffer and Reserved Biddings*, 7150.
4. *Under Sales by the Court*. See XXIV. *post*.

1. In General.

6. Where the trustees of a road had advertised tolls to be let by auction, subject to certain special conditions as to the mode of sale, inconsistent with the regulations prescribed by the General Turnpike Act, 3 Geo. 4, c. 126, s. 55, the terms of sale giving a reserved bidding to the trustees, and there was only one bidder at the sale, when, the minute-glass having been thrice turned, as prescribed by the Act, the trustees declared their intention to make their reserved bidding:—Held, that the bidder was not entitled to specific performance; but his bill was dismissed without costs. *Levy v. Pendergrass*, 2 Beav. 415.

7. At a sale by auction of an undivided moiety of some building ground, the biddings were made at so much per square yard:—Held, that the amount offered per square yard, multiplied by the whole number of square yards, was to be paid for the moiety; and that the biddings were not to be considered as made for the entirety of the property, and half the amount only to be paid for the moiety. *Chamberlain v. Lee*, 8 L. J., N. S., Ch., 266.

8. One of the conditions of sale was, that if, at the time of sale, the purchaser did not comply with the conditions, the vendor might declare his purchase void, and might thereupon put up the property again at the bidding immediately before the bidding of the defaulting purchaser; the premises were knocked down at the price of 16,800*l.* to a purchaser who made default; his purchase was declared void, and they were again put up at 16,750*l.*, the bidding next to his; but that bidder and others having refused to abide by their former offers, the property was put up at 13,200*l.* and sold for 15,400*l.* to the same person who had before offered 16,750*l.* *Semble*, that the vendors, after declaring the first purchase void, could not at that sale put up the premises at less than 16,750*l.* *Roberts v. Bozon*, 3 L. J., Ch., 113.

2. Agreements not to Bid.

9. An agreement between two intending purchasers of property sold by auction under

the order of the Court, that one should bid for and purchase the property, and that, if purchased, they should divide the lot, is not inequitable, and is not of itself a ground for setting aside the purchase. *Re Carey*, 4 Jur., N. S., 1290; 26 Beav. 187; 28 L. J., Ch., 218.

A piece of land was advertised for sale. Two adjoining landowners were desirous of purchasing it; they agreed that one alone should attend the sale, and purchase, if it should be sold, for a sum not exceeding a sum named. If the land was purchased, terms were arranged, and it was to be divided between them. Upon a summons, by the vendors, to set aside the sale:—Held, that the agreement between the purchasers was not contrary to equity; that it did not vitiate the contract, and that the application could not be supported. *Id.*

1. A. paid B. a sum of money not to bid at a public auction. B. attended the sale and did not bid. A. bought the property:—Held, that A. was entitled to a decree for specific performance against the vendors. *Heffer v. Martyn*, 36 L. J., Ch., 372; 15 W. R. 390.

3. Puffer and Reserved Biddings.

2. Post obit bond of a young man put up to sale by him without reserve, relieved against. *Fos v. Wright*, 6 Madd. 111.

3. Sale by auction on behalf of an infant; without a reserved bidding, strongly condemned. *Cutts v. Salmon*, 16 Jur. 623; 21 L. J., Ch., 750.

4. Where particulars of sale by auction state it to be "without reserve," and puffers are employed by vendor, specific performance will not be decreed. *Meadows v. Tanner*, 5 Madd. 34.

5. The circumstance that a person bid at an auction under the private direction of the vendors, for the purpose of preventing a sale under a sum specified as the value, is no objection to a specific performance; especially in a case where the vendors were assignees under a commission of bankruptcy, and the purchaser was not present but purchased by an agent. *Smith v. Clarke*, 12 Ves. 477.

6. At an auction, one person only bid for the vendor to 75*l.* an acre, upon a private notice to the auctioneer; then, after a contest with the real bidders, the estate was bought at 101*l.* 17*s.* an acre, and the purchaser some days afterwards paid the duty; he was decreed to perform the contract with costs. *Bramley v. Atk.*, 3 Ves. 620.

Where all the bidders at an auction, except the buyer, are bidding for the seller, without notice, and the buyer is thereby induced to give more than the value, neither courts of law nor equity will support it. *Id.*

No objection to a sale by auction, that persons were employed by the vendor to bid for him without public notice. *Id.*

7. At a public auction, the seller's known agent bade for the plaintiff, the vendee; and under the circumstances the sale was damped thereby, a specific performance refused on that account. *Twining v. Morrice*, 2 Bro. C. C. 326.

8. Equity will never countenance demands for attending at auctions to enhance the price

of goods, etc. *Walker v. Gascoigne*, 13 Vin. 543. pl. 12.

9. A. brought his bill for an allowance of a certain sum of money as a commission upon the sale of goods by auction, where he attended as a puffer to enhance the price of the goods. Bill dismissed with costs; the demand being of such a nature as ought not to have any countenance in a court of equity. *Walker v. Nightingale*, 4 Bro. P. C. 193.

10. Objections by a purchaser by auction; first, that a way round and across a meadow was not specified; secondly, on account of a bidding for the plaintiff: a specific performance was decreed with costs. *Bowles v. Round*, 5 Ves. 508.

11. Though a puffer ought not to be employed to screw up the price or take advantage of the ignorance of other bidders, yet a progressive bidding to be fixed, or reserved bidding, by a person employed by the vendor without the knowledge of the other bidders, will not necessarily be deemed to be taking an advantage of their ignorance. A party to a contract becoming aware of an objection to the validity of the contract, must forthwith state it as an objection on which he means to resist performance of the contract, or, if after such knowledge he treats the contract as subsisting, he will be considered to have waived the objection. *Flint v. Woodin*, 9 Hare 618; 22 L. J., N. S., Ch., 92; 16 Jur. 719.

12. A sale by a mortgagee, at which the purchaser employed a clerk of the mortgagee's solicitor to bid, set aside. *Parnell v. Tyler*, 2 L. J., N. S., Ch., 195.

13. A., being requested to attend an auction to bid for the vendors, declined, saying he intended to bid for himself. The estate was put up in lots, and three in-bidders were appointed, without notice to the company. A. purchased two lots, but it did not appear whether or not his biddings were upon those of the respective in-bidders. Assuming that they were severally appointed to bid for respective lots, and that some one of them bid upon each of the lots purchased by A.:—Held, that it could not be inferred that A.'s biddings were upon those of a puffer, and that he, at any rate, could not claim relief for want of notice, because he knew that biddings would be made for the vendors. Specific performance therefore decreed. *Birch v. Hanson*, 1 L. J., N. S., Ch., 42.

Semble, that there being one bidder for the vendors upon each lot, without public notice, is not in itself sufficient to vitiate the sale; at least, if the final bidding is not upon that of a puffer. *Id.*

14. Where the property is advertised to be sold "without reserve," any interference direct or indirect, by the vendor, which may affect the rights of the highest bidder, will preclude the vendor from the aid of the Court to enforce the sale. Where a life interest was so advertised for sale, and the vendor privately agreed with another that he should bid a certain sum, and be declared the purchaser at that sum, unless a higher sum were bid, bill to enforce performance by a purchaser at a higher price, dismissed. *Robinson v. Wall*, 2 Ph. 372; 16 L. J., N. S., Ch., 401; 11 Jur. 577. Affirming 10 Beav. 73; 16 L. J., N. S., Ch., 17; 11 Jur. 1.

15. At the sale of an estate by public auction,

one of the conditions being that the highest bidder should be the purchaser, a person attended who had no intention of being a purchaser, but was employed by the vendor to bid, in order to prevent the property from being sold at an under-value; and this person made several biddings, till he reached the sum of 650*l.*, when he ceased to bid. The property was afterwards purchased for 690*l.* Upon the purchaser objecting to perform his contract, on the ground that puffers had been employed at the sale, the Court decreed special performance, the purchaser declining to have the validity of the contract tried in a court of law. *Woodward v. Miller*, 2 Colly. 279; 15 L. J., N. S., Ch., 6; 9 Jur. 1003.

Quere, whether the declarations of an auctioneer at a sale, to the effect that there are no puffers, are receivable in evidence, unless the expressions used are put in issue by the pleadings. *Id.*

1. Under a sheriff's order the interest (if any) of F. N., a partner in a late firm, in certain leasehold premises which were the property of the firm, were put up for sale. The purchaser at the auction discovered after payment of his purchase-money that F. N. was insolvent, and that his interest purported to be sold was of no value; and that a creditor of the firm, who was the assignee in bankruptcy of one of the partners, and was then carrying on the business, had given instructions for the sale, knowing the interest to be worthless, in order to establish his title to the separate property of F. N., who was of weak mind, and against whom he had obtained a judgment in an action at law, and discovered further that he had employed his clerk to run up the biddings to a high price:—Held, that the sale was void as against the purchaser, and that the person who so gave instructions for the sale was liable to repay the purchase-money and interest. *Smith v. Harrison*, 5 W. R. 408; 26 L. J., Ch., 412; 3 Jur., N. S., 287; 29 L. T. 11.

2. Property was put up for sale by auction, the conditions stating that the highest bidder was to be the purchaser, and not saying anything as to bidding on behalf of the vendors. An agent of the vendors bid 2,500*l.*; the auctioneer then bid 2,600*l.*; and the agent and the auctioneer continued bidding against each other till the biddings reached 3,600*l.* The defendant then bid 3,650*l.*, and the property was knocked down to him:—Held, that the vendors could not enforce the contract. *Mortimer v. Bell*, 1 L. R., Ch., 10; 35 L. J., Ch., 25; 11 Jur., N. S., 897; 14 W. R. 68; 13 L. T., N. S., 348.

Puffing does not invalidate a sale, if the puffer does not bid beyond a fixed reserved price; but the sale is bad, if the puffer is employed for the purpose of running up the purchaser, and not solely to prevent a sale below the reserved price. S. C. 5 N. R. 501.

3. Property was put up for sale by auction, under the order of the Court. The auctioneer at the sale stated that the sale would be without reserve, and that all parties interested in the property had liberty to bid. The mortgagee of the property, who had the conduct of the sale, bid against the purchaser, to whom the property was eventually knocked down. The purchaser sought to be discharged from

the purchase, upon the ground of puffing; but the Court refused to discharge him, although the purchaser swore that he heard only the statement that the sale was to be without reserve, and did not hear that all persons interested were at liberty to bid. *Dimmock v. Hallett*, 12 Jur., N. S., 953; 15 W. R. 93; 15 L. T., N. S., 374; 2 L. R., Ch., 21; 36 L. J., Ch., 146.

4. A puffer is a person who bids at a sale, but does not intend, and is not bound, to complete the purchase. *Shimmin v. Belton*, 1 Ir. R., Eq., 289.

Property was set up for sale by auction in pursuance of a decree for sale in a mortgage suit, under a condition that the highest bidder should be the purchaser, subject to the approval of the master. There was no condition that the sale should be subject to a reserved bidding. After the biddings had reached 300*l.*, the only person who bid against the purchaser was the clerk of the solicitor for the mortgagees, who was employed to buy in the property unless it produced a certain price put upon it by the mortgagees, and who bid without the leave of the Court. The property was sold for 500*l.* The Court refused to set aside the sale. *Id.*

Held, that the clerk was not a puffer. *Id.*

Held, also, that his bidding without the leave of the Court was an irregularity which the purchaser could not avail himself of to set aside the sale. *Id.*

5. Land was offered for sale by auction, since 30 & 31 Vict., c. 41, subject to a reserved price, but a right to bid was not reserved:—Held, that the employment of a person to bid on the seller's behalf was illegal, and vitiated the sale. *Gilliat v. Gilliat*, 18 W. R. 203; 21 L. T., N. S., 522; 9 L. R., Eq., 60; 33 L. J., Ch., 142.

6. Landed property was sold by public auction under conditions which stated that the highest bidder should be the purchaser, and which reserved to the vendor the right to bid once by himself or his agent. The auctioneer bid three times with the sanction of the vendor, and then the vendor stated what the reserve price was, when a person bid beyond that sum, and was thereupon declared the purchaser:—Held, that by reason of the biddings of the auctioneer the vendor had exceeded the limited right reserved to him by the condition of bidding once by himself or agent, and that therefore the sale was void at the option of the purchaser, both at law and under 30 & 31 Vict., c. 48. *Parfitt v. Jepson*, 46 L. J., C. P. D., 529; 36 L. T., N. S., 251.

IV. SIGNATURE OF CONTRACT.

7. Sales of land by auction are within the Statute of Frauds, except sales under decree. Auctioneer's receipt for the deposit, and containing expressly, or by reference, the terms, viz., the price, cannot have the effect of an agreement, binding the vendor within the Statute of Frauds. *Blagden v. Bradbear*, 12 Ves. 466.

8. Specific performance decreed against the purchaser of an estate by an agent, upon the signature of the agent's name by the auctioneer, who is an agent lawfully authorised for

that purpose within the Statute of Frauds. *Komeys v. Proctor*, 1 Jac. & Walk. 350; 3 Ves. & B. 57.

1. A bill for specific performance stated the terms of the agreement for sale of real estate by private contract reduced into writing, but not signed by the defendant himself, who had, however, paid his deposit to the person employed as auctioneer, who signed a receipt referring to the fair copy to be prepared for signature from the rough unsigned memorandum:—Held, that the signature by the auctioneer of this receipt, which thus referred to a document which showed what the agreement was, took the case out of the operation of the Statute of Frauds. *Wood v. Midgley*, 2 Sm. & G. 115. Reversed 23 L. J., Ch., 553.

The auctioneer employed to sell on behalf of the vendor, who signs a receipt for the deposit to the purchaser who pays it, acts as agent of both parties; and if the receipt refers to a writing containing the terms of the agreement, the purchaser cannot avail himself of the Statute of Frauds. *Id.*

2. At a sale by auction on the 10th August 1880 (an announcement of which, endorsed on the particulars and conditions, had the auctioneer's name printed at foot), D. signed a memorandum appended to the particulars and conditions, acknowledging that he had "this day purchased from Mr. Stafford, the vendor, by public auction, subject to his approval, the premises mentioned in the annexed particulars, for the sum of 250*l.*, subject to the conditions of sale also annexed hereto;" but there was no signature by the vendor, nor any subsequent adoption of the contract under his hand. At the time of sale D. paid a portion of the purchase-money in cash, and for the balance of the stipulated deposit he gave his I O U. Three days afterwards D. paid a further sum on account of the deposit, and was handed a receipt, dated the 13th August 1880, signed by the auctioneer's clerk, on behalf of "Michael Crooke" (the auctioneer), and acknowledging that he had "received from Mr. Dyas (the purchaser) 30*l.* sterling, which, with 20*l.* paid 10th August, makes 50*l.* deposit on his purchase, 84*l.*, Mr. John Stafford's property." The vendor's solicitor subsequently wrote to D. recognising the sale, furnished him with copies of the title-deeds, and approved of the draft conveyance to him, which, however, the vendor refused to execute; whereupon D. having brought an action for specific performance:—Held, that there was no agreement enforceable against the defendant, as the contract of the 10th August having been made expressly "subject to his approval," the memorandum of that date only amounted to a proposal, and did not constitute a note in writing, within the Statute of Frauds; there not being then in fact any contract in existence that subsequent parol approval by the defendant or his agents could not have the effect of altering the character in which his name appeared in the memorandum, so as to convert it into an authentication of a contract: and that the auctioneer's name at foot of the endorsement on the particulars and conditions merely authenticated the announcement of the sale. *Dyas v. Stafford*, 9 L. R., Ir., 520. Reversing 7 L. R., Ir., 590.

Held, also, that the receipt of the 13th August did not satisfy the statute. *Id.* Affirming 7 L. R., Ir., 590.

3. At a sale by auction subject to conditions, the auctioneer entered in his sale book the names of the vendor and purchaser, the subject-matter of the sale, and the amount of the purchase money, but omitted, in the entry, to embody or make any reference to the conditions of sale. There was no other memorandum or contract in writing:—Held, that there was no sufficient contract in writing within s. 4 of the Statute of Frauds, and specific performance refused as against the purchaser. *Rishton v. Whatmore*, 8 L. R., Ch. D., 467; 47 L. J., Ch., 629; 26 W. R. 827.

4. *Seem*, that a contract signed by an auctioneer on behalf of an undisclosed proprietor is a valid contract under the Statute of Frauds. *Beer v. London & Paris Hotel Co.*, 20 L. R., Eq., 412; 42 L. T., N. S., 715.

V. AUCTIONEER AS PARTY TO SUIT.

5. Although it is the law that an auctioneer holding the deposit on a purchase may be made a defendant in an action for specific performance, yet, as a general rule, the proper practice is not to make him a defendant when the deposit is of small amount, unless he refuses to pay it into court when required; but where the deposit is of large amount, he may be properly made a defendant, unless he has paid into court before action brought. *Egmont (Earl) v. Smith*, *Smith v. Egmont (Earl)*, 6 L. R., Ch. D., 469; 46 L. J., Ch., 356.

6. The plaintiff, who had bought property at an auction and paid a deposit to the auctioneers, brought an action against the vendors and the auctioneers to have the contract rescinded, the deposit repaid with interest, the costs of the action paid, and for damages. The statement of claim alleged that all, or nearly all, of the biddings previous to that of the plaintiff were fictitious, and were either biddings by the vendors or their agents, or were announced by the auctioneer without any bidding having in fact been made. The auctioneers applied for liberty to pay the deposit into court, and to have the action dismissed against them on such payment being made. The Master of the Rolls made an order that, the vendors undertaking to pay the auctioneers their costs of the action without prejudice to how they should ultimately be borne, and to pay any interest and damages to which the plaintiff might be held entitled, and the auctioneers undertaking, in the event of the vendors not carrying out their undertaking, to pay to the plaintiff interest on the deposit up to the time of payment into court, and the costs of the action up to and including that application in the event of the Court holding the plaintiff entitled to interest and costs, the auctioneers should be at liberty to pay the deposit into court, and that all further proceedings against them should be stayed. But held, on appeal, that the order must be discharged, the auctioneers not having submitted to give the plaintiff all the relief which he could in any event be entitled to against them; for that if the allegations in the statement of claim were established, the plaintiff

would be entitled to have judgment against them for the deposit with interest, and to have an order for costs of the action against all the defendants. *Heatley v. Newton*, 19 L. R., Ch. D., 326; 51 L. J., Ch., 225; 45 L. T. 455; 30 W. R. 72.

Semble, that it would not have been open to him to make them parties for the mere purpose of discovery. *Dickson v. Harrison* (9 L. R., Ch. D., 243) explained. S. O. 45 L. T. 455; 30 W. R. 72.

IV. Sales by Agents.

- I. *Authority*, 7153.
- II. *Signature*, 7156.
- III. *Personal Liability of Agents*, 7156.
- IV. *Other Cases*, 7156.

I. AUTHORITY.

1. *Sufficiency and Proof of*, 7153.
2. *Parol Authority*, 7155.
3. *Of Estate Agents*, 7155.
4. *How Pledged*, 7155.

1. Sufficiency and Proof of.

1. Purchaser, under particulars giving a false description, not bound at law or in equity, or by any act of his agent, without a fresh authority. *Devereil v. Bolton (Lord)*, 18 Ves. 509.

2. A. and B. having entered into a verbal treaty for the purchase of certain premises belonging to A., and not being able to agree as to the amount of the purchase-money, A. addressed a letter to C., a third person, stating that he would take a certain sum from B. for the premises, reserving a small portion of the same for his sister, if C. approved of it. B. subsequently lodged the sum named by A. with C., of which lodgment C. made a memorandum on A.'s letter, with the remark that it was "a great price":—Held, that C. must be considered the agent of A., and that, as he had signed the contract acknowledging the receipt of the purchase-money, A. was bound to perform the agreement. *Field v. Boland*, 1 Dr. & Wal. 37.

3. Baron and feme having joint power to sell an estate of the wife's, give authority to an agent to sell by auction; he sells by private contract for more than the price they required; the buyer cannot compel specific performance. Husband delivering his wife's compliments in a letter to the agent, is no proof of her joining in giving authority to agent. *Daniel v. Adams*, Amb. 495.

4. E., in February 1857, entered into an agreement, for himself and brothers and sisters, to sell to the plaintiff eight fields, forming part of an estate, for 1,000*l.*, and the plaintiff was to have possession on the 25th March. The agreement was signed by A. and B. only; but the bill alleged that E., and his four brothers and sisters, who were tenants in common of the equity of redemption, agreed to sell the property to the plaintiff,

and that A. and B., or at least one of them, signed the agreement as agents or agent of their brothers and sister. The plaintiff, with the privy of the five tenants in common, paid the purchase-money to the mortgagee in part satisfaction of the mortgage, and he was let into possession, and expended moneys in draining. An abstract of title was furnished, and accepted; but before the conveyance was prepared, the plaintiff and his solicitor received notice not to prepare it, as the five vendors would not execute it, on the ground that one of them did not concur in the sale, and the others declined to complete. E. and A. and B. admitted that they agreed to sell the fields to the plaintiff, and that they believed their brothers and sister would concur in the agreement, but that they had no authority from them to sell, of which the plaintiff was aware. A. and B. denied that they signed on behalf of any one. C. and D. denied that they had ratified the agreement, and submitted that they were not bound; but, in fact, D. was with E. and A. and B. present when the purchase-money of 1,000*l.* was paid to the mortgagee. E. and A. and B. submitted to a decree for specific performance:—Held, first, that there was not enough to show that C. was bound by the agreement; but that D., the other tenant in common, was bound, having been present when the 1,000*l.* was paid to the mortgagee, and perfectly cognisant of what took place. *Davies v. Davies*, 6 Jur., N. S., 1320.

Held, secondly, that as to C.'s one-sixth share in the equity of redemption, the plaintiff was entitled to a decree that he should redeem or be foreclosed; and in case of redemption, that there should be a petition. *Id.*

5. The owner of an estate, in answer to an inquiry from an intending lessee, said, "A. B. manages all my affairs, and you are to treat with him." This does not imply that A. B. had authority to enter into a binding agreement. *Semble. Ridgway v. Wharton*, 8 De G. M. & G. 677. And see S. C. 6 H. L. Ca. 238; 27 L. J., Ch., 46; 5 W. R. 804; 2 Eq. Rep. 839.

6. Where the authority of the agent of the vendor was not sufficiently shown, a specific performance at the suit of the purchaser was refused, but, under the circumstances, without costs. *Wilkinson v. Stringer*, 16 Jur. 1033.

7. If an agent for a purchaser, having a general authority, contracts to purchase such title as the vendor has, the Court will compel specific performance of the contract. *St. John v. Stirling*, 7 L. J., Ch., 189.

8. Where the same solicitor, acting for both parties in a matter of sale and purchase, submitted conditions which he represented to be "usual conditions," and the purchaser afterwards refused to complete, on the ground that some of them were unusual:—Held, that the purchaser must be considered to have acted under the advice of his own solicitor, and that specific performance must be decreed. *Minton v. Kirwood*, 12 Jur., N. S., 86; 14 W. R. 274; 13 L. T., N. S., 743. Affirmed 12 Jur., N. S., 970; 15 W. R. 116.

9. A purchaser alleged, by his answer to a suit for specific performance, that he acted as a puffer in bidding for one lot, and also as

puffer in bidding for another lot, which was knocked down to him; and that he therefore purchased the lot, and signed the agreement for the purchase, as the agent of the vendor; but the statement in his depositions of the circumstances attending the signature was somewhat different from that in his answer, and he had signed an order on his attorney for payment of the deposit money:—Held, that there was not sufficient evidence of agency, and the defendant was held to have purchased on his own account. *Bennett v. Smith*, 16 Jur. 421.

1. B. became the purchaser of premises at an auction, declaring himself the agent of C. in C.'s presence; but the vendor's solicitor required B. to sign the agreement, and declined to substitute the name of C. Communications afterwards took place between the vendor's solicitor and C., with reference to the title. The vendors afterwards brought their bill against B. and C. for specific performance of the contract:—Held, that, supposing B. to be the agent of C., yet the signature of B. to the contract made him personally liable to perform it. That the communication between the vendor's solicitors and the solicitor of C. with reference to the title, was not an adoption of C. as the purchaser in the place of B., but should be assumed to be made in furtherance of the original contract, in which, according to B.'s representation, he was (as between himself and C.) only a formal party. That the bill of the vendors having been dismissed against C. at his instance, C. would not be allowed to set up, in a suit by B. against himself, that the decree against B. in the suit of the vendors had been improperly obtained in his absence. That the acceptance of the title by C. in such communications would not be binding upon B., for such acceptance would be regarded as having been made in C.'s own right, as claiming through B., and not as agent for B. *Chadwick v. Maden*, 9 Hare 188; 21 L. J., Ch., 876.

2. B., in writing, authorised his solicitor, M., to sell all the property mentioned, and to sign an agreement for such sale on his behalf. M. shortly afterwards offered the property to H., who was another client of his, and he, after some consideration, entered into a contract for the purchase of the property. The contract was signed by M. for B., and by H. as acting on his own behalf. B. at first approved of the contract, but he subsequently refused to complete the same, on the grounds of concealment, and that M. was in a situation of confidential relation to both parties:—Held, that the circumstances showed no concealment or unfair conduct; that the authority given to M. was sufficient to enable him to enter into the contract; that it was properly used, and that the contract must be specifically performed by B. *Hesse v. Briant*, 2 Jur., N. S., 922.

Held, also, that the rule which will not permit a person in a confidential relation to act on behalf of both vendor and purchaser did not apply. *Ib.*

3. A. B. was authorised by the defendant to make a proposal of sale of some land to the plaintiff, but to be accepted within a week. The plaintiff wrote to A. B. within that time, accepting the offer, but A. B. did not com-

municate the acceptance to the defendant until long after:—Held, that there was a valid contract, which was not destroyed by the neglect of A. B. to communicate the acceptance to the defendant. *Wright v. Bigg*, 15 Beav 592.

4. An agreement to sell property was signed for a company by the secretary, who was alleged to be its authorised agent. The agreement was made subject to conditions of sale, and it was alleged that the vendors therein described referred to the company. The conveyance was prepared for execution when the company was ordered to be wound up, and the liquidator repudiated the contract on the ground that the secretary was not an authorised agent for the purpose of sale:—Held, that the allegations in the bill were sufficient to show that the secretary was the authorised agent for the purpose of executing the contract, both within the Statute of Frauds and the Companies Act 1867. *Beer v. London & Paris Hotel Co.*, 20 L. R., Eq., 412; 32 L. T., N. S., 715.

5. An agent, commissioned by a vendor to find a purchaser, has authority to describe the property, and to state any fact or circumstance which may affect the value, so as to bind the vendor; and if an agent so commissioned makes a false statement as to the description or value (though not instructed so to do), which the purchaser is led to believe, and upon which he relies, the vendor cannot recover in an action for specific performance. A surveyor was employed by the owner of a leasehold house to find a purchaser. He represented to the defendant that another person, H., was ready to buy the property for 700*l.*, and that if the defendant were to give 50*l.* more, he would make a clear profit of 7 per cent.; that H. had further offered to rent the property at 300*l.*, or the ground floor only at 200*l.* The defendant, relying on the above representations and others, which were unauthorised by the vendor, and untrue, contracted to purchase for 750*l.*; but afterwards, finding out the falsehood, refused to complete. The vendor himself also made a misleading statement to the purchaser:—Held (independently of the statement made by the vendor himself), that the false statements made by the agent, being within his authority, were sufficient to vitiate the contract; and specific performance refused. *Mullens v. Miller*, 22 L. R., Ch. D., 194; 52 L. J., Ch., 380; 48 L. T. 103; 31 W. R. 559.

6. W. entered into a verbal agreement with S. to sell him an inn called the Lion Inn for 950*l.* On the following day W.'s solicitor wrote to S.'s solicitor:—"W. has been with us to-day, and stated that he had arranged with your client S. for the sale to the latter of the Lion Inn for 950*l.* We therefore send herewith draft contract for your perusal and approval":—Held, that this letter was not such a note or memorandum of an agreement as is required by the Statute of Frauds. *Smith v. Webster*, 3 L. R., Ch. D., 49; 45 L. J., Ch., 528; 35 L. T., N. S., 44; 24 W. R. 894. Reversing 45 L. J., Ch., 430; 34 L. T., N. S., 479.

7. Several persons interested in a particular piece of land, authorised, by agreement among themselves, one of their number, W., to dispose of it. The land was divided into lots,

and a plan of the lots made, and certain conditions, on which the land might be let or sold, were printed on the plan. M., an intending purchaser, made inquiries of W. as to the sale of certain lots. W. expressly informed him that he must purchase subject to the conditions stated on the plan. One of these conditions required that a purchaser should execute a contract embodying the conditions. M. offered to purchase these lots at a price which he named. W. promised to lay his offer before "the proprietors" (without naming or describing them), and very shortly afterwards wrote to M. that he had done so, and (stating the conditions) that the proprietors had accepted his offer; adding, that in reducing the price they had taken into consideration his intention of soon building on the land, an intention which of course they wished to encourage. W. added that he had instructed the solicitors to forward to M. the agreement for purchase. There was, in fact, nothing in the conditions which bound a purchaser to build, though there were provisions which assumed that he might do so, and which, in such a case, regulated the mode of proceeding. M. wrote back, in answer, that he could not be bound to build at any given time, or at all; that the subject had better be reconsidered, unless W. was prepared to leave him to do as he might think best. W. replied that the acceptance of the offer was without condition, and that M. was free to do what he might think best. M. afterwards declined to complete the purchase:—Held, that the dealings between the parties sufficiently showed the authority of W. to enter into the contract; and, farther, that the description of "the proprietors" for whom he acted was sufficient. *Rossiter v. Miller*, 3 L. R., App. Cas., 1124; 39 L. T., N. S., 173; 26 W. R. 865; 48 L. J., Ch., 10. Reversing 5 L. R., Ch. D., 648; 37 L. T., N. S., 14; 25 W. R. 890; 46 L. J., Ch., 727; which reversed 46 L. J., Ch., 228; 36 L. T., N. S., 304; 25 W. R. 890.

2. Parol Authority.

1. Authority of agent may be by parol; the agreement must be by writing. *Mortlock v. Buller*, 10 Ves. 311.

2. A contract for the purchase of land made by an agent will be enforced, although the agent was appointed merely by parol. *Heard v. Pilley*, 4 L. R., Ch., 548; 38 L. J., Ch., 718; 17 W. R. 750; 21 L. T., N. S., 68.

In a bill filed by a purchaser for specific performance of a contract for sale, it was alleged that the contract was made by one of the defendants as agent for the plaintiff, but that the agent claimed the benefit of the contract for himself. It appeared by the statements in the bill, that the agent was appointed merely by parol. Demurrer by the two defendants, the agent and the vendor, was overruled. *Id.*

3. An agent to contract for the sale, etc., of land, under the second section of the Statute of Frauds (Irish Statute), need not to be authorised by writing. *Clinan v. Cooke*, 1 Sch. & Lef. 22.

4. A contract for the purchase of land made by an agent in his own name, vests the equit-

able estate in the principal, and may be established by him against the agent and persons claiming under him, although the agent is appointed merely by parol. *Cave v. Mackenzie*, 46 L. J., Ch., 564; 37 L. T., N. S., 218.

The plaintiffs appointed by parol W. F. M. as their agent to purchase land on their behalf. W. F. M. entered into a contract for the purchase of the land in his own name, and then assigned the benefit of the contract to J. T. M. for valuable consideration. In an action by the plaintiffs against W. F. M. and J. T. M. to establish the agency, the vendor not being a party:—Held, that the appointment of W. F. M. was an agency within s. 4 of the Statute of Frauds, and not a trust or confidence within s. 7, and therefore was not required to be evidenced by writing. *Id.*

Held, also, that the plea of purchase for value without notice raised by J. T. M. was of no avail, inasmuch as the prior equitable title vested in the plaintiffs by force of the contract. *Id.*

3. Of Estate Agents.

5. Upon a written request by an owner of freehold property to an estate agent to procure a purchaser for it and to advertise it at a certain price:—Held, that the estate agent had no authority to enter into an open contract for sale; and, *semble*, that he had no authority to enter into any contract for sale. *Hamor v. Sharp*, 19 L. R., Eq., 108; 44 L. J., Ch., 53; 23 W. R. 158; 31 L. T., N. S., 648.

6. When an owner of property employs an estate agent to procure a purchaser or tenant at a specified price, the agent has no implied authority to conclude a contract for sale; his duty is simply to find a purchaser or tenant, and to communicate his offer to the owner. *Wilde v. Watson*, 1 L. R., Ir., 402.

4. How Pleaded.

7. In an action for specific performance of an agreement made by an agent, the statement of defence, after alleging unsoundness of mind of the principal, denied that any agreement had been entered into by a person lawfully authorised, and claimed the benefit of the Statute of Frauds:—Held, that the defendant had not put in issue the question of authority of the agent, and was only entitled to adduce evidence with respect to the unsoundness of mind. *Byrd v. Nunn*, 47 L. J., Ch., 1; 7 L. R., Ch. D., 284.

8. The former practice, which, in a suit for specific performance, required the authority of an agent to enter into a binding contract on behalf of his principal to be specially pleaded, still prevails. *Vale of Neath Colliery Co. v. Furness*, 34 L. T., N. S., 231; 45 L. J., Ch., 276; 24 W. R. 631.

When, therefore, a plaintiff in his statement of claim alleged that the defendant "duly authorised J. to act as his agent in and about the purchase" of a colliery, that J. acting as such agent wrote a letter to B., "who was then duly authorised to act in the matter of the sale of the colliery as agent for the plaintiff," offering 6,000*l.* for the colliery, and that

B. by the plaintiff's direction by letter accepted the offer, adding, "I will send you draft contract in due course":—Held, that there was no sufficient allegation that J. and B. were duly authorised to sign a binding contract on behalf of their principals. *Id.*

II. SIGNATURE.

1. Vendor is bound by signature of agent's clerk, thus: "Witness E. P. for Mr. S. agent for the seller," upon evidence of assent; but clerks in general have no authority to bind the principal. *Coles v. Trecothick*, 9 Ves. 234; 1 Smith 233.

2. An agent not being able to write, held the top of the pen while another person wrote his name to an agreement:—Held, a sufficient signature. *Helshaw v. Langley*, 11 L. J., N. S., Ch., 17.

3. Specific performance of a contract concerning land, not decreed on the signature of an agent without authority. *Howard v. Braithwaite*, 1 Ves. & B. 202.

4. *Quære*, whether the signature of an attorney to a statement at the foot of a draft agreement, signifying his approval of the draft on behalf of his client, is a signature within the Statute of Frauds. *Thornbury v. Bevil*, 1 Y. & Coll. C. C. 554; 6 Jur. 407.

By Auctioneer.] See III. IV. *ante*.

III. PERSONAL LIABILITY OF AGENTS.

5. Attorney, as agent, on sale of an estate, not disclosing to the buyer an incumbrance, and leading him to suppose the title good:—Held, liable to make satisfaction in default of the vendor. *Arnot v. Bischoe*, 1 Ves. 95.

6. When a person assumes, without authority, to act as agent for the sale of real estate, and the contract is merely verbal, the person injured by relying on his representations has no remedy in equity against him for damages on the ground of part performance; and there is nothing in the Judicature Acts to alter this rule. *Warr v. Jones*, 24 W. R. 695.

7. A. B., an attorney representing himself to be authorised by the owners, entered into an agreement on their behalf to sell a house to the plaintiff, and he received a deposit. The plaintiff filed a bill against the owners and A. B. praying a specific performance, and in the alternative that if the agreement could not be enforced against the owners, then that A. B. might repay the deposit and the costs incurred by the plaintiff and of the suit. It appeared at the hearing that A. B. had not authority to sell:—Held, that the remedy of the plaintiff against A. B. being altogether at law, could not be had in this suit, and the bill was dismissed with costs. *Sainsbury v. Jones*, 5 Myl. & C. 1; 4 Jur. 499. Affirming 2 Beav. 462.

8. B. became the purchaser of premises at an auction, declaring himself the agent of C. in C.'s presence, but the vendors' solicitor required B. to sign the agreement, and declined to substitute the name of C. Communications afterwards took place between the

vendors' solicitor and C. with reference to the title. The vendors afterwards brought their bill against B. and C., for specific performance of the contract:—Held, that supposing B. to be the agent of C., yet the signature of B. to the contract made him personally liable to perform it; that the communication between the vendors' solicitor and the solicitor of C., with reference to the title, was not an adoption of C. as the purchaser in the place of B., but should be assumed to be made in furtherance of the original contract, in which, according to B.'s representation, he was (as between himself and C.) only a formal party; that, the bill of the vendors having been dismissed against C. at his instance, C. would not be allowed to set up, in a suit by B. against himself, that a decree against B., in a suit of the vendors, had been improperly obtained in his absence; that the acceptance of his title by C., in such communications, would not be binding upon B., for such acceptance would be regarded as having been made in C.'s own right as claiming through B., and not as agent for B. *Chadwick v. Maden*, 9 Hare 188; 21 L. J., N. S., Ch., 876.

9. If a party executes a deed as principal, he at once takes the property and makes himself liable for the purchase-money, and he will not be heard to say that no contract existed with the vendor, or that his execution was obtained upon the representation of a third party that the purchase-money was paid, and that he took the property in the character of trustee only. *Wilson v. Keating*, 5 Jur., N. S., 815; 28 L. J., Ch., 895.

IV. OTHER CASES.

10. Where an agent contracts it may be proved by parol evidence who is his principal. *Morris v. Wilson*, 5 Jur., N. S., 168.

11. The owner of a colliery placed it in the hands of an agent to sell at a minimum price of 12,000*l.*, on the understanding that he should be entitled to the difference between 12,000*l.* and any greater sum which the colliery might fetch. The agent treated with R. & Co., who agreed (in the event which happened) to purchase the colliery for 12,000*l.*, and pay the agent 2,000*l.* for his expenses and commission in the matter. R. & Co. afterwards declined to purchase the colliery, and the agent filed a bill against them and the owner of the property for specific performance of the agreement:—Held, that the bill was not maintainable. *Glasbrook v. Richardson*, 23 W. R. 51.

12. To a claim for specific performance of an agreement to sell lands, the defendant pleaded, first, that the agreement was entered into by a house agent, who was not authorised by the defendant to sell; secondly, that since the contract the defendant had notice that the purchasers were trustees of a marriage settlement, and that the property, which was an underlease, might be an improper investment of the trust funds. Interrogatories by the defendant, directed to establish the case that the investment was a breach of trust, were ordered to be struck out as irrelevant. *Mansfield v. Childerhouse*, 46 L. J., Ch., 30; 2 L. R., Ch. D., 82.

V. Sales at a Valuation.

1. Where there is a contract to sell at a valuation by A., B., and C., the Court will compel the vendor to permit the valuation. *Morse v. Merest*, 6 Madd. 26.

The time of valuation is of the essence of the contract; but the defendant cannot take advantage of it, if he has improperly occasioned the delay. *Id.*

2. Though a person may agree to sell at a price to be fixed by arbitration, and the award can be impeached only upon the grounds affecting all awards, as fraud or gross mistake; yet upon such an agreement, where some of the persons to be bound were married women, of whom also one had not executed, the Court refused a specific performance, and dismissed the bill, leaving the plaintiff to law. *Emery v. Wase*, 5 Ves. 846.

3. Agreement for sale, according to the valuation of two persons, one chosen by each party, or of an umpire, to be appointed by those two, in case of disagreement. Bill for a specific performance that the Court will appoint a person to make the valuation, or otherwise ascertain it, dismissed. *Milnes v. Gery*, 14 Ves. 400.

A contract that does not settle the price is valid and complete only when and if the party to whom it is referred shall fix it, and is otherwise totally inoperative. *Id.* 408.

Agreement to sell at a fair valuation, may be executed. *Id.* 407.

4. Specific performance cannot be decreed to an agreement to sell at a price to be fixed by arbitrators (already appointed to settle other matters in dispute between the parties), where the defendant (the vendor) had refused to execute the arbitration bond, and it was therefore uncertain that any award would ever be made. *Wilks v. Davis*, 3 Meriv. 507.

5. Specific performance will not be decreed of an agreement to sell certain property at a price to be settled by two persons who are named, if the Court sees reason to believe that the price subsequently fixed by these persons is considerably below the real value of the property. *Parken v. Whitby*, T. & R. 366.

If in the course of proceedings in a suit for specific performance, there comes out a fact not put in issue in the cause by either party which affects the legality of the contract, or tends to show that the contract is not fully stated in the bill, the Court will direct an inquiry into the fact so disclosed. *Id.*

6. A specific performance cannot be decreed of an agreement to sell at a price to be settled by arbitrators named by the parties, if no award has been made; but if the parties agree to pay the amount of a valuation, but have not appointed any persons to make it, the Court will interfere so as to ascertain the value, and direct a specific performance of the agreement. *Daly v. Duggan*, 1 Ir. Eq. R. 312.

7. Under a contract for sale at a price to be fixed by an award within a limited time during the lives of the parties, the death of one is not an accident against which the Court will relieve. *Blundell v. Brettaroh*, 17 Ves. 241. And see *Puteney v. Warren*, 6 Ves. 88.

Specific performance refused, under a contract for sale, at a price to be fixed by arbitrators within a certain time, or if they should

not agree to make their award within the time, by an umpire, also within a limited time; the construction of the contract (requiring the delivery of the award in writing to each party) being, that though the consequential acts, executing the conveyances, etc., might be done by representatives, it was, with reference to the terms to be fixed by the award, personal to the parties, one of whom died before it. *Id.* 232.

8. The price is of the essence of a contract of sale; if therefore to be fixed by arbitrators, and they do not fix it, there is no contract, but the Court determining that an agreement ought to be executed, does not require foreign aid to carry the details into execution. *Gourlay v. Somerset*, 19 Ves. 431.

9. Specific performance of contract by competent party, and its nature and circumstances unobjectionable, are as much of course in equity as damages at law. *Hall v. Warren*, 9 Ves. 608.

Upon bill for specific performance of contract, overreached by commissions of lunacy, the plaintiffs not having traversed the inquiry, an issue was directed whether the defendant was lunatic at the execution; if so, whether he had lucid intervals, and whether the contract was executed during a lucid interval; the difficulties in executing the contract which was for sale of estate vested in lunatic, viz., that the price was to be fixed by persons to be nominated, not appearing strong enough to preclude the previous inquiry with a view to performance, the plaintiff being willing to take the title. *Id.* 605.

10. Agreement between vendor and purchaser of a copyhold estate, in which they covenant for themselves and their representatives to fulfil the contract, and to refer the question of value. One of the parties dying, the representatives cannot annul the decision of the referee, by showing an error in his estimate, or compel the acceptance of the penalty, under which the agreement was secured, in satisfaction of their breach of contract. *Belchier v. Reynolds*, 2 Ken. Ch. 87.

11. Option to purchase at a valuation; valuation must not only be made according to the letter of the will, but must be fair and adequate. Option must be declared before valuation. Goodwill an element in the value of a reversionary interest in a public house. *Edwards v. Edwards*, 1 Jur. 654.

12. Upon a reference to surveyors or other persons of skill, to fix the value of property to be bought or let, they are not necessarily to examine witnesses, but may judge from their own experience and observation; their not having examined witnesses is, therefore, not an objection to their award, provided they *bonâ fide* mean to say that they know enough of the subject to decide properly without doing so. *Semble*, it is not a good ground of objection to an award relating to the value of a mine, that one of the referees did not himself go down the mine but left it to another person to report to him. *Semble*, it would not be a good ground of objection to an award, that the referees consulted with the umpire simply. But where a referee consulted with the umpire, and then concurred in an award fixing the value of the matter in question at the amount mentioned to him by the umpire, although he

himself did not think it worth half of that amount, but because he thought it of no use differing:—Held, that the award was bad. *Semble*, referees must sign the award together. An award signed by the referees and by the umpire was treated merely as the award of the referees. An award was made on the 13th April; it was invalid if properly objected to; it was objected to on the 8th August by a party who knew of it on or a day or two after the 18th June. *Semble*, that the objection was made in due time. Specific performance refused on ground of delay. *Eads v. Williams*, 4 De G. M. & C. 674; 3 W. R. 98; 1 Jur., N. S., 193; 3 Eq. Rep. 244. Reversing 2 W. R. 506.

1. By the terms of the agreement the land was to be valued, and the purchase-money was not to be less than 400*l*. *Quere*, whether this agreement could be enforced, no valuation having been made. *Potts v. Thames Haven Dock & Railway Co.*, 15 Jur. 1004.

2. A purchaser having agreed to buy certain land and bleach works for 7,700*l*., and to take the plant and machinery at a valuation:—Held, that the necessity of a valuation was no reason for refusing specific performance at the suit of the vendor. *Jackson v. Jackson*, 1 Sm. & G. 184; 22 L. J., Ch., 873.

A. agrees to purchase a house at a certain price, and to take the machinery and fixtures at a valuation to be ascertained by valuers appointed on each side, who were to appoint a third party as umpire in case they should not agree upon the amount. The valuers were appointed by the vendor and purchaser, but they had not come to any agreement as to the amount, nor had they appointed an umpire. The purchaser refused to join in reappointing valuers, and declined to complete his contract. Upon a claim by the vendor, specific performance of the whole agreement decreed with costs, the question of valuation to be settled by the chief clerk in chambers. S. C. 1 W. R. 264; 17 Jur. 293.

3. Lands were settled to such uses as Sir C. M. and his son should by deed jointly direct, and subject thereto to Sir C. M. and his son successively for life, with remainders over to the sons of the son in tail. A railway company having under their Act power to take the lands thus settled, Sir C. M. and his son contracted for the sale to them of a certain part of the lands, and the company were let into possession on an agreement that the amount of compensation should be settled either by arbitration or a jury as Sir C. M. should choose: the company also paid a sum of money to Sir C. M. expressly on account of the compensation money to be ultimately fixed; Sir C. M., however, died before anything further was done:—Held, under these circumstances, that there was no contract, the specific performance of which the Court could enforce or aid in carrying into effect as a defective execution of the joint power of appointment, at the instance of the son and against the parties entitled in remainder under the settlement. *Morgan v. Milman*, 3 De G. M. & G. 24; 17 Jur. 193; 22 L. J., Ch., 897; 1 W. R. 143. Affirming 16 Jur. 756.

Where on a sale of property the parties have stipulated that the price shall be ascertained in a particular way, and it is not so ascertained,

the Court cannot, in the absence of special circumstances, interfere to aid the carrying out of the contract by having the price ascertained in some different mode. *Id*.

4. Where a railway company agreed for the purchase of lands from persons under disability, and the certificate of two surveyors, as to the adequacy of price, had not been obtained, the Court refused to decree specific performance at the instance of the company. *Wycombe Railway Co. v. Donnington Hospital*, 1 L. R., Ch., 268; 12 Jur., N. S., 347; 14 W. R. 359; 14 L. T., N. S., 179.

5. In a suit for specific performance, where possession and expenditure are fairly referable to an express agreement with the landowner, to give an adequate consideration, to be calculated on a principle sufficiently defined in the agreement, the Court will, in favour of the possession and expenditure, endeavour to decree a specific performance; but not where the plaintiff after filing his bill, but before the hearing, has obtained by an Act of Parliament the means of securing and keeping his possession without the aid of the Court. *Meynell v. Surtees*, 3 Sm. & G. 101; 1 Jur., N. S., 80. Affirmed 2 Jur., N. S., 737; 25 L. J., Ch., 257; 3 W. R. 535.

6. The defendant agreed to purchase a property at a valuation to be made by A. The Court, though it considered A.'s valuation very high, "and perhaps exorbitant," decreed specific performance, there appearing neither "fraud, mistake, nor miscarriage." *Collier v. Mason*, 25 Beav. 200.

7. A. entered into a contract with B. for the sale of property to him at a price to be fixed by two valuers, named in the contract, who afterwards valued the property at an inadequate price:—Held, nevertheless, that B. was entitled to a decree for specific performance, there being no proof of fraud or collusion on the part of the valuers. *Weekes v. Gallard*, 21 L. T., N. S., 655; 18 W. R. 331.

8. Difference between a contract to sell at a price, to be determined by arbitration, and a contract which is only to be valid provided the price fixed be not less than the value determined by arbitration. *Baker v. Metropolitan Railway Co.*, 1 N. R. 8; 32 L. J., Ch., 7; 11 W. R. 18; 7 L. T., N. S., 494; 31 Beav. 504; 9 Jur., N. S., 61.

9. An agreement for the sale of leasehold premises and the goodwill of a trade and fixtures, to be taken at a valuation to be made by two gaugers, to be named, or their umpire:—Held, that a court of equity could not decree a specific performance of an agreement, one part of which was left to be determined by arbitration. *Darby v. Whitaker*, 4 Drew. 134.

D. agrees with W. and another in writing to sell to them a lease, trade, and goodwill, subject to the rent and ordinary covenants, but free from all other incumbrances; also, to sell the tenant's fixtures, furniture, and effects, at such sum as the same should be valued at by two persons named, or their umpire, and all the stock of beer not exceeding a specified quantity at the valuation of two licensed gaugers or their umpire. And for the consideration aforesaid the purchasers agreed to accept an assignment without requiring evidence of title prior to the lease, and if either party

neglected to perform the agreement he should pay to the other 150*l.* as liquidated damages. The defendants, alleging misrepresentation, refused to produce the lease under which the plaintiff held, and the forfeiture of the lease by change of a policy, refused to complete:—Held, that all these objections were untenable; but specific performance refused, on the ground that the clause as to fixtures and stock could not be enforced. *S. C. 5 W. R. 772.*

Semble, the Court will not decree payment of a valuation to be made, but will enforce a contract for purchase of a goodwill where it is annexed to the premises. *Id.*

1. A contract for the sale of land provided that one party was to be consulted on any houses proposed to be built thereon by the other, and in case of difference, that A. and B., or their nominees, should have power to decide any such question. There having been no decision:—Held, that the Court could not specifically perform the contract. *Tillett v. Charing Cross Bridge Co.*, 26 Beav. 419.

2. A. and B., being in partnership as distillers, came to an agreement whereby B. was to buy out A., and it was agreed that if B. should, during A.'s life, be desirous of retiring, he should give notice, and A. should then have an option of repurchase, on the terms that within six months after notice by A. the premises, goodwill, stock in trade, and all such of the subsisting contracts as A. should be willing to take, should be valued in the "usual way" by two valuers, one to be named by A., the other by B., or by the umpire of the two valuers. B. gave notice of his intention to retire, whereupon A. gave notice of his intention to repurchase, and two valuers were appointed; but after the appointment B. refused to allow his valuer to proceed with the valuation:—Held, on the authority of *Milnes v. Gery* (14 Ves. 400), and *Wilks v. Davis* (3 Meriv. 507), that there was no contract between the parties which the Court could specifically enforce. *Vickers v. Vickers*, 4 L. R., Eq., 529; 36 L. J., Ch., 946.

3. When an agreement has been entered into for the sale of a house at a fixed price, and of the fixtures and furniture therein, at a valuation by a person named by both parties, and he undertakes the valuation, but is refused permission by the vendor to enter the premises for that purpose, the Court will make a mandatory order to compel the vendor to allow the entry to enable the valuation to proceed. *Smith v. Peters*, 20 L. R., Eq., 511; 44 L. J., Ch., 613; 23 W. R. 783.

4. When two partners made an agreement, containing a provision that on the determination of the partnership, one partner should purchase the share of the other at a valuation to be made by two persons, one to be appointed by each partner, and the partnership was carried on for some time under the agreement:—Held, that though the valuation could not be so made, because no umpire was provided, a court of equity would carry the partnership agreement into effect by ascertaining the value of the share. *Dinham v. Bradford*, 5 L. R., Ch., 519.

Where the fixing a value by arbitrators is not of the essence of an agreement, the Court will carry the agreement into effect, and will itself, if necessary, ascertain the value. *Id.*

5. By the contract for the sale of an estate it was agreed that the price should be 24,000*l.*, and that certain furniture and other articles on the estate, the value of which was about 2,000*l.*, should be valued by valuers mutually agreed upon, and that the purchaser would take a part of the furniture and articles at that valuation. The vendor refused to appoint a valuer, and refused to complete. A decree made at the suit of the purchaser for specific performance of the contract, except so far as it related to the furniture and articles. *Richardson v. Smith*, 5 L. R., Ch., 648; 39 L. J., Ch., 877; 19 W. R. 81.

6. A landowner, through whose land a railway company proposed to pass, agreed in May 1864 to withdraw his opposition to their bill on the terms that the company would vary the course of their line and make certain bridges, works, and approaches. The company gave a notice to treat, and on the 20th March 1867 they went into possession. On the 27th May a further agreement was come to that the company should pay 2,250*l.* for purchase-money and compensation, and should construct the bridges askew according to an agreed plan. The company constructed the line as agreed upon, but did not complete the works, nor pay the purchase-money, nor the interest, though the completion of the works was demanded in July 1868, and payment of interest in December 1868. On the 6th February 1869 a substituted agreement was made between the landowner and the company, whereby it was agreed that an estimate should be made by the company's engineer of the costs of completing the road, and submitted to A., the landowner's agent, "for approval; in case of difference the amount to be determined by B.," the amount, when agreed or determined, to be paid to the landowner, in discharge of all obligations as to the road; and the purchase to be completed forthwith. In December 1871 A. died; and in May 1872 the company, for the first time, sent in an estimate for the cost of completing the road. The purchase had not been completed, and neither the purchase-money nor any interest had been paid. B. was living:—Held, that the submission of the estimate to A. for approval was of the essence of the agreement of the 6th February 1869; and that, inasmuch as by his death the agreement was incapable of being performed in the manner and form therein specified, the Court could not enforce performance of it. *Firth v. Midland Railway Co.*, 20 L. R., Eq., 100; 44 L. J., Ch., 313; 32 L. T. 219; 23 W. R. 509.

Umpire, Appointment of, by Court. 7. A vendor and purchaser entered into an agreement for the sale of some property, at a price to be fixed by two valuers mentioned in the agreement, and as to matters in difference between the valuers, by an umpire to be appointed by such valuers before entering upon the valuation. The valuers could not agree upon an umpire:—Held, that the 12th section of the 17 & 18 Vict., c. 125, did not empower the Court to appoint an umpire, there being no "case of arbitration" within that section. *Collins v. Collins*, 26 Beav. 306; 5 Jur., N. S., 30; 28 L. J., Ch., 184; 7 W. R. 115; 32 L. T. 233.

VI. Conditions and Particulars and Misdemeanor therein, and when Misleading.

- I. *Particulars. In General*, 7160.
- II. *Conditions. In General*, 7161.
- III. *As to Occupancy and Outstanding Leases*, 7162.
- IV. *As to Locality and Identity of the Property*, 7165.
- V. *As to Quantity and Acreage*, 7165.
- VI. *As to Tenure or Interest of Vendor*, 7166.
- VII. *As to Matters Material to the Enjoyment of the Property*, 7170.
- VIII. *As to Re-sale*, 7172.
- IX. *Conditions as to Title*. See XI. IV. *post*.
- X. *By Fiduciary Vendors*. See MORTGAGE, XVI. II. 6.—POWER, XXI. VIII. 1.
- XI. *Abatement and Compensation*. See IX. *post*.

I. PARTICULARS. IN GENERAL.

1. A particular writing for the purchase of an estate, no writing within the Statute of Frauds, unless the party purchased by it, or that it was shown him at the time of purchase, so that, if that contains more than the words of the conveyance will in strictness carry, the purchaser cannot compel specific execution of the residue on the particular. *Cass v. Waterhouse*, Pre. Ch. 29.

2. Observations upon the duty of a vendor in preparing particulars of the estate to be sold. *Martin v. Cotter*, 3 J. & L. 496; 9 Ir. Eq. R. 351. And see 9 Ir. Eq. R. 44.

3. Property put up for sale at public auctions should be most accurately described; and not merely so described as that a purchaser may, by drawing the proper deductions from the particulars and conditions of sale, ascertain what is intended to be sold. *Swainsland v. Dearsley*, 7 Jur., N. S., 984; 30 L. J., Ch., 1; 9 W. R. 526; 4 L. T., N. S., 432; 29 Beav. 430.

4. Agreements for sale of an estate, especially if by auction, depend on the *bona fides* of the transaction; therefore trifling errors in the description are not material. *Calcraft v. Roebuck*, 1 Ves. 221.

5. Purchaser under particular giving a false description, not bound at law or in equity, nor by any act of his agent without a fresh authority. *Deverell v. Bolton (Lord)*, 18 Ves. 509.

6. Specific performance decreed against a purchaser at a public auction, where the representation in the particulars of sale (complained of as calculated to mislead), was so vague and indefinite, that it ought to have put the purchaser on making previous inquiry. *Trower v. Newcome*, 3 Meriv. 704.

7. When property is sold by auction it is the office of particulars to give an accurate description of the property. *Torrance v. Bolton*, 14 L. R., Eq., 124; 41 L. J., Ch., 643; 20 W. R. 718; 27 L. T., N. S., 19. Affirmed 21 W. R. 134; 42 L. J., Ch., 177; 8 L. R., Ch., 118; 27 L. T., N. S., 738.

8. The defendant, an auctioneer, being owner of a sum of 500*l.* stock standing in the names of directors, which had been made an indemnity to provide against costs in a pending chancery suit, put the fund up for sale,

under a particular, which stated the above fact, and further, that there was a considerable sum applicable for payment of costs, and that such costs would be paid thereout; also, that the fund of 500*l.* might be looked upon as a secure and sound investment. The plaintiff purchased the fund for 230*l.*, and found afterwards that it was all required to answer the indemnity. The plaintiff alleged that the defendant knew at the time that the fund was liable to be wholly swallowed up in costs. The Court, being of opinion that the defendant had knowledge of this fact:—Held, that he could not be heard to say it was not present to his mind when he put the property up for sale, and decreed rescission of the contract. As against a co-defendant, a solicitor, who had taken no part in the misrepresentation, the action was dismissed. *Mathias v. Yettis*, 46 L. T. 497.

9. A purchaser, being in possession of adjoining property, purchases a lot under which there is a coal-mine, and on which eighty-eight cottages stand, stated in the particulars to be "in the occupation of the owners" of an adjoining colliery; and there is a condition that "the mines under the lots were reserved to the owners with such powers and privileges as belonged to them." It turning out that the cottages paid no rent, the purchaser claimed compensation. It appeared that they were held under an old deed, giving power to the owners of the mines to build cottages, and compensate the tenants of the land:—Held, that the vendor must state all the truth on the particulars, and inform himself of it when he sells, and the purchaser must be held to have notice of all contained in the particulars and conditions. But those particulars in this case did not lead to the fact of the existence of the deed under which the cottages were held, and therefore there must be inquiries as to the tenure of the cottages. *Branding v. Plummer*, 2 W. R. 662; 2 Drew. 427; 23 L. J., Ch., 960; 2 Eq. Rep. 1260.

10. Where the vendor of lands in lots for the purpose of buildings, accompanies his description, particulars, and conditions of sale with a map delineating the intended divisions of the property by new roads, he must be understood to hold out expectations that the lots will be so divided, and it would not be competent to him to divide the land in a different manner, so as to attract an occupancy and population entirely different from that which would have been produced by acting on the plan proposed and held out at the sale. *Peacock v. Penson*, 11 Beav. 355; 18 L. J., N. S., Ch., 57; 12 Jur. 954; 14 *id.* 518.

11. The actual designation in the particulars of the property offered for sale of the number of acres contained in a lot:—Held, to negative the presumption of any intention, on the part of the vendor, to sell the estate in a lump. *Leslie v. Thompson*, 9 Hare 273; 20 L. J., N. S., Ch., 561; 15 Jur. 717.

12. Where leasehold property which is sold in separate lots is held under one lease, it is incumbent on the vendor to state that fact in plain and distinct terms. *Sheard v. Vemables*, 36 L. J., Ch., 922; 15 W. R. 1166; 17 L. T., N. S., 10.

13. A. and his agent attended an auction for the sale of a house, at which certain condi-

tions of sale were exhibited, and with which they became acquainted. A. afterwards, through his agent and the agent of the vendor, purchased the same house:—Held, that the particulars of sale were not incorporated with the purchase, and therefore not binding on the purchaser. *Cowley v. Watts*, 17 Jur. 172; 22 L. J., Ch., 591.

1. When a purchaser buys a house, and has it conveyed to him without any reservation, he takes the house not "such as it is," but such as it is described in the particulars of sale, and conveyed by the deed. *Suffield v. Brown*, 10 Jur., N. S., 111; 33 L. J., Ch., 249; 12 W. R. 356; 9 L. T., N. S., 627.

2. Premises were advertised to be sold according to certain printed particulars and conditions of sale. Before the sale took place several of the printed copies were altered by the vendor's solicitor, who introduced in writing a reservation of a right of way to other premises belonging to the vendor. Several of the altered copies of the particulars were laid on the table in the auction-room without any remark with regard to the alteration; and an altered copy was delivered to the auctioneer, who read the same aloud before the biddings commenced; but the party who became the purchaser did not hear or notice the alteration. The contract was signed by the auctioneer (inadvertently) and by the purchaser on a copy of the particulars of sale not containing the reservation. After the purchase money was paid and possession given, the purchaser filed his bill for a specific performance of the contract by a conveyance from the vendor without a reservation of the right of way; and the bill was dismissed without costs. *Manser v. Back*, 6 Hare 443.

3. Particulars of sale described lot 5 as consisting of a leasehold house, No. 20, of a certain description, with a yard, at the end of which were a coach-house and stable, and small yard beyond, with extra stable; and stated that the house was occupied by W., the yard, coachhouse, etc., by H. Lot 6 was described as a leasehold house, "No. 21, adjoining lot 5, and of similar design and accommodation, is now, and has been for years, in the occupation of T." The two houses were built on adjoining strips of land, each held under a separate lease. The small yard and extra stable lay behind No. 21, and were comprised in the lease of lot 6. The occupation was as stated in the particulars. The plaintiff purchased lot 5, H. lot 6. The plaintiff took an assignment from the vendor of the property in the lease of lot 5, and no more. H., on the following day, took an assignment of all the property comprised in the lease of lot 6, thus obtaining the legal estate in the small yard and extra stable:—Held, that the plaintiff was entitled to an assignment from H. of the small yard and extra stable, for that, according to the true construction of the particulars, H. had not contracted to purchase them, but the plaintiff had. *Leuty v. Hillas*, 2 De G. & J. 110; 27 L. J., Ch., 534. S. C. before the Vice-Chancellor, 4 Jur., N. S., 1166.

4. When property is sold in lots, described in particulars of sale, a vendee is only affected with notice of what concerns the lots which he purchases, and is not to be taken as having

read all the particulars of all the lots. *Curtis v. Thomas*, 33 L. T., N. S., 664.

II. CONDITIONS. IN GENERAL.

5. Purchaser discharged from purchase against catching conditions of sale. *Adams v. Lambert*, 2 Jur. 1078.

6. Vendors, having put forth ambiguous conditions of sale:—Held, to be bound strictly by those conditions. *Seaton v. Mapp*, 2 Colly. 556.

7. Facts stated in the conditions of sale as the grounds of such conditions, must be proved, though it appeared to be the object of the conditions, but not very clearly stated, to exclude inquiry into those facts. *Symons v. James*, 1 Y. & Coll. C. C. 487; 6 Jur. 452.

8. Where conditions of sale are so obscurely worded, that, when taken in connection with the particulars of sale, they are likely to mislead an ordinary purchaser as to the nature of the property offered for sale, *semble*, that the Court will discharge the purchaser from his bargain on the argument of exceptions to the title, without putting him to the necessity of moving to be discharged from the purchase. *Taylor v. Martindale*, 1 Y. & Coll. C. C. 658; 10 L. J., N. S., Ch., 339; 5 Jur. 648.

9. An annuity was granted for the lives of four persons, and the lives and life of the survivors and survivor of them, secured by a term in a reversion of a freehold estate, and the reversion was offered for sale. One of the conditions of sale was, that certain evidence that "a life annuity granted to" A. B. had not been paid or claimed for twenty years, should be conclusive evidence that the annuity and term had determined:—Held (affirming 2 W. R. 280), that the condition was not binding, as the condition was one so worded as to lead a purchaser to a definite conclusion contrary to the real facts of the case. *Drysdale v. Maos*, 23 L. J., Ch., 518; 2 W. R. 341; 2 Eq. Rep. 386; 5 De G. M. & G. 103.

10. Where conditions of sale are not drawn *bonâ fide*, but are intended to cover difficulties arising from facts uncommunicated, they will not preclude the purchaser from taking the objection. *Jackson v. Whitehead*, 28 Beav. 154.

A. having a leasehold bequeathed his residue to his widow for life, and afterwards to two trustees for sale; he appointed his widow, and the two trustees, his executors. The widow remained in possession twenty-three years, and after her death, the executrix of the surviving trustee sold the property, subject to a condition of sale, that the purchaser should admit the assent of the executors to the bequest of the leaseholds to the trustees:—Held, that such a condition was valid, although the vendor did not state that the administratrix, *de bonis non*, claimed to have the power of selling. *Id.*

11. Observations on the effect of stringent conditions of sale on the value of property. *Hoy v. Smythies*, 2 Jur., N. S., 1011.

12. Conditions of sale must be construed strictly against the person who forms them. *Greaves v. Wilson*, 25 Beav. 290; 4 Jur., N. S., 271; 27 L. J., Ch., 546; 5 W. R. 482.

13. Property was sold by auction on the

15th June. The principal conditions of sale, which were read aloud before the sale, were—(3) that the abstract of title was to be delivered to the purchaser within ten days from the day of sale; (4) that no objection or requisition was to be made in respect of the title prior to a lease of the 10th April 1809; (6) that all requisitions and objections in respect of the title or matters appearing on the abstract should be sent in writing within ten days after the delivery of the abstract to the purchaser or his solicitor, otherwise it shall be considered that all such requisitions or objections were waived by the purchaser, and that he had accepted the title, and for that purpose time should be deemed of the essence of the contract; (8) that the purchaser shall not object to the title in connection with the sale of the premises to R., to whom the assignment of them, dated the 29th January 1870, was made, but should assume that R. acquired under and by virtue of the deed a valid title to the premises by the deed expressed to be assigned to him; (9) that the purchaser should not object to the title because L., in 1858, as a trustee for B., purchased from the trustees of the then owners, B. being one of the last-mentioned trustees. The purchaser's solicitor had not been furnished with any copy of the conditions before the day of sale, though he had asked for them, and had only hastily perused them in the vendor's solicitor's office on the morning of that day, and had no knowledge of the title or its defects. The abstract of title, which was very long and complicated, was delivered to the purchaser's solicitor on the 25th June, and he sent the abstract and a case to counsel on the 26th. The purchaser's solicitor received the opinion of counsel that the title was bad on the 8th July. The title was bad on the ground that R., the assignee of the deed of 1870, had purchased the premises sold for X. and others, X. being one of the trustees for sale of the property so bought, and also on the ground that L., the assignee in the deed of 1858, had purchased for B., who was also a trustee for sale:—Held, in a suit for specific performance by the vendor, first, that whatever opinion might be entertained as to the ninth condition, the eighth condition was so framed as to deceive the purchaser, and entirely throw him off his guard by unwarrantably suppressing and masking a fatal defect in the title. *Boyd v. Dickson*, 10 Ir. R., Eq., 239.

Held, secondly, that, having regard to the object and frame of the eighth and ninth conditions, and the length and complication of the title, the vendor could not avail himself of the sixth condition, as he could not be heard to say that an objection should be sent in within the limited time, which his other conditions showed could never have been made. *Ib.*

1. When property is sold by auction it is the office of the particulars to give an accurate description of the property, and of the conditions to state the terms on which the sale is made. *Torrance v. Bolton*, 14 L. R., Eq., 124; 41 L. J., Ch., 643; 20 W. R. 718; 27 L. T., N. S., 19. Affirmed 21 W. R. 134; 42 L. J., Ch., 177; 8 L. R., Ch., 118; 27 L. T., N. S., 73.

Therefore, when property was put up for sale, and in the particulars, which were advertised, was described as being an absolute reversion in a freehold estate, falling into possession on the death of a lady in her seventieth year; and by the conditions of sale, which were read for the first time at the auction just previously to the commencement of the biddings, the property was stated to be sold subject to two mortgages, on a bill by the purchaser at the auction, who stated that he was deaf, and did not understand that by the conditions he was buying only an equity of redemption in the property:—Held, that although his solicitor paid the deposit on his behalf after having read the conditions, he was entitled to a decree for the rescission of the contract and for a return of the deposit with interest, and a declaration of lien. *Ib.*

Held, also, that though in an ordinary case, inasmuch as the purchaser's carelessness had contributed to the mistake, he would not have been entitled to the costs of the suit, he might have them on account of having, previously to the commencement of the suit, offered, on condition of having the contract rescinded and the deposit returned, to pay the costs of the sale. *Ib.*

The Court looks with disfavour on the practice of not producing the conditions of sale till the actual time of the auction. *Ib.*

2. A condition of sale is bad as misleading, (1) if it requires the purchaser to assume what the vendor knows to be false; (2) if it states that the state of the title is not accurately known when in fact it is known to the vendor. *Re Banister, Broad v. Munton*, 12 L. R., Ch. D., 131; 48 L. J., Ch., 837; 27 W. R. 826; 40 L. T. 828.

3. An estate was put up to sale by auction. The conditions of sale were drawn out in manuscript, but were not printed or circulated. They were shown in this state to B., a solicitor for a person who was likely to be a purchaser. He objected at once to one of the conditions of sale, as one which the contemplated purchaser could not be advised to assent to. The auction took place, and the objection to this condition was publicly noticed by an indifferent attendant at the sale. The property was bought in. On the following day the proprietor of the estate called upon the contemplated purchaser, and persuaded him to sign an agreement for the purchase of the estate, as it was alleged, at a most exorbitant price, and containing a reference to the objected condition of sale:—Held, that, under such a state of circumstances, specific performance of the agreement could not be enforced. *Lee v. Dawson*, 4 L. T., N. S., 464.

Auctioneer, Power of. 4. *Quere*, whether on a sale by auction the auctioneer has authority to frame conditions of sale and to do all things necessary to carry the sale into effect. *Pike v. Wilson*, 1 Jur., N. S., 59.

III. AS TO OCCUPANCY AND OUTSTANDING LEASES.

5. A statement in the rental that the tenants had taken renewals from the receiver, and the landlord would have a power of distress for renewal fines:—Held, not to amount to a mis-

representation importing that the legal estate in reversion would be assigned to the purchaser. *Vaughan v. Magill*, 12 Ir. Eq. R. 207. Affirming *Id.* 200.

1. A vendor, who was an auctioneer, sold an estate, but did not disclose that he was owner; the purchaser had before the sale intimated he would bid a certain price. The property was knocked down at that sum. The particulars of sale stated the property to be let on lease, containing a covenant to keep in repair. The vendor could not show in whom this lease was vested. The purchaser refused to complete, on the ground of no person being shown who could be proceeded against for breach of the covenant to repair, that the vendor had an unfair advantage over him, and that the sale was not conducted *bonâ fide*; but the Court decreed a specific performance, with costs. *Flint v. Woodin*, 9 Hare 618; 22 L. J., N. S., Ch., 92; 16 Jur. 719.

2. A purchaser of lands, sold under the decree, and described in the rental as held under a lease that would expire on the 1st June then next, discharged from his purchase, it subsequently appearing that the tenant of part of the lands was entitled, under an equitable article, to a reversionary lease for four lives. *Linahan v. Cotter*, 7 Ir. Eq. R. 176.

3. The rental described lands as held by lease for three lives and thirty-one years, the lease being for three lives and the survivor, and, in case all the lives should die before the expiration of thirty-one years, for so much of such term of thirty-one years from that period as should be to come upon the decease of the survivor:—Held, that the rental being substantially correct, there was no misrepresentation which would entitle the purchaser to be discharged from the purchase. *Vignolles v. Bowen*, 12 Ir. Eq. R. 184.

4. In a sale by the direction of the Court, the particulars of sale stated, that lot 12 comprised a house "at present in the occupation of C., at a rental of per annum 42l." The purchaser of this lot paid the deposit, and his purchase was confirmed by order absolute, and he then obtained an order for payment of the remainder of the purchase money into Court. The purchaser afterwards discovered that C. was not tenant to the vendors, but to some person who claimed by an adverse title:—Held, that the description in the particulars of sale must mean that C. was tenant to the vendors for a limited period at a given rent, and that this was a representation so different from the fact that it amounted to such bad faith on the vendor's part as would induce the Court to discharge the purchaser from his contract. *Lachlan v. Reynolds*, 1 Kay 52; 2 W. R. 49; 23 L. J., Ch., 8.

5. A house was stated in particulars of sale "in the occupation of the Catholic Law and General Insurance Company, under a lease." The company was in occupation by virtue of a lease, which, however, had not been granted to the company, but to A., B., and C., who were their trustees. The vendor's solicitor, immediately before the sale, told the purchaser that he did not remember the names of the lessees, but believed that A. and B. were two of them. The purchaser objected to the title, on the ground that the statement in the particulars amounted to a representa-

tion that the company were the lessees:—Held, that, assuming the statement to be such that if the case had stood on the particulars only, the contract ought to have been rescinded, the purchaser, having bought with the above information, must be held to his bargain. *Farebrother v. Gibson*, 1 De G. & J. 602.

6. T. agreed to sell to C. certain freehold houses, and to make a good marketable title. On investigation of the title it appeared that the houses were part of a property which had been sold by a building society in lots, subject to stringent restrictive covenants which were admitted to make the title not a marketable one. T. having declined to procure a release of the covenants, C. brought an action to recover back his deposit. T. adduced evidence that C. knew of the restrictions at the time of the contract, and the jury found that he did:—Held, that this evidence could not be admitted to modify the terms of the express contract, and that the plaintiff was entitled to recover. *Farebrother v. Gibson* (1 De G. & J. 602) and *Leyland v. Illingworth* (2 De G. F. & J. 248) distinguished. *Cato v. Thompson*, 9 L. R., Q. B. D., 616; 47 L. T., 491.

7. Where particulars and conditions of sale purport to offer an estate in fee simple or possession, the existence of leases for lives over a part of the estate will entitle a purchaser either to rescind the contract or to compensation, according to circumstances. *Hughes v. Jones*, 10 W. R. 139; 5 L. T., N. S., 408.

A statement in conditions of sale that a purchaser is to be let into the receipt of the rents and profits for a certain day, must be construed to mean ordinary rents and profits, and not rents reserved on leases for lives. *Id.*

It is the duty of a vendor to qualify, upon the face of particulars, the interest which he intends to sell, if he does not intend to sell an unqualified estate in fee. *Id.*

8. A vendor, in his particulars of sale, described certain cottages as part of lot 6, and as in the occupation of the owners of the Sedghill Collieries, or their under-tenants or workmen. By a further particular he stated, that "the mines and minerals within and under such of the collieries as were situate within certain townships were reserved to the owners thereof, with such powers and privileges as belonged to them." It turned out that the mine under lot 6 was not the Sedghill Colliery, but the Hazebrigg Colliery, and the owners of the Hazebrigg Colliery had in some way obtained or long used a right to build and use cottages on lot 6 without paying rent, except a trifling compensation for surface damage, and they had transferred their right to the owners of the Sedghill Colliery:—Held, that the particulars did not, on the face of them, convey such information as the vendor ought to have given; but inquiries were directed as to the circumstances under which the cottages were occupied, and whether the owners of the Sedghill Colliery had any right against the vendor. *Brandling v. Plummer*, 2 Drew. 427; 23 L. J., Ch., 960; 2 W. R. 662; 2 Eq. Rep. 1260.

9. Vendors in September issued particulars of sale, headed "particulars and conditions of sale, first edition." The document contained no conditions, and stated that the property

would be sold on October 18th. Lot 8 was therein described as a corner public-house and cottages, without mention of any mortgage. Shortly before the time fixed for the sale the vendors found that a mortgage for 800*l.* upon lot 8 could not be paid off for some years, and thereupon issued a second edition of particulars which postponed the sale till the 16th November, and stated that lot 8 would be sold subject to the mortgage for 800*l.* The sale took place on the 16th November; the defendant, who had the day before received a copy of the first edition of the particulars from a friend of his own, attended with that copy in his hand, and bought lot 8. The contract was signed upon a copy of the second edition, from which the auctioneer read the particulars of lot 8. It was also proved that he stated, in answer to special questions, in the defendant's hearing, that lot 8 would be sold subject to the mortgage. Both editions of the particulars stated the rents of lot 8 at a sum not then actually received, but which would, as notice had been given to the tenants, be payable upon the completion of repairs then contracted to be finished before the day fixed for completion. The particulars described the public-house as let to a responsible tenant for a term of which seventeen years were unexpired. It appeared that only fifteen years of the term were unexpired, and it was determinable in 1881 or 1888, at the option of the tenant:—Held, that neither of these statements was such misrepresentation as to entitle the purchaser to resist specific performance of his contract. *Goddard v. Jeffreys*, 51 L. J., Ch., 57; 45 L. T. 674; 30 W. R. 269.

1. An undivided moiety of a property was sold by auction, the rent of which was described as 16*l.*; but that was the rental of the whole, and not of a moiety. The purchaser might have discovered this from the rest of the particulars; but having sworn that he had purchased, under a mistake that the sum of 16*l.* was the rental of a moiety, the Court refused to decree a specific performance against him. *Smaistland v. Dearsley*, 29 Beav. 430; 7 Jur., N. S., 984; 30 L. J., Ch., 1; 19 W. R. 526; 4 L. T., N. S., 432.

It is the duty of a vendor, in his particulars of sale, to describe the property with perfect accuracy, and not leave it to inference. *Ib.*

2. The particulars of sale stated, that a certain farm, comprising about one-third of the whole of the property, was lately in the occupation of A., at the yearly rent of 290*l.* 15*s.* The facts were, that A. had held a farm for three months previously for a rent of 1*l.*, and that the vendor had afterwards agreed to let the farm at 225*l.* per annum, but the agreement had been rescinded before taking possession, and the evidence showed that the farm would not let for nearly so much as 290*l.*:—Held, that this was a misrepresentation of fact, amounting to fraud, and did not come within the ordinary condition providing for compensation in the event of a mistake, or an error in the particulars; held, that there was such substantial misrepresentation as entitled the purchaser to be discharged. *Dimmock v. Hallett*, 12 Jur., N. S., 953; 15 W. R. 92; 15 L. T., N. S., 374; 2 L. R., Ch., 21; 36 L. J., Ch., 146.

Other misstatements in the particulars held to be merely over-colouring, and not to amount to misrepresentation. *Ib.*

3. The Court will not decree specific performance of a contract entered into with a tenant for life for sale of parts of a settled estate in a suit against a tenant for life in remainder alone. A tenant for life contracted to sell parts of a settled estate to a railway company, and to give immediate possession. It appeared that the land was subject to a mining lease, of which there were then thirteen years to run, to a surface lease with four years to run, and to tenancies from year to year, which had been overlooked by the vendor, and for which the company had to pay compensation:—Held, that "possession" meant actual occupation; but the leases having expired before the death of the first tenant for life, and the remaindermen not being bound by the tenancies from year to year, the company had no equity after the death of the first tenant for life, as against a tenant for life in remainder, to deduct the compensation paid by them from the purchase money of the land. *North Staffordshire Railway Co. v. Lantton*, 3 N. R. 31.

4. The plaintiffs advertised for sale by auction an hotel, stated in the particulars to be held by a "most desirable tenant." The defendants sent their secretary down to inspect the property and report thereon. The secretary reported very unfavourably, stating that the tenant could scarcely pay the rent (400*l.*), rates, and taxes. The defendants, relying on the statements in the particulars, authorised the secretary to attend the sale and to bid up to 5,000*l.* The property was bought in at the sale, and the secretary purchased it by private contract for 4,700*l.* It appeared subsequently that the quarter's rent previous to the sale had not been paid; the previous quarter had been paid by instalments, and six weeks after the sale the tenant filed his petition. It appeared, however, that the hotel business was as good during the last year as previously, and that the month of the tenant's failure was the best he had had. The plaintiffs brought an action for specific performance, relying (in answer to the defence and counter-claim for rescission on the ground of misrepresentation) on the fact that the defendants had made their own inquiries:—Held, that the statement that the property was held by a "most desirable tenant" could not be treated as "*simplex commendatio*," and that the defendants, having relied thereon, were entitled to rescission of the contract, on the authority of *Redgrave v. Hurd* (20 L. R., Ch. D., 1). *Smith v. Land & House Property Corporation*, 49 L. T. 532.

5. A public-house and premises put up for sale by auction were described in the particulars as in the occupation of certain persons at certain rents. The conditions stated that the property was sold "subject to existing tenancies." Certain brewers by their agent became the purchasers of the property at the auction. Shortly afterwards they discovered that the property was in lease to another brewer for a term of years, of which about nine remained unexpired. Thereupon they refused to complete their contract. In a suit against them by the vendor for specific per-

formance:—Held, that there was a misdescription of the property, which precluded the vendor from enforcing the agreement, and that the purchasers had not constructive notice of the lease. *Caballero v. Henty*, 43 L. J., Ch., 635; 9 L. R., Ch., 447; 22 W. R. 446; 30 L. T., N. S., 314.

Notice by Tenancy.] See NOTICE, IV.

IV. AS TO LOCALITY AND IDENTITY OF THE PROPERTY.

1. At the auction mart in London the defendant purchased a house at Brighton, simply described as "Lot 1, No. 39, Regency Square." He afterwards discovered that the house was not actually in the square, but in a side street communicating with the square, but it was always named 39, Regency Square:—Held, that there was no misdescription; and specific performance was decreed against the purchaser. *White v. Bradshaw*, 16 Jur. 738.

2. A. bought at an auction a freehold house, described in the particulars of sale as "No. 58, Pall Mall, opposite Marlborough House." The house was not actually in Pall Mall, but at the rear of the houses in that street, approached by a covered passage seventy feet long, of which no mention had been made in the particulars of sale. The vendors were only able to give a right of way over this passage, which passed over a basement not in their possession. Evidence was adduced, showing that the passage was insecurely supported from beneath, and not capable of sustaining heavy weights:—Held, that the purchaser was entitled to have the contract rescinded; the right of access not being such as he was entitled to on the purchase of a freehold property, the particulars of sale having been silent as to the peculiarities of the approach; a man making a contract being entitled to have property which will answer the description. *Stanton v. Tattersall*, 1 W. R. 602; 1 Eq. Rep. 643; 17 Jur. 967; 1 Sm. & G. 529.

3. Specific performance of a contract for the sale of property, partly freehold and partly leasehold, will not be refused on the ground that the boundaries of the two portions are not distinctly defined, *semble*. *Monro v. Taylor*, 3 Macn. & G. 713; 8 Hare 51; 21 L. J., Ch., 525.

V. AS TO QUANTITY AND ACREAGE.

4. A contract for the purchase of a farm described it as containing "349 acres, or thereabout, be the same more or less;" and stipulated that the premises should be taken at the quantity above stated, whether more or less. In fact, the farm consisted of only 349 customary acres, which was less than the same number of statute acres by about 100 acres or upwards. On a bill being filed for specific performance, the purchaser, admitting that he had been for several months in possession of the property, and had exercised acts of ownership over it, on the faith that a good title to 349 acres would be shown, insisted that in the contract "acres" meant "statute

acres," and that he was not bound to perform the contract, unless 349 statute acres were conveyed to him:—Held, that in such case a reference of title would not be directed on motion. *Semble*, the stipulation that the premises should be taken at the quantity before stated, be the same more or less, would not cover so large a deficiency as existed here. *Portman v. Mill*, 2 Russ. 570.

5. After a sale by auction of a messuage and lands, one of the conditions of which was that any mistake or error in the description of the property, or any other error in the particulars, should not annul the sale, but (except where otherwise provided for by the conditions) a compensation should be given or taken, to be settled by two referees or an umpire, it was found that one of the lots contained about twenty acres more, and another about ten acres less than the quantity of land described in the particulars:—Held, that, upon the construction of the condition, the mistake or error thereby contemplated was such a mistake or error as would annul the contract: that the excess of the quantity of land in one of the lots, and the deficiency in the other, were both subjects of compensation within the condition; and that the Court would, if necessary, refer it to the Master to settle the amount of such compensation, notwithstanding that from the variety in the nature of the different portions of the land in which the variations occurred there was no uniform standard for computing such amount: that whether a vendor could or could not in equity be relieved, on the ground of mistake, from a contract for the sale of lands inaccurately described as to quantity, and which description had been prepared by his solicitor from former particulars and conditions relating to the same property, drawn up by another solicitor on the report of a surveyor, equity would not, in such circumstances, enforce the contract against the vendor, unless the case should be one for compensation, and the purchaser should submit to make such compensation. *Leslie v. Thompson*, 9 Hare 268; 15 Jur. 717; 20 L. J., Ch., 561.

6. Misdescription of the quantity of land in regard to the acres being statute acres or customary, is not matter of compensation, but a ground for setting aside the sale. *Price v. North*, 2 Y. & Coll. 620; 7 L. J., N. S., Exch. Eq., 9.

7. The owner of an estate agreed to sell it for 250,000*l.*, representing it to contain 1,530 acres. The purchaser agreed to sell it to a company for 350,000*l.*, of which the sum of 150,000*l.* was paid to him, 75,000*l.* in cash, and bonds for 75,000*l.*, and he paid the vendor of the estate 50,000*l.* as a deposit. The estate contained less than 1,100 acres, and the company, having at the time only 1,536*l.* in hand, complained to the purchaser of the deficiency, and he then wrote to the vendor declining to complete. The company afterwards rescinded the contract, and the purchaser brought an action against the vendor for the deposit, which was compromised by the vendor repaying the deposit and rescinding the contract. The company filed a bill against the purchaser and some other defendants who had agreed to share with him for a return of the 75,000*l.* and of the bonds:—Held, that, although the

financial position of company might render it convenient to them to rescind the contract, and though they might otherwise have been ready to take the smaller quantity of land, they were entitled to rescind the contract as the purchaser was unable to complete with them. *Aberaman Iron Works v. Wickens*, 4 L. R., Ch., 101; 20 L. T., N. S., 89; 17 W. R. 211; 18 L. T., N. S., 305; 5 L. R., Eq., 485.

Held, that the company was entitled to rescind on the ground of misrepresentation though they might have been able to ascertain the extent of the estate. *Ib.*

Held, that the company was entitled to re-payment of what they had paid, and to a return of the bonds, and that they had a lien on a portion of the 50,000*l.* re-paid to the purchaser, which had been paid into court. *Ib.*

One of the articles of the contract provided that the estate as to extent of acreage should be taken to be conclusively shown by certain deeds:—Held, that this was merely a conveyancing condition as to identity, and that, coupled with the representation as to the acreage, it did not estop the company from rescinding on the ground of deficiency in acreage. *Ib.*

The same relief was asked against the other defendants as against the purchaser. One of these defendants, by his answer, said that the suit was unnecessary and improper; another, that he was improperly made a party to the suit:—Held, that they, whether necessary or not, were proper parties to the suit, but that no relief in the shape of re-payment could be given against them, and that if they had merely submitted to any order which the Court might make they would have been entitled to their costs, but as they had answered in this manner they would not have their costs. *Ib.*

See also IX. VIII. post.

VI. AS TO TENURE OR INTEREST OF VENDOR.

1. *Copyhold for Freehold*, 7166.
2. *Leasehold for Freehold*, 7167.
3. *Under-lease for Lease*, 7167.
4. *Other Cases*, 7168.

1. Copyhold for Freehold.

1. A. articles with B. for the purchase of an estate of 180*l.* per annum, for which he was to give thirty-five years' purchase upon granting and conveying it to him, and pays 50*l.* in part; but discovering that 30*l.* per annum of the lands were copyhold, refused to go on. On a bill by B., equity will not decree a specific execution of this agreement, being inequitable, but will order the 50*l.* to be paid back. *Hick v. Phillips*, Pre. Ch. 575.

2. Land was advertised to be sold in lots as freehold, subject to conditions, one of which was, that all objections to the title, not made within a prescribed time, should be considered as waived; and another provided that any misstatement of the quality, tenure, outgoing, or other particulars, should be the subject of compensation. An objection to the title of

one lot was taken after the prescribed time, that it was of copyhold tenure. It, however, appeared that, under a composition with the lord, the rights of the copyhold were such as to render the tenure hardly different from that of freehold:—Held, that the misdescription did not form a ground for resisting a specific performance, although the decision might have been otherwise had the misdescription been wilful. *Price v. Macaulay*, 2 De G. M. & G. 339.

3. Property sold as copyhold, turned out to be partly freehold:—Held, that the vendor could not compel a specific performance, and that special conditions, providing that errors in the description should not invalidate the sale, and for a compensation, did not alter the case. *Ayles v. Cox*, 16 Beav. 23.

4. When a vendor, having reason to believe that part at least of his property was copyhold, sold and conveyed the same to a purchaser as freehold, there being nothing on the abstract to show that any part was copyhold, and the property turned out to be all copyhold:—Held, that the purchaser was entitled to have the sale set aside and the purchase money re-paid, with interest after the rate of 4*l.* per cent. per annum, with the costs attending his purchase, but was not entitled to damages in respect of expenses to which he had gone with the view of selling the property again. *Hart v. Swaine*, 26 W. R. 30; 37 L. T., N. S., 376; 7 L. R., Ch. D., 42; 47 L. J., Ch., 5.

5. The mere fact that land for a lease of which an agreement has been made is copyhold is not a bar to specific performance. *Paston v. Newton*, 2 Sm. & Gif. 437.

6. Conditions of sale had described the property to be sold as freehold. Subsequently, after the purchaser had paid his consideration money, but before the final completion of the conveyance, it turned out to be copyhold:—Held, that the purchaser was entitled to have his contract for purchase rescinded, and money re-paid with interest. *Turner v. West Bromwich Union (Guardians)*, 9 W. R. 155; 3 L. T., N. S., 662.

The lords of the manor had forborne for nearly 100 years to receive certain small money payments in lieu of fines, heriots, etc., which had been commuted and payable so long as the premises should be retained as a workhouse:—Held, that, in the absence of evidence adverse to the lord of the manor's rights, the Court would not presume that the land had been enfranchised. *Ib.*

7. An estate was described in particulars of sale as containing 227 acres, and as being freehold with the exception of fifty acres copyhold of a forest. The tenure being doubtful, a clause was inserted in the contract for sale to the effect that the estate was sold as being about fifty acres copyhold, but no abatement or compensation was to be made in favour of the purchaser in case the quantity of pure copyhold should exceed fifty acres, and the rest of the estate was sold as being partly of freehold and partly of copyhold tenure. The vendor was not to be required to distinguish which portions were of one tenure and which of the other, nor was any compensation to be allowed. The purchaser sent in requisitions by which he claimed to have the freeholds

and copyholds distinguished, with a view to compensation. The purchaser afterwards discovered that the 227 acres consisted of about 178 acres of copyhold and forty-nine of freehold, and that all minerals except stone were reserved to the Crown:—Held, that there had been a misdescription of the property to which the purchaser had properly objected, and specific performance was refused. *Turquand v. Rhodes*, 37 L. J., Ch., 830; 18 L. T., N. S., 844; 16 W. R. 1074.

2. Leasehold for Freehold.

1. Purchaser will not be compelled to take, under contract for freehold, a long leasehold, though for a very long term, upon principle of compensation. *Drene v. Corp*, 9 Ves. 368.

2. If a person possessed of a term, contracts to sell the fee, he cannot compel the purchaser to take, but the purchaser can compel him to convey the term, and this Court will arrange the equities between the parties. *Wood v. Griffith*, 1 Swan. 54; 1 Wils. 34. See also *Mortlock v. Buller*, 10 Ves. 316.

3. Specific performance of agreement to buy fee-simple of lands and right, etc., refused, where part of subjects of contract only leasehold, and the right is qualified; object being to work commercial speculation, which could only be done by enjoyment of unqualified right; and twelve years had elapsed since agreement entered into. *Wright v. Howard*, 1 Sim. & S. 190; 1 L. J., Ch., 94.

4. L., having a term of ninety-nine years, with a covenant that he may, within twenty years, purchase the fee, demised to F., for ninety-nine years and a half, at a ground-rent, and then acquired the fee. The ground-rent was put up for sale described as "a freehold ground-rent issuing out of lands on lease, which will expire in December 1922," being the expiration of the ninety-nine years and a half term:—Held, that the title was too doubtful, in reference to the remedies which the purchaser would have for enforcing the rent, to be forced on an unwilling purchaser. *Langford v. Selmes*, 3 Kay & J. 220; 3 Jur., N. S., 859.

Under such a description the purchaser has a right to expect a power of entry and distress in case of non-payment. *Id.*

5. Injunction granted to stay action against the auctioneer for the deposit, although the estate sold was represented as freehold with leasehold adjoining, and turned out to be almost all leasehold, and although there had been great delay in making out the plaintiff's title. *Fordyce v. Ford*, 4 Bro. C. C. 494.

6. Effect of an indefinite representation by a vendor; as that a leasehold estate was nearly equal to freehold, being renewable upon a small fine; putting the purchaser upon inquiry; though, connected with certain circumstances, such representation may be fraudulent, and form a ground for rescinding the contract. *Fenton v. Browne*, 14 Ves. 144.

7. A vendor, being a lessee of a house with a right of purchase, agreed to sell the fee-simple and inheritance for 2,500*l.*, and assigned his lease and contract to purchase to the purchaser, who by mistake covenanted to perform the covenants in the lease. One-

fourth of the property was leasehold, and the vendor having brought an action for the purchase money, on a bill by the purchaser, the Court set aside the contract. *Price v. Ley*, 4 Giff. 235.

8. Premises were put up for sale by auction. Lot 1 was described as all freehold, and in the occupation of R. Lot 2 was described as leasehold. In fact, part of the premises in the occupation of R. was leasehold, and held under the same lease as those comprised in lot 2. A., with a knowledge of this fact, became the purchaser of lot 2, in the belief that it comprised all the leaseholds. He filed a bill, claiming to have the whole of the leaseholds included in his assignment; and the bill was dismissed with costs. *Fairhead v. Southes*, 9 Jur., N. S., 764; 11 W. R. 739.

9. Held, under the circumstances of the case, that a party, having agreed to purchase premises stated to be partly freehold and partly leasehold, could not, in the absence of concealment or misrepresentation on the part of the vendor, resist a specific performance of his contract, merely on the ground that the exact position of the boundary line between the freehold and leasehold portions could not be ascertained; and that this would be so, even assuming, for the purpose of argument, that a vendor who contracts to sell property partly freehold and partly leasehold is, in the absence of specific stipulations, to be considered as bound to show what part is freehold and what leasehold. *Monro v. Taylor*, 3 Macn. & G. 713; 8 Hare 51; 21 L. J., N. S., Ch., 525.

10. A party purchasing an estate under the impression that it is an estate in fee-simple, said to be subject to a perpetual rent-charge, without requiring the production of the last receipt of the rent, from which the nature of the tenure would appear, must take the consequences of his own laches, if it turn out that the estate is not a fee-simple, but only a tenancy from year to year; and he will not be allowed to set up as a defence that he had no notice of such tenancy. *Att.-Gen. v. Stephens*, 3 Eq. Rep. 1072; 1 Kay & J. 724; 1 Jur., N. S., 1039; 24 L. J., Ch., 694.

3. Under-lease for Lease.

11. Messuages described in a particular of sale as held for the residue of a term of ninety-nine years from the 24th June 1838, but not as being held by an original lease, were sold subject to conditions that the purchaser should not be entitled to call for the lessor's title, and that any error or misstatement of the term of years should not vitiate the sale, but should be the subject of compensation, under a provision for arbitration, authorising the arbitrator of either party to proceed in certain events *ex parte*. The title proved to be an under-lease, for a term less by three days than the term of ninety-nine years granted by the original lease. The vendor filed a bill to enforce specific performance, with compensation to an amount which had been assessed in conformity with the conditions, by one arbitrator, nominated by the vendor, the purchaser having taken no part in the arbitration. The Court dismissed the

bill with costs. *Madeley v. Booth*, 2 De G. & Sm. 718.

1. Bill filed by a purchaser to rescind a contract, the plaintiff alleging that he had been induced to enter into it by fraud and misrepresentation. It appeared that the advertisement out of which the contract arose was of the sale of six houses; total rental 131*l.* 6*s.* per annum; lease about seventy-five years, at a moderate ground-rent of 50*l.* a year; but what the plaintiff, who agreed to give 420*l.* for the property, found himself liable to take was an underlease of the houses at a rent of 50*l.* Cranworth, C., reversing the order appealed from, dismissed the bill without costs, being satisfied that though there was a misdescription of the property, there was no such substantial misrepresentation as called upon the Court to exercise its jurisdiction. *Bartlett v. Salmon*, 6 De G. M. & G. 33; 1 Jur. N. S., 277.

2. B., by memorandum of agreement dated 6th December 1856, agreed, on or before the 5th January 1857, to assign to D., messuages, called "The Cider Cellars," for the residue of two several terms of sixty years and twenty-one years, for which B. held the same under leases, of which terms thirty-eight years and eight years, or thereabouts, were unexpired, subject to the yearly rents of 154*l.* and 50*l.*, "and to the covenants in such lease contained, and free from all incumbrances." The agreement contained the following stipulation: "D., the purchaser, agrees to accept such assignment without requiring evidence of any title prior to the above-mentioned leases, nor make any objection thereto, notwithstanding any recital, statement, or covenant therein contained, or by reason of the leases being derivative or under-leases." The statement in the memorandum of B.'s interest was incorrect; what he possessed was, an interest under an under-lease in the residue of two terms of sixty years and twenty-one years, less seven days. The rent subject to which B. held the property comprised in the former lease, also, was 150*l.* and not 154*l.*:—Held, that there not being on the face of the agreement a distinct description that the property was subject to the risk of eviction by no default of the purchaser, he was entitled to take advantage of the omission. *Brumfit v. Morton*, 3 Jur. N. S., 1198.

3. A. writes a letter to her solicitor, saying that she has agreed to give B. the lease of certain premises in consideration of 400*l.* A. subsequently agrees to surrender the same premises to C., the owner of the fee, in consideration of 550*l.*, and afterwards grants an underlease for all the rest of her term, less one day, to B., in consideration of 1,000*l.* and a bond of indemnity:—Held, that the underlease is no execution of the agreement to assign, the consideration and the subject matter being different; and specific performance of the agreement with C. decreed, and the deed granting the underlease set aside. *Goodwin v. Fielding*, 1 W. R. 255, 343.

4. If a lessee for a term of years underlet for a less term, and the underlessee sell by auction the lesser term, describing it as a lease, and one of the conditions of sale is that the lessor's title shall not be inquired into, the vendor's title being good, *quære*, whether

the purchaser can refuse to complete, because there is a term imposed between the vendor's interest and the freehold. *Darlington v. Hamilton*, 1 Kay 550; 23 L. J., Ch., 1000; 2 Eq. Rep. 906.

5. An underlease, described in the conditions of a sale by auction as a lease, is a fatal misdescription. *Henderson v. Hudson*, 15 W. R. 860.

The purchaser was aware that a short time before the sale the vendor only had the underlease:—Held, that the knowledge prevented his setting up the misdescription as an objection to the title. *Id.*

6. A purchaser of a lease, who knows at the date of the contract that the vendor's interest is only an underlease, is bound, although the interest is described in the contract as a lease. *Flood v. Pritchard*, 40 L. T. 873.

7. Although, according to the decided cases, a vendor who contracts for the sale of leasehold property described as held under a lease, cannot, if nothing further is said, make a good title unless it is held under an original lease, yet in a case where the particulars and conditions of sale of property so described contained enough to give notice to a purchaser that the property was held under a derivative lease:—Held, that the purchaser could not on that account refuse to complete, or claim compensation on the ground of misdescription. *Madeley v. Booth* (2 De G. & Sm. 718) commented on. *Cambernell & South London Building Society v. Holloway*, 13 L. R., Ch. D., 754; 49 L. J., Ch., 361; 41 L. T., 752; 28 W. R. 222.

4. Other Cases.

8. Particular describing a lease as subject to notice to quit, not inconsistent with a covenant that the tenant shall hold over for a certain time "after the end of the term," that being upon the context distinguished from the "other sooner determination," and time generally not being of the essence of the contract. *Hall v. Smith*, 14 Ves. 426.

9. In 1805 premises, consisting of two pieces of land in W., were demised to A. for seventy-nine years. A. built several houses, and in 1811 demised the premises for seventy years to R., reserving a rent of 43*l.* In 1815 A., reciting the indentures of 1805 and 1811, and that C. had contracted for the purchase of the ground-rent issuing out of the two pieces of land, houses, etc., conveyed "the two pieces of land and houses, and also the yearly rent of 43*l.*, and all powers and remedies for receiving the same, and all the estate," etc., to C., to hold the same "for all the residue then to come of the term of seventy years granted by the indenture of 1811." In 1855 the representatives of C. contracted to sell "a leasehold ground-rent of 43*l.*, payable during the remainder of a term of years created by way of underlease, which will expire in 1881, issuing out of two pieces of land in W., with the reversion":—Held, as between a purchaser and the vendors seeking to enforce the contract, that this was no misdescription of their interest, and that the purchaser was bound to complete. *Lecoy v. Mogford*, 2 Jur. N. S., 1084; 4 W. R. 805.

The indenture of 1815 operated as a good conveyance to C. of the reversion of A. in the premises, for a term of years commensurate in duration with the residue of the term of seventy years which he had before created in favour of B. in 1811. *Id.*

1. A testator devised his freehold estates to trustees in trust to permit his wife to receive the rents for her life, and after her decease upon trust to permit his nephew, his heirs and assigns, to hold and enjoy the said estates, and receive the rents and profits, subject to the payment of 20*l.* yearly and every year for ever to his niece, her executors, administrators, and assigns, and the testator made chargeable his said freehold estates with the payment of the said sum. The annuitant died, and her devisees contracted to sell the rent-charge, which was stated to have been given to the testator's niece, her executors, administrators, and assigns:—Held, that the rent-charge might be legally distrained for, and that the thing contracted to be sold was within the words of the contract, and a decree was made for specific performance. *Ramsay v. Thorgate*, 18 L. J., N. S., Ch., 238; 16 Sim. 575.

2. Particulars of sale described the subject of the sale as the interest, if any, of F. N. The vendor knew at the time that the interest sold was of no value, and he made no representation as to the value. A purchaser bought, with notice that the subject of sale might be of no value, but without any means of ascertaining whether it was of any or no value. Upon a bill filed by him, the Court ordered the sale to be set aside, and the purchase money refunded, with interest and costs. *Smith v. Harrison*, 3 Jur., N. S., 287; 26 L. J., Ch., 412; 5 W. R. 408.

3. By an agreement for the sale of a reversionary estate in fee, it was stipulated, that a statement in a deed of 1836, to the effect that a life annuity granted to A. B. had not been paid or claimed for eight years (supported by a declaration of the vendor that no claim had been made upon him since 1841, and that he believed that the annuity had not been claimed for the last twenty years), should be conclusive evidence that the annuity had determined. It appeared that the annuity was granted by a person entitled in reversion, and was granted for the life of the survivor of four persons, two at least of whom were living:—Held, that the omission to state these circumstances disentitled the vendor to enforce the stipulation in a specific performance suit instituted by him. *Drysdale v. Mace*, 5 De G. M. & G. 103; 23 L. J., Ch., 518; 2 W. R. 341; 2 Eq. Rep. 386. Affirming 2 W. R. 280.

4. Where conditions of sale incorrectly state the effect of the trusts of a reversionary interest, the purchaser of that interest is not bound to accept the title. *Hadley v. Robins*, 14 W. R. 387; 14 L. T., N. S., 100.

5. A slight and immaterial misdescription of the term in the agreement for the sale of a lease will not relieve a purchaser from the obligation of completing his purchase. *Jennings v. Brunt*, 19 L. T., N. S., 705.

6. The Court may not decree specific performance of a contract for the sale of a reversion if the vendor had misled the purchaser by stating that it was subject to a

lease containing all the usual covenants for repairs, etc., the vendor knowing at the same time that there was no person against whom the covenant could be enforced; but where property is sold subject to a lease so described, and tenants are in possession of the property, and pay their rent according to the terms of the lease, and the vendor is not aware at the time of the contract of any difficulty in enforcing the covenants, the Court will not refuse to decree specific performance on the ground that the vendor cannot show upon whom the liability of the covenants in the lease has devolved, and the vendor is not bound to find out and acquaint the purchaser with the name of the party who may be liable to such covenants. *Flint v. Woodin*, 9 Hare 618; 22 L. J., N. S., Ch., 92; 16 Jur. 719.

7. A vendor put up for sale by auction a certain sum or redeemed land tax, which he described in the particulars as charged on three houses. On investigating the title, it was discovered that the amount was made up of three sums, each of which was charged on a particular house, and not the whole upon each of the houses. The particulars referred to the contract with the commissioners for the redemption of the tax as part of the vendor's title, but did not further state, as appeared from the schedule to the contract, that the gross sum was charged in separate sums upon each of the houses. The purchaser had no notice of the real facts beyond what appeared upon the face of the particulars. Upon a bill by the vendor to enforce specific performance of a contract for purchase:—Held, that 42 Geo. 3, c. 116, did not operate to consolidate the several charges into one assessment, and to make the whole amount leviable on each part of the property redeemed. *Cox v. Coventon*, 8 Jur., N. S., 1142; 10 W. R. 829; 7 L. T., N. S., 78.

Held, also, that the reference to the contract for redemption did not give the purchaser notice of the contents of the schedule, so as to affect him with the consequences. *Id.*

Held, also, that there was a material misdescription of the property sold; that the difference in value between what was offered for sale and what was bought was not a subject for compensation; and that specific performance of the contract could not be enforced against the purchaser. *Id.*

8. W., by agreement endorsed on printed particulars of sale, sold to B. a house, in front of which a piece of common ground was railed in, but divided from the house by a road, to which common W. had a possessory title only. A., alleging that on the plan he considered the common land part of the purchase, refused to complete. On claim filed by W.:—Held, that inasmuch as the plan might have misled B., no decree for specific performance could be made; but as there was enough doubt to induce investigation, the claim must be dismissed without costs. *Weston v. Bird*, 2 W. R. 145.

9. A purchaser was discharged from his purchase on the ground of misrepresentation, lands having been set up to be sold as held under written agreements for leases from 1827, which appeared upon inquiry subsequent to the sale to be mere parol agreements. *Bessonnet v. Robins*, Sau. & Sc. 142.

A purchaser seeking to be discharged from his purchase under the Court upon the ground of misrepresentation, must swear distinctly to his having been deceived by the representations made to him; but the case not being perfectly clear, and some time having been suffered to elapse before the application, the purchaser was refused his costs. *Id.*

1. A person purchased at a sale by auction for 2,500*l.* property which was described in the particulars of sale as "an immediate reversion in fee-simple." Shortly after signing the contract he discovered that by the conditions of sale, which were produced for the first time and read aloud by the vendor's agent at the commencement of the sale, the purchaser was to take the property subject to the obligation of paying off mortgages for 2,500*l.*, the gross value of the reversion being under 5,000*l.*:—Held, that the description in the particulars of sale was an improper description, and the reading of the conditions of sale in the auction-room was not sufficient to convey to the purchaser a knowledge of the real facts; and that he was therefore entitled to have the contract rescinded. *Torrance v. Bolton*, 42 L. J., Ch., 177; 8 L. R., Ch., 118; 27 L. T., N. S., 738; 21 W. R. 134. Affirming 14 L. R., Eq., 124; 41 L. J., Ch., 643; 20 W. R. 718; 27 L. T., N. S., 19.

2. Leaseholds in Liverpool were put up for sale under the direction of the Court in four lots, under a condition that the purchasers should enter into the usual covenant for paying and observing the rents and covenants of the leases, and indemnifying the vendors therefrom. There was no condition as to the leases being produced, nor that the purchasers should be deemed to have notice of their contents. As to one of the lots, the particulars stated the rents at which the different parts of it were underlet, and the amount of a mortgage on it; but, owing to a slip, did not mention that it was subject to any ground-rent. It was, in fact, subject to a ground-rent of 43*l.* The other lots were leaseholds held under the corporation of Liverpool, which usually reserves only a nominal rent on its leases. A purchaser bought this lot for 1,400*l.*, and applied to be discharged from his purchase, both he and his solicitor deposing that they were led by the particulars to believe, and did believe, that the property was not subject to any ground-rent:—Held, that the purchaser was entitled to be discharged. *Jones v. Rimmer*, 14 L. R., Ch. D., 588; 49 L. J., Ch., 775; 43 L. T. 111; 29 W. R. 165.

VII. AS TO MATTERS MATERIAL TO THE ENJOYMENT OF THE PROPERTY.

3. A contract was entered into for the sale of a piece of land described as arable land, not stating anything as to the existence of a right of way to it. It turned out that it was extremely doubtful whether there was any right of cartway to it:—Held, that specific performance ought not be decreed at the suit of the vendor, in the absence of any conduct on the part of the purchaser precluding his taking the objection. *Denne v. Light*, 3 Jur., N. S., 627; 26 L. J., Ch., 459.

4. A certain lot was described in the particulars as being sold with a certain reservoir and waterworks, yielding a yearly rental of 60*l.*, exclusively of the land and buildings. An objection was taken after the prescribed time, and was supported by the fact that this rent arose from supplying with water certain houses separated from the reservoir by the property of strangers, over which the vendor had no right to carry it, beyond a permissive right from year to year by payment of a rent:—Held, that the description contained such a misrepresentation as to preclude the vendor from enforcing a specific performance; and that the objection was not one as to title, and therefore was not obviated by the stipulation as to time. *Price v. Macaulay*, 2 De G. M. & G. 339.

5. A property situate in a town, and comprising a warehouse with a small steam-engine, was described in particulars of sale under a decree as "well supplied with water." The property was well supplied with water, but only from the waterworks of the borough, and by payment of water rates, there being no natural supply. The manufactories in the town were generally supplied with water from wells upon the properties themselves, though small steam-engines in warehouses frequently were not:—Held, that there was a misdescription, and that a purchaser who purchased on the faith of the description in the particulars, without knowing the real state of the case, could not be compelled to complete his purchase without compensation. *Leayland v. Illingworth*, 2 De G. F. & J. 248.

6. Objections by a purchaser by auction, first, that a way round and across a meadow was not specified; secondly, on account of a bidding for a plaintiff; a specific performance was decreed with costs. *Bowles v. Round*, 5 Ves. 608.

7. If land, generally reputed to be water-meadow, is sold by the assignees of a bankrupt by the description of uncommonly rich water-meadow, whereas, in fact, it is very imperfectly watered; this is not such a misrepresentation as will avoid the sale. *Scott v. Hanson*, 1 Russ. & M. 128. Affirming 1 Sim. 13; 5 L. J., Ch., 67.

8. Particulars of a sale of a messuage and land sold by public auction, described the former as being "a substantial and convenient dwelling-house," and as having "five bedrooms." The defendant, who became the purchaser, and paid a deposit on the purchase money, resisted the completion of the contract on the ground of misdescription, and alleged that the house was neither conveniently nor substantially built, and also that two of the so-called bedrooms were too small to be fit for that purpose:—Held, that the two rooms were not improperly described as bedrooms; that there had been no misrepresentation in stating that the house was substantial and convenient; and that, therefore, the contract must be specifically performed. *Johnson v. Smart*, 6 Jur., N. S., 815; 2 Giff. 151.

9. Upon a sale by auction of a large parcel of land, in sixty lots, the particulars and conditions of sale referred to a plan on which several roads were marked out, so as to provide frontages for all the lots; but there was no indication that any lot was to have rights of

way beyond the road adjoining it and directly leading into the public highway. In a suit by a purchaser of two lots for specific performance, the question arose as to what rights of way he was entitled to have conveyed to him:—Held, that the Court could only act on the footing of the contract, and that the purchaser could only claim a right of way over the road adjoining the lots, and directly thence into the public highway. *Randall v. Hall*, 4 De G. & Sm. 343.

1. Upon delivery of the abstract by a vendor who had contracted to deduce a good title in fee-simple, it appeared that one of his predecessors had covenanted in his purchase deed not to use the property (which was a semi-detached villa standing on an eighth of an acre in a residential neighbourhood), or any part of it, for the purpose of gasworks or a public-house:—Held, that this was such a restriction upon the user and enjoyment of the property as to constitute a fatal objection to the title. *Re Higgins & Hitchman's Contract*, 21 L. R., Ch. D., 25; 51 L. J., Ch., 772; 30 W. R. 700.

2. Leaseholds in Liverpool were put up for sale under the direction of the Court in four lots, under a condition that the purchasers should enter into the usual covenant for paying and observing the rents and covenants of the leases, and indemnifying the vendors therefrom. There was no condition as to the leases being produced, nor that the purchasers should be deemed to have notice of their contents. As to one of the lots, the particulars stated the rents at which the different parts of it were underlet, and the amount of a mortgage on it; but, owing to a slip, did not mention that it was subject to any ground-rent. It was, in fact, subject to a ground-rent of 43*l*. The other lots were leaseholds held under the corporation of Liverpool, which usually reserves only a nominal rent on its leases. A purchaser bought this lot for 1,400*l*., and applied to be discharged from his purchase, both he and his solicitor deposing that they were led by the particulars to believe, and did believe, that the property was not subject to any ground-rent:—Held, that the purchaser was entitled to be discharged. *Jones v. Rimmer*, 14 L. R., Ch. D., 588; 49 L. J., Ch., 775; 43 L. T. 111; 29 W. R. 165.

3. M. was owner of two adjacent houses in Dublin, held respectively under renewed leases of December 1879 and January 1880, which provided that the lessee should be at liberty to carry on the business of a grocer and wine and spirit dealer, but not for consumption on the premises; and that he should not exercise (among other trades) that of a publican or vintner, without the landlord's consent, under pain of an additional rent of 100*l*. per month. The original leases, dated in 1844 and 1852, and made to M.'s father, contained exactly similar provisions, notwithstanding which one of the houses had, since 1860, been continuously used as an ordinary public-house, without any objection on the part of the landlord, or demand of the penal rent. M. having put the entire premises up for sale in March 1880, the plaintiff, an intending purchaser, accompanied by K. (who was a local commission agent for the sale of public-houses, and aware of the restrictive clauses in the leases), went to M.'s solicitor, and saw the particulars

and conditions of the sale, the sixth of which latter was as follows:—"Each of the said leases contained expressly permission to the lessee, his executors, administrators and assigns to exercise and carry on the business of a grocer and wine and spirit dealer upon the premises; and the purchaser shall not object by reason of any covenants, conditions, or penal rents, expressed or reserved, in restriction of the carrying on of certain other trades or businesses; not by reason of any restriction as to consumption on the premises, but shall be satisfied with the notorious fact that the late (defendant's father) continued without hindrance to carry on his trade and business as it was carried on up to the time of his death, on the 21st May 1879, and the present proprietor has done so since; and such fact can be verified, if required, by statutable declaration." The plaintiff, who was himself also a publican, having hurriedly read this document, thereupon signed an agreement to purchase for 3,800*l*., and paid a deposit of 500*l*., without any independent professional advice. The abstract of title having been shortly afterwards furnished, the plaintiff objected to the prohibiting clauses in the leases, alleging that he had not been previously aware of them; that K. had not informed him of them; and that he (the plaintiff) had been misled by the terms of the sixth condition of sale; and on his refusing to complete M. re-sold the premises for 3,000*l*. The plaintiff having then brought an action against M., to set aside his agreement and recover his deposit, and M. having filed a counterclaim in respect of his loss of 300*l*. on the sale:—Held, by the Vice-Chancellor, that K. was not agent for the vendor, but acted in the transaction rather as agent for the purchaser; that the sixth clause of the conditions of sale was not a suppression of the existence of the restrictive covenant, but was rather suggestive of inquiry as to the restriction to which it pointed; that upon the evidence there were no grounds for holding that the plaintiff had been surprised or hurried into the contract, and that, therefore, the plaintiff's action failed; that the deposit forfeited; and that the defendant M. was entitled to an inquiry as to damages for the plaintiff's failure to carry out his contract:—But held, on appeal (reversing the decision of Chatterton, V.-Ch.), dissentiente Deasy, L. J., that the sixth condition was misleading and (on the facts) designedly so, and had misled the plaintiff; that K. was not the plaintiff's agent in the transaction, and that, therefore, his knowledge could not be imputed to the plaintiff, and, accordingly, that the claim should be allowed and the counterclaim dismissed. *Stanley v. McGauran*, 11 L. R., Ir., 314.

Per Law, C.:—Whether misrepresentation be of a fact, or of the contents or effect of a written document, the person to whom such misrepresentation is made is entitled to rely on it, and look no further. *Ib*.

Per FitzGibbon, L. J.:—Where a material misrepresentation exists, the allegation of deceit must be met by proof of knowledge, as contrasted with notice, and contributory negligence has no place amongst the pleas to an action founded upon such misrepresentation. *Ib*.

VIII. AS TO RE-SALE.

1. A contract for sale contained a clause giving the vendor the right, on failure by the purchasers to complete, to re-sell the property and have any deficiency made good by the purchasers:—Held, that this clause was intended to provide for the case of failure of the contract, and could not be enforced in a suit for specific performance. *Dickinson v. London, Chatham, & Dover Railway Co.*, 15 W. R. 141; 15 L. T., N. S., 262.

VII. Misrepresentation.

- I. *Rescission of Contract for*, 7172.
- II. *As a Defence to Suits for Specific Performance.* See SPECIFIC PERFORMANCE—LANDLORD AND TENANT, I. II. 7.
- III. *Misrepresentation and Fraud Generally, and by Fiduciary Persons.* See FRAUD.

I. RESCISSION OF CONTRACT FOR.

2. Misrepresentation, though in a slight degree, is an objection to specific performance. Distinction upon a bill to rescind the contract. *Cadman v. Horner*, 18 Ves. 10.

3. In a case where some delay arose in completing a purchase of mines from difficulties connected with the title it was agreed, that, if the vendor could verify certain statements he had made as to the capabilities and value of the property, the purchasers would complete the contract. The purchasers, after inquiries instituted by themselves, being satisfied of the correctness of those statements, completed the contract; but after six months' possession, having discovered that they were not in fact correct, filed a bill to rescind the contract for fraud:—Held, that the contract could not be rescinded, because the purchasers did not rely on the vendor's statements but tested their accuracy, and, after having knowledge or the means of knowledge, declared that they were satisfied of their correctness. *Attwood v. Small*, 6 Cl. & F. 232; 2 Jur. 200. Reversing S. C. *sub. nom. Small v. Attwood*, Younge 407; 2 L. J., N. S., Exch. Eq., 16.

If, on the treaty for the sale of property, the vendor makes representations which he knows to be false, the falsehood of which the purchaser had no means of knowing, but he relies on them, a court of equity will rescind a contract so entered into, although it may not contain the representations; but it will not rescind without the clearest proof of fraudulent misrepresentations, and that they were made under such circumstances as show that the contract was based on them. *Ib.*

If a purchaser, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him or to his agents, he cannot be heard to say he was deceived by the vendor's representations, the rule being *caveat emptor*; and the knowledge of his agents being as binding on him as his own knowledge. *Ib.*

Where representations are made of the

nature and character of property offered for sale affecting its value, and those representations turn out to be false to the knowledge of the party making them, a foundation is laid for an action at law for damages for the deceit, and for a suit in equity to set aside the contract. S. C. 6 Cl. & F. 395.

4. Effect of an indefinite representation by a vendor; as that a leasehold estate was nearly equal to freehold, being renewable upon a small fine; putting the purchaser upon inquiry; though, connected with certain circumstances, such representation may be fraudulent, and form a ground for rescinding the contract. *Fenton v. Bromne*, 14 Ves. 144.

5. Misrepresentations, to constitute sufficient grounds for setting aside a purchase, must be material, as being of such a nature as, if true, to add to the value, must not be evidently merely conjectural statements, and must be made without a belief in their truth or without reasonable grounds for such a belief. *Jennings v. Broughton*, 5 De G. M. & G. 126; 23 L. J., Ch., 999.

Where advertisements for the sale of shares in a mine had been issued containing unfounded statements, but the purchaser had not relied upon them, and had had opportunities of judging of their accuracy:—Held, that he was not entitled by reason of them to have the contract rescinded. *Ib.*

In suits to rescind contracts for fraud, particularly where the subject is of variable value, it is the duty of the plaintiff to put forward his complaint at the earliest possible period. *Ib.*

6. A vendor and his solicitor fraudulently, and in the absence of the purchasers' solicitor, obtained from a purchaser (who was desirous of completing the purchase, and had entered into possession) the purchase-money and covenants for the production of title-deeds, while the title as to part of the purchased premises was still under investigation. On a bill filed by the purchaser against the vendor and his solicitor, it was held that the plaintiff was entitled to have the contract rescinded, and his purchase-money together with all costs, charges, and expenses (including auction duty) repaid to him, and to have the deeds of covenant executed by him delivered up to be cancelled. *Berry v. Armistead*, 2 Keen 221.

7. Purchase of a reversionary interest by the solicitors for sale, set aside on the ground of concealment. *Re Bloye's Trust*, 1 Macn. & G. 488; 2 H. & Tw. 140; 19 L. J., N. S., Ch., 89; 14 Jur. 49.

8. Where a purchaser seeks to be relieved against the purchase on the ground of personal fraud by the vendor, and the alleged fraud is not proved, he is not entitled to relief on any other ground. *Wilde v. Gibson*, 1 H. L. Ca. 606; 12 Jur. 527. Reversing S. C. *nom. Gibson v. D'Eate*, 2 Y. & Coll. C. C. 542; 8 Jur. 94.

A bill filed by a purchaser to set aside a purchase and conveyance of an estate, on the ground of fraudulent concealment of a right of way, dismissed with costs, there being no proof of concealment by the vendor, although the dealings were inconsistent with any right of way. *Ib.*

To set aside a purchase, perfected by conveyance and payment of the purchase-money, for fraudulent concealment by the vendor of

a defect in the title, where there was no warranty or statement that there was no defect, proof of concealment by the vendor's agent is not sufficient; there must be proof of direct personal knowledge and concealment by the principal. *Id.*

1. On a bill to set aside a sale, the parties having contradicted each other, the evidence of the one was to be taken as neutralising that of the other, and the Court decided according as the case set up by either was more consistent with and was corroborated by admitted facts and documents connected with the transaction. *Wentworth v. Lloyd*, 10 H. L. Ca. 589; 10 Jur., N. S., 961; 33 L. J., Ch., 688; 10 L. T., N. S., 767.

2. Where misrepresentations had been made in a contract for sale, and the vendor accepted an I. O. U. for the greater part of the purchase-money, and the purchaser filed a bill to set aside the contract, and the vendor brought an action on the I. O. U.—The Court granted an *ex parte* injunction, and subsequently continued an injunction to restrain such action and ordered the contract to be cancelled. *Bartlett v. Salmon*, 1 Jur., N. S., 277.

3. A firm had become insolvent. One of the members was separately insolvent and *non compos*; another was separately adjudicated bankrupt. In order to procure a title to the separate interest of the *non compos* partner (whose separate creditors would not enter into an arrangement for releasing it), one of the creditors, who was also a separate creditor of the bankrupt partner, obtained an execution against the *non compos* partner, and sold by the sheriff at auction, expecting and intending to purchase himself, and sent a clerk to bid up to 150*l.* A. purchased at 151*l.*, the property being quite worthless:—Held, such a concealment of circumstances as to justify the sale being set aside, with costs on A.'s application. *Smith v. Harrison*, 3 Jur., N. S., 287; 26 L. J., Ch., 412; 5 W. R. 508.

4. When a vendor, ignorant of the real value of an estate, sells it at a loss, on the faith of what the purchaser represents to him that it is worth, the sale will be set aside, and that irrespective of any fiduciary relation, fraud, or other concealment in the transaction between the parties. *Haygarth v. Wearing*, 24 L. T., N. S., 825; 40 L. J., Ch., 577.

5. There is no general rule that actual fraud is necessary to induce a court of equity to rescind a contract for sale. The Court acts on the same principle in rescinding contracts for sale as in setting aside other contracts and dealings which it considers unconscionable. *Torrance v. Bolton*, 8 L. R., Ch., 118; 42 L. J., Ch., 177; 27 L. T., N. S., 738.

6. A. having two parcels and B. one parcel of land, supposed to contain petroleum, it was agreed between them and C. that C. should pay them 10,000 dollars for the land if he succeeded in forming a company for the purpose of working the oil springs, and in inducing such company to pay him 13,750 dollars as the price of the land, out of which he was to keep for himself 3,750 dollars. B. accordingly, assuming the character of owner, gave to C. a conditional promise to sell all the land to him for 13,750 dollars, provided the offer was accepted within a certain time. A. wrote a

letter, meant to be shown to, and which was shown to, persons intending to become members of the new company, and was proved to have influenced them, in which letter he recommended the purchase, not disclosing that he had any interest therein. A. and B. actively co-operated with C. throughout the whole transaction. The company, in ignorance of the combination, accepted the proposal, but having discovered the fraud, sued for a rescission of the contract:—Held, that the contract must be wholly rescinded, the price repaid, and the land reconveyed. There being a doubt (owing to the expiration of the term for which the company had been constituted) whether the company was competent to receive the money and to execute a reconveyance, the order provided that the repayment should be made to the company, or to such other persons as were entitled in their right, on the reconveyance of the lands being made to the satisfaction of the colonial court. *Lindsay v. Petroleum Co. v. Hurd*, 5 L. R., P. C., 221; 22 W. R. 492.

7. W. agreed to purchase from B. a mineral estate for 250,000*l.*, payable by instalments, and subsequently agreed to sell the property to a company which he had promoted, the price to be 350,000*l.*, payable by instalments, and as to 75,000*l.* of it payable in the company's bonds. Both agreements provided that the estate, as to extent of acreage, should be taken as conclusively shown by the title deeds, and neither agreement specified the acreage, but B. told W., and W. told the company, that it contained 1,530 acres, both B. and W. believing the statement to be true. The company, before they made the agreement, had the estate inspected and valued by a mining surveyor, but there was no evidence as to whether or not he measured it. After W. had paid B. 50,000*l.*, and the company had paid W. 75,000*l.*, and given him their bonds for 75,000*l.*, the company refused to complete their purchase, alleging that the estate contained less than 1,100 acres. W. thereupon refused to complete his purchase on the same ground, and brought an action against B. to recover the 50,000*l.* and also for damages. B. offered to W. to reduce his purchase-money by 50,000*l.*, and W. made a like offer to the company, but both offers were refused. The action was compromised, B. repaying to W. the 50,000*l.*, and the agreement between them being cancelled by mutual consent. The company was wound up, and the official liquidator, six months after the company's repudiation of the purchase, instituted a suit against W. for the cancellation of their contract, for the repayment and return by W. of the 75,000*l.* and bonds, and for an injunction to restrain W. from negotiating or parting with the bonds. The bill did not allege that the deficiency of acreage in fact existed, and there was no evidence on the subject:—Held, that the company was not entitled to have the contract rescinded on the ground of misrepresentation; that they could not sustain a suit in equity to recover the instalments of purchase-money; that they had no lien on the 50,000*l.* repaid by B. to W., and that as to the bonds the suit was unnecessary, because they could only be assigned by W. subject to the equities between him and the company, and also because the company could not be sued upon them

without the leave of the Court; and the bill was dismissed without prejudice to any rights at law. *Aberaman Ironworks v. Wickens*, 5 L. R., Eq., 485; 4 L. R., Ch., 101; 20 L. T., N. S., 89; 18 L. T., N. S., 306; 17 W. R. 211.

After his agreement with B., W. agreed with C., D., and E., to share with them in certain proportions the profit to be made by the resale of the estate; W., C., D., and E. together got up the company, and part of the money received by W. from the company was disposed of by them jointly. C., D., and E. were made parties to the suit, and the bill sought to make them liable to the company for the money and bonds received by W.:—Held, that they were not so liable, and were improperly made parties to the suit. *Ib.*

1. A piece of land, imperfectly watered, was described in the particular as uncommonly rich water meadow:—Held, that this was not such a misrepresentation as would avoid the sale. *Scott v. Hanson*, 1 Russ. & M. 128. Affirming 1 Sim. 13; 5 L. J., Ch., 67.

2. The plaintiffs advertised for sale by auction an hotel, stated in the particulars to be held by a "most desirable tenant." The defendants sent their secretary down to inspect the property and report thereon. The secretary reported very unfavourably, stating that the tenant could scarcely pay the rent (400l.), rates and taxes. The defendants, relying on the statements in the particulars, authorised the secretary to attend the sale and to bid up to 5,000l. The property was bought in at the sale, and the secretary purchased it by private contract for 4,700l. It appeared subsequently that the quarter's rent previous to the sale had not been paid; the previous quarter had been paid by instalments, and six weeks after the sale the tenant filed his petition. It appeared, however, that the hotel business was as good during the last year as previously, and that the month of the tenant's failure was the best he had had. The plaintiffs brought an action for specific performance, relying (in answer to the defence and counter-claim for rescission on the ground of misrepresentation) on the fact that the defendants had made their own inquiries:—Held, that the statement that the property was held by a "most desirable tenant" could not be treated as "simplex commendatio," and that the defendants, having relied thereon, were entitled to rescission of the contract, on the authority of *Redgrave v. Hurd* (20 L. R., Ch. D., 1). *Smith v. Land & House Property Corporation*, 49 L. T. 532.

VIII. Mistake.

I. *Rescission of Contract for*, 7174.

II. *As a Defence to Suits for Specific Performance*. See SPECIFIC PERFORMANCE, XI.

IX.

III. *Generally*. See MISTAKE.

I. RESCISSION OF CONTRACT FOR.

3. A man purchasing an estate by a particular, but in the conveyance itself part of the land is left out, equity will not set aside. *Clavell v. Littleton*, Pre. Ch. 307.

4. Purchaser not entitled to a conveyance of part, though answering the general description in the advertisement of sale, as it was not in the contemplation of either party at the time of the purchase or conveyance; purchaser being referred to a more particular description which did not include that part, and the surrender having been made according to that, and from his own instructions. If one party thought he had purchased *bonâ fide* part of an estate which the other thought he had not sold, it is a ground to set aside the contract. If both understood the whole was to be conveyed, it must; otherwise, if neither understood so. *Calverley v. Williams*, 1 Ves. J. 210.

Small variation in general description of land not material. *Id.* 212.

5. Though, generally, a purchaser cannot be called upon for purchase-money until title made, yet where he is let into possession upon mutual confidence of speedy title, and the difficulty is a mutual surprise, he cannot, without express contract, retain possession, withholding purchase-money. *Gibson v. Clarke*, 1 Ves. & B. 500.

6. Where a contract is entered into for the sale of an estate, and, under the general words, property passes, which the vendor insists he did not mean to sell, but the purchaser by his answer denies, or does not admit that it was not in his contemplation at the time of the purchase. *Semble*, that the vendor cannot sustain a bill against the purchaser to have the contract rectified, on the ground of mistake, and carried into execution. *Quære*, whether, consistently with the Statute of Frauds, the Court can entertain a bill for rectifying an executory contract for the sale of lands, and carrying it, when rectified, into execution, even where the mistake is admitted by the answer. *Att. Gen. v. Sitwell*, 1 Y. & Coll. 559; 5 L. J., N. S., Exch. Eq., 86.

7. Where, by the mutual mistake of vendor and purchaser as to the duration of a leasehold interest, it had been sold at a price considerably below its value, and the conveyance had been executed, and the purchaser let into possession:—Held, upon a bill filed some years afterwards by the vendor against the representatives of the purchaser, that the vendor was not entitled to be relieved against the mistake. *Okill v. Whittaker*, 1 De G. & Sm. 83. Affirmed 2 Ph. 338; 16 L. J., N. S., Ch., 454; 11 Jur. 681.

8. A contract for the sale of a plantation of larches was entered into by a vendor in ignorance of the number of trees contained in it. The purchaser knew the exact number, but was not aware of the mistake made by the vendor. He was, however, prior to signing the contract, told by the vendor's woodman that his master must have made some mistake in reference to the matter:—Held, that the contract ought to be set aside. *Hamilton v. Board*, 2 N. R. 13.

9. Where vendor in ignorance and mistake agrees to sell that in which he has no interest at time of sale, equity will rescind the contract, and will order bond given for purchase money to be cancelled, and interest paid on it to be refunded without costs on either side. *Hitchcock v. Giddings*, 4 Price 135.

10. The purchaser may escape from his bargain on the ground of mistake, if it was a mistake which the vendors contributed to—

that is, in other words, if he was misled by any act of the vendors. If the mistake was entirely his own, then the Court ought not to let him off his bargain on the ground of a mistake made by himself solely, unless the case is one of considerable harshness and hardship. *Goddard v. Jeffreys*, 51 L. J., Ch., 59; 45 L. T. 675; 30 W. R. 270.

1. P., in August 1861, agreed to purchase a house and premises of L., supposing that he was seized in fee, but he subsequently discovered that L. possessed only an agreement from B. for a lease for a short term, of which five years and a half were unexpired, with an option of purchase. P. agreed to purchase, for 2,500*l.*, "the benefit of L.'s agreement with his lessor," and he covenanted to perform all L.'s covenants in the agreement for a lease. L. admitted that this contract was erroneous. It was subsequently discovered that B. had not a freehold title to more than three-fourths of the property, and P. consequently refused to complete his purchase. L. brought an action to recover 600*l.*, the declaration stating that the plaintiff in the action sought to recover 500*l.* only under the first count, 2,500*l.* having been inserted in the agreement by mistake for 500*l.* P. instituted a suit in equity to have the agreement set aside, and to have the action stayed:—Held, that the mistake in the agreement rendered it null and void, and the Court ordered it to be delivered up to be cancelled, and the defendant to pay the costs of the suit and of the action. *Price v. Ley*, 9 Jur., N. S., 295; 11 W. R. 399. Affirmed 11 W. R. 475; 32 L. J., Ch., 530; 7 L. T., N. S., 845.

2. Where purchaser has given full value for estate, mistake of some party to conveyance of their claim thereto, under a marriage settlement, shall not turn to the prejudice of the purchaser without notice. *Malden v. Menill*, 2 Atk. 8.

3. Premises were put up for sale by auction. Lot 1 was described as all freehold, and in the occupation of R. Lot 2 was described as leasehold. In fact, part of the premises in the occupation of R. was leasehold, and held under the same lease as those comprised in lot 2. A., with a knowledge of this fact, became the purchaser of lot 2, in the belief that it comprised all the leaseholds. He filed a bill, claiming to have the whole of the leaseholds included in his assignment; and the bill was dismissed, with costs. *Fairhead v. Southee*, 9 Jur., N. S., 764; 11 W. R. 769.

4. B. being entitled to a sum of 2,916*l.* stock in reversion expectant on the death of an old lady aged eighty-two, obtained through the defendant E., who acted as solicitor for both parties, a loan of 1,650*l.* upon mortgage. The mortgage contained a power of sale upon three months' notice, or on interest being one month in arrear. The interest being in arrear, the stock was sold, under the power, for 1,950*l.*, as subject to succession duty at 3 per cent. The tenant for life was then in a precarious state of health, and died within three months. It was afterwards found that only 7*l.* was payable for succession duty. None of the purchase money was paid except the deposit, the rest being left upon mortgage of the stock. There was evidence that having regard to the age and health of the tenant for life, from

100*l.* to 200*l.* might have been obtained for the reversion:—Held, that the sale could not be set aside, either on the ground of under-value, as there was no fraud; nor the leaving of the purchase money on mortgage; nor the mistake as to succession duty, that being merely a matter for compensation. *Bettys v. Maynard*, 49 L. T. 389; 31 W. R. 461. Reversing 46 L. T. 766; 30 W. R. 793.

5. In a sale under a decree, the will of the testator in the cause devising the property the subject matter of the suit had been incorrectly abstracted in the abstract furnished to the purchaser, although the document next appearing upon the abstract recited the will correctly. The conveyancer acting on behalf of the purchaser had not called attention to this discrepancy, although he had directed an examination of the probate for other purposes. The will had been admitted to probate in facsimile, but neither the will nor the probate copy had been examined. The purchaser, who had accepted the title and paid the money into court, where it still remained, had subsequently discovered the mistake:—Held, that as the conveyancer had been clearly misled by the abstract, the purchaser was entitled to be relieved from his purchase, but on the terms of paying the costs of the application, as he had been negligent in the matter. No costs were given to the person having the conduct of the sale. *McCulloch v. Gregory*, 3 W. R. 231; 1 Kay & J. 286; 24 L. J., Ch., 246; 3 Eq. Rep. 495.

6. The conveyance on a sale of land contained a reservation of the minerals lying thereunder to the vendor, which the evidence showed was not intended by either the vendor or the purchaser. Five years afterwards the purchaser discovered the mistake, and filed a bill to have the conveyance rectified. The vendor, after putting in an answer, by which he denied that there had been any mistake on his part, died before he could be cross-examined, and the suit was revived against his legal representative:—Held, having regard to the lapse of time and other circumstances, that if the defendant did not consent to have the conveyance rectified, the whole transaction must be set aside, in which event the plaintiff would be fixed with an occupation rent, while the defendant would have to repay the purchase money, with interest, and also all sums expended by the plaintiff in permanent improvements. *Bloomer v. Spittle*, 13 L. R., Eq., 427; 41 L. J., Ch., 369; 26 L. T. 272; 20 W. R. 435.

7. A. being jointly interested with M. and G. in a foreign mine, agreed to sell his share to them upon certain terms not to be fulfilled immediately. Under an arrangement negotiated between M. and B. the whole property was conveyed to B. upon trust to secure him an annuity. A. concurred in this conveyance under an impression that B. was at the same time to execute a mortgage securing the fulfilment of the terms upon which A. sold. B. in fact executed this mortgage, but without knowing what it was, and without having been informed by A. of the terms upon which he had sold:—Held, that A. ought to have communicated directly with B., and that the Court was justified in setting aside the second instrument alone, in a suit to which M. and G. were not parties. *Leader v. McEwen*, 1 N. R. 251.

8. A person purchased at a sale by auction,

for 2,500*l.*, property which was described in the particulars of sale as an "immediate reversion in fee simple." Shortly after signing the contract he discovered that by the conditions of sale, which were produced for the first time and read aloud by the vendor's agent at the commencement of the sale, but which the purchaser was prevented by deafness from hearing distinctly, the purchaser was to take the property, subject to the obligation of paying off mortgages for 2,500*l.*, in addition to his purchase money, the real value of the reversion being considerably under 5,000*l.*:—Held, that the purchaser was entitled to have the contract rescinded, on the ground of common mistake, and of misdescription in the particulars; and that he was also entitled to have the deposit which he had paid returned, with interest at 4 per cent., and until payment, to a lien for the amount on the vendor's interest in the property. *Torrance v. Bolton*, 41 L. J., Ch., 643; 14 L. R., Eq., 124; 20 W. R. 718; 27 L. T., N. S., 19. Affirmed 21 W. R. 134; 42 L. J., Ch., 177; 27 L. T. 738; 8 L. R., Ch., 112.

1. Where personal considerations enter into a contract, error as to the person with whom the contract is made annuls the contract; not so where the person sought to be bound would have been equally willing to make the same contract with any other person. *Smith v. Wheatcroft*, 9 L. R., Ch. D., 223; 39 L. T., N. S., 103; 27 W. R. 42; 47 L. J., Ch., 745.

IX. Abatement and Compensation.

See also VI. *ante*—LANDLORD AND TENANT, I. III.

- I. *General Principles*, 7176.
- II. *After Conveyance Executed*, 7177.
- III. *For Charges and Incumbrances*, 7178.
- IV. *Dower and other Life Interests*, 7179.
- V. *Leases Outstanding*, 7179.
- VI. *Limited Interests, and Title Defective as to Part of Property*, 7179.
- VII. *Mines and other Reservations*, 7181.
- VIII. *Quantity. Defective*, 7182.
- IX. *Rents, Tithes, and other Outgoings*, 7183.
- X. *Repairs*, 7184.
- XI. *On Sale of Timber Estates*, 7185.
- XII. *Misrepresentation as to Value*, 7185.
- XIII. *Water Supply*, 7186.
- XIV. *Other Cases*, 7186.
- XV. *Deterioration and Risk after Contract*. See XIII. *post*.
- XVI. *Relief by Way of Damages*. See SPECIFIC PERFORMANCE, III.

I. GENERAL PRINCIPLES.

2. If an agreement be in part unperformed, the principle of a court of equity is in compensation, not forfeiture. *Page v. Broom*, 4 Russ. 6. Affirmed 2 Russ. & M. 214.

3. Where a bill for specific performance is dismissed on the ground of inadequacy of consideration, the Court will not aid a party in recovering his deposit, or giving him com-

pensation for his loss, by decreeing an account. *Kendall v. Beckett*, 9 L. J., Ch., 24.

4. If a purchaser cannot have what was his strong inducement to the contract, a specific performance, with compensation, not to be enforced. *Stapylton v. Scott*, 13 Ves. 426.

5. Specific performance upon the principle of compensation and indemnity: not if the effect is the substantial deviation from the contract. *Halsey v. Grant*, 13 Ves. 73. S. P. *Hornblow v. Shirley*, *id.* 81.

6. Where two purchasers in equal moieties between them, and one has abatement in price, etc., made to him, he shall account to other as to it. *Carter v. Horne*, 1 Eq. Abr. 7.

7. General rule of specific performance that the purchaser shall have what the vendor can give, with an abatement out of the purchase money, for so much as the quantity falls short of the representation, enforced against trustees for infants, upon the mere mistake of their agent without fraud, etc., but the relief adapted to the justice of the case, viz., the purchase being of wood upon a gross valuation, without regard to the quantity of land; an abatement for a deficiency of quantity from erroneously inserting the hedges and fences not included in the purchase, was directed with reference to land. *Hill v. Buckley*, 17 Ves. 394.

8. The principle of equity with respect to specific performance is, that if substantially the purchaser can have the thing contracted for, a slight variation in the qualifications of it will not disable the vendor from having a decree for specific performance, when the difference is such as can be compensated in money. *Magennis v. Fallon*, 2 Moll. 588.

9. The jurisdiction of equity is never exercised to decree compensation singly without other relief. As to the jurisdiction in cases of compensation generally. *Newham v. May*, 13 Price 749; McClel. 511.

10. *Semble*, that in a case of misdescription, a court of equity would not enforce against trustees specific performance with compensation, as being prejudicial to the *cæteri quo trust*, and incapable of being ascertained. *White v. Cuddon*, 8 Cl. & J. 766; 6 Jur. 47. Reversing *sub. nom.* *Cuddon v. Cartwright*, 4 Y. & Coll. 25.

11. Purchaser not bound to take with compensation in a case of great intentional misrepresentation, although so provided by the conditions of sale in case of "any error or misstatement" in the particulars. *Stewart v. Alliston*, 1 Meriv. 26.

12. Though generally so, it is not universally true that a purchaser may take what he can get, with compensation for what he cannot have. Whether that is ever done without express undertaking on his part to do what Court shall order, *quære*. *Paton v. Rogers*, 1 Ves. & B. 351.

13. One of the terms of an agreement was, that the contract should be void if the purchaser's counsel should be of opinion that the marketable title could not be made by a certain time. The counsel being of that opinion, a bill by the purchaser for specific performance with a compensation was dismissed with costs; and an application afterwards made by the plaintiff that his deposit might be set off against the defendant's costs, and the surplus

(if any) paid to him, was refused with costs. *Williams v. Edwards*, 2 Sim. 71.

1. The doctrine of compensation ought not to be extended. Jurisdiction has been exercised in giving compensation founded on the minuteness of the object, compared with the estate sold, and not upon any jurisdiction to find and adjust pecuniary equivalents, where essential parts of the contract cannot be performed. The Master's certificate of the sale and the printed rental are analogous to the minute of a contract on a private sale. The purchaser of several denominations in one lot will be discharged on motion if the Master reports that a good title cannot be made to one of the denominations. *Pendergast v. Eyre*, 2 Hog. 81.

2. At the hearing, a decree, as drawn up, was simply for specific performance, although the Court had directed it to be without prejudice to the question of compensation:—Held, that the plaintiff was not thereby precluded, as having elected to take the decree in that form, from compensation. *Wilson v. Williams*, 3 Jur., N. S., 810.

The want of mutuality is not a sufficient argument against granting specific performance, with compensation, at the prayer of a purchaser, although a vendor could not compel a purchaser to accept such a compensation. *Id.*

3. Where a bill by a vendor for specific performance does not set up a right to enforce a title with compensation, but avers that the vendor was and is able to make a good title, and that everything has been shown that was necessary, the Court will not, upon the failure of the latter averment, entertain the question of compensation. *Ashton v. Wood*, 3 Jur., N. S., 1164; 3 Sm. & G. 436.

4. Though the conduct of a purchaser, after the discovery of circumstances entitling him to rescind a contract, may be such as to preclude him from so doing, it does not necessarily follow that he is entitled to compensation. *Hughes v. Jones*, 10 W. R. 139; 5 L. T., N. S., 408; 8 Jur., N. S., 399; 31 L. J., Ch., 83; 3 De G. F. & J. 307.

5. *Quere*, per Turner, L. J., whether the principle of compensation is applicable where there is no estimable loss to a purchaser unless he happen to sell. *Edwards-Wood v. Marjoribanks*, 5 Jur., N. S., 181; 23 L. J., Ch., 298; 1 Giff. 384; 3 De G. & J. 329. And see 8 C. 6 Jur., N. S., 1167; 7 H. L. Ca. 306; 30 L. J., Ch., 176. S. C. *nom. Woods v. Marjoribanks*, 4 Jur., N. S., 27.

6. Upon a reference to the Master to inquire as to the title to compensation for damage done to lands, the Master ought regularly to inquire whether the damage was temporary or permanent. *Cator v. Croydon Canal Co.*, 4 Y. & Coll. 405; 13 L. J., N. S., Ch., 89.

II. AFTER CONVEYANCE EXECUTED.

7. After conveyance the omission of certain parcels, of which omission the purchaser had notice by the abstract:—Held, not a ground for rescinding the contract. The purchaser having by his mistake allowed the vendor to convey the omitted parcels to another purchaser:—Held, not entitled to have the con-

veyance rectified:—Held, also, that a decree for compensation cannot be made after conveyance. At a sale of land in lots by auction, A. purchases lot 5 and B. lot 6. By mistake part of 5 is included in the conveyance to B., and omitted in that to A. Bill that B. should convey such part to A., and in alternative that A.'s contract with the vendor might be rescinded, or that A. might have compensation from him, dismissed as against the vendor; but, overruling decision of Master of the Rolls, relief allowed as against B. *Lentz v. Hillas*, 6 W. R. 217; 27 L. J., Ch., 534; 2 De G. & J. 110; 4 Jur., N. S., 1166.

8. A man purchasing an estate by a particular, but in the conveyance itself part of the land is left out, equity will set it aside. *Clavell v. Littleton*, Pre. Ch., 307.

9. An estate sold under a decree was described as of a certain annual value, and, by the conditions, compensation was to be made for any error in the particular. The purchaser paid his money into court, was let into possession, and took a conveyance. After he got into possession he discovered that the rent was over-stated in the particular:—Held, that he was entitled to a compensation out of his purchase money. *Cann v. Cann*, 3 Sim. 447.

10. A purchaser cannot, in the absence of fraud, obtain compensation after conveyance for a misrepresentation, even though such misrepresentation related to the subject matter of the conveyance. *Manson v. Thacker*, 7 L. R., Ch. D., 620; 47 L. J., Ch., 312; 26 W. R. 604; 38 L. T., N. S., 209.

A freehold waterside property on the Thames was put up for sale by auction under a decree made in a partition suit. By one of the conditions of sale it was provided that if any error or misstatement should appear in the particulars compensation should be made to or by the purchaser as the case might be. The property was sold, the title accepted by the purchaser, who paid his purchase money into court, and the conveyance was executed and the purchaser let into possession. A year after the completion of the purchase, the purchaser discovered that there was an underground culvert under the property to certain mills at some distance from the river, the existence of which was unknown to the vendors, and which was injurious to the property, and for which the purchaser claimed compensation:—Held, that the purchase having been completed and there being no allegation of fraud or wilful misrepresentation on the part of the vendors, the purchaser was not under the condition entitled to any compensation. *Id.*

11. Where, in an agreement for the sale of land, the conditions provided that if any error or misstatement should be found it should not annul the sale, but that compensation should be made in respect thereof, and an error in the quantity of the land was discovered after the conveyance had been executed:—Held, that the purchaser was entitled to compensation. *Re Turner and Shelton*, 13 L. R., Ch. D., 130; 49 L. J., Ch., 114; 41 L. T. 668; 23 W. R. 312.

Manson v. Thacker (7 L. R., Ch. D., 620) not followed. *Id.*

12. Plaintiff sold by auction a term of fifty years in a public-house at a rent of 105*l.*, and

subject to a covenant against Sunday trading. It was stated at the sale that the freeholder had offered to release the covenant on having 25*l.* additional rent. Defendant was the purchaser, and after the sale received an abstract which showed that the vendor was an underlessee. After this the plaintiff procured from the freeholder a release of the covenant, and the defendant accepted a lease at a rent of 130*l.* and paid the purchase money partly by an order on his brewers. On the day after completion he became aware that the release from the freeholder was not effectual without a release from the original lessee, and stopped payment of the order on the brewers until this should be obtained. The required release could not be obtained, and the defendant claimed to retain his bargain with compensation:—Held, that compensation could not be given for an error discovered after completion. *Re Turner and Shelton* (13 L. R., Ch. D., 130) dissented from. *Allen v. Richardson*, 13 L. R., Ch. D., 524; 49 L. J., Ch., 137; 41 L. T. 614; 28 W. R. 313.

Held, also, that plaintiff was entitled to specific performance of the original contract at the rent of 105*l.*, and without a release of the covenant. *Id.*

1. The contract for sale of an estate provided, *inter alia*, that any material error in the rental furnished to the purchaser, and referred to in the agreement, should not annul the sale, but that compensation should be made in respect thereof. The rental so furnished, and on the faith of which the purchaser entered into the contract, represented in substance that by a fee-farm grant of part of the estate the timber thereon (which was of the value of 800*l.* or thereabouts) was reserved to the vendor. The value of the timber formed a material element in the purchaser's calculation of the price. The timber, though reserved in the original lease in perpetuity, which had been converted into the fee-farm grant, had been afterwards granted by a subsequent owner of the estate to the lessee, and was not reserved by the fee-farm grant, and the vendor had, consequently, no title to the timber. In the abstract of title delivered to the purchaser the conveyance of the timber was set out, and the material portions of the fee-farm grant were correctly abstracted, and copies of the deeds were furnished along with the abstract; but the attention of the purchaser not being specially called to the error in the rental, the existence of the error escaped the notice of the solicitor and counsel for the purchaser, and was not in fact known to the purchaser or his solicitor until after the purchase was completed, the purchase money paid, the conveyance executed, and possession taken by the purchaser:—Held, that the purchaser was entitled to compensation for the value of the timber. *Phelps v. White*, 7 L. R., Ir., 160.

Per Palles, C. B.:—The purchaser was so entitled to compensation—first, on the ground of the antecedent misrepresentation, independently of the clause in the contract for sale providing for the allowing of compensation; secondly, the statement in the rental relating to the timber having been made a substantive part of the contract, on the ground of the collateral contract or warranty that the

timber was so reserved. It is not necessary that the plaintiff should frame such an action either as one for damages for breach of contract or for fraudulent misrepresentation; but it is sufficient to set out in the statement of claim facts which entitle him to relief, and to pray for any relief which the facts may warrant. *Manson v. Thacker* (7 L. R., Ch. D., 620) and *Allen v. Richardson* (13 L. R., Ch. D., 524) considered, and *Bos v. Helsham* (2 L. R., Exch., 72), and *Re Turner and Shelton*, (13 L. R., Ch. D., 130) approved of. *Id.*

2. After the purchaser of real estate has taken a conveyance, and the purchase money has been paid, no action can be maintained for damages or compensation on account of errors as to the quantity or quality of the subject matter of the sale, unless such errors amount to breach of some contract or warranty contained in the conveyance itself, or unless some fraud or deceit has been practised upon the purchaser. *Jolliffe v. Baker*, 11 L. R., Q. B. D., 255; 52 L. J., Q. B., 609; 48 L. T. 966; 32 W. R. 59.

III. FOR CHARGES AND INCUMBRANCES.

3. A small incumbrance which may be the subject of compensation, no objection to a specific performance. *Guest v. Homfray*, 5 Ves. 818.

4. A contracted with B. and C., trustees, for the purchase of an advowson and rectory, and parish church. By the articles of agreement, B. and C. agreed to sell, and D. to purchase, such advowson, subject to certain stipulations, and that if any objections and requisitions should be made which the vendors would be unable or unwilling to comply with, they might annul the contract without payment of any costs. After the title had been accepted, and the draft conveyance sent by the purchaser's solicitors to the vendor's solicitors, it was discovered, on inquiry at the office of Queen Anne's Bounty, that the rector had, with the consent of the patron, borrowed a sum of money of Queen Anne's Bounty on the usual terms, for the purpose of re-building the parsonage house, and that only a small portion of such sum had been paid off. This loan by the governors of Queen Anne's Bounty was not disclosed by the abstract. A. refused to annul the contract, and filed a bill against B. and D. for specific performance, with compensation. Specific performance was decreed, but:—Held, that as there had been no misrepresentation or concealment of value, A. was not entitled to compensation. *Edwards-Woods v. Marjoribanks*, 6 Jur., N. S., 1167; 7 H. L. Ca. 806; 30 L. J., Ch., 176. Affirming 1 Giff. 384; 3 De G. & J. 329; 5 Jur., N. S., 181; 28 L. J., Ch., 298, which affirmed S. C. *nom.* *Woods v. Marjoribanks*, 4 Jur., N. S., 827.

5. Mode of determination of amount of compensation to purchaser in respect of an annuity charged upon the land purchased together with other land of the vendor, and of exonerating the purchased land therefrom. *Powell v. South Wales Co.*, 1 Jur., N. S., 773.

6. A tenant for life of a real estate, the trustees of which were empowered to sell it at his request and by his direction, entered into a contract to sell it. The estate was subject,

with others, to a charge for younger children. The tenant for life died without issue, and the fee of the estate passed under his will:—Held, that the purchaser, on waiving the objection as to the charge, was entitled to a specific performance against the representatives of the vendor, but he was not entitled either to an indemnity against the charge or to compensation. *Bainbridge v. Kinnaird*, 32 Beav. 346; 9 Jur., N. S., 862; 11 W. R. 608; 8 L. T., N. S., 447; 2 N. R. 5.

IV. DOWER AND OTHER LIFE INTERESTS.

1. A. contracted to sell to B. the fee simple, clear of incumbrances. B., aware that on a former occasion an attempted sale had gone off in consequence of A.'s wife refusing to bar her dower, asked as to this, and was informed that she would join. Afterwards she refused to join:—Held, that B. was entitled to compel a specific performance, with a compensation and an indemnity against the right to dower. *Wilson v. Williams*, 3 Jur., N. S., 810.

Semble, a proper indemnity would be to retain in court a third part of the purchase money, the dividends to be paid to A. and his assigns during the joint lives of himself and wife; and if she survived A., to B. during her life; and upon her decease, the capital so retained in court to be paid to the husband. *Id.*

2. A vendor contracted to sell an estate in fee, with a stipulation that if any dispute should arise as to the title, the same should be submitted to some eminent conveyancer, and that, in case he should be of opinion that a good title could not be made, the contract should be rescinded. Upon the delivery of the abstract, it appeared that the vendor's mother had a life interest in the premises, and that her interest was known to the vendor at the time of the contract. Upon her refusing to join in the conveyance to the purchaser:—Held, that the vendor was not entitled to rely on the before-mentioned stipulation as a ground for rescinding the contract, but that the contract must be specifically performed, with compensation in respect of the life interest. *Nelthorpe v. Holgate*, 1 Colly. 203; 8 Jur. 551. And see 1 Colly. 223. n.

3. By a marriage settlement real estate was limited to such uses as A. and B. (husband and wife) should appoint, and in default of appointment to the use of trustees during the life of B., in trust for her separate use, with remainder to A. in fee. A. entered into a contract to sell the property to C., who had notice of the provisions of the settlement; and in the contract it was stated that A. would procure a proper assurance of the premises to the purchaser to be executed by all necessary parties. The purchase money was paid by C. to the trustees of the settlement, and by them invested pursuant to the contract; and a draft conveyance in the form of a joint appointment by A. and B. to C. was approved, but before executing it A. died suddenly. B. having after A.'s death refused to convey her life interest:—Held, that C. was entitled to specific performance to the extent of A.'s reversion in fee, with compensation in respect of B.'s life interest, and a

lien on the invested purchase money in the hands of the trustees of the settlement. *Barker v. Cow*, 4 L. R., Ch. D., 464; 35 L. T., N. S., 662; 46 L. J., Ch., 62; 25 W. R. 138.

V. LEASES OUTSTANDING.

4. The purchaser, under his contract, is entitled to actual possession where the contrary is not stipulated for, and an outstanding lease is not the subject of compensation. *Linehan v. Cotter*, 7 Ir. Eq. R. 176.

5. The defendant contracted to sell an inn to the plaintiff, and in the treaty represented to him that the agreement under which the tenant in possession held it was a void agreement, and that he would give the plaintiff possession at Michaelmas following. He had, in fact, given the tenant notice to quit at that time; the tenant did not quit. These representations were proved by witnesses:—Held, that the plaintiff was entitled to be released from the agreement, or that he might at his election perform it and have compensation. He elected to have performance, and it was decreed to him, with compensation and costs. *Desant v. Richards*, Taml. 509.

6. A. contracted to purchase a leasehold estate subject to an underlease, of which seven years were unexpired, to B.'s father. A. agreed with B., on having a surrender of this underlease, to grant him a new lease, and B. agreed to procure a surrender of the underlease from his father, and to accept such new lease. B.'s father refused to surrender his underlease:—Held, upon demurrer, that A. could not obtain specific performance of this agreement, there being no allegation that B. had professed himself legally competent to enforce a surrender; and the question as to compensation to A. being determinable by action at law for damages:—Held, also, that B. could not be compelled to accept a lease in the terms proposed at the expiration of the underlease. *Beeston v. Stutely*, 6 W. R. 206; 27 L. J., Ch., 156; 3 L. T., N. S., 112.

7. An estate was put up for sale by a particular, describing it as "now or late in the several occupations of H. R. and others," and by one of the conditions, it was provided that, on completion, the purchaser should be "let into the receipt of the rents and profits." Some parts of the property were subject to leases for lives at a low rent:—Held, that a purchaser who entered into the contract without knowing of the existence of such leases could not be compelled to take the title without compensation. *Hughes v. Jones*, 3 De G. F. & J. 307; 10 W. R. 139; 5 L. T., N. S., 408; 8 Jur., N. S., 399; 31 L. J., Ch., 83.

8. A purchaser buying with notice of tenants in possession is bound to inquire into the nature of their interest, and is not entitled to an abatement of the purchase money because their interest proves to be larger than he supposed when he entered into the contract. *James v. Lichfield*, 39 L. J., Ch., 248; 9 L. R., Eq., 51.

VI. LIMITED INTERESTS AND TITLE DEFECTIVE AS TO PART OF PROPERTY.

9. Specific performance decreed upon the bill of the purchaser, with compensation for

a defect of a title, if to be ascertained, by reduction of the purchase money; if not, or the plaintiff would so take it, with an indemnity, the defendant, the vendor, proposing an option to take it as it was, or relinquish the contract; the defect consisting in the representation by the particular of a church lease for twenty-one years, the lease being actually for lives, and the covenant limited and contingent. *Milligan v. Cooke*, 16 Ves. 1.

1. Principles upon which the Court proceeds in determining whether the purchaser is entitled to a partial performance of the contract, with compensation for the deficiency, where the vendor has only a limited interest in the estate contracted to be sold, and is, therefore, incapable of performing the whole contract. *Thomas v. Dering*, 1 Keen 729; 6 L. J., N. S., Ch., 267; 1 Jur. 211, 427.

2. A. contracted with B. for the purchase in fee of property in ignorance that B. was only entitled to an estate *pur autre vie*, and that C. (B.'s wife) was entitled to the remainder in fee on the determination of the particular life. D., with full knowledge of A.'s contract, took a conveyance from B. and C. of the property, acknowledged by C. so as to pass her interest.—Held, that A. was entitled, by way of specific performance, to a conveyance from D. of B.'s interest, with compensation in respect of C.'s interest, which B. was unable to bind or convey without her consent. *Barnes v. Wood*, 8 L. R., Eq., 424; 38 L. J., Ch., 683; 17 W. R. 1080.

3. When a husband and wife agreed to sell her estate in fee simple, the purchaser being aware that the estate belonged to the wife, and she afterwards refused to convey.—Held, that the purchaser could not compel the husband to convey his interest and accept an abated price. *Castle v. Wilkinson*, 5 L. R., Ch., 534; 39 L. J., Ch., 843; 18 W. R. 586.

4. A purchaser of real estate at a sale in the Court of Bankruptcy, will not be discharged from his purchase on objections to title, where the abstract of title posted in the court contains express notice of the defects objected to.—Held, also, that where title cannot be made out to small portions of the estate, the purchaser will not be discharged, but will be entitled to compensation *pro tanto* only, unless he can show that the deficient portion was essential to the proper enjoyment of the whole, or that it constituted his main object in entering into the contract. Difference in practice between sales of real property in bankruptcy and in courts of equity. *Exp. Gettin, Re Smith*, L. L. & G. temp. Plunk. 429.

5. Where the particulars of sale of certain leasehold property contained a misstatement, thereby causing the reversion to the full rack rental value of the premises to appear as if it would fall in eight years earlier than actually was the case, of which misstatement the vendors asserted that the purchaser had knowledge at the time of the sale, although the evidence on this point was conflicting; and where the conditions of sale provided that any error or misstatement in the particulars should not annul the sale, but compensation should be made to or by the purchaser, as the case might be.—Held, that, even if the purchaser were aware of the misstatement in the particulars, the vendors were not thereby

relieved from the liability to make him compensation, in accordance with the terms of the conditions of sale. *Lett v. Randall*, 49 L. T. 71.

6. The objection by a purchaser applying only to a small part of the estate, a specific performance decreed with compensation. *M'Queen v. Farquhar*, 11 Ves. 467.

7. A., being entitled to nine-sixteenths only of an estate, agrees, by mistake, to sell the entirety to B. *Semble*, that a specific performance will not be decreed as to the nine-sixteenths, with an abatement out of the purchase money, especially where C. has a lien on the estate for a debt which would exhaust nearly the whole of the purchase money. *Wheatley v. Slade*, 4 Sim. 126.

8. An agreement was entered into with two vendors for the sale of two-sixths of certain leasehold property, together with other the estates and interest of the vendors therein. It turned out that the vendors were only entitled to two twenty-one parts of the estate:—Held, that the purchaser was entitled to specific performance of the contract to the extent of the vendors' interests with a proportionate abatement. *Jones v. Evans*, 17 L. J., N. S., Ch., 469; 12 Jur. 664.

9. In the case of a sale under the order of the Court, it being clear that a certain portion of the property was not intended by the vendor to be included in the contract of sale; the Court, in the absence of any proof of misconduct in the purchaser or his agent, refused to compel a specific performance by the purchaser, excluding the portion in question. The purchaser, however, electing to take exclusive of the portion of property in dispute, the Court ordered accordingly, and without compensation. *Alvanley v. Kinnaird*, 2 Macn. & G. 1; 14 Jur. 837, varying the order below.

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11. Where a vendor can make a title to three-fourths only of the property sold, the purchaser is not entitled to take the three-fourths with an abatement, but he may take the three-fourths at the price agreed on for the whole. *Maw v. Topman*, 19 Beav. 576.

12. Vendors who by the contract bind themselves to make out a good title to all the lands included in the contract, but are unable to show a title to $\frac{1}{11}$ part, not necessary to the enjoyment of the other parts included in the contract, which provided no compensation for errors in dimensions in the land, the bill averring that they could make title to all the lands sold, seeking specific performance as to all.—Held, that it was not competent to the vendors at the hearing to seek performance with compensation. *Ashton v. Wood*, 3 Sm. & G. 436; 3 Jur., N. S., 1164.

Quere, whether the Court will in no case decree specific performance with compensation for defects of title in small particulars, the

question of compensation being raised by the bill. *Id.*

1. Where a plaintiff filed a bill for specific performance of an agreement to purchase lands, and failed to show a good title to a small portion of the lands, which was not material to the beneficial enjoyment of the remainder of the lands, the Court decreed specific performance of the agreement, with compensation, and directed the costs to follow the event. *Carver v. Richards*, 6 Jur., N. S., 667.

2. Vendors agreed to sell the entirety of certain freehold property for 6,000*l.*, and to make out a good marketable title. The purchaser, in consequence of delays on the part of the vendors, filed a bill for specific performance of the agreement. It was subsequently discovered that the vendors were entitled to only a moiety of the property:—Held, that the purchaser was entitled to a decree for specific performance of the agreement by the vendors of their moiety, with an abatement of one-half of the purchase money. *Hooper v. Smart, Bailey v. Piper*, 18 L. R., Eq., 683; 43 L. J., Ch., 704; 22 W. R. 943; 31 L. T., N. S., 86.

3. In an agreement for the sale of seventeen undivided shares of a coal mine there was an article stating two conveyances by which six undivided shares of the land, beneath which the coal lay, had been conveyed to the vendors' predecessor in title, but stating that there was no express mention in the conveyances of the minerals under the land, and requiring that the purchasers should assume that six undivided shares of the minerals passed by the conveyances of the land, and thereby became absolutely vested in the vendor's predecessor in title. In the abstract of the vendor's title sent to the purchasers, mention was made of a certain indenture, but nothing further was said about it. The purchasers' solicitor inquired of the vendors' solicitor what this deed was, and was told that it could not be found, and no abstract of it or information about it could be furnished, but that it was believed not to affect the property sold. The vendors' solicitor also said, as he really believed to be the case, that though the title to the six undivided shares could not be strictly proved, yet the vendors had a good holding title to them. After these transactions the purchasers entered into the agreement, and paid the deposit money. Subsequently, the deed which was supposed to have been lost was found, when it was discovered that by virtue of it the six undivided shares of the mine belonged to some person quite different from the vendors, and that neither they, nor their predecessor in title, had ever had any title to those shares. The purchasers refused to proceed with the agreement, whereupon the vendors brought this action for specific performance of it. The purchasers contended that without these six shares the mines would be useless to them, and claimed to be entitled to be released from the agreement:—Held, that, as there had been no fraud in the matter, but the vendors had acted under a *bona fide* mistake, and the purchasers had had the fact that there was a doubt as to title brought to their notice before entering into the agreement, and had thought fit to run the risk of taking the property

without having the matter cleared up, specific performance of the agreement ought to be decreed, but that a deduction must be made from the purchase money as compensation to the purchasers for the loss of the six shares. *English v. Murray*, 49 L. T. 35; 32 W. R. 84.

4. When two persons agreed to sell property, of whom one was entitled to a moiety subject to a mortgage for its full value, and the other had no interest:—Held, that a judgment for specific performance with abatement might be made against the former. *Horrocks v. Rigby*, 9 L. R., Ch. D., 180; 47 L. J., Ch., 800; 38 L. T., N. S., 782; 26 W. R. 714.

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5. A contract was made for the purchase of land, and the purchaser afterwards discovered that another person had a right to dig coal on the land:—Held, that the purchaser was entitled to take the land with compensation for the defect. *Ramsden v. Hirst*, 4 Jur., N. S., 200; 27 L. J., Ch., 428; 6 W. R. 349.

A vendor of an estate had granted to A. the right to work coals under the property, with a proviso, that when the workings of the coal had finally ceased, the pits should be filled up, and the land restored to a proper state of cultivation. A. ceased to work the mines, and filled in the pits. Upon the sale of the estate, A. claimed to be entitled to re-work the coal, and the purchaser therefore claimed compensation. The Court considered that there had only been a temporary cessation to work the coals, and that the purchaser was entitled to compensation, to be ascertained by an expert appointed by the judge. *Id.*

6. Reservation of salt works, mines, etc., in 1704, with a right of entry, though no instance of any claim, and the title had been transferred in 1761, without such reservation upon the usual covenants:—Held, an objection, giving a right to compensation, the purchaser not insisting upon it further. *Seaman v. Vandrey*, 16 Ves. 390.

7. R. agreed to sell to W. lands in New South Wales free from incumbrances, and the greater part of the purchase money was paid. On an investigation of the title it appeared that these lands were held, with other lands, under a Crown grant, containing various reservations and conditions, with a proviso for re-entry on breach of condition. W. filed a bill for specific performance, with compensation on account of these reservations, offering to complete without compensation, if the Court was of opinion that he was not entitled to it. An order was made on appeal, declaring him entitled to compensation, and directing a reference as to the amount. In answer to this inquiry, it was found that the amount of compensation could not be ascertained. W. then filed a supplemental bill, asking that if the compensation could not be ascertained R. might be decreed to repay, with interest, the part of the purchase money which he had paid, and that W. might be declared entitled to a lien on the land for it:—Held, that W. was bound to take the property without compensation, and as the compensation could not be ascertained he was entitled to the return of his purchase money, with the interest at 4*l.* per

a defect of a title, if to be ascertained, by reduction of the purchase money; if not, or the plaintiff would so take it, with an indemnity, the defendant, the vendor, proposing an option to take it as it was, or relinquish the contract; the defect consisting in the representation by the particular of a church lease for twenty-one years, the lease being actually for lives, and the covenant limited and contingent. *Milligan v. Cooke*, 16 Ves. 1.

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A vendor of an estate had granted to A. the right to work coals under the property, with a proviso, that when the workings of the coal had finally ceased, the pits should be filled up, and the land restored to a proper state of cultivation. A. ceased to work the mines, and filled in the pits. Upon the sale of the estate, A. claimed to be entitled to re-work the coal, and the purchaser therefore claimed compensation. The Court considered that there had only been a temporary cessation to work the coals, and that the purchaser was entitled to compensation, to be ascertained by an expert appointed by the judge. *Ib.*

6. Reservation of salt works, mines, etc., in 1704, with a right of entry, though no instance of any claim, and the title had been transferred in 1761, without such reservation upon the usual covenants:—Held, an objection, giving a right to compensation, the purchaser not insisting upon it further. *Seaman v. Vandrey*, 16 Ves. 390.

7. R. agreed to sell to W. lands in New South Wales free from incumbrances, and the greater part of the purchase money was paid. On an investigation of the title it appeared that these lands were held, with other lands, under a Crown grant, containing various reservations and conditions, with a proviso for re-entry on breach of condition. W. filed a bill for specific performance, with compensation on account of these reservations, offering to complete without compensation, if the Court was of opinion that he was not entitled to it. An order was made on appeal, declaring him entitled to compensation, and directing a reference as to the amount. In answer to this inquiry, it was found that the amount of compensation could not be ascertained. W. then filed a supplemental bill, asking that if the compensation could not be ascertained R. might be decreed to repay, with interest, the part of the purchase money which he had paid, and that W. might be declared entitled to a lien on the land for it:—Held, that W. was bound to take the property without compensation, and as the compensation could not be ascertained he was entitled to the return of his purchase money, with the interest at 4*l.* per

cent., and to a lien on the estate for the amount. *Westmacott v. Robins*, 4 De G. F. & J. 390.

1. In a contract for sale of land containing valuable quarries, was a clause reserving to the vendor power to rescind in case any objection or requisition should be persisted in; in another clause provision was made for compensation in case any error or mistake should appear to have been made in the description of the property, or the vendor's interest therein. A requisition was made by the purchaser, founded on an exception in favour of a lord of the manor, of mines and minerals in one of the title deeds relating to part of the land. The purchaser alleged, therefore, that the quarries were not as to this part of the land included, and he claimed compensation. The vendor raised a contention that by custom or prescription he had a right to the quarries, but the objection being persisted in, he rescinded the contract:—Held, upon a bill by the purchaser claiming specific performance with compensation, that the requisition was one of title, giving the vendor the right to rescind. *Marrison v. Fletcher*, 40 L. J., Ch., 131; 6 L. R., Ch., 91.

VIII. QUANTITY. DEFECTIVE.

2. General rule of specific performance that the purchaser shall have what the vendor can give, with an abatement out of the purchase money for so much as the quantity falls short of the representation, enforced against trustees for infants upon the mere mistake of their agent without fraud, etc.; but the relief adapted to the justice of the case, viz., the purchase being of wood upon a gross valuation, without regard to the quantity of land, an abatement for deficiency of quantity from erroneously inserting the hedges and fences, not included in the purchase, was directed with reference to land. *Hill v. Buckley*, 17 Ves. 394.

3. Purchaser is not entitled to abatement for deficiency of quantity, the particulars of sale describing lot as containing "more or less." *Winch v. Winchester*, 1 Ves. & B. 375.

4. Where it was stated by one of the conditions of sale, that the quantity of a particular lot of the estates sold under a decree was stated from estimation, and that the purchaser should not object to complete this purchase if the quantity should turn out less than that stated:—Held, that the purchaser was not by such condition precluded from his right to compensation in the event of the quantity having turned out deficient. *Frost v. Brewer*, 3 Jur. 165.

5. Where lands sold under a decree contain a less quantity than stated in the rental, the plaintiff cannot, he not having made any objection, set aside the sale, or insist that the purchaser shall not have compensation if he choose to hold his bargain. *Magamley v. Brady*, 7 Ir. Eq. R. 557.

6. Misdescription of the quantity of land in regard to the acres being statute acres or customary, is not matter of compensation, but a ground for setting aside the sale. *Price v. North*, 2 Y. & Coll. 620; 7 L. J., N. S., Exch. Eq., 9.

7. A tenant in possession purchased the property, which was represented to be forty-six feet in depth; it turned out to be thirty-three only:—Held, that he was entitled to an abatement. *King v. Wilson*, 6 Beav. 124.

8. After a sale by auction of a messuage and lands, one of the conditions of which was, that any mistake or error in the description of the property, or any other error in the particulars, should not annul the sale, but (except where otherwise provided for by the condition) a compensation should be given or taken to be settled by two referees or an umpire, it was found that one of the lots contained about twenty acres more, and another about ten acres less, than the quantity of land described in the particulars:—Held, that upon the construction of the condition, the mistake or error thereby contemplated was such a mistake or error as would annul the contract; that the excess of the quantity of land in one of the lots, and the deficiency in the other, were both subjects of compensation within the condition, and that the Court would, if necessary, refer it to the Master to settle the amount of such compensation, notwithstanding that from the variety in the nature of the different portions of the land in which the variations occurred, there was no uniform standard for computing such amount; and that whether a vendor could or could not in equity be relieved, on the ground of mistake, from a contract for the sale of lands inaccurately described as to quantity, and which description had been prepared by his solicitor from former particulars and conditions, relating to the same property, drawn up by another solicitor on the report of a surveyor. Equity would not in such circumstances enforce the contract against the vendor, unless the case should be one for compensation, and the purchaser should submit to make such compensation. *Leslie v. Thompson*, 9 Hare 268; 20 L. J., N. S., Ch., 561; 15 Jur. 717.

9. Although as a general rule there is a deficiency in the quantity of land contracted to be sold, the purchaser is entitled to specific performance of the contract, with compensation for the deficiency. This rule applies only within certain limits. The plaintiff agreed to purchase an estate which, on the written contract, was, by mistake, stated to contain 21,750 acres; it turned out that it contained only 11,814 acres:—Held, that the purchaser was not entitled to specific performance with a proportionate abatement for the deficiency of acreage, but that he could only enforce the contract on payment of the full price or rescind the contract. *Durham (Earl) v. D'Legard or Legard*, 34 Beav. 611; 11 Jur., N. S., 706; 34 L. J., Ch., 589; 13 W. R. 959; 13 L. T., N. S., 82.

10. Upon the sale of real estate one of the conditions was as follows:—"The admeasurements are presumed to be correct, but if any error be discovered therein, no allowance shall be made or required either way." It was stated in the particulars that the property sold contained an area of 7,683 square yards or thereabouts; but upon admeasurements, the area was found to be 4,350 only. Upon a bill by the purchaser against the vendor for specific performance with compensation for the deficiency in quantity:—Held, that the

purchaser was not entitled to compensation in respect of the mistake as to quantity, and a decree was made for specific performance on payment by the purchaser to the vendor of the full amount of the purchase money, with costs. *Cordingley v. Cheesbrough*, 3 Giff. 496; 8 Jur., N. S., 585, 755; 31 L. J., Ch., 617; 6 L. T., N. S., 15, 642; 4 De G. F. & J. 379.

1. At a sale by auction under a decree the property sold was stated in the particulars to contain 753 square yards or thereabouts, and one of the conditions provided that if any error, misstatement, or omission in the particulars should be discovered, it should not annul the sale, nor should any compensation be allowed by the vendor or purchaser in respect thereof. The property was found to contain 573 square yards only:—Held, that the condition only applied to small errors, and did not cover so large a deficiency, and that the purchaser was entitled to compensation. *Whittemore v. Whittemore*, 8 L. R., Eq., 603.

2. An estate was described in particulars of sale as containing 227 acres, and as being freehold with the exception of 50 acres copyhold of a forest. The tenure being doubtful, a clause was inserted in the contract for sale to the effect that the estate was sold as being about 50 acres copyhold, but no abatement or compensation was to be made in favour of the purchaser in case the quantity of pure copyhold should exceed 50 acres, and the rest of the estate was sold as being partly of freehold and partly of copyhold tenure. The vendor was not to be required to distinguish which portions were of one tenure and which of the other, nor was any compensation to be allowed. The purchaser sent in requisitions by which he claimed to have the freeholds and copyholds distinguished, with a view to compensation. The purchaser afterwards discovered that the 227 acres consisted of about 178 acres of copyhold and 49 of freehold, and that all minerals except stone were reserved to the Crown:—Held, that there had been a misdescription of the property to which the purchaser had properly objected, and specific performance was refused. *Turquand v. Rhodes*, 37 L. J., Ch., 830; 18 L. T., N. S., 844; 16 W. R. 1074.

Compensation to Vendor. 3. By the particulars of a sale by auction, at which the defendant was declared the purchaser of lots 1, 2, 3, and 4, lot 1 was described as comprising 70 acres, 24 perches, more or less, and lots 2, 3, and 4, as comprising together 321 acres, 2 roods, 30 perches, more or less; and by the conditions of sale it was provided, amongst other things, that any mistake or error in the description of the property should not annul the sale, but should be the subject of compensation, to be given or taken, as the case might require. A map or plan of the property was annexed to the particulars, in which the different lots were distinguished by different colours. After the sale it was found that lot 1 comprised 89 acres, 29 perches; and lots 2, 3, and 4 only 310 acres, 3 roods, and 18 perches:—Held, upon special case, stating that the error in the particulars had arisen from the adoption therein of the description furnished by a surveyor's report

made on a former occasion, which was erroneous, and submitting the question of the vendor's title to compensation to the Court, that the purchaser was bound to make compensation to the vendors in respect of the extra quantity of land comprised in lot 1, and entitled to receive compensation from the vendors in respect of the deficiency in lots 2, 3, and 4. *Leslie v. Thompson*, 9 Hare 268; 20 L. J., N. S., Ch., 561; 15 Jur. 717.

The addition of a statement of the acreage, more or less, to the previous description of property offered for sale:—Held, to negative any presumption arising out of such prior description, of an intention to sell the property in the lump. *Id.*

4. On the purchase at a specified price per acre, of land, described in the particulars as grass land, bounded by a public drain, and "containing by estimation twenty-three acres or thereabouts, but to be surveyed," the land when measured *usque ad medium flum aqua* contained 23a. Or. 26p., of which 1a. Or. 33p. was comprised within the drain:—Held, that, if the land comprised within the drain was included in the conveyance, the purchaser was bound to pay for it at the specified rate. *Re Popple*, 25 W. R. 248.

IX. RENTS, TITHES, AND OTHER OUTGOINGS.

5. A contract having been made for sale of an estate, it afterwards appeared that there were some outgoing from the estate which were not disclosed at the time of the contract, yet, these being matters which are in compensation, the contract shall be carried into execution, with an allowance only to the purchaser for those particulars which diminish the value; the agreement not being completed within the time specified, the purchaser shall be allowed interest for such time as the purchase money shall appear to have been kept dead for the special purpose of completing the contract. *Homland v. Norris*, 1 Cox 59.

Quit-Rent and Tithe-Rent Charge. 6. Quit rents, being incidents of tenure, are subjects of compensation. *Esdaile v. Stephenson*, 1 Sim. & S. 122.

Quare, if rent charges are. The Court, when small, has allowed them so. *Id.*

7. Part of the lands sold under the decree was liable to quit-rent and tithe rent-charge, though not so stated in the rental. Another part was stated in the rental to be held from year to year by C. at a rent payable 1st May and 1st November; but the purchaser found, after he lodged his one-fourth of the purchase money, that it was held for a term, with power to the tenant to surrender on any 25th March or 29th September, giving six months' previous notice, and it was surrendered on the 25th March then next. The tenure by which other parts were held was not stated in the rental, but the purchaser on going into possession found they were held for lives still subsisting:—Held, first, the purchaser was entitled to compensation for the quit-rent but not for the tithe rent-charge. *Martin v. Cotter*, 8 Ir. Eq. R. 147.

8. A. agreed to sell an estate, tithe-free, to B. Afterwards C., the vicar of L. (in which

parish part of the estate was situated), filed a bill for tithes against the occupiers of another part of the estate, as also being situate in L. A. agreed that part of the purchase money should be set apart as an indemnity to B. against the claim made by C., which was accordingly done, and B. paid the remainder of his purchase money, and took a conveyance of the estate. C. died, and his suit was dismissed for want of prosecution, but the indemnity fund was not transferred to A. One of C.'s successors instituted a fresh suit for the tithes of the same lands. Pending these proceedings, it was discovered that the lands were situate in the parish of S., and were tithable to the rector of S., and, on proof of those facts, the latter suit was dismissed at the hearing:—Held, that B. was entitled to a compensation out of the land for the tithes of the land situate in S. *Crompton v. Melbourne*, 5 Sim. 353.

1. In enforcing contracts upon principle of compensation for variance from description, the Court has gone so far, to the extent even of totally defeating the object of the purchaser, that where the principal subject of the contract was all the corn and hay tithes of a parish, and of hay tithe half was allotted to vicar, or half commuted for customary payment, the nature of that payment, the extent of meadow, and the possible conversion of arable, not distinctly appearing, the injunction against recovering the deposit was continued after answer. *Drew v. Hanson*, 6 Ves. 675.

2. As a general rule, where land is agreed to be sold tithe free, the right to the tithes is to be considered so material to the enjoyment of the lands, that a purchaser is not compelled to complete his contract, with a compensation, if a good title cannot be made to the tithe; but this rule admits of exception where the circumstances manifest that the right to the tithe did not form any inducement to the purchaser to enter into the contract. *Smith v. Tolcher*, 4 Russ. 302.

3. The purchaser of an estate, sold as tithe-free, cannot be compelled to take it subject to tithe on terms of compensation; but an estate of 140 acres being sold under a decree, the particulars stating about thirty-two acres to be tithe free, and no evidence of exemption having been produced on the reference of the title, the Master was directed to certify the proper amount of compensation. A purchaser under a decree for sale, having accepted, and (on a report of an objection to the title for which compensation was ordered) retained possession, must pay interest on the purchase money from the time at which he might have safely taken possession, and is entitled to an allowance for prior, not for subsequent, deterioration of the estate. *Binks v. Rokeby (Lord)*, 2 Swan. 222.

4. Plaintiff, in a bill for specific performance of a contract, is not entitled generally to satisfaction, by way of damage for the non-performance, to be ascertained by an issue, or a reference to the Master. Distinction as to case of compensation, as for a part subject to tithes, though represented as tithe-free, giving the purchaser, if he chooses to take the purchase, a right to compensation, but not to compel the vendor to purchase the tithes. *Todd v. Gee*, 17 Ves. 273.

Taxes. 5. An estate consisting of fen land, and so described in particulars of sale, was charged by a local but public Act with draining and embanking taxes, of which purchaser had no express notice:—Held, he was not entitled to compensation. *Barraud v. Archer*, 2 Sim. 433; 9 L. J., Ch., 173.

6. An estate sold, and at the auction, eau brink tax stated at a certain amount. It was afterwards discovered that the eau brink tax was less than the amount stated, and the corporation tax more; and on a bill filed by the vendors for a specific performance, the defendant claimed compensation for the excess in amount of the corporation tax, after deducting the difference in the amount of the eau brink tax. The Court allowed the compensation. *Townshend v. Granger*, 9 L. J., Ch., 176.

Fines. 7. Trustees for sale of a manor described it in advertisements, and particulars, and conditions of sale, as a manor in which the fines were arbitrary, adding that the clear profits on an average of the last eight years had been 150*l.* a year. And it was one of the conditions of sale that if there should be any error or misstatement in the particulars, the vendors or purchaser, as the case might happen, should pay or allow a proportionate value, according to the average of the whole purchase money, as a compensation either way. After the sale it was found that by the custom of the manor arbitrary fines were payable only on alienation; and that on the death of the tenant his customary heir paid upon admittance a small fixed sum, and the widow was admitted to her free-bench without any payment. It was also found that the clear profits exceeded 200*l.* a year:—Held, reversing a decree made on a bill which was filed by the purchaser for specific performance, with compensation in respect of the misstatement as to the fines, that there was no such misdescription of the property as would entitle the purchaser to compensation, inasmuch as the annual profits which constituted the substantial value far exceeded the amount stated. *White v. Cudden*, 8 Cl. & F. 766. Reversing S. C. *sub nom. Cudden v. Cartwright*, 4 Y. & Coll. 25.

X. REPAIRS.

8. Compensation for the dry rot in house and premises decreed, upon representation of the vendor to the purchaser as to the state of repairs; he relying upon such representations, and stating to the plaintiff that he did not employ a surveyor for that reason. *Grant v. Mum*, Coop. 173.

9. Specific performance of an agreement for sale of estate decreed, notwithstanding a variance from the description, with compensation for the deficiency in value; though a minute examination might have discovered the defects, as in the state of the house, etc.; but not for a variance from the description, as lying within a ring fence: the premises consisting of leasehold farm, and three years having expired pending the suit, interest was given to the vendor, and a rent set upon it in respect of his possession. *Dyer v. Hargrave*, 10 Ves. 505.

XI. ON SALE OF TIMBER ESTATES.

1. There is no instance of a court of equity compelling a purchaser who contracted for the purchase of a demesne with ornamental timber, where ornamental timber has been cut down between the contract and possession given, or title shown, to complete the purchase. Ornamental timber is essentially different from ordinary timber. *Magennis v. Fallon*, 2 Moll. 590.

The principle of equity with respect to specific performance is, that if substantially the purchaser can have the thing contracted for, a slight variation in the qualifications of it will not disable the vendor from having a decree for specific performance, when the difference is such as can be compensated in money. *Id.* 588.

2. Lands of copyhold and freehold tenure, lying intermixed and undistinguishable, were sold with the timber standing on them. The conditions of sale stipulated that the vendor was not to be bound to distinguish the freeholds from the copyholds, and that the timber was to be taken at a valuation made for the purposes of that sale, the value of the timber on each lot being specified. The deposit was paid of 10 per cent. on the whole price of the land and timber. It was also stipulated, that in case of delay in the completion of the purchase, interest of 5 per cent. should be payable on the whole price of the land and timber:—Held, first, that the contract was an entire contract for the sale of land with timber on it; not two contracts, one for the sale of land and another for timber; secondly, that the purchaser was not entitled to any abatement, though he could not cut a single tree, not being able to distinguish any one tree as standing on freehold ground; thirdly, that in the case of one lot sold under the same conditions and particulars of sale, and which consisted entirely of copyholds, the purchaser was equally bound to pay the stipulated price for the timber, although he could not cut any of it. *Crosse v. Lawrence*, 9 Hare 462; 21 L. J., N. S., Ch., 889; 16 Jur. 142.

3. Bill by the vendor for the specific performance of a contract to purchase a timber estate, where the particulars of sale described it as comprising a certain wood with upwards of sixty-five acres of fine oak timber trees, the average size of which approached fifty feet, and the particulars of the lot described it only as sixty-five acres, two roods; and twelve perches of growing timber. It appeared on the evidence for the plaintiff that the average size of the trees was about thirty-five feet, but on that for the defendant that it was only about twenty-two feet; and the defendant moreover alleged that it was sold at a time when he had no means of seeing the wood, and that he relied on the particulars of sale:—Held, that as the representation on the particulars of sale had proved to be incorrect, and as it was not shown that the defendant knew it to be incorrect at the time of making the contract, the Court would not, at all events, enforce the specific performance of the contract without compensation, and that (inasmuch as the particulars of the sale did not express what number of trees or quantity of timber the wood contained) it was not a case

in which the Court could measure the extent of the deficiency or ascertain the amount of compensation, and that the bill must therefore be dismissed. *Brooke (Lord) v. Rounthwaite*, 5 Hare 298; 5 L. J., N. S., Ch., 332; 10 Jur. 656.

4. General rule of specific performance, that the purchaser shall have what the vendor can give, with an abatement out of the purchase money for so much as the quantity falls short of the representation, enforced against trustees for infants, upon the mere mistake of their agent, without fraud, etc.; but the relief adapted to the justice of the case, viz., the purchase being of wood upon a gross valuation, without regard to the quantity of land, an abatement for a deficiency of quantity from erroneously inserting the hedges and fences, not included in the purchase, was directed with reference to land merely, not wood-land. *Hill v. Brookley*, 17 Ves. 394.

XII. MISREPRESENTATION AS TO VALUE.

5. In suits as to the specific performance of a contract to purchase large colliery works, the purchasers alleged as a defence misrepresentation by the vendors as to the value. As to several allegations the purchasers were held to have failed, and specific performance was decreed, but with compensation to the purchasers in respect of an alleged misrepresentation as to the amount of stores consumed in the collieries, and a consequent excess in the statement of income. An inquiry was directed as to such compensation, and it was found that there was a large excess in the statement of income beyond its true amount:—Held, that the purchasers were entitled to a deduction from their purchase money bearing the same proportion to the whole purchase money as the excess bore to the income stated. *Powell v. Elliot*, 10 L. R., Ch., 424; 33 L. T., N. S., 110; 23 W. R. 777.

Held, also, that as no direction as to costs was given by the original decree in the suits, and that as the purchasers were held to be entitled to a considerable abatement, the vendors must pay the costs of the suits, and could not on the hearing on further consideration be relieved from payment of any part of the costs on account of the failure of the purchasers as to parts of their case on the original hearing. *Id.*

6. Purchaser, under a decree, having paid in his entire purchase money, was not entitled to compensation out of the fund, for the difference between the amount of rent received by the receiver in the interim before possession given, and the amount which ought to have been received according to the rental, which was erroneous, it appearing that he was aware, when he purchased, of the discrepancy between the rental and the true rent payable; otherwise if rents had been lost, and the claim had been for compensation for loss accrued after he paid his purchase money, and before he could get possession. *Campbell v. Hay*, 2 Moll. 102.

7. An estate sold under a decree was described as of a certain annual value; and, by the conditions, compensation was to be made for any error in the particular. The purchaser

paid his money into court, was let into possession, and took a conveyance. After he got into possession, he discovered that the rent was overstated in the particular:—Held, that he was entitled to a compensation out of his purchase money. *Cann v. Cann*, 3 Sim. 447.

XIII. WATER SUPPLY.

1. An estate was set up to sale in lots. In the particulars, the lots were described respectively, as "All that, etc.—comprising lot—in the sale-plan." The sale-plan circulated at the auction represented a well on Lot 4, with a drain and pipe conveying the water from the well through Lot 2 to Lot 1. The plaintiff, the purchaser of Lot 1, filed his bill for specific performance, with compensation for the loss of the water, the vendor having conveyed away the other two lots, without any reservations to the plaintiff of a right to a flow of water from the well:—Held, that the sale-plan, accurately describing the existing state of the property, would not carry the case higher than a view of the property by the purchaser. Decree for specific performance, without compensation. *Fenster v. Turner*, 11 L. J., N. S., Ch., 161; 6 Jur. 144.

2. Property was described in particulars of sale as being well supplied with water. It was supplied with water from a neighbouring waterworks at considerable expense; but the evidence showed that other property near to it, and at a higher level, was supplied with water from sources existing on such property:—Held, that there was a misdescription of the property purchased, and that the purchaser was therefore entitled to compensation. *Leyland v. Iltingworth, Ex p. Webster*, 6 Jur., N. S., 811; 29 L. J., Ch., 611; 8 W. R. 695; 2 De G. F. & J. 248.

XIV. OTHER CASES.

3. One stipulation in a contract for purchase was that the vendor should make a certain road, which it turned out he could not make without incurring a forfeiture:—Held, that the purchaser was entitled to a decree for specific performance with a compensation for the road. *Peacock v. Penson*, 11 Beav. 355; 18 L. J., N. S., Ch., 57; 12 Jur. 954; 14 *id.* 518.

4. Part of the lands sold under the decree was liable to quit-rent and tithe rent-charge, though not so stated in the rental. Another part was stated in the rental to be held from year to year by C. at a rent payable 1st May and 1st November; but the purchaser found, after he lodged his one-fourth of the purchase money, that it was held for a term, with power to the tenant to surrender on any 25th March or 29th September, giving six months' previous notice, and it was surrendered on the 25th March then next. The tenure by which other parts were held was not stated in the rental, but the purchaser on going into possession found they were held for lives still subsisting:—Held, that C. was at the time of sale a tenant, not from year to year, but for a term to end on the 25th March then next, and the purchaser was entitled to compensation

therefore; held also that he was not entitled to compensation in respect of the premises whose tenure was not stated, as he should have ascertained how they were held. *Martin v. Cottler*, 8 Ir. Eq. R. 147.

5. Premises sold at auction were described in the particulars as being customary leaseholds, renewable every twenty-one years, at the customary rent of 10s., on payment of the customary fine. The fourth condition of sale, after fixing a time for the delivery of the abstract and objections to the title, stipulated that if there were any objection which the vendor should be unable or unwilling to remove, he might vacate the sale on repayment of the deposit money, without interest or costs. The fifth condition stipulated that the production of the lease by the vendor should be accepted as sufficient evidence of the lessor's title. The sixth condition stipulated that errors of description, or any errors inserted in the particular, should not vacate the sale, but should be subject to abatement or compensation. It turned out, on the investigation of the title, what was previously unknown to all the parties interested, that there was no custom to renew, but that the premises were held for an absolute term of twenty-one years:—Held, first, that the fact of the property being sold as leaseholds renewable by custom, when there was no such custom, was an error of description, not a defect of title. Secondly, that whatever might have been the decree, in the absence of the condition of sale providing that errors of description should not vitiate the sale, but that the same should be concluded, with compensation, the purchaser was, under that condition, entitled to specific performance, with a deduction from the price. *Nemby v. Paynter*, 17 Jur. 483; 22 L. J., Ch., 871; 11 Hare 26; 1 Eq. Rep. 173.

6. A reversion depending on the contingency of a tenant for life dying without issue, the tenant for life being fifty-six years of age, and married, and his wife being in her fifty-fourth year, and the only issue of the marriage having been a still-born child, eleven years previously, is the subject of estimate and calculation. *Boothby v. Boothby*, 1 Macn. & G. 604; 2 H. & Tw. 214.

7. A reversion depending upon the contingency of the tenant for life, who was sixty-three years of age, and a bachelor, dying without issue, is not the subject of estimate or calculation; but the purchaser of this reversion having, in his treaty with the vendor, proposed to deduct one-half of the reversion in respect of such contingency, and the treaty having been concluded upon that basis, the Court, as between the vendor and purchaser, will value the contingency accordingly. *Baker v. Bent*, 1 Russ. & M. 224; Tam. 368.

8. Course of proceeding where purchaser seeking specific performance asks also compensation for a misdescription. Contract held duly rescinded within conditions of sale. Observations on the effect of stringent conditions of sale on the value of the property. *Hoy v. Smythies*, 2 Jur., N. S., 1011.

9. Purchaser not entitled to compensation where the misdescription consisted in stating that the premises sold were in the joint occupation of A. and B. as lessees, the fact

being that the premises had been demised to C., and by C. assigned to A., who was, together with B., in the occupation of them at the time of sale. *Ridgway v. Gray*, 1 Macn. & G. 109; 1 H. & Tw. 195.

The purchaser could not in this case be compelled to accept an indemnity. *Id.*

1. A vendor put up for sale by auction a certain sum of redeemed land tax, which he described in the particulars as charged on three houses. On investigating the title, it was discovered that the amount was made up of three sums, each of which was charged on a particular house, and not the whole upon each of the houses. The particulars referred to the contract with the commissioners for the redemption of the tax as part of the vendor's title, but did not further state, as appeared from the schedule to the contract, that the gross sum was charged in separate sums upon each of the houses. The purchaser had no notice of the real facts beyond what appeared upon the face of the particulars. Upon a bill by the vendor to enforce specific performance of a contract of purchase:—Held, that there was a material misdescription of the property sold; that the difference in value between what was offered for sale and what was bought was not a subject for compensation; and that specific performance of the contract could not be enforced against the purchaser. *Cox v. Coventon*, 8 Jur., N. S., 1142; 10 W. R. 829; 7 L. T., N. S., 78.

2. The plaintiff agreed to purchase from the defendants a certain manor, of which he was to be let into the enjoyment on a certain day. Before that day arrived, one of the copyhold tenants died, and three persons were admitted as his successors by the vendors, who received the fines payable upon such admission. To a bill filed by the plaintiff, praying that the said contract might be specifically performed by the defendants, with an abatement out of the purchase money by way of compensation to the plaintiff for the loss of the said fines, and for the depreciation in value of the said manor, caused by the admission of younger lives in lieu of the deceased tenant, a general demurrer was allowed. *Cuddon v. Vite*, 6 W. R. 606; 4 Jur., N. S., 579.

3. Specific performance of an agreement for sale of estate decreed, notwithstanding a variance from the description, with compensation for the deficiency in value, though a minute examination might have discovered the defects, as in the state of the house, etc., but not for a variance from the description, as lying within a ring fence; the premises consisting of leasehold farm, and three years having expired pending the suit, interest was given to the vendor, and a rent set upon it in respect of his possession. *Dyer v. Hangrave*, 10 Ves. 505.

4. Although according to the decided cases, a vendor who contracts for the sale of leasehold property described as held under a lease, cannot, if nothing further is said, make a good title unless it is held under an original lease, yet in a case where the particulars and conditions of sale of property so described contained enough to give notice to a purchaser that the property was held under a derivative lease:—Held, that the purchaser could not on that account refuse to complete, or claim compen-

sation on the ground of misdescription. *Madoley v. Booth* (2 De G. & Sm. 718) commented on. *Camberwell & South London Building Society v. Holloway*, 13 L. R., Ch. D., 754; 49 L. J., Ch., 361; 41 L. T. 752; 28 W. R. 222.

X. Time. When Essence of Contract.

- I. *By Original Stipulations or Conditions*, 7187.
- II. *When Engrafted by Notice*, 7191.
- III. *From Nature of Subject Matter of Contract*, 7193.
- IV. *Waiver*, 7194.
- V. *Delay in Application to Rescind*, 7196.
- VI. *Other Cases*, 7196.
- VII. *Delay as a Defence to Suits for Specific Performance*. See LANDLORD AND TENANT, I. II. 3—SPECIFIC PERFORMANCE, XI. I.
- VIII. *Time for Exercise of Options and Pre-emptions*. See XXIII. II. post.
- IX. *Reference as to when Title first made*. See XI. VIII. 8 post.

I. BY ORIGINAL STIPULATIONS OR CONDITIONS.

1. *In General*, 7187.
2. *As to Delivery of Abstract*, 7189.
3. *As to Delivery of Objections and Requisitions*, 7189.
4. *As to taking Possession*, 7190.

1. In General.

5. Upon sale of a reversion, part of the terms was that the money be paid by a certain time; not being so by default of vendee, vendor discharged from his contract. *Newman v. Rogers*, 4 Bro. C. C. 391.

6. Bill for specific performance of articles for purchase, dismissed with costs, because title was not laid before counsel within time limited. *Lewis v. Lechmere (Lord)*, 10 Mod. 502.

7. A purchase was to be completed on the 25th October. Before that day arrived the purchaser, at the vendor's request, extended the time to the 5th November. The title, however, was not completed on that day:—Held, on motion, that the purchaser was at liberty to abandon the contract. *Parkin v. Thorold*, 2 Sim., N. S., 1. Affirmed at the hearing 22 L. J., N. S., Ch., 170; 16 Jur. 959; 16 Beav. 59.

Where a contract has been entered into, by which a Court of law decides that the purchaser is not bound unless a title be made before a given day, if the Court of Equity gives relief, it must be, not on the ground that it puts on the words of the contract a construction different from that put on them at law, but because there are grounds collateral to the contract on which it can found a jurisdiction warranting its interference. *Id.*

In equity the time appointed for the com-

pletion of a contract is not, as at law, of the essence of the contract, but it may be made so by direct stipulation or necessary implication. S. C. 16 Beav. 59; 16 Jur. 959.

1. Time held to be of the essence of the contract partly upon construction of conditions of sale, and partly by reason of the nature of the trade carried on upon the property agreed to be sold. *Seaton v. Mapp*, 2 Colly. 556.

2. Time will, in equity, be deemed of the essence of the contract, in all cases where it can be collected, from the terms of the contract, that the parties intended that the time for its completion should be strictly adhered to. *Hipwell v. Knight*, 1 Y. & Coll. 401; 4 L. J., N. S., Exch. Eq., 52.

3. Time made of the essence of a contract by a special condition. *Hudson v. Temple*, 29 Beav. 536.

Upon the sale of some leaseholds, it was stipulated, "that if, from any cause or circumstance whatever, the purchase should not be completed on a day named, the vendor should be at liberty to annul the contract." The purchaser refused to pay the purchase money on the day named, the only remaining requisitions being as to the registration of a deed, and the sufficiency of a stamp, which the vendor undertook to supply. The purchaser, on the same day, annulled the contract:—Held, that he was justified in so doing. *Id.*

Conditions for sale of leasehold property expressly made time to be of the essence of the contract, and provided that if from any cause or circumstances whatever the contract was not completed agreeably to the conditions by the time specified, the vendor might annul the contract. The time fixed for completion was between one and two o'clock on the 11th October. The vendor attended then, and executed the assignment of the property, and the purchaser's agent almost immediately afterwards also executed it. The purchase money was not then paid. The vendor annulled the contract on the afternoon of the same day, viz., the 11th October, and re-sold the property:—Held, that he was entitled so to do; and upon a bill filed by him against the purchaser for a decree to cancel the assignment for a re-conveyance of the property, for an injunction to restrain two actions, and for payment of the costs of the suit:—Held, that he was entitled to such a decree. S. C. 3 L. T., N. S., 495.

If a vendor of leaseholds makes time the essence of a contract, and on the day specified for the completion of the purchase insists upon the money being paid, he may, in the event of the purchaser's neglect, omission, or refusal to comply with such request, avail himself of a power in the contract to annul the sale, though two objections to the title which he had given his written undertaking to remove remained unsatisfied, and though he had executed a deed which he had delivered to his solicitor as an escrow assigning the premises to the purchaser. S. C. 7 Jur., N. S., 248; 30 L. J., Ch., 251; 9 W. R. 243.

4. By an agreement entered into between the plaintiff, a landowner, and a railway company, the company was to take portions of the plaintiff's lands, and it was agreed that they should make and maintain, for the convenience of the plaintiff, so many crossings and of such kinds as C., the plaintiff's surveyor, should

direct and notify in writing within one month after the company's obtaining possession of the land. In December 1858 the company entered into possession, but no award or notification of the works required was made until March following. In the meantime the company had made considerable progress in constructing the line, and they resisted the plaintiff's demand for the works notified. The plaintiff thereupon filed a bill to have the notified works executed and performed. In settling the terms of the agreement, the company had stipulated for a reduction from two months, the period originally proposed, to one month of the time within which C. should notify:—Held, that the stipulation as to time must be regarded as of the essence of the contract; and the Court considering that there was no sufficient evidence of any agreement to enlarge the time, specific performance of the works mentioned in the award or notification was refused. *Darley v. London, Chatham, & Dover Railway Co.*, 9 Jur., N. S., 452; 33 L. J., Ch., 9; 11 W. R. 388; 8 L. T., N. S., 94.

The bill prayed specific performance of the agreement, but the case put forward by the plaintiff rested simply upon the award. At the bar plaintiff claimed relief upon the footing of the agreement independently of the award:—Held, that no such relief could be granted, since the company must necessarily have been led to suppose that the plaintiff relied upon the award only; but leave was given to amend. *Id.*

5. The time for paying the deposit may be made an essential term for entering into a contract for sale of an estate. *Honeyman v. Marryat*, 21 Beav. 14; 1 Jur., N. S., 857; 3 W. R. 502. And see S. C. 6 H. L. Ca. 112; 4 Jur., N. S., 17; 26 L. J., Ch., 619.

6. Upon the sale by auction of a contingent reversionary interest in railway stock, the conditions of sale were that the purchaser should pay to the auctioneers a deposit as part of the purchase money and sign agreements for payment of the remainder on or before August 17th, when the purchases were to be completed: should the completion of the purchases be delayed from any cause whatever beyond that period the purchasers were to pay interest on the balance of the purchase money from that date until the completion of the purchase:—Held, that as by the conditions of sale a possible postponement of the purchase was contemplated, time was not of the essence of the contract. *Patrik v. Milner*, 25 W. R. 700; 36 L. T., N. S., 738; 2 L. R., C. P. D., 342; 46 L. J., C. P. D., 537.

7. By a contract in writing, dated the 3rd September 1873, E. agreed to purchase freehold farms from N. for 33,000*l.*, subject to the title being accepted by his solicitor. The purchase money was to be paid on the 29th September 1873, on which day it was presumed that the contract would be completed and possession given; but in the event of the purchase not being completed on that day, the purchaser was to pay interest up to such reasonable time as might be agreed upon by his solicitor. When the title was produced it appeared that E. was not the legal owner of the land, but had agreed to purchase the same from the trustees of a settlement for 21,000*l.*, by a contract which was not completed till after the 29th September

1873. E. took the objection that it appeared on the face of the title that the trustees had sold the estate to N. for a grossly inadequate price. N. proved that the trustees had had a fair valuation made of the land before offering it to him, but notwithstanding, on the 29th September, E. wrote to N. stating that he considered the objection fatal, and that he rescinded the contract. N. then obtained a conveyance from the trustees, and re-sold the estate for 25,000*l.* to a stranger, and in August 1875 brought an action against E. to recover the difference of price by way of damages for breach of the contract. E. filed a bill against N. to restrain the action, and to obtain a declaration that the contract was rescinded:—Held, by Bacon, V.-Ch., first, that the bill to obtain a declaration of the rescission of the contract could not be maintained, and that E.'s bill must therefore be dismissed. *Noble v. Edwardes*, *Edwardes v. Noble*, 36 L. T., N. S., 312; 5 L. R., Ch. D., 378.

Held, secondly, that the apparently inadequate price at which the estate was sold by the trustees was not a fatal objection to the title, and, therefore, that E. had no right to rescind the contract. *Id.*

Held, thirdly, that N. had a right to re-sell the estate and claim the difference by way of damages against E., there being no distinction in this respect between a sale of chattels and of land. *Id.*

Held, on appeal (the objection not having been urged before the Vice-Chancellor), that, on the construction of the agreement, it was to be completed on the 29th September 1873, and that, the action having been commenced before the Judicature Act came into operation, time was of the essence of the contract; and that, the vendor not being on that day in a position to make a good title and execute a conveyance, he could not sustain an action for damages. S. C. 5 L. R., Ch. D., 378; 37 L. J., N. S., 7.

2. As to Delivery of Abstract.

1. Time will, in equity, be deemed of the essence of the contract, in all cases where it can be collected, from the terms of the contract, that the parties intended that the time for its completion should be strictly adhered to. Where, for instance, upon an agreement for the purchase of an estate, the parties entered into a stipulation that an abstract of title should be delivered immediately, and that, in case the contract was not completed by a given day, the purchaser should be released from his contract. *Hymell v. Knight*, 1 Y. & Coll. 401; 4 L. J., N. S., Exch. Eq., 52.

2. Merely undertaking to deliver an abstract and possession at a particular time does not make it the essence of the contract. *Boehm v. Wood*, 1 Jac. & Walk. 419.

3. Conditions of sale stated that an abstract of title would be furnished within seven days from the day of sale, on the application of the purchaser for the same, and provided that all objections should be taken within eight days of such delivery, or be considered as waived. The purchaser's solicitor called for the abstract two days after the sale, but owing to the estate being in mortgage, and the mortgagee being abroad, the abstract was not delivered

till thirteen days after the sale. The purchaser brought an action for the deposit. The vendor filed a bill for specific performance, and an injunction:—Held, on demurrer, that the time of the delivery of the abstract was not of the essence of the contract, the importance of stipulations as to time being differently regarded in courts of law and equity. *Roberts v. Berry*, 3 De G. M. & G. 284; 22 L. J., Ch., 398.

4. When a contract for sale is entered into by which it is stipulated that the abstract is to be delivered on a particular day, and it is not delivered within a reasonable time after that day, the purchaser is at liberty to repudiate the contract. *Venn v. Cattell*, 27 L. T., N. S., 469.

The conditions of sale under which a purchase was made provided that the abstracts should be delivered within twenty-one days from the day of sale. When seventy-eight days had expired without any abstract having been delivered, the purchaser gave notice to the vendor that he declined to complete. After one hundred and eighteen days had elapsed, abstracts of the title to some of the lots were delivered to the purchaser, and the abstract of the remaining lot was delivered a fortnight later, but were returned by the purchaser on the same days on which they were delivered:—Held, that as the vendor had failed to deliver the abstracts within a reasonable time after the day named, he could not enforce the contract against the purchaser. *Id.*

3. As to Delivery of Objections and Requisitions.

5. The conditions of sale provided that all objections to the title disclosed by the abstract, not taken within a certain time after delivery of the abstract to the purchaser, should be deemed to be waived:—Held, that the time for objecting was not to be computed from the time of the delivery of an imperfect abstract; and that the purchaser was not precluded from taking an objection after the time fixed on, which arose out of evidence called for before the expiration of that time. *Blacklow v. Laws*, 2 Hare 40.

6. Where it was stipulated that all objections to the title should be taken within twenty-one days of the delivery of the abstract, or be deemed waived, and time as to this was to be considered the essence of the contract:—Held, that the twenty-one days did not begin to run till a perfect abstract had been delivered. *Hobson v. Bell*, 2 Beav. 17; 8 L. J., N. S., Ch., 241; 3 Jur. 196.

A sale was made by a mortgagee under a power, subject to certain special conditions:—Held, that they were not of such a depreciating character as to invalidate the sale. *Id.*

7. A special condition of sale stipulated, that by a fixed day the purchaser should either reject or accept the title, and if not rejected it was to be good. Within the time fixed the purchaser took an objection, but stated at the same time he did not reject the title upon that ground, but wished to hear how the vendor met the difficulty. The vendor insisted at first on the condition, by which the purchaser, not having rejected the

title, was to be held to have accepted it, but subsequently entered upon a long correspondence:—*Semble*, that the vendor had by his conduct waived the condition. *Lane v. Debenham*, 17 Jur. 1006.

1. Conditions of sale stipulated that the sale should be completed on a certain day; and that objections to the title, not made within twenty-one days from the delivery of the abstract, should be considered as waived; and that if the purchaser should not comply with the conditions, his deposit should be forfeited, and the vendor be at liberty to re-sell the property. The purchaser did not deliver his objections until several weeks after the expiration of the twenty-one days, and after the day appointed for completing the purchase; the vendor's solicitor, however, received them, and entered into a long correspondence with the purchaser on the subject of them, but without coming to a satisfactory conclusion. Finally, the vendors re-sold the property, but at a less price, notwithstanding the purchaser protested against the re-sale, and gave notice to the vendor of his intention to file a bill to enforce the contract. About six months afterwards, he filed his bill, making the auctioneer and the purchaser at the re-sale, to whom he had some months before given notice of his prior contract, co-defendants to it. The Court held that the benefit of the conditions had been waived by the vendor's solicitor, and decreed a specific performance, with a reference to the Master as to title, and dismissed the bill with costs as against the auctioneer, because he denied that he had ever intended to part with the deposit, and without costs as against the purchaser at the re-sale, who claimed the benefit of his contract if the Court should think that the plaintiff's ought not to be performed. Where objections to title are to be considered as waived, unless made within a certain time after the delivery of the abstract, *quære*, whether that condition can be insisted on, if the abstract is very defective. *Cutts v. Thodey*, 13 Sim. 206; 6 Jur. 1027. Affirmed 1 Colly. 223. n.

2. In a condition of sale, that objections to the vendor's title are to be sent in within a given time, time is of essence of the contract. *Oakden v. Pike*, 11 Jur., N. S., 666; 34 L. J., Ch., 620; 13 W. R. 673; 12 L. T., N. S., 527.

Requisitions upon title were sent in, in pursuance of the conditions of sale, within the specified time after the delivery of a complete abstract, and satisfactorily complied with by the vendors. The purchaser afterwards raised an objection upon the title, and the vendors' solicitor replied, "The question must, of course, be set at rest, and I apprehend the only way this can be done is to file a bill for specific performance, unless you can suggest any better way of settling the point. Of course, none of the conditions of sale are waived"—Held, that, notwithstanding the reply, the objection was to be considered as waived, and that the vendors were entitled to specific performance. *Id.*

3. If a vendor does not deliver the abstract of title within the time specified in the conditions, he cannot hold the purchaser bound to send in his objections within the time limited for that purpose, even though it was

stipulated in the condition for sending in the objections that time in that respect should be of the essence of the contract. In such a case, the time within which objections will be considered as waived will depend upon the general principles of the Court and the conduct of the parties. *Upperton v. Nicholson*, 6 L. R., Ch., 436; 40 L. J., Ch., 401; 25 L. T., N. S., 4; 19 W. R. 733.

Land was described in a contract for sale as freehold, but it was shown by the abstract that it was formerly copyhold, and had been enfranchised. A decree was afterwards made at the suit of the vendor for specific performance, and a general inquiry directed as to title; in the course of which the purchaser for the first time objected that the minerals were reserved to the lord of the manor under the enfranchisement:—Held, that the objection was fatal to the title; but as the purchaser had taken the objection so late, he was not allowed his costs. *Id.*

4. When a requisition is made by a purchaser, the vendor must be allowed a reasonable time to comply with it. Thus a requisition was made at the end of June, which involved the necessity of instituting a suit, and obtaining a decree. On the 1st August the vendor consented to comply with the requisition, and obtained a decree in Michaelmas term; but on the 9th August the purchaser gave notice to rescind the contract:—Held, that it was ineffectual. *Nicholls v. Corbett*, 22 Beav. 376.

5. Where executors, believing the testator to have charged his real estate with his debts, sold it under conditions of sale, by one of which it was stipulated that "the purchaser shall send his objections and requisitions (if any) in respect of the title, and all matters appearing on the abstract . . . within ten days from the delivery of the abstract, and in this respect time shall be of the essence of the contract, and in default of such requisitions and objections (if any), the purchaser shall be deemed to have accepted the title":—Held, that, although the ten days had expired, the purchaser was entitled to raise the objection that the vendors had no title at all, on the ground that there was no charge of debts. *Want v. Stallibrass* (8 L. R., Exch., 175) followed. *Re Tanqueray-Willauve and Landau*, 45 L. T. 181. Affirming 20 L. R., Ch. D., 465; 51 L. J., Ch., 434; 46 L. T. 542; 30 W. R. 801.

Quære, whether, when there is a charge of debts, executors selling real estate many years after the death of the testator are bound to answer the purchaser's inquiries whether any of the testator's debts remain unpaid. *Sabin v. Hoap* (27 Beav. 553) doubted. *Id.*

Unless twenty years have elapsed since the death of a testator who has charged his estate with the payment of his debts, the vendor selling under the power given by the charge is not bound to answer the purchaser's inquiry whether any debts of the testator still remain unpaid, and the purchaser ought not to make the inquiry, as he will get a good title even if there are no debts. *Id.*

4. As to taking Possession.

6. Although the Court will not order a

reference of title on motion, where a purchaser resists the performance of the contract on another ground, yet it will take care that the latter is substantial. *Semble*. The motion was therefore granted, where the only other ground insisted upon by the owner was, that the time of possession had been made of the essence of the contract; but which, upon looking into it, appeared not to have been the case. Merely undertaking to deliver an abstract and possession at a particular time, does not make it of the essence of a contract. *Boehm v. Wood*, 1 Jac. & Walk. 419.

1. A. agreed to sell to B. an orchard, described as being in the occupation of P., and that the purchaser should have possession on the day appointed for completion:—Held, that possession did not mean personal occupation, and a decree for specific performance was made against B., although A. was unable, by reason of P.'s tenancy, to put him in actual occupation of the premises. *Lake v. Dean*, 28 Beav. 607.

2. In a suit by a vendor for specific performance against a purchaser, if the contract stipulated that the possession should be given at a specified day, it is competent for the purchaser to insist that both time and a vacant possession are of the essence of the contract, and the Court will receive, as evidence that such was the purchaser's intention, statements made by the agent of the purchaser at the time of signing the contract. Where a purchaser has consented to enlarge the time for completion, and where a vacant possession was of the essence of the contract, it is competent for him to object to complete at the expiration of such enlarged time, if the possession is not then vacant, and if he has done no act towards completion of the contract after he had notice that vacant possession could not be given at the day. But where a purchaser had by his acts waived the time of completion in the first instance, and had gone on for some time inducing the vendor to incur expenses to perfect his title, and suddenly, upon the discovery that vacant possession could not be given according to stipulation, declined to complete, the Court, although it dismissed a bill filed against such a purchaser for specific performance, dismissed it without costs. *Nokes v. Kilmorey*, 1 De G. & Sm. 444.

3. On the 14th December 1864 C. signed an agreement for the purchase from T. of a leasehold house and premises. The agreement contained these words: "Possession to be given on the 14th January next." A deposit was paid by T., and a receipt in writing was given to him by C.'s agent. The receipt stated that the deposit was "to be returned in the event of the sale not being completed through the vendor's fault." An abstract of title was delivered to C.'s solicitors on the 24th December, and they desiring to examine the abstract with the deeds, it appeared that the deeds were not in the possession of T., and that the purchase could not be completed on the 14th January. On that day C.'s solicitors gave notice to abandon the contract. Possession was on the same day tendered to C., but he refused to accept it. A bill was ultimately filed by T. against C. for specific performance. Upon the evidence the Court was of opinion that it was essential, that C.

should have, by the 14th January, possession of the house for repairs and improvements, with a view to his own immediate residence; a possession, therefore, with a title. *Tilley v. Thomas*, 16 W. R. 166; 3 L. R., Ch., 61; 17 L. T., N. S., 422.

II. WHEN ENGRAFTED BY NOTICE.

4. Party declaring, that unless contract was performed by such a day, he should consider it as a refusal by the other party to perform it, and would act accordingly, does not amount to a notice of abandonment of the contract. *Reynolds v. Nelson*, 6 Madd. 26.

Time may by the terms of the contract be made the essence thereof. But it is not decided, that where there is no special stipulation to that effect, it can be made so by a subsequent notice that it will be so considered. *Id.*

5. Where time is not the essence of the contract, by its original terms, it may be made so on reasonable notice by either party; but where an objection, founded on such a notice, is set up and fails, the defendant will have to pay the costs up to the hearing. *Taylor v. Brown*, 2 Beav. 180; 9 L. J., N. S., Ch., 14.

6. Though time be not of the essence of a contract, it may be made so by notice, where there has been great and improper delay on one side in completing. It may, however, be waived by proceeding in the purchase after the expiration of the time fixed by notice. *King v. Wilson*, 6 Beav. 124. And see *Stewart v. Smith*, 6 Hare 223. n.

7. Consideration of the questions, whether time was of the essence of the contract, whether reasonable notice to complete was given, and whether that notice was complied with. *Maobryde v. Weekes*, 2 Jur., N. S., 918: 22 Beav. 533.

A. agreed to grant a lease to B. After considerable delay on the part of A., B. gave a notice, that unless he completed within a month he would rescind the contract. The day before the expiration of the time thus limited, A. forwarded to B. the drafts, but he furnished no abstract, nor showed that he was in a situation to complete. B. rescinded the contract:—Held, that it was effectual, and the Court dismissed A.'s bill for specific performance, with costs. *Id.*

8. Though time be not originally an essential part of a contract, yet either party may, by notice, insist on its being completed within a reasonable time. *Parkin v. Thorold*, 16 Beav. 59; 16 Jur. 959; 22 L. J., N. S., Ch., 170. But see 2 Sim., N. S., 1.

A purchase was to be completed on the 25th October. Before that time the purchaser gave notice that unless the title was completed by the 5th November he would abandon his contract. The title was not completed till the 8th January following, and the purchaser accordingly revoked the contract. Specific performance nevertheless decreed against him. *Id.*

Observations as to the necessity of preserving an uniformity of decisions in the different courts. *Id.*

9. The purchaser cannot, owing merely to

the delay of the vendor in complying with his requisition, determine the contract without notice, or bring an action for his deposit before the termination of his notice, where time was not originally of the essence of the contract. Whether he can do so after the expiration of notice where time has not been made of the essence of the contract, or, being of the essence of the contract, has been waived, depends upon the conduct of the vendor after notice. *Wood v. Machu*, 5 Hare 158.

1. Though time may not be of the essence of the contract, yet, upon unreasonable delay on the part of a vendor in completing, the purchaser, upon giving notice, may rescind the contract. *Benon v. Lamb*, 9 Beav. 502; 15 L. J., N. S., Ch., 218.

2. An agent, with authority by deed from the owners of a foreign mine to sell it for cash or credit, contracted to sell it partly for cash and partly for shares in a company which was to be formed for working the mine. The purchaser from the agent afterwards contracted to sell the mine to the company, who, before any conveyance to them was executed, discovered that the mine had been sold by its original owners to other parties. The company then gave to their vendor (the purchaser from the agent) three months' notice to rescind the contract, and the vendor filed a bill against them for specific performance, partly on the ground of unreasonably short notice. The bill was dismissed with costs. *Reed v. Don Pedro North Del Rey Gold Mining Co.*, 12 W. R. 1049; 10 L. T., N. S., 836.

3. A. agreed to sell to B. a piece of land. A. was to make a new road, of which B. was to have the use, and B. was to expend 3,000*l.* in building a house on the property. The contract was to be completed on the 1st August, interest was payable if not completed on that day, and time was declared to be of the essence of the contract as regarded the making of objections to the title. The contract not having been completed, vendor, on the 4th August, gave notice that he rescinded the contract unless completed within a month. At this time, there only remained two substantial requisitions, with which the vendors were taking steps to comply:—Held, first, that time was not of the essence of the contract; secondly, that the notice was not reasonable; and thirdly, that there was nothing in the nature of the contract which prevented its being specifically performed. *Wells v. Maxwell*, 32 Beav. 408; 9 Jur., N. S., 565; 11 W. R. 676; 8 L. T., N. S., 591. Affirmed 9 Jur., N. S., 1021; 32 L. J., Ch., 44; 11 W. R. 842; 8 L. T., N. S., 713.

4. Where there is an undue delay on the part of the vendor in making out his title, the purchaser, on reasonable notice, pay put an end to the contract. *Nott v. Riccard*, 22 Beav. 307; 2 Jur., N. S., 1038; 25 L. J., Ch., 618; 4 W. R. 269.

The plaintiffs, on the 28th March 1855, agreed to sell some property to the defendant, the purchase to be completed on the 22nd June. By the conditions the vendors were bound to furnish a certain declaration as to seisin free from incumbrances. The vendors

furnished an insufficient declaration, and on the 30th May positively refused to furnish any other. On the 23rd July the purchaser gave notice, that unless the requisite declaration were furnished within a fortnight, he would rescind the contract, and default being made by the vendors, he did so on the 10th August:—Held, that the purchaser was justified in putting an end to the contract, and a bill afterwards filed by the vendors for specific performance was dismissed, with costs. *Id.*

Semble, the purchaser was empowered to put an end to the contract without giving notice to rescind. *Id.*

5. A tenant held under an agreement which gave him the option of purchasing the estate from his landlord on giving three months' notice. He accordingly gave notice, which expired on the 14th August. On the 4th September the vendor urged him to complete the purchase, and on the 2nd November gave him notice that unless he completed within six weeks he should consider the contract as abandoned. The purchaser went on with the investigation of the title, but did not complete before the six weeks had expired. The vendor then treated the contract as abandoned. In a suit instituted by the purchaser for specific performance:—Held, first, that time was not of the essence of the contract, and that if it had been, it would have been waived by the conduct of the parties. Secondly, that six weeks limited by the defendant was not a reasonable time; and specific performance was decreed. *Pegg v. Wisden*, 16 Jur. 1105; 1 W. R. 43.

Held, also, that the purchaser, having proceeded to examine the deeds with the abstract, must be considered to have accepted the title; but, under the circumstances, he was allowed a week to bring in objections before the Master of the Rolls. *Id.*

6. In November 1861 S. agreed to purchase from the plaintiff "the mill property, including cottages in Esher village—all the property to be freehold," and verbally agreed to take a limited title. The property was identified by parol evidence. Negotiations were carried on as to the title till June 1863, when it was accepted subject to certain requisitions, of which the principal was this:—Part of the property was copyhold, and had been devised by a testator to one of his daughters in fee. After his death, two daughters of the testator, being co-heiresses, were admitted as tenants in common, and when the plaintiff enfranchised the copyhold the conveyance was made to the two daughters, their heirs and assigns. The daughter not beneficially interested refused to convey the legal estate, and an order was obtained from the Court vesting the legal estate, under the Trustee Act, s. 9, in trustees for the other daughter. The purchaser objected that the order should have been made under s. 10, and upon this objection negotiations went on till December 1864, when the purchaser gave notice that unless within one week the vendor would agree to comply with the requisitions, he should require a good marketable title to the whole property, and if that were not shown within five weeks the contract would be treated as rescinded:—Held, that the con-

tract was not void for delay, which could only be computed from the termination of negotiations till the filing of the bill; that the purchaser having agreed to accept a limited title, and the negotiations having gone on upon that footing, a complete title could not be demanded; that the time limited by the notice to rescind was not reasonable. *McMurray v. Spicer*, 5 L. R., Eq., 527; 16 W. R. 332; 37 L. J., Ch., 505.

1. When time is not originally made of the essence of the contract for sale of land, one of the parties is not entitled afterwards by notice to make it of the essence, unless there has been some default or unreasonable delay by the other party. After a delay of two years on the part of a vendor, he gave notice to the purchaser to complete his contract within three weeks, and that, if he did not do so, the vendor would treat the contract as at an end:—Held, that the time limited for completion was, under the circumstances, unreasonably short, and the notice therefore of no effect. *Green v. Sevin*, 13 L. R., Ch. D., 589; 49 L. J., Ch., 166; 41 L. T. 724.

2. When, after a contract for the sale of land has been entered into, a notice is given to make time of the essence of the contract, the question whether the notice is reasonable or not must be judged of as at the date when it is given. The plaintiff held a lease from the defendant which gave him an option of purchasing the demised property at any time during the term, on giving the lessor three months' previous notice in writing. On the 24th March 1877 the plaintiff gave the defendant notice of his intention to exercise the option. There were some difficulties in completing the defendant's title to the property, and an abstract of title was not delivered to the plaintiff's solicitor till the 17th June 1878. The plaintiff's solicitor not having acknowledged the receipt of the abstract, and having neglected to answer several letters from the defendant's solicitors, they, on the 16th September, wrote to the plaintiff himself, asking whether he intended to complete the purchase. The plaintiff replied the next day that he would write at once to his solicitor. On the 24th September 1878, no further communication having been received from the plaintiff or his solicitor, the defendant gave the plaintiff a notice in writing, requiring him to complete the purchase, and stating that, unless he completed it on or before the 31st October 1878, the defendant would treat the contract as rescinded, and that in that respect time should be deemed of the essence of the contract. On the 26th September 1878 the plaintiff acknowledged the receipt of the notice, and said that he had seen his solicitor, who had promised to proceed as soon as possible. On the 1st November 1878, no further communications having been received from the plaintiff or his solicitor, the defendant's solicitor wrote to the plaintiff, that the defendant, in pursuance of his notice, declared the contract at an end; and they requested the return of the abstract, and demanded payment of rent for the property. The plaintiff had been in possession of the property ever since his notice to purchase, but had refused to pay any rent after the 24th June 1877. On the 21st Novem-

ber 1878 the plaintiff commenced his action for the specific performance of the contract to purchase:—Held, that the notice of the 24th September fixed an unreasonably short time for the completion of the purchase, and was therefore invalid. Specific performance was decreed, and the defendant was ordered to pay the costs of the action up to and including the trial. *Cramford v. Thogood*, 13 L. R., Ch. D. 153; 49 L. J., Ch., 108; 28 W. R. 248; 41 L. T. 549.

III. FROM NATURE OF SUBJECT MATTER OF CONTRACT.

3. Time is of the essence, where subject of contract is of nature liable to daily fluctuation in value. *Doloret v. Rothschild*, 1 Sim. & S. 590; 2 L. J., Ch., 125.

4. Time held to be of the essence of the contract between vendor and purchaser, partly by reason of the nature of the trade, viz., that of a publican, carried on upon the property offered for sale, and partly upon the construction of the conditions of sale. *Seaton v. Mapp*, 2 Colly. 556.

5. In an agreement by a tenant at will of a public-house, for the sale of the possession, trade, and goodwill of the house at a fixed sum, and of the stock and furniture at a valuation, one of the terms being, that possession should be taken, and the money paid on a given day, time is of the essence of the contract, and a purchaser who is not in a condition to fulfil his part of the contract on that day, cannot compel a specific performance, though he was ready on the following day to have proceeded to complete the purchase. *Costake v. Tili*, 1 Russ. 376.

6. Upon the sale of a public-house as a going concern time is of the essence of the contract. *Cowles v. Gale*, 7 L. R., Ch., 12; 41 L. J., Ch., 14; 25 L. T. 524; 20 W. R. 70.

When, therefore, upon the day for the completion of the contract the vendors were not in a position to transfer the licence under 9 Geo. 4, c. 61, s. 11, the purchaser was held entitled to repudiate the contract. *Id.*

The executors of the owner of a public-house renewed the licence in the name of the deceased owner:—Held, that the licence was absolutely void, and that the executors could not make a good title to the public-house. *Id.*

7. Time is of the essence of the contract for the sale of a public-house; and when the particulars of the contract for such a sale are silent on the subject, it is to be assumed that the transfer of the licence of the public-house will be made under the Licensing Act, 9 Geo. 4, c. 61, s. 11. *Day v. Lühke*, 37 L. J., Ch., 330; 16 W. R. 717; 5 L. R., Eq., 336.

8. The owner and licensee of an inn died on the 13th July 1870, having devised the inn to trustees for sale. His licence expired on the 10th October in the same year. On the 26th August 1870, at the annual general licensing meeting, the trustees procured a new licence in the testator's name. On the 12th October they contracted to sell the inn. On November 16th the meeting took place to effect the change, but the purchaser then objected that the trustees could not transfer the licence to him, and refused to complete:

—Held, that the licence taken out in the name of the dead man was invalid, and, therefore, that the trustees being unable on the 16th November to transfer a valid licence under which the business could be lawfully carried on, could not enforce the contract against the purchaser. *Covles v. Gale*, 41 L. J., Ch., 14; 7 L. R., Ch., 12.

1. Specific performance of agreement to buy fee-simple of lands and right, etc., refused, where part of subject of contract proves only leasehold, and the right is qualified; object being to work commercial speculation, which could only be done by enjoyment of unqualified right, and because twelve years had elapsed since agreement entered into. *Wright v. Howard*, 1 Sim. & S. 190; 1 L. J., Ch., 94.

2. Specific performance refused on the laches and trifling of the plaintiff, the contract being for a sale to the plaintiff, under a bankruptcy of a reversionary interest for life, which in the interval fell into possession, the defendant having also been in some degree remiss; the bill was dismissed without costs, on delivering up the agreement. *Spurrer v. Hancock*, 4 Ves. 667.

3. Upon sale of a reversion, part of the terms was that the money be paid by a certain time; not being so by default of the vendee, vendor discharged from his contract. *Newman v. Rogers*, 4 Bro. C. C. 391.

4. A wager contract was made in India (before such contracts were declared illegal) upon the average price to be obtained at the first public sale of opium at Calcutta of the 30th November 1846. The sale was then advertised for that day with the printed conditions of sale, but, owing to difficulties arising in the sale, it was postponed, and the sale took place with conditions somewhat altered on the 7th December following:—Held, that upon the true construction of the contract the words “30th of November” were merely words of description, and that the contract was binding on the parties with reference to the sale of the 7th December, time not being in such a case essential to the contract. *Chotayloll v. Manickchand, Chotayloll v. Uggerohund*, 4 W. R. 317; 6 Moo. Ind. App. 251.

5. When a contract for purchase provides that possession shall be given by a certain day, the word “possession” must be understood to mean possession with a good title shown. This construction is the same in equity as at law, although a court of equity will consider time not to be of the essence of the contract, and will relieve against a breach of performance at the date assigned, unless there is something in the contract, the nature of the property, or the circumstances, which renders it inequitable for the Court to interfere. *Tilley v. Thomas*, 3 L. R., Ch., 61; 17 L. T., N. S., 422.

A person agreed to purchase a leasehold house for his own residence, and contracted that he should have possession by a certain day; but the vendor, although he tendered possession, failed to show a good title by the day named:—Held, that the stipulation as to time was of the essence of the contract, and a bill for specific performance of the agreement dismissed. *Id.*

See also LANDLORD AND TENANT, I. II. 2.

IV. WAIVER.

6. Where, on the sale of real estate, it was stipulated in the agreement of purchase, that it should be void if the money was not paid on a day stated, and the vendor authorised to re-sell:—Held, that the purchaser continuing in possession, and giving a warrant to confess judgment in ejectment, was a waiver of the forfeiture. *Exp. Gardner*, 4 Y. & Coll. 503; 10 L. J., N. S., Exch. Eq., 46.

7. Time will, in equity, be deemed of the essence of the contract, in all cases where it can be collected, from the terms of the contract, that the parties intended that the time for its completion should be strictly adhered to. But where, upon an agreement for the purchase of an estate, the parties entered into a stipulation that an abstract of title should be delivered immediately, and that, in case the contract was not completed by a given day, the purchaser should be released from his contract, and the abstract was not immediately delivered, but communications on the subject of the title were continued between the parties until the time limited by the contract had expired:—Held, that under these circumstances, the benefit of the stipulation as to time was waived by the purchaser. *Hippell v. Knight*, 1 Y. & Coll. 401; 4 L. J., N. S., Exch. Eq., 52.

Where a person had contracted for the purchase of an estate from trustees under a deed of release and assignment for the benefit of the creditors of a tender, upon a stipulation that a good title should be made by a given day, and that day fell within the period during which a fiat in bankruptcy might have issued against the trader:—Held, that he was in the situation of a purchaser who had waived a stipulation that time should be of the essence of the contract. *Id.*

8. By the terms of an auction the title deeds were to be produced by a certain day; they were not then ready, but the purchaser received them afterwards without objection; he cannot afterwards, on disliking the title, object to the delay. *Smith v. Burnam*, 2 Anstr. 527.

9. Specific performance of an agreement to purchase may be decreed after considerable delay, if the vendee has not demanded his deposit or shown a determination not to proceed in the purchase. *Pincke v. Curtis*, 4 Bro. C. C. 329.

10. Where, by the terms of an auction, the sale is to be completed by a certain day; yet, if neither party take any step to quicken the other, till it becomes impossible to execute the agreement by the day fixed, the time is waived, and equity will interfere to prevent the purchaser taking advantage of it at law. *Jones v. Price*, 3 Anstr. 924.

11. Time is of the essence of the contract; waived by a protracted treaty. *Wood v. Bernal*, 19 Ves. 220.

Vendor and purchaser having proceeded in treaty beyond the time limited for completion of contract, and the vendor having brought an action and withdrawn his record, on finding he could not support it, not having got in a judgment amounting to half the purchase money, and the purchaser having brought an action for his deposit and obtained a verdict: an in-

junction to restrain his proceeding was refused. *Id.*

1. Time may be made the essence of a contract, but may be waived by conduct. *Hudson v. Bartram*, 3 Madd. 440.

2. The time of valuation is of the essence of the contract; but the defendant cannot take advantage of it if he has improperly occasioned the delay. *Morse v. Merest*, 6 Madd. 26.

3. Though time be not of the essence of the contract, it may be made so by notice, where there has been great and improper delay on one side in completing. It may, however, be waived by proceeding in the purchase after the expiration of time fixed by notice. *King v. Wilson*, 6 Beav. 124.

4. A., in 1838, agreed to sell to B. certain lands; B. to pay 6,000*l.* of the purchase money at once, and the rest by the 1st January 1839, on a good title being made out; B. to get possession of L., part of the lands, on the 1st May 1838, subject to any question of title; the abstract to be delivered on the 1st November 1838, and a good title made out to the satisfaction of B.'s counsel in a month after; B. to execute the conveyance on the 1st January 1839; and if a good title were not made out by the 1st February 1839 (which was expressly fixed as of the essence of the contract), B. to be discharged from his purchase. B. paid the 6,000*l.* and entered into possession of L., and before January 1839 requested A. not to press the contract, as he was not in a condition to pay the balance; and at the request of B. A. deferred to furnish the abstract until 1844. In August 1845 B. furnished requisitions for searches. The discussion on the title continued until June 1847, when B. stated he considered himself no longer bound unless his objections were satisfactorily answered in a month. A. then furnished what he relied on as satisfactory evidence of the point in dispute, and declined to give further searches, and in March 1848 filed a bill for specific performance:—Held, that though time was originally of the essence of the contract, it was waived by the conduct of the parties; that B.'s right to give notice to rescind the contract could not arise until July 1847, and the bill was filed within a reasonable time after; that the retention of L. by B. was inconsistent with the rescinding of the contract. The "satisfaction of counsel" means "reasonable satisfaction." *Gordon v. Mahony*, 13 Ir. Eq. R. 363.

5. Specific performance decreed, the abstract (though delivered very late, and under a notice that vendee would insist on his deposit with interest, if the title should not be made out, etc.) having been delayed and kept without objection, and the vendee, upon the construction and the circumstances, not being entitled to insist on the time as the essence of the contract. *Seton v. Slade*, 7 Ves. 265.

6. Several suits at law and in equity to determine the title to certain lands were pending between persons claiming to be mortgagees of such lands and one who claimed the same lands in fee by title under a settlement paramount to the mortgage. The plaintiff, claiming to be a subsequent mortgagee of the same lands, contracted to purchase the interest of the prior mortgagees in their principal moneys, arrears of interests and securities, and

to pay the purchase money at a certain stipulated time, all of which, except an annuity, were to be paid in 1843, and to pay and indemnify the prior mortgagees against the past and future costs of the suits and proceedings; and time was to be of the essence of the contract. The plaintiff did not pay the instalments until a considerable time after the stipulated period, but such later payments were accepted by the vendors. The bill filed in 1845 (when some of the payments still remained to be made) alleged that the defendants refused to perform the agreement, and prayed a specific performance:—Held, on demurrer, that the plaintiff being interested as second mortgagee in the subject of the suits, the contract was not to be deemed champerty. That, the defendants insisting upon their right to treat the agreement as void, the plaintiff was not bound to tender the unpaid instalments of the purchase money before filing his bill. That every default by the plaintiff in payment of the instalments at the stipulated time is a new breach of the contract, giving the defendants the right to rescind it, but that to preserve such a right it must be asserted immediately that the breach occurs, and that in this case the breach had been waived. That the time of performing the several acts required by the agreement on both sides being past, the Court would now enforce a contemporaneous performance of the contract by both parties. *Hunter v. Daniel*, 4 Hare 420; 14 L. J., N. S., Ch., 124; 9 Jur. 520.

7. In a suit by a vendor for specific performance against a purchaser, if the contract stipulated that the possession should be given at a specified day, it is competent for the purchaser to insist that both time and a vacant possession are of the essence of the contract, and the Court will receive, as evidence that such was the purchaser's intention, statements made by the agent of the purchaser at the time of signing the contract. Where a purchaser has consented to enlarge the time for completion, and where a vacant possession was of the essence of the contract, it is competent for him to object to complete at the expiration of such enlarged time, if the possession is not then vacant, and if he has done no act towards completion of the contract after he had notice that vacant possession could not be given at the day. But where a purchaser had by his acts waived the time of completion in the first instance, and had gone on for some time inducing the vendor to incur expenses to perfect his title, and suddenly, upon the discovery that vacant possession could not be given according to stipulation, declined to complete, the Court, although it dismissed a bill filed against such a purchaser for specific performance, dismissed it without costs. *Nokes v. Kilmorey*, 1 De G. & Sm. 444.

8. If it is of the essence of the contract that an act should be completed by a fixed date, an extension of the time does not operate as an absolute waiver of that condition, but only substitutes the extended time for the original time. *Barclay v. Messenger*, 43 L. J., Ch., 449; 30 L. T., N. S., 350; 22 W. R. 522.

M. & W., entitled to a lease under a building agreement, defeasible by notice in case they did not complete buildings by the 1st January 1874, in July 1873 entered into an agreement to sell their interest for 2,000*l.*, 200*l.* of which was paid on signing the agree-

ment, 800*l.* and 1,000*l.* to be paid at the times specified in the 5th clause, which was as follows:—"If the purchaser shall fail to pay either the 800*l.* on the 14th July 1873 or the 1,000*l.* on the 31st July 1873, or as to the 1,000*l.* upon such deferred date as the parties might agree upon, all money paid previously to such default being made shall be absolutely forfeited and this contract become null and void." The 800*l.* was duly paid. The time for payment of the 1,000*l.* was extended to the 26th August 1873. The purchaser made default in payment at that date. The vendors gave notice to determine the agreement, and a suit for specific performance was instituted by the purchasers:—Held, that by the 5th clause time was made of the essence of the contract. That the extension of the time to the 26th August did not operate as an absolute waiver of that condition, but merely substituted the 26th August for the original date. *Id.*

V. DELAY IN APPLICATION TO RESCIND.

1. A conveyance made twenty years ago shall not be set aside on a suggestion that the party making it was *non compos*. *Winchcomb v. Hall*, 1 Ch. Rep. 40.

2. If time is to be considered as of the essence of a contract, that point must be made promptly. *Monro v. Taylor*, 8 Hare 62; 3 De G. M. & G. 113; 21 L. J., N. S., Ch., 525. See also *Madeley v. Booth*, 2 De G. & Sm. 718; *Price v. Griffith*, 1 De G. M. & G. 80; 21 L. J., N. S., Ch., 78; 15 Jur. 1093.

3. Delay of seven months in taking proceedings to set aside a sale, during which the purchaser was improving the property;—Held, no bar to the plaintiff's right to relief. *Pearson v. Benson*, 28 Beav. 598.

4. The defence of laches applies with peculiar force to a bill seeking to set aside a sale or lease of mineral property after a considerable lapse of time. *Ernest v. Tivian*, 33 L. J., Ch., 413; 12 W. R. 295; 9 L. T., N. S., 785.

Where property of which a void or defective lease has been granted is subsequently sold, the purchaser takes the property subject to the burden of any delay of which the vendor may have been guilty; and in reference to a defence founded on laches, the purchaser can stand in no better position than the vendor would have done, if he had never parted with the property. *Id.*

VI. OTHER CASES.

5. Time is not generally regarded as the essence of contract in equity. *Seton v. Slade*, 7 Ves. 273, where several instances of this doctrine are mentioned.

6. Time held not essence of contract. *Gibson v. Patterson*, 1 Atk. 12.

7. The time at which a contract is to be performed, is not essential in equity as at law. The relief against the lapse of time is in the discretion of the Court upon the circumstances, as if the contract is abandoned. *Radcliffe v. Warrington*, 12 Ves. 326.

8. A contract of which time is the essence,

and a chief term in which is the punctual payment of interest, not enforced, where interest was left in arrear two or three days. *Hicks v. Gardner*, 1 Jur. 541.

9. On a bill for specific performance, the questions whether the time was originally of the essence of the contract, and whether being so, the defendant has done any act whereby he has waived it, as a ground of objection to the performance, are questions depending on evidence, and not to be decided except upon the hearing. *Levy v. Lindo*, 3 Meriv. 81.

XI. Title.

- I. General Principles, 7196.
- II. The Abstract. Sufficiency, 7197.
- III. Verification, 7198.

See also XVI. post.

- IV. Conditions respecting, 7203.

- V. Defective or Doubtful, and Relief in Respect thereof, 7210.

See also XXIV. VI. post.

- VI. Particular Objections, 7220.

- VII. Waiver of Title, 7227.

- VIII. Reference as to, 7231.

- IX. Covenants for. See XVII. post.

I. GENERAL PRINCIPLES.

10. A title is first shown when the abstract states all the matters which, if proved, make a good title. *Parr v. Lovegrove*, 4 Drew. 170; 4 Jur., N. S., 600; 6 W. R. 201, 709.

A title is made when the matters are proved. *Id.*

A vendor can make a good title where a good title appears on the face of the abstract, and where he is able and willing to prove the deeds and facts alleged in the abstract. The showing a good title is the delivery of the abstract, where the vendor is in a condition to prove everything necessary to establish his title, appearing on the face of the abstract. *Id.*

A contest as to what species of evidence is necessary, and the non-production in the first instance of the evidence ultimately required, is not such a refusal to produce evidence, as that until such evidence is produced a vendor can be said not to have shown a good title. *Id.*

Whatever a vendor puts upon his abstract he is bound to prove and verify. *Id.*

A title may begin with a will. *Id.*

11. A marketable title is a title which at all times and under all circumstances may be forced upon an unwilling purchaser. *Pyrke v. Waddington*, 10 Hare 1.

12. A good title may be made to an estate, although the origin cannot be shown by any deed or will; but it must be shown that there has been such a long uninterrupted possession, enjoyment, and dealing with the property, as affords a reasonable presumption that there is an absolute title in fee-simple. *Cottrell v. Watkins*, 1 Beav. 361.

13. If a contract for the sale of land is silent as to the title which is to be shown by the vendor, the legal implication that the pur-

chaser is entitled to a good title may be rebutted by evidence that, before the execution of the contract, the purchaser had notice of defects in the vendor's title. But if the contract expressly provides that a good title shall be shown, the purchaser is entitled to insist on a good title, notwithstanding that before the execution of the contract he had notice of defects in the vendor's title. *Re Gloag and Miller's Contract*, 23 L. R., Ch. D., 320; 52 L. J., Ch., 654; 48 L. T. 629; 31 W. R. 601.

1. A vendor is ordinarily bound to take the steps within his power to complete his contract, and heavy damages would be given for default; but he is not bound to enter into litigation with an adverse claimant in order to perfect his title. *Williams v. Glenton*, 1 L. R., Ch., 200.

2. Where a purchaser accepts the title, he is only bound to the extent to which he has been made cognisant of it. *Bousfield v. Hodges*, 33 Beav. 90.

3. A defendant admitted by his answer, his belief that at the time of the contract the plaintiff had a title:—Held, that it was not open to the defendant afterwards to show that plaintiff had no title. *Phipps v. Child*, 3 Drew. 709.

4. Equity does not compel a purchaser to take such a title as a willing purchaser might be satisfied with; but the Court will inquire whether a title can be had, and, if the title is defective as to part, there is no principle of equity more artificial than that which calls on the Court to decide whether the purchaser shall be bound to take with any and what compensation. *Knatchbull v. Grueber*, 3 Meriv. 140.

Where a man contracts to purchase, on the faith of the vendor's having a good title, he has a right to have the title sifted to the bottom, before he can be called upon either to accept an indemnity or compensation for a defect, or to abandon the contract. *Id.* 137.

5. A vendor is bound to use all reasonable diligence to make a good title; nor will the Court, without the consent of the purchaser, excuse the vendor from making a good title, on the terms of discharging the purchaser from his contract. *Hawkins v. Shoven*, 1 L. J., Ch., 148.

6. Purchaser must get such a title as he can force down upon a re-purchaser from him. *Magennis v. Fallon*, 2 Moll. 578.

7. The right of a good title does not grow out of the agreement between the parties, but is given by law; but a purchaser may waive his right, by going on with the agreement after he has full notice that he is not to expect a good title. This is, in such case, matter of notice, and not of contract. *Ogilvie v. Poljambé*, 3 Meriv. 53.

8. Observations on clearing a title, by showing the non-existence of rights under a reservation, or onerous covenant not stated, and on the duty of being careful and explicit in preparing for a sale. *Martin v. Cotter*, 2 Ir. Eq. R. 351; 3 J. & L. 496. Affirming 9 Ir. Eq. R. 44.

9. In November 1861 S. agreed to purchase from the plaintiff "the mill property, including cottages in Esher village—all the property to be freehold," and verbally agreed to take a limited title. The property was identified by

parol evidence. Negotiations were carried on as to the title till June 1863, when it was accepted subject to certain requisitions, of which the principal was this: Part of the property was copyhold, and had been devised by a testator to one of his daughters in fee. After his death, two daughters of the testator, being co-heiresses, were admitted as tenants in common, and when the plaintiff enfranchised the copyhold the conveyance was made to the two daughters, their heirs and assigns. The daughter not beneficially interested refused to convey the legal estate, and an order was obtained from the Court vesting the legal estate, under the Trustee Act, s. 9, in trustees for the other daughter. The purchaser objected that the order should have been made under s. 10, and upon this objection negotiations went on till December 1864, when the purchaser gave notice that unless within one week the vendor would agree to comply with the requisitions, he should require a good marketable title to the whole property, and if that were not shown within five weeks the contract would be treated as rescinded:—Held, that the purchaser having agreed to accept a limited title, and the negotiations having gone on upon that footing, a complete title could not be demanded. *Murray v. Spicer*, 5 L. R., Eq., 527; 16 W. R. 332; 37 L. J., Ch., 505.

10. Whether the interest contracted for be freehold or leasehold, for a long term of years, or a short lease at rack-rent, the party who comes for a specific performance should be prepared to show that he is able to give what he seeks to compel the other to take. *Fildes v. Hooker*, 2 Meriv. 424.

11. The Court of Chancery does not warrant the title of an estate, which is purchased under its direction. *Trulmin v. Moore*, 3 Meriv. 223.

II. THE ABSTRACT. SUFFICIENCY.

12. A condition of sale was, that in case the purchaser should raise objections to the title which the vendor should not be able or willing to remove, the vendor might rescind the contract on notice, and re-payment of the deposit to the purchaser; and objections not delivered within fourteen days after delivery of the abstract to be treated as waived, in which respect time was to be essential. *Morley v. Cook*, 2 Hare 106; 12 L. J., N. S., Ch., 136.

Semble, that the vendor was only bound *bonâ fide* to deliver an abstract of such title as he had at the time of delivering it, and so long as the condition remained in force was not bound to deliver any supplemental abstract of title afterwards acquired. *Id.*

Quare, whether the benefit of the condition would not in equity be forfeited by a vendor, who designedly delivered an imperfect abstract of the title, which he had at the time of delivering it. *Id.*

13. The purchaser of shares in a mining company is not entitled to a regular abstract of the title of the mines themselves, as if he were purchasing a share in the land in which they are worked; but he is entitled to such evidence of the constitution of the company, and of the nature of the title under which the

mines are worked, as will show that the subject matter of the purchase is what it professes to be, and that the proposed form of transfer to him will give him a valid title to the shares. *Curling v. Flight*, 2 Ph. 613; 17 L. J., N. S., Ch., 359; 12 Jur. 423. Varying 6 Hare 41; 17 L. J., N. S., Ch., 79; 12 Jur. 91.

1. Upon the death of one of two partners intestate, the personal representatives of the deceased partner agreed to sell his moiety of the real property of the partnership to the surviving partner, and at the same time stipulated that they would furnish him, at their own expense, with an abstract of their title to that moiety:—Held, that they were bound to furnish the usual abstract of title, and not merely the letters of administration under which they acted, in relation to the intestate's personal estate. *Morris v. Kearsley*, 2 Y. & Coll. 139.

2. The defendant sold and conveyed to the plaintiff some undivided shares in various properties. Disputes afterwards arose as to what shares had been purchased. They agreed to settle all these disputes, and signed a written agreement that the plaintiff should pay the defendant 9,500*l.*, and that the defendant should execute such deeds as the plaintiff should require for the conveyance of the estates. Upon a bill for specific performance:—Held, that the defendant was not bound to deduce any title to the property. *Godson v. Turner*, 15 Beav. 46.

3. Under the usual reference as to title, a good title is made out when it is proved, but is first shown when the facts necessary to make it out are specifically alleged on the abstract, and are within a vendor's power to prove. *Parr v. Lovegrove*, 4 Drew. 170; 4 Jur., N. S., 600; 6 W. R. 201, 709.

A title is first shown when the abstract states all the matters which, if proved, make a good title. *Ib.*

A title is made when the matters are proved. *Ib.*

Where a title commenced by a general devise and seisin, and was only proved by a deed more than sixty years old, reciting the seisin, and there was ground to assume that the vendor had deeds earlier than those on the abstract:—Held, the purchaser was entitled to inspection of those deeds, if in the vendor's possession, but not to have them in the abstract. *Ib.*

Quere, whether a purchaser is generally entitled to inspection of deeds earlier than a sixty years' title. *Ib.*

4. Distinction between showing a good title on the abstract and verifying it. *Sherwin v. Shakespeare*, 17 Beav. 267.

5. Even before the 22 & 23 Vict., c. 35, s. 24, a vendor was not justified in suppressing an equitable incumbrance, although it might have been subsequently discharged. *Drummond v. Tracy*, 1 Johns. 608; 6 Jur., N. S., 369; 29 L. J., Ch., 304; 8 W. R. 207. See also *Smith v. Robinson*, 13 L. R., Ch. D., 148; 49 L. J., Ch., 20; 41 L. T. 405; 28 W. R. 87.

6. Conditions of sale provided, that requisitions upon title should be delivered within a certain time; and in default, that all objections should be deemed to be waived. The purchaser did not deliver any requisitions. Upon a bill by the vendor for specific per-

formance, the defence was, that no sufficient abstract had been delivered:—Held, that the onus lay upon the purchaser to show that the abstract was imperfect; and, in the absence of any evidence, a decree was made for specific performance, with a reference to chambers to settle the conveyance in case the parties differed. *Ward v. Ghymes*, 9 Jur., N. S., 1097; 11 W. R. 794; 8 L. T., N. S., 782.

7. The delivery of an abstract is the furnishing by a vendor of a document which contains with sufficient fulness the effect of every instrument which constitutes part of his title.

Oakden v. Pike, 11 Jur., N. S., 666; 34 L. J., Ch., 620; 13 W. R. 673; 12 L. T., N. S., 527.

8. A vendor is bound to disclose every fact within his knowledge relating to his title. Where a vendor has knowingly suppressed a defect in title, the Court will not allow him to force the title upon the purchaser, although in the conditions of sale he has employed general words large enough to include the defect. *Edwards v. Wickwar*, *Re Brayne*, 35 L. J., Ch., 48; 14 W. R. 79; 13 L. T., N. S., 428.

9. Where an abstract of title shows a good equitable title in the vendor, with power to get in the legal estate under the Trustee Acts or otherwise, it is unnecessary for the abstract to show the devolution of the legal estate. *Camdenell and South London Building Society v. Holloway*, 13 L. R., Ch. D., 754; 49 L. J., Ch., 361; 41 L. T. 752; 28 W. R. 222.

10. Wherever there is a sale by the Court, it is a necessary part of the title to show that the Court has jurisdiction to sell; and the vendor, though he may by his conditions protect himself from producing the pleadings themselves, must set forth in his abstract so much of the proceedings in the suit as is necessary to show that the Court had such jurisdiction. *Waters v. Waters*, 36 L. J., Ch., 195; 15 W. R. 191; 15 L. T., N. S., 406.

III. VERIFICATION.

See also XVI. *post*.

1. *In General*, 7198.
2. *Proof by Recitals*, 7199.
3. *Proof of Identity*, 7200.
4. *Proof of Pedigree*, 7201.
5. *Proof of Seisin*, 7201.
6. *Will. Probate or Establishment of*, 7202.

1. In General.

11. Bill by a purchaser praying specific performance upon the terms of the vendor deducing a good title, at her own expense, in the ordinary way, dismissed, the Court being of opinion, upon the construction of a series of letters, and upon the fact of the abstract of title having been delivered to the purchaser in the first instance, that the vendor entered into the negotiation only upon this footing, namely, that she should deliver an abstract of title, and verify it so far as she had the means in her possession at her own expense, but that the purchaser, if upon perusal of the abstract he were satisfied with the title, should be at the expense of completing its verification. *Thomas v. Blackman*, 1 Colly. 301.

1. Facts stated in conditions of sale as the ground of the conditions must be proved. *Symons v. James*, 1 Y. & Coll. C. C. 487.

2. *Semble*, the acceptance of a title by a joint purchaser is no answer to the right of the other purchaser to have a good title proved. *Mackreth v. Dunn*, 10 L. J., N. S., Ch., 367.

3. Where the vendor of mining shares filed a bill for specific performance of the contract, insisting that he was not bound to give other evidence of his title to the shares than attested extracts from the cost books or registers of the mines, and alleging the refusal of the defendant to accept such evidence, but not going on to allege that the plaintiff could not give other evidence:—Held, on demurrer by the defendant, that as the plaintiff was not precluded from giving other evidence, if necessary, it must be overruled. *Curling v. Flight*, 5 Hare 242.

4. Distinction between showing a good title on the abstract and verifying it. *Sherwin v. Shakespeare*, 17 Beav. 267.

5. A title is first shown when the abstract states all the matters which, if proved, make a good title. *Parr v. Lovegrove*, 4 Drew. 170; 4 Jur., N. S., 600; 6 W. R. 201, 709.

A title is made when the matters are proved. *Ib.*

A vendor can make a good title where a good title appears on the face of the abstract, and where he is able and willing to prove the deeds and facts alleged in the abstract. The showing a good title is the delivery of the abstract, where the vendor is in a condition to prove everything necessary to establish his title, appearing on the face of the abstract. *Ib.*

A contest as to what species of evidence is necessary, and the non-production in the first instance of the evidence ultimately required, is not such a refusal to produce evidence, as that until such evidence is produced a vendor can be said not to have shown a good title. *Ib.*

Whatever a vendor puts upon his abstract he is bound to prove and verify. *Ib.*

2. Proof by Recitals.

6. In a vendor's suit for specific performance, the abstract showed a seisin in fee in B. in 1798, and a devolution of the title both legal and equitable from him to the plaintiff, and uninterrupted enjoyment thereunder. In one of the deeds abstracted, dated in 1815, there was, however, a recital of seisin in A. in 1779, and that by mesne conveyances the premises came to B. The deeds recited were missing, but affidavits were produced verifying extracts from the account books of deceased solicitors who had been concerned in framing the recited deeds, in which charges were made for preparing those deeds, and for attending to witness their execution:—Held, that the recital coupled with the extracts was good secondary evidence of the execution and contents of the missing deeds. *Moulton v. Edmonds*, 1 De G. F. & J. 246; 6 Jur., N. S., 305; 29 L. J., Ch., 1818; 8 W. R. 153.

The abstracted deed of 1815 also contained recitals of deeds purporting to be mortgages

of the premises by B., and subsequent reconveyances to him by the mortgagees. These deeds were also missing, but were abstracted in an abstract produced to the purchaser, which had been made out and examined by a conveyancer in 1815, and from which the recitals in the deed of 1815 had been prepared:—Held, that the abstract of 1815 was sufficient secondary evidence of the execution and contents of the missing deeds. *Ib.*

7. Where a deed, dated sixty years back, contains a recital of the creation of a mortgage term, and a subsequent assignment of it in trust to attend the inheritance, and the term is not subsequently noticed in the title, it will be presumed to have been surrendered; and it is no objection to the title that the vendor cannot produce the deed creating the term, nor the assignment of it. *Townsend v. Chamberlorn*, 1 Y. & J. 538.

8. By a deed executed in 1858 (after the death of the settlor), the trustees conveyed the property to a purchaser for value. This deed contained a recital of the deed of 1845, and a recital that the trustees "in pursuance of the trust for sale conferred on them" by that deed had caused the property to be put up for sale:—Held, that by virtue of s. 2 of the Vendor and Purchaser Act 1874, this recital, not being shown to be inaccurate, was conclusive evidence that the deed of 1845 had not been revoked either by an exercise by the settlor of the power of revocation, or by a sale of the property by him for value during his lifetime. *Re Marsh and Granville (Earl)*, 24 L. R., Ch. D., 11; 48 L. T. 947; 31 W. R. 845. Affirming 62 L. J., Ch., 189; 47 L. T. 471; 31 W. R. 239.

9. Under the Vendor and Purchaser Act 1874 (37 & 38 Vict., c. 78, s. 2), a recital in a conveyance more than twenty years old, that the vendor was seised in fee-simple, is sufficient evidence of that fact, and no prior abstract of title can be demanded except so far as the recital shall be proved to be inaccurate; and in such cases a forty years' title is not required. *Bolton v. London School Board*, 7 L. R., Ch. D., 766; 26 W. R. 549; 47 L. J., Ch., 461; 38 L. T., N. S., 277.

10. In 1840 property was mortgaged to W. in fee, there being nothing in the mortgage deed to show that he was not the beneficial owner of the mortgage money. He died in 1842, having by his will devised and bequeathed his real and personal estate to three trustees (of whom his wife was one), on trusts for the benefit of his wife and children, and having appointed the same three persons executors. He also devised and bequeathed his trust and mortgaged estates to the same three persons, subject to the trusts and equities affecting the same respectively. The widow alone proved the will, and alone acted as trustee. The other two trustees disclaimed the trusts. In 1854 the widow obtained a decree absolute foreclosing the mortgage. In 1865 she, by a deed endorsed on the mortgage deed, conveyed the property, without receiving any pecuniary consideration for it, to K., C., and B., in fee, as joint tenants at law and in equity. The conveyance contained a recital that the testator held the mortgage money on an account under which K., C., and B. were then solely entitled thereto, as was thereby acknow-

ledged, whereby the widow, as trustee under the testator's will, was trustee only of the property for K., C., and B., and they had requested her to convey it to them. On a subsequent sale of the property by persons who had purchased it from K., C., and B., the purchasers required evidence of the truth of the recital in the deed of 1865 that K., C., and B. were entitled to the mortgage money. And, assuming that the testator was a trustee of the mortgage money, the purchasers required the vendors to show that the property sold was comprised in the trust; that K., C., and B. were duly appointed to succeed the testator in the trust; and that they had an effectual power of sale and of giving a receipt for the purchase money:—Held, that it would be contrary to the practice of the Court to go behind a recital evidently framed for the purpose of keeping notice of trusts off the conveyance; that the requisitions need not be answered; and that a good title had been shown by the vendors. *Re Harman and Uxbridge & Rickmansworth Railway Co.*, 24 L. R., Ch. D., 720; 52 L. J., Ch., 808; 49 L. T. 130; 31 W. R. 857.

See also PRACTICE (EVIDENCE), XXXV. x. 9.

3. Proof of Identity.

1. By the conditions of sale, no further evidence of identity was to be required than what was afforded by the abstract and the documents therein abstracted. The descriptions in the documents differed amongst themselves and from the description in the particulars of sale:—Held, that the purchaser was entitled to have further proof of the identity. *Flower v. Hartopp*, 6 Beav. 476; 12 L. J., N. S., Ch., 507; 7 Jur. 613.

2. A clause in an agreement for purchase, that the purchaser is not to require any further proof of identity than that given by the title-deeds, exempts the vendor from producing further evidence; but he cannot force the title on the purchaser unless the evidence is complete upon the deeds. *Curling v. Austin*, 2 Dr. & Sm. 129; 10 W. R. 682.

3. Identity is as much matter of title as devolution. *Brown v. Wales*, 15 L. R., Eq., 142.

4. Contract for the sale of the borough, lordship, and manor of H., with rights, royalties, members, and appurtenances, and all the messuages, lands, tenements, and other hereditaments, and their rights, members, and appurtenances, to the said borough, lordship, and manor belonging, as set forth and described in a particular referred to in the contract; the vendors derived their title under a conveyance in 1809, by the general description of the borough, lordship, and manor of H., with all and singular the rights, and members, and appurtenances thereunto belonging or appertaining, with a reference to preceding deeds, containing the same description, through which the title was traced in the same general manner to 1744; the purchaser objected that the identity of the several lands mentioned in the particular as forming part of the manor was not made out, and it appeared that some of them had been purchased since 1744, and therefore could not pass under the ancient

and general description; the vendors thereupon produced abstracts of the title of such lands, and showed by stewards' books that the lands, ever since they had been purchased, had been annexed to and treated as part of the manor, and contended that they passed under the general words "appertaining or belonging" in the conveyance of 1809; to obviate the difficulty they also obtained a confirmation of that conveyance, with a declaration that the lands in question were intended to be passed by it under the general words. Exceptions to the Master's report of a good title were overruled, principally, as it should seem, on the grounds of the deed of confirmation; the Court declaring, that if it were of opinion that a good title could be made, it would hesitate to decree a specific performance, unless that deed was delivered to the purchaser. *Townsend v. Champenore*, 1 Y. & J. 538.

5. A. B. became the purchaser of a mansion-house and park under conditions of sale, which stated that the whole property was freehold except eight acres which were copyhold, but undistinguished except as to not including any of the buildings. The abstract of title having been delivered, and discussions thereon having taken place which raised difficulties in the way of completing the purchase, a supplemental agreement was entered into, detailing what requisitions as to title, etc., should be complied with. Among these requisitions was one in the following words: "Declaration of identity of lands mentioned in deeds to those now sold":—Held, on a bill filed by the vendor for specific performance, that a supplemental agreement was a substitution for the original contract, and that A. B. was not entitled to demand that the vendor should distinguish the freehold from the copyhold parts of the premises, so as to show that the latter did not include any of the buildings. *Dawson v. Brinkman*, 3 Macn. & G. 53. Affirming 3 De G. & Sm. 376.

6. A purchaser of lands under the description of "partly freehold and partly leasehold" is entitled to have the boundary dividing the freehold from the leasehold defined by reference to the instruments of title, or shown to be capable of being so defined; but the circumstance that the property is described in the agreement as partly freehold and partly leasehold, the boundaries distinguishing the one from the other not being therein, and having not theretofore been clearly defined, is not an objection to a decree for specific performance. *Monro v. Taylor*, 8 Hare 61. Affirmed 3 Macn. & G. 713; 21 L. J., N. S., Ch., 525.

The uncertainty in the boundary or extent of property which arises, not from an instrument being incapable of legal construction, but from its not having theretofore received any such legal construction, is not a ground for refusing specific performance of a contract to sell such property. *Id.*

If the boundary of property contracted to be purchased can be certainly defined, whether the extent be more or less, the purchaser will be bound by the contract; but whether he will be so bound if the boundary depends on a plan or instrument which is so vague as not to admit of legal construction, *quære. Id.*

A contract by a lessee under an ecclesiastical

corporation, whilst he was in treaty with the corporation for the renewal of his lease, to sell the leasehold premises, does not necessarily throw upon him the obligation of procuring the renewal of the lease at his own expense, for the benefit of the purchaser; whether, if the vendor after the contract procure such renewed lease, the purchaser is not entitled to take it without bearing the expense of the renewal, *quære*. *Id.*

Although a good title was not shown by the vendor until during the pendency of the reference, the Court held that the purchaser must, nevertheless, bear the costs of the suit, it being manifest that, if the particular evidence which completed the title had been produced before the bill was filed, yet the suit would not have been avoided. *Id.*

1. Where, upon a contract for the sale of an estate, a separate and distinct contract is made for the sale of the timber upon it, the Court will not enforce the latter contract, unless the vendor can give the purchaser such possession and dominion over the timber as will entitle him to fell and remove it; but if an entire contract be made for the sale both of the estate and the timber (notwithstanding the purchase money is made up of distinct sums for each), the vendor is only bound to make out his title to the land according to the contract, and the title to the land is the title to the timber upon it. *Crosse v. Lawrence*, 9 Hare 462; 21 L. J., N. S., Ch., 889; 16 Jur. 142.

A contract for the purchase of copyhold land at a certain price, and the timber upon it at a specified valuation, enforced as one entire contract, although the vendor could not show any custom in the manor or licence from the lord enabling the tenants of the manor, or himself, or his assigns, to fell the timber. *S. C.* 9 Hare 469; 21 L. J., N. S., Ch., 889; 16 Jur. 142.

The purchaser of undistinguished freehold and copyhold land and timber under a single and entire contract must be considered as estimating, in the price he pays for the land, the price he pays for the timber. *S. C.* 9 Hare 467; 21 L. J., N. S., Ch., 889; 16 Jur. 142.

2. A lessee, being in possession of a lease of certain messuages, granted an underlease of one (No. 7) to A., who subsequently assigned it to B. The lessee, by his will, demised the leaseholds to trustees, who, under an order of the Court, sold *inter alia* No. 7 to a purchaser, in the particulars of sale No. 7 being described as leased to A. On investigating the title, it appeared that the parcels set out in the underlease to A. were, by a clerical mistake, the parcels of No. 6. The trustees, after the sale, obtained an order of the Court to correct this mistake, by authorising an assignment to the tenant of No. 6, and a new underlease, with proper parcels, to the tenant of No. 7; and the Court overruled an objection to the title by the purchaser of No. 7, and compelled him to complete his purchase. *Grissell v. Peto*, 2 Sm. & G. 39; 18 Jur. 591.

3. Where there was a doubt as to whether part of lands agreed to be sold was included in a particular devise, the Court, though disposed to solve the doubt in favour of the vendors, would not, under its discretionary jurisdiction in specific performance, compel the purchaser to accept the title. *Ashton v. Wood*, 3 Jur., N. S., 1164.

4. Proof of Pedigree.

4. Evidence as to the heirship of daughters. *Hemming v. Spiers*, 15 Sim. 550; 11 Jur. 294.

5. A conveyance to a purchaser in 1793, from persons residing in Bermuda, of lands then in their possession, and to which, subject to an outstanding but satisfied mortgage term, they claimed title, under an entail created in 1732, through a descent recited in the deeds. A subsequent assignment of the mortgage term from the mortgagee to the purchaser, and an uninterrupted enjoyment under his conveyance, will not enable him to make a good title, if unsupported by extrinsic evidence of the pedigree recited in the deeds, or of possession prior to 1793, conformably to that pedigree. *Fort v. Clarke*, 1 Russ. 601.

6. A vendor making title as heir is not bound to produce affirmative evidence in his possession that the ancestor from whom he traces descent took as purchaser, but may rely on the statutory presumption, until some proof to the contrary is adduced. But he is bound to disclose any matters within his knowledge tending to rebut the presumption that his ancestor took by purchase. *Dorling v. Claydon*, 1 Hem. & M. 402.

7. B. entered into a contract for the purchase of an estate, which stated that "N., the vendor, in 1848, entered into possession of the receipts of the rents of the estate, claiming as heir-at-law to his cousin, the last owner; that a copy of the pedigree on which such claim was based would be furnished to B., who should admit the right of N. as such heir-at-law, and should not require any further evidence of marriages, births, failure of issue, intestacies, survivorships, or any other matters of pedigree than such as were in the possession of N., he executing to B. a bond of indemnity against the claims of all other parties to the lands as heir-at-law of N., deceased, for the next seven years." A pedigree was furnished, but it failed to show that N. was the heir-at-law; and the purchaser refused to complete:—Held, that the purchaser was bound to admit the title of N. *Nash v. Browne*, 9 Jur., N. S., 431; 32 L. J., Ch., 148; 7 L. T., N. S., 667.

5. Proof of Seisin.

8. Where a title of more than sixty years commences with a will containing a general devise, and there is a subsequent deed of covenant by the devisee in fee to produce deeds of earlier date, that will and deed, coupled with continuous possession ever since, is sufficient evidence of seisin. A title more than sixty years old commenced by a general devise; a deed more than sixty years old recited the seisin of the devisor:—Held, that that, coupled with the continued possession, was sufficient evidence of seisin. *Parr v. Lovegrove*, 4 Drew. 170; 4 Jur., N. S., 600; 6 W. R. 201.

9. Where a condition of sale provided that the vendors should not be required to commence the title prior to the will of E., but that the purchaser should be satisfied with a declaration of the seisin of E. in fee-simple of the property, free from incumbrances for a certain period:—Held, that the declaration must strictly comply with the terms of the

condition. *Nott v. Riccard*, 2 Jur., N. S., 1038; 25 L. J., Ch., 618.

1. A father, who died in 1760, made a general devise of freeholds and copyholds to his daughter in tail. His grandson was in 1783 admitted to the copyholds as tenant in tail, and was proved to have been in 1833 in possession of the copyholds and of certain freeholds then held therewith. He made a will purporting to devise these freeholds and the copyholds, and died in 1840. His brother and heir in 1841 executed a deed purporting to be for the purpose of barring any estates tail in the freeholds, whereby he conveyed the freeholds to the devisee under the will, and covenanted to surrender the copyholds. This deed was not enrolled, but the devisee was admitted to the copyholds. The devisee died intestate, and his brother succeeded him as his heir, and made a will purporting to devise the freeholds and the copyholds in fifths, the plaintiff taking one-fifth and the defendant another fifth. The defendant afterwards agreed to buy the plaintiffs one-fifth, and a conveyance was made by her conveying to the defendant her one-fifth and all her estates and shares in the land, neither of them being aware of the earlier title. Four years afterwards the deed purporting to bar the estate tail was found, and thereupon the defendant requested the plaintiff, who was heir in tail of the original testator, to confirm the sale, and sent to her the draft of a deed reciting that the original testator was seised in fee of the freeholds and devised them, and that she was tenant in tail. She then filed a bill to have her conveyance set aside and to be declared tenant in tail of the freeholds.—Held, that the conveyance by the plaintiff of the fee in the whole when she had intended to convey one-fifth only might embarrass her in proceeding at law, and that the Court must determine the question; but that the plaintiff was bound to show that the original testator was seised in fee of the freeholds claimed by her, and that as she had not done so, her bill must be dismissed; and that under the circumstances, the sending by the defendant of the draft deed stating that the original testator was seised in fee was not an admission by the defendant of the fact. The defendant had conveyed his estate to mortgagees, and that they, as purchasers for valuable consideration without notice, could not be interfered with. *Bulley v. Bulley*, 9 L. R., Ch., 739; 22 W. R. 779; 30 L. T., N. S., 848; 44 L. J., Ch., 79.

2. Under the Vendor and Purchaser Act 1874 (37 & 38 Vict., c. 78), s. 2, a recital in a conveyance more than twenty years old, that the vendor was seised in fee simple, is sufficient evidence of that fact, and no prior abstract of title can be demanded except so far as the recital shall be proved to be inaccurate; and in such cases a forty years' title is not required. *Bolton v. London School Board*, 7 L. R., Ch. D., 766; 26 W. R. 549; 47 L. J., Ch., 461; 38 L. T., N. S., 277.

See also SEISEIN.

6. Will. Probate or Establishment of.

3. Where the title of an estate was derived from a person who entered as heir, under the

impression that his ancestor's will was void, a purchaser has a right to production of the will, or evidence of its contents. *Stevens v. Guppy*, 2 Sim. & S. 439; 4 L. J., Ch., 59.

4. Where a title depends on the words of a will, this is as properly determinable in equity as by a judge and jury at *Nisi Prius*. *Tanner v. Wise*, 3 P. W. 296; Ca. temp. Talb. 284.

5. A devisee obtains a decree to hold and enjoy against the heir, who it was supposed had suppressed the will; pending this suit, a third person gets an assignment of mortgage made by the testator, and then purchases the equity of redemption of the heir with notice of the will. The Court would not admit the purchaser to dispute the justness of the decree, nor to try at law whether the will was not cancelled by the testator. *Finch v. Newnham*, 2 Vern. 215.

6. In an abstract of a vendor's title, a will which formed part of it was represented as having been proved in the Spiritual Court, which afterwards appeared not to have been done. The purchaser filed his bill, praying that the defendants might either be decreed to prove the will, or that it might be deposited in the hands of the Master for safety. It appeared that two other persons were interested under the will, and they were added as parties, and, they not objecting, the will was directed to be deposited with the Master; the vendors having, by their misrepresentation, occasioned the suit, were ordered to pay all the costs. *Harrison v. Coppard*, 2 Cox 318.

7. One articles to buy lands, and the title is under a will, not proved in equity against the heir, yet, in some cases, equity will compel the purchaser to accept the title. *Cotton v. Wilson*, 3 P. W. 190.

8. An agreement having been entered into for the sale of certain securities upon tolls within the diocese of Lincoln, it appeared from the abstract of title that the will of one in the series of owners, through whom the property passed to the vendor, had been proved only in the Consistory Court of the Bishop of Lincoln. Upon a bill filed by purchaser against vendor, the Court declined either to force the title on the purchaser or to order the vendor to procure probate in the Prerogative Court of the Archbishop of Canterbury. *Williams v. Bland*, 2 Colly. 575; 15 L. J., N. S., Ch., 351; 10 Jur. 404.

9. In a suit for specific performance by a vendor whose title was derived under a suspicious will, it appeared that the heir had failed in an action of ejectment, and afterwards, on a motion for a new trial, the Master reported in favour of the title, and the Vice-Chancellor confirmed the report, and decreed specific performance, without requiring the plaintiff to establish the will. But the Lord Chancellor, on appeal, reversed that decision, holding that it was more consonant to the principles of this Court that the validity of the will in such a case should be conclusively determined, if possible, between the vendor and the heir, than that it should be left to be litigated between the heir and the purchaser after the purchase money should have been paid. *Grove v. Bastard*, 2 Ph. 619; 17 L. J., N. S., Ch., 351; 10 Jur. 385.

10. A testator, in 1836, devised all his real estate to his wife, and appointed her executrix.

He afterwards purchased an advowson, and died. The widow proved this will, and sold the advowson. An objection being made that the after-purchased property did not pass, a search was made, and another testamentary instrument of 1847 was found, purporting to confirm a will of 1836:—Held, that the purchaser was entitled to the same amount of proof of the codicil of 1847 as would be necessary to establish it against the heir, and that it ought to be proved in the Ecclesiastical Court. *Weddall v. Nixon*, 17 Beav. 160; 17 Jur. 642; 22 L. J., Ch., 939.

1. A purchaser of real property, the title to which is derived under a will, is not entitled to have the will established, or to have the concurrence of the testator's heir in the conveyance to him, unless some reasonable ground exists for doubting the validity of the will. *McCulloch v. Gregory*, 3 Kay & J. 12.

On a sale by parties claiming under a devisee named in a will, which has been unsuccessfully disputed in the Ecclesiastical Court, not by the next-of-kin or heir-at-law, but by parties claiming under a prior will, the purchaser has not in general a right to have the will established as against the heir. 8 C. 2 Jur., N. S., 1134.

Such a purchaser (the vendor having bought in the alleged rights, if any, of the heir-at-law, and being therefore in a position to convey as in the case of an intestacy, but not having contracted to sell otherwise than as devisee) has no right to put such vendor to any proof of the heirship of the party whose assumed rights of inheritance had been so brought in. *Id.*

Notwithstanding the above, *semble*, that in a proper case of suspicion being made out against a devisee, the Court will assist a purchaser in requiring the suspected will, under which such devisee claims, to be established against the heir. *Id.*

IV. CONDITIONS RESPECTING.

1. *When Misleading. In General*, 7203.
2. *Conditions as to Commencement of Title*, 7204.
3. *Other Special Conditions*, 7205.
4. *Rescission by Vendor under Special Conditions as to Title*, 7207.
5. *On Sale by Fiduciary Vendors*. See MORTGAGE, XVI. I. 6—POWER, XXI. VIII. 1.
6. *On Sale of Leaseholds*. See XXII. I. 2 *post*.

1. When Misleading. In General.

2. *Quare*, whether a vendor of a doubtful title is justified in selling under the usual conditions; that all objections not sent in within a limited time are waived for rescinding the contract, and that no one but the vendor is to be required to join; or in not putting in his abstract matter tending to show that doubts had been raised. *Warde v. Dickson*, 5 Jur., N. S., 698. S. C. *nom. Warde v. Diaon*, 28 L. J., Ch., 315.

Under such conditions a purchaser is not prevented from taking an objection which he has discovered *aliunde* after the time limited for taking objections. *Id.*

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3. Conditions of sale which state certain facts, and represent that certain acts were done in error, and that the vendors could sell an absolute interest, will not preclude a purchaser from requiring proof of the title. *Johnson v. Smiley*, 22 L. J., Ch., 826; 17 Beav. 223; 1 W. R. 440; 1 Eq. Rep. 397.

4. A condition of sale which does not fairly state the objection to the title against which it is directed is not binding on a purchaser. *Beioley v. Carter*, 4 L. R., Ch., 230; 17 W. R. 300.

5. Conditions of sale must express in distinct terms a difficulty of title, and therefore when a condition set out facts from which the conclusion in law was that the vendors showed no title, but this conclusion was one which would not occur to an ordinary purchaser, and was not stated in the condition:—Held, that the sale could not be enforced. *Williams v. Wood*, 16 W. R. 1005.

6. The defendant having sold and conveyed land to the plaintiff, suggesting that he had a title, and it afterwards appearing that he was not entitled to part, the same being an encroachment from a common, though no eviction had happened or was threatened, a bill lies to set aside the conveyance, and for a return of the purchase money, and all expenses. *Edwards v. McLeay*, Coop. 308. Affirmed 2 Swan. 287.

7. A condition of sale which refers to a document as affecting the title and offers an opportunity of inspecting it is not misleading, unless it so states the document as to lead to the belief that all that is material in it is disclosed. *Blenkorn v. Penrose*, 43 L. T. 668; 29 W. R. 237.

8. A condition of sale is bad as misleading, (1) if it requires the purchaser to assume what the vendor knows to be false; (2) if it states that the state of the title is not accurately known when in fact it is known to the vendor. *Re Banister, Broad v. Muntton*, 12 L. R., Ch. D., 131; 48 L. J., Ch., 837; 27 W. R. 826; 40 L. T. 828.

At a sale of the fee simple of a farm under the order of the Court there was a condition that a declaration by the tenant should be produced to the purchaser that the farm was taken by him from E. in October 1835, and had since been held by him of her and those claiming under her in succession. The condition provided that the purchaser should be satisfied with the title so made, without the production of any document previous to the will of E. in 1860, who should be assumed to have been seized of the property in fee simple in possession, free from incumbrances, in October 1835, and up to and at her death. The condition further stated that it was not accurately known, and could not be satisfactorily explained, how she acquired the property, and it was expressly stipulated that no other title than as above should be acquired or inquired into. The purchaser, after an abstract of title in accordance with the condition had been furnished to him, discovered that E. was a mortgagee in possession, and had no title against the mortgagor except under the Statute of Limitations by adverse possession commencing in 1884; and that her executor in 1861 had paid legacy duty on the mortgage debt, and not succession duty on the estate.

These facts were well known to the vendor:—Held (reversing the decision of Fry, J., on fresh evidence), that the condition of sale was a misleading condition, and that the purchaser was entitled to have a good holding title notwithstanding the condition, or else to rescind his contract. *Id.*

The conveyancing counsel of the Court must be treated as the agent of the vendor as between the vendor and the purchaser. *Id.*

Where the conditions on the face of them purport to give only a good holding title, the purchaser on being relieved from them is not entitled to have more than a good holding title. *Id.*

1. B. entered into a contract for purchase of a freehold estate from H. One of the conditions of sale was, that the title to the beneficial ownership to the property should commence with the will of C., dated in 1829, and the purchaser should assume that C. was at his death beneficially entitled to the property in fee simple, free from incumbrances. On an investigation of the title it appeared that C. had in 1824 contracted for the purchase of the estate, but the vendor not at that time being able to make a good title, C. took possession and invested the purchase money, and it was not till long after the death of C. that the title was made out and the purchase money paid:—Held, in a suit by H. for specific performance of the contract, that the statement in the conditions of sale was erroneous and misleading, and was consequently not binding on the purchaser, and the bill was dismissed with costs, H. having declined to take an open reference as to title. *Harnett v. Baker*, 45 L. J., Ch., 64; 20 L. R., Eq., 50; 32 L. T., N. S., 382; 23 W. R. 559.

See also Following Subdivisions.

2. Conditions as to Commencement of Title.

2. Where the conditions of sale stated that the premises were acquired under an award of commissioners under an Inclosure Act, and that the abstract would not contain any earlier title than such award:—Held, that the award made in general terms must be *prima facie* evidence of the lands being freehold, and that the purchaser had no right to inquire as to the title to the lands given by vendor in exchange. *Cattell v. Corral*, 4 Y. & Coll. 228.

3. A. entered into a contract with B. for the purchase of B.'s interest in certain mud lands for 3,050*l.*, in the event of an Act of Parliament, which was to be applied for in order to reclaim them, being obtained. The contract provided, that B. should be called upon to produce only the title from his vendor (C.) to himself. C. was one only of four claimants of the mud lands, but A. was aware of this circumstance when he entered into the contract. The Act was passed, and A. took possession of the mud lands thereunder, and commenced operations to reclaim them, but he refused to complete his contract, upon the ground of there being conflicting claims to the mud lands. Upon a bill by A. against B. for specific performance of the contract:—Held, that evidence *abundante* to show want of

title in C. was not admissible; and specific performance was decreed against A., on the ground that his contract with B. was for the purchase of such right, title, and interest as the vendor might have under C. *Hume v. Pocock*, 1 L. R., Eq., 423; 12 Jur., N. S., 20; 35 L. J., Ch., 662; 14 W. R. 495; 14 L. T., N. S., 127. Affirmed on the latter ground, 1 L. R., Ch., 379; 12 Jur., N. S., 445; 35 L. J., Ch., 731; 14 W. R. 681; 14 L. T., N. S., 386.

4. In a contract for the sale of leasehold hereditaments, it was agreed, that the vendor should produce a good and marketable title commencing from the freeholder, but that no title should be called for prior to the lease. In the course of the investigation of the title, it was stated, that the lease had been granted in pursuance of a prior contract, the benefit of which had been the subject of a security, which was by the same statement represented as having been satisfied:—Held, first, that the purchaser was entitled to investigate the dealings with the contract prior to the lease being granted; secondly, that stipulations as to title in a contract between a vendor and a purchaser are to be construed favourably to the latter, though not contained in conditions of sale exclusively prepared by the vendor. *Rhodes v. Ibbetson*, 4 De G. M. & G. 787; 23 L. J., Ch., 459; 2 Eq. Rep. 76.

5. A good title may be made to an estate, although the origin cannot be shown by any deed or will; but it must be shown that there has been such a long uninterrupted possession, enjoyment, and dealing with the property, as affords a reasonable presumption that there is an absolute title in fee-simple. *Cottrell v. Watkins*, 1 Beav. 361.

6. In 1857, in suits in chancery, it had been certified that a good title could be made to certain estates, and the estates were afterwards sold under orders of the Court, subject to a condition that the title should not be required prior to a private Act of Parliament which had vested the estates in trustees for sale, and which recited the previous certificate of good title made by the Court of Chancery:—Held, that the title up to the period for which it had been certified might be accepted without further examination as indefeasible for registration. *Re Watney*, 38 L. J., Ch., 57.

7. Special conditions of sale, limiting the extent of title:—Held, to be no excuse for a purchaser not insisting on the production of a deed beyond those limits of which he had notice. *Peto v. Hammond*, 30 Beav. 495.

8. Freehold property was sold in 1877 subject to a condition that the title should commence with a deed dated the 30th December 1867, and that no earlier or other title should be required or inquired into by the purchaser:—Held, that this condition did not preclude the purchaser from insisting on an objection to the prior title which was not discovered through any inquiry made by him, but was accidentally disclosed by the vendor. *Smith v. Robinson*, 13 L. R., Ch. D., 148; 49 L. J., Ch., 20; 41 L. T. 405; 28 W. R. 37.

But held, that, in an action by the vendor for the specific performance of the contract, the purchaser was only entitled to an inquiry whether the vendor could make a good holding title to the property. *Id.*

Where there is a condition of sale that no title to the property sold shall be shown before a certain date, *semble*, that s. 24 of the 22 & 23 Vict., c. 35, does not apply to the concealment of an incumbrance prior to that date. *Ib.*

1. The defendant purchased from a railway company land over a tunnel, which, not being "superfluous," the company had no power to sell, and the plaintiff contracted to purchase the land from the defendant as freehold building land. One of the conditions of sale was that the title should commence with the conveyance from the company; another, that the purchaser should not require the production of, or investigate or make any objection or requisition in respect of, such conveyance; and another, that the purchaser should send his objection, if any, to the title within seven days from the delivery of the abstract. The plaintiff declined to complete after the expiration of the seven days, and sued for the deposit:—Held, that the deposit could not be recovered. *Rosenberg v. Cook*, 8 L. R., Q. B. D., 162; 51 L. J., Q. B., 170; 30 W. R. 344.

2. Though a condition of sale that the title shall commence with a certain indenture leaves it open to the purchaser to show *aliunde* that the parties purporting to convey were not competent to do so, yet if this is not shown, their competency to convey must be assumed, and this where the conveyance was by a corporation only having power to convey under certain circumstances not shown to exist. *Osborn v. Osborn*, 18 W. R. 421.

3. Upon the sale of an estate, one of the conditions was that the title to the beneficial ownership should commence with the will of A. C., and the purchaser must assume that A. C. was at his death beneficially entitled to the property in fee simple free from incumbrances. A. C. had contracted before his death for the purchase of the property, but it was not till many years after his death that the title was made out, the property conveyed, and the purchase money paid:—Held, that the purchaser was not bound by the condition of sale, and the vendor declining an open reference as to title, his bill for specific performance was dismissed with costs. *Harnett v. Baker*, 20 L. R., Eq., 50; 32 L. T., N. S., 382; 23 W. R. 559; 45 L. J., Ch., 64.

4. A contract entered into in 1882 for the sale of freehold estate provided that the title should commence "with an indenture dated the 18th October 1845," and made between persons whose names were mentioned, and that the earlier title should not be investigated or objected to. From the abstract of title delivered by the vendors to the purchaser it appeared that the deed of 1845 was a conveyance by a person, who purported to be the absolute owner, of freehold and leasehold property to trustees, on trust for himself for life, and after his death on trust to sell the property, and to hold the proceeds of sale on the trusts declared by a deed of even date. An express power was reserved to the grantor to revoke the trusts. The deed was a voluntary one, except for the consideration which resulted from the liability assumed by the trustees in respect to the leaseholds:—Held, that, inasmuch as the fact that the deed of 1845 was a voluntary one would influence the purchaser in determining whether he would agree to accept

a title commencing within forty years, the vendors ought to have stated in the condition of sale the nature of the deed; that the omission to state this rendered the condition a misleading one; and that the purchaser was not bound by the contract to accept a title commencing with that deed. *Re Marsh and Granville (Earl)*, 24 L. R., Ch. D., 11; 48 L. T. 947; 31 W. R. 845. Affirming 52 L. J., Ch., 189; 47 L. T. 471; 31 W. R. 239.

5. Conditions of sale, settled by the Court in 1871, provided that a conveyance on a sale made by B. in 1838 should be the root of title, that no objection or requisition should be made with respect to earlier title, and that recitals in deeds twenty years old should be conclusive evidence of the instruments recited. That conveyance purported to recite the will, but stopped short of the final gift over, thus showing a good title to the fee in B.:—Held, that a purchaser under the Court was not precluded from showing that B.'s title under the will was defective, and that he was entitled to be freed from his contract, and to get all his costs. *Elsae v. Elae*, 41 L. J., Ch., 213; 13 L. R., Eq., 196; 20 W. R. 286; 25 L. T., N. S., 927.

3. Other Special Conditions.

6. Where condition of sale was for sale of interest "under such title as vendor lately held the same, an abstract of which may be seen," etc.:—Held, that the purchaser could not object to title. *Freme v. Wright*, 4 Madd. 364.

7. A stipulation to give such a title as shall be satisfactory to the purchaser does not authorise the purchaser to make any other than the usual objections to the title. *Lord v. Stephens*, 1 Y. & Coll. 222.

8. One of the terms of an agreement was, that the contract should be void if the purchaser's counsel should be of opinion that a marketable title could not be made by a certain time. The counsel being of that opinion, a bill by the purchaser for a specific performance with a compensation was dismissed with costs; and an application afterwards made by the plaintiff that his deposit might be set off against the defendant's costs, and the surplus (if any) paid to him, was refused with costs. *Williams v. Edwards*, 2 Sim. 78.

9. A. agrees in writing with C. for the purchase of an estate, if a good title could be made. B. (a stranger) afterwards files a bill claiming part of the lands; C. buys in his claim. C. is entitled to a specific execution of the agreement. *Masters v. Cook*, Colles' P. C. 433.

10. Circumstances under which special conditions of sale precluded a purchaser from requiring evidence of the assent of executors to a bequest. *Jackson v. Whitehead*, 6 Jur., N. S., 133.

11. The conditions of sale represented that a certain deed, under which an interest was claimed in the estate, was a forgery, and that the vendor had made his affidavit to that effect, and that, therefore, the purchaser should not take any objection to the title by reason of that deed. The purchaser afterwards refused to complete the purchase,

brought an action for his deposit, and obtained a verdict, the jury declaring the deed to be genuine. A court of law having afterwards held that the purchaser was precluded from rescinding the contract, on the ground that the statement of the plaintiff turned out to be untrue, the vendor, in case he could make a good title in other respects, was held entitled to a decree for a specific performance of the contract with costs. *Cattell v. Corral*, 3 Y. & Coll. 413. And see *Corral v. Cattell*, 4 Mees. & Welsb. 734; 8 L. J., N. S., Exch., 225.

1. By the terms of a letter from the plaintiff, which was accepted and signed by the defendants, it was agreed that the "plaintiff should let to the defendants, or assign if preferred, for the longest term he could grant":—Held, that the defendants were bound to take such title as the plaintiff had at the time the agreement was made, and that under the terms of the agreement the defendants were not entitled to call upon the plaintiff to show his lessor's title. *Molloy v. Sterne*, 1 Dr. & Wal. 585.

2. Purchaser agreed to accept vendor's title "without dispute;" the purchaser afterwards objected that at the date of the agreement there was a flaw in the vendor's title, consisting of an unreleased incumbrance, which left the legal estate in the property outstanding. Upon a bill filed by the vendor for specific performance:—Held, that the purchaser was precluded, by the terms of his contract, from insisting on the objection. *Duke v. Barnett*, 2 Colly. 337; 15 L. J., N. S., Ch., 173; 10 Jur. 87.

3. If conditions of sale simply state the facts, and stipulate that the purchaser shall take such title or such interest as the circumstances detailed would confer upon him, and no other, the purchaser must accept it, whatever it may be; but if they go on to state, not as a conclusion of law from the circumstances detailed, but as a positive fact, that the vendors have power to sell the fee, the purchaser is not precluded from inquiring whether the vendors have anything to sell, as their power so to do may have arisen from separate and independent sources. *Johnson v. Smiley*, 17 Beav. 223; 22 L. J., Ch., 826; 1 Eq. Rep. 397.

A bankrupt was seised as tenant in tail in remainder of certain copyholds held of a manor in which the custom prevailed that a fine could not be levied of an estate tail until it came into possession. The commissioner, under the 65th section of the above Act, in 1832, sold by auction the estate during the life of the bankrupt, and the estate was bought by the bankrupt himself and conveyed to him. After he had obtained his certificate, the estate tail came into possession. In 1852 the assignees contracted to sell the fee, subject to the bankrupt's life estate, to the defendant:—Held, in a suit for specific performance, that nothing passed to the assignees beyond the power to sell the life estate of the bankrupt. S. C. 1 W. R. 440.

A condition of sale stated several facts upon which the vendors' title depended, and proceeded to say, that the vendors had power to bar the entail and sell the fee:—Held, that this did not preclude the purchaser from objecting to the vendors' title. *Id.*

4. Trustees of real estate having no power of leasing granted leases of it, and afterwards put it up for sale subject to the leases, the existence of which, as it was admitted, materially lessened the value of the property. The conditions of sale stated that the leases were made by the trustees without authority, and provided that the purchaser should make no objection in respect of them. The purchaser refused to complete, and contended that the conditions were binding as being a stipulation that he should concur in a breach of trust:—Held, that the conditions precluded the purchaser from objecting to the title on the ground of the existence of the leases. *Nicholls v. Corbett*, 3 De G. J. & S. 18.

5. A bill for a specific performance of an agreement between the plaintiff and defendant, in which, after reciting that B. was lord of the manor of certain lands, and that the plaintiff had contracted with him for the purchase of all his interest therein, it was agreed that the defendant should purchase from the plaintiff all his interest in the property, and that he should "be called upon to produce only the title from B. to himself":—Held, that the agreement must be specifically performed, and that the defendant was precluded from inquiring into the title of B., but could only call upon the plaintiff to show a title from B. to himself. *Hume v. Pocock*, 14 W. R. 191, 681; 13 L. T., N. S., 585.

6. On a contract for the sale of lands described as partly freehold and partly copyhold, and the timber thereupon (the latter at a specified valuation), upon a condition that the vendor should not be required to distinguish the freehold land from the copyhold, nor the respective boundaries thereof, it was held that upon the particulars and conditions the contract for the land and timber was one contract, and not separate contracts, and that the purchaser was bound to pay for the timber at a valuation, notwithstanding the fact that it might be wholly upon the copyhold land, and therefore subject to the rights of the lord and the restrictions of the custom. *Crosse v. Lawrence*, 9 Hare 462; 16 Jur. 142.

7. Where a condition of sale, under a decree of the Court, stipulates in very general terms that all documents dated more than twenty years ago shall be conclusive evidence of all matters referred to in or implied by them, and that all deeds and proceedings in Chancery shall be at the expense of the purchaser, the vendor is bound to set forth in his abstract so much of the pleadings in the suit as to show that the Court had jurisdiction and no more. *Waters v. Waters*, 15 W. R. 191; 15 L. T., N. S., 406; 36 L. J., Ch., 195.

8. A reversionary legacy, in which infants were interested, was sold by an order of the Court in an administration suit. The particulars of sale stated that infants were interested in the property, and there was a special condition that the purchaser should make no objection on the ground of want of jurisdiction:—Held, that the condition of sale was fair and reasonable, and that the purchaser was bound by it. *Nunn v. Hancock*, 6 L. R., Ch., 850; 40 L. J., Ch., 700; 25 L. T., N. S., 469; 19 W. R. 1041. Affirming 24 L. T., N. S., 569; 19 W. R. 843.

Semble, that the Court had jurisdiction to

make the order for sale, and that the infants and all other parties were bound by it. *Id.*

1. Upon delivery of the abstract by a vendor who had contracted to deduce a good title in fee simple, it appeared that one of his predecessors had covenanted in his purchase deed not to use the property (which was a semi-detached villa standing on an eighth of an acre in a residential neighbourhood), or any part of it, for the purpose of gasworks or a public-house:—Held, that this was such a restriction upon the user and enjoyment of the property as to constitute a fatal objection to the title. *Re Higgins and Hitchman's Contract*, 21 L. R., Ch. D., 95; 51 L. J., Ch., 772; 30 W. R. 700.

2. T. agreed to sell to C. certain freehold houses, and to make a good marketable title. On investigation of the title it appeared that the houses were part of a property which had been sold by a building society in lots, subject to stringent restrictive covenants, which were admitted to make the title not a marketable one. T. having declined to procure a release of the covenants, C. brought an action to recover back his deposit. T. adduced evidence that C. knew of the restrictions at the time of the contract, and the jury found that he did:—Held, that this evidence could not be admitted to modify the terms of the express contract, and that the plaintiff was entitled to recover. *Farebrother v. Gibson* (1 De G. & J. 602) and *Leyland v. Illingworth* (2 De G. F. & J. 248) distinguished. *Cato v. Thompson*, 9 L. R., Q. B. D., 616; 47 L. T. 491.

3. A contract for sale of superfluous land of a railway company which had been conveyed by the company to the vendor contained a stipulation that the purchaser should assume and admit that everything (if anything was necessary) was done by the company to enable them to sell the land as surplus land, and should not call for or require production of any evidence to that effect; and a further stipulation that if the purchasers should fail to comply with the terms of the agreement the deposit should be forfeited to the vendor. The land was not situate in a town or used for building purposes. In the course of the investigation of the title the purchaser discovered that the prior owners had not waived their right of pre-emption; and as the vendor refused to remedy the defect, the purchaser brought an action claiming a return of the deposit and damages. The vendor then sold the land to one of the prior owners:—Held, that the purchaser was bound by the stipulations to admit the title of the company to sell to the vendor; and that as he had refused to abide by that stipulation, he had broken the contract, and could not maintain the action, or claim a return of his deposit. *Best v. Hamand*, 12 L. R., Ch. D., 1; 48 L. J., Ch., 503; 27 W. R. 742.

4. In an agreement for sale of freehold and leasehold property there was a condition that the purchaser was to assume that "E. M. was at the time of his death seised in fee simple of the premises," and should "not require the production of, or investigate, or make any objection in respect of the prior title to the lot, whether such prior title is or is not referred to in any abstracted document." The purchaser discovered by an inspection of an inclosure award that E. M. was not at the date of his death seised of the hereditaments,

but that he, the purchaser, was entitled to the same:—Held, that this condition did not preclude the purchaser from acquiring such knowledge *alunde*, and on that ground refusing to carry out the contract, although no fraud was alleged. *Jones v. Clifford*, 35 L. T., N. S., 937; 3 L. R., Ch. D., 779; 24 W. R. 979; 45 L. J., Ch., 809.

4. Rescission by Vendor under Special Conditions as to Title.

5. One of the conditions of sale provided, that if the purchaser should raise objections to the title which the vendor should not be able or willing to remove, the vendor should be at liberty to rescind the contract, and that all objections which should not be taken in writing within ten days after the delivery of the abstract should be considered as waived:—Held, that the condition referred to the first delivery of objections, and if the vendor expressed his willingness to answer them, he could never afterwards rescind the contract. *Tanner v. Smith*, 10 Sim. 410.

The injunction was dissolved by the Lord Chancellor on appeal. S. C. 4 Jur. 310.

6. A condition of sale was, that in case the purchaser should raise objections to the title which the vendor should not be able or willing to remove, the vendor might rescind the contract, on notice and repayment of the deposit to the purchaser, and objections not delivered within fourteen days after delivery of the abstract to be treated as waived, in which respect time was to be essential. The purchaser returned the abstract with queries within the fourteen days, and the vendor answered the queries; the purchaser on the same day objected to the answers; the correspondence on the subject of the title continued for several weeks, and then the vendor gave notice that he rescinded the contract:—Held, that the continuance of the treaty for the completion of the title, after the first objection of the purchaser, was a waiver of the condition as to the rescinding of the contract; that such a condition of sale ought to be discouraged, and ought not to receive a construction oppressive on the purchaser; and that the vendor's right to rescind the contract under the condition must be co-extensive with the purchaser's right to object to the title under the same condition. Whether the benefit of the condition would not in equity be forfeited by a vendor who designedly delivered an imperfect abstract of the title which he had at the time of delivering it, *querre*. *Morley v. Cook*, 2 Hare 106; 12 L. J., N. S., Ch., 136; 7 Jur. 79.

Semble, the vendor is bound only to deliver a *bonâ fide* abstract of such title as he has at the time of making it out, and is not bound to deliver a further abstract of title afterwards acquired. *Id.*

7. By conditions of sale, all objections to the title were to be taken within twenty-eight days from the delivery of the abstract; and if they were not removed within fourteen days, the vendor was to be at liberty to annul the contract, on payment of the deposit, but without costs. The purchaser having made an objection which was not removed, the vendor

gave notice to annul the contract. The objection being held valid, the Court considered the vendor entitled to avail himself of the condition; but was of opinion, that if, in giving the notice to annul, the defendant had sought improperly to "escape from the performance of a duty which, by the nature of the contract, he was bound to perform, it would have been invalid. *Page v. Adam*, 4 Beav. 269; 10 L. J., N. S., Ch., 407; 5 Jur. 793.

1. A condition of sale, which provides that if the purchaser insists upon any requisitions which the vendor shall be unable or unwilling to comply with, the vendor may annul the sale, does not entitle the vendor to annul the sale without answering the requisitions, upon the ground that he is unable to comply with them. *Turpin v. Chambers*, 29 Beav. 104; 7 Jur., N. S., 459; 30 L. J., Ch., 470; 9 W. R. 363.

2. A vendor put up for sale the absolute reversion to 2,000*l.* consols, with conditions that any objections to title should be made within ten days after delivery of the abstract, and that the vendor, in case he should be either unable or unwilling to meet any objection that should be raised, might rescind the contract upon return of the deposit without interest or costs. The vendor filed a bill for specific performance, and the case came on upon motion for decree:—Held, that, notwithstanding the expiration of the time allowed for making objections to title, the purchaser was entitled to raise objections in respect of matters not disclosed upon the face of the abstract, which he had subsequently discovered, and which would render the title bad or doubtful. *Ward v. Dickson*, 5 Jur., N. S., 698. S. C. *nom. Ward v. Dixon*, 28 L. J., Ch., 315.

Held, also, that the vendor could not rescind the contract under the condition without first dismissing his bill with costs, and cannot rescind at all if the cause comes to hearing. *Id.*

3. The particulars of sale (erroneously, but without any fraud) described a part of the property as customary leasehold, holden of a certain manor, and renewable every twenty-one years, at a customary fine, and an annual rent of 10*s.* This property proved to be holden only for the residue of a lease for twenty-one years, at a rent of 10*s.*, without any customary right of renewal. One of the conditions of sale fixed the time at which any objections to the title of vendor should be taken, and enabled him, at any time after the delivery of such objections, to vacate the sale. Another condition provided, that the purchaser should accept the existing lease and the assignment to the vendor as a sufficient title to the leasehold property, and a further condition stipulated, that if, through any mistake, the estate should be improperly described, or any error or misstatement be inserted in the particular, such error or misstatement should not vitiate the sale, but the vendor or purchaser should allow or pay compensation. Upon a bill by the purchaser against the vendor:—Held, that the purchaser was entitled to specific performance of the contract, with compensation for the absence of any customary right of renewal, the same being a misstatement or misdescription within the last-mentioned condition: that the power reserved to the vendor of vacating the

sale must be construed to apply only to a case of dispute, arising upon an objection of title: that the claim of the purchaser for compensation, in respect of the absence of any customary right to renew the lease, was not an objection to the title within the meaning of the particulars and conditions of sale. *Painter v. Newby*, 11 Hare 26; 17 Jur. 483; 22 L. J., Ch., 871; 1 Eq. Rep. 173.

Held, also, that the word "title" referred to the title of the vendor to the thing described, and not to the description. S. C. 1 W. R. 284.

4. A contract for sale stipulated that the vendor should deliver an abstract of the title to the purchaser, who should make all his requisitions within seven days, and that the purchaser should take title as the vendor had:—Held, that, notwithstanding such a condition, if the vendor agrees to deliver an abstract, and stipulates that objections are to be taken within a specified time, that imports that objections may be taken. *Kay v. Haydon*, 1 W. R. 73; 9 Hare (App.) lix.

And a contract by purchaser to take such title as vendor has does not relieve vendor from the necessity of showing a *bona fide* title, and producing the best title he can from the materials in his power. S. C. 1 W. R. 112.

5. Special conditions of sale are construed most strictly against a vendor. *Hoy v. Smythes*, 22 Beav. 510; 2 Jur., N. S., 1011.

By the eighth condition of sale, a vendor reserved a right to rescind, in case of objection to title, etc., and by the eleventh, misdescriptions were not to annul the sale, but be the subject of compensation. *Somble*, that the eighth condition did not apply to cases of misdescription within the eleventh condition. *Id.*

On the sale of a copyhold manor, it was stated that the "fine was two years' improved value." The eighth condition enabled the vendor, in case of any objection to title, to rescind; and the eleventh condition provided for compensation in case of mistake or error. The abstract was delivered, and no objection was taken to the title, within the time prescribed for that purpose. Subsequently some doubt arose as to whether the fine was of one or two years' improved value:—Held, that (so far) the plaintiff was entitled to specific performance with a compensation. The purchaser having afterwards raised a question as to title, and filed a bill for specific performance, the vendor, on the same day, gave notice to rescind:—Held, that, although the objection as to title was waived at the bar, the vendor had a right to insist on the contract having been rescinded, and the bill was dismissed. *Id.*

6. Conditions of sale must be construed strictly against the person who frames them. *Graaves v. Wilson*, 25 Beav. 290; 4 Jur., N. S., 271; 27 L. J., Ch., 546; 6 W. R. 482.

A condition that the vendor shall be at liberty to rescind the contract, if the purchaser should "show any objection of title, conveyance, or otherwise, and should insist thereon":—Held, not to authorise the vendor to rescind the contract, without attempting to answer the requisitions, although some of them were untenable. *Id.*

Held, also, that he was bound to answer them, and give the purchaser an opportunity of either waiving or insisting upon them. *Id.*

The vendor, notwithstanding such a condition, held bound to comply with a requisition, that a mortgagee of the property, by underlease, should be paid off and concur in the conveyance. *Id.*

A vendor has duties, in that character, which he cannot get rid of by such conditions of sale. *Id.*

A condition of sale provided that if the purchaser should show any objection, whether of title, conveyance, or otherwise, and should insist thereon, the vendor should be at liberty to rescind the contract and annul the sale on returning the deposit without interest or costs. The purchaser delivered requisitions on the title, all of which were covered by the conditions of sale. He required also the concurrence in the assignment of certain mortgagees by demise. The vendor acknowledged the receipt of the requisitions, and stated that they were of such a kind that he thought fit to rescind the contract and annul the sale. A decree for specific performance was made at the instance of the purchaser, he waiving all objections, except as to the concurrence of the mortgagees in the assignment. *Id.*

Semble, that he might rescind on account of requisitions which would be tenable in the absence of any condition as to rescinding, even though he might be able to satisfy them, if such requisitions should be of an unreasonable character in respect of expense or otherwise. *S. C. 6 W. R. 482.*

1. Where a sale takes place under a condition providing that if the purchaser makes any requisition which the vendor is unable or unwilling to comply with, the vendor may, by notice in writing, annul the sale, the vendor may, if the purchaser insists upon a requisition, after being informed that the vendor is unable to comply with it, rescind the sale by notice, and such notice need not give the purchaser a time within which to waive his requisition. *Duddell v. Simpson*, 2 L. R., Ch., 102; 12 Jur., N. S., 969; 36 L. J., Ch., 70; 15 W. R. 115; 15 L. T., N. S., 305. Affirming 1 L. R., Eq., 578; 35 L. J., Ch., 451; 14 W. R. 418; 14 L. T., N. S., 11.

A vendor entitled to an underlease for a term of twenty-four years, less three days, put up the property for sale, as held under a lease for twenty-four years, relying on the promise of the persons entitled to the three days to concur. They afterwards refused to concur:—Held, that the vendor could not be considered to have made a misrepresentation, so as to disentitle him to the benefit of the above condition. *Id.*

2. In a contract for sale of lands containing valuable quarries, there was a clause reserving to the vendors power to rescind if any objection should be persisted in, and another providing that compensation should be given for any error in the description of the property or of the vendors' interest therein. The purchaser alleging that the right to the quarries was in a third party, under an exception of mines and minerals, in one of the title deeds, asked for compensation, which the vendors, insisting that they could make a title to the quarries under a custom or by adverse user, refused to make; and upon the purchaser persisting in his demand, they exercised their power of rescinding:—Held, that the question

between the parties was one of title, and that the rescission was therefore justifiable. *Manson v. Fletcher*, 39 L. J., Ch., 583; 10 L. R., Eq., 212; 23 L. T., N. S., 277; 18 W. R. 798. Affirmed 19 W. R. 141; 23 L. T., N. S., 645.

3. Part of property sold was in the occupation of a tenant under a lease, by which the vendor agreed to repair. The repairs not being done, the tenant instituted a suit against both vendor and purchaser. The purchaser sent in an objection and requisition in respect of the repairs not being done:—Held, that such an objection was not an objection to title in respect of which the vendor was entitled to rescind the contract under a condition applying to objections to the abstract. *Sale v. Lambert*, 43 L. J., Ch., 470; 18 L. R., Eq., 1; 22 W. R. 478.

4. Particulars stated that property was to be sold pursuant to a decree of the Court, and one of the conditions was that if the purchaser should make any objection the vendor should be unable or unwilling to comply with, the latter should be entitled to rescind, and the deposit should be returned without interest or costs. The sale took place, and the deposit was paid and invested. It afterwards appeared that the sale took place before the chief clerk had made his certificate, and the Court had decided in a suit between the vendor and the purchaser of another lot, that the purchaser was entitled to be discharged:—Held, that the condition did not apply, and that the purchaser was entitled to the return of his deposit and to be indemnified against all expenses he had been put to, and to the bank annuities on which the deposit had been invested, and the dividends which had accrued thereon. *Pomell v. Pomell*, 19 L. R., Eq., 422; 44 L. J., Ch., 311; 32 L. T. 148; 23 W. R. 482.

5. A person contracted to sell property, and showed only an equitable title, and the purchaser required the vendor to get in the legal estate:—Held, that such requisition was as to a matter of conveyance only, and the vendor could not rescind the contract under a condition empowering him to rescind if any objection to title were made which he was unable or unwilling to remove. *Kitchen v. Palmer*, 46 L. J., Ch., 611.

6. A condition in a contract for sale that, if the purchaser shall make any objection or requisition which the vendor shall be unwilling on the ground of expense or otherwise to comply with, the vendor may annul the sale, does not enable a vendor to rescind the contract in a case where he fails to show any title whatever. *Bowman v. Hyland*, 8 L. R., Ch. D., 588; 47 L. J., Ch., 581; 39 L. T., N. S., 90; 26 W. R. 876.

7. At a sale by auction of leasehold property by a mortgagee under a power one condition of sale was that within the time limited from the delivery of the abstract the purchaser should send to the vendor's solicitors his requisitions on the title or evidence, and in default of any he should be deemed to have accepted the title, and for the purpose of requisitions the abstract was to be deemed to be perfect if it supplied the information suggesting the same, and if the purchaser should insist on any requisition which the vendor should be unable or should decline to

comply with, he should be at liberty to rescind the contract. An abstract was delivered, but it did not show the real state of the title. After requisitions were sent and replies received, the purchasers' solicitors were informed by mortgagees that the property had been mortgaged by deposit of an underlease to them. The vendor, who was not aware of the mortgage, was required to pay the amount due to the mortgagee, but his reply was that he was unable and unwilling to satisfy the claim, and that he would rescind the contract. The purchasers insisted on the mortgage being discharged, and upon a summons under the Vendor and Purchaser Act 1874, a declaration was made that the vendor was not entitled under the conditions and circumstances to rescind. *Re Jackson and Oakshott*, 14 L. R., Ch. D., 851; 49 L. J., Ch., 523; 41 L. T. 719; 28 W. R. 794.

Repayment of Purchase Money.] 1. A person contracted to purchase real estate, subject to a condition that if he made any requisition which the vendor was unable or unwilling to comply with the vendor should be at liberty to rescind the contract. He made several requisitions and died intestate without completing the contract, and after death the vendor rescinded it on account of his alleged inability to comply with one of the requisitions, which if not complied with might have given the purchaser a right to compensation, but would not have entitled him to annul the contract:—Held, that the heir-at-law of the purchaser was entitled to have the amount of the purchase money paid to him out of the intestate's personal estate. *Hudson v. Cooke or Cook*, 41 L. J., Ch., 306; 13 L. R., Eq., 417; 20 W. R. 407; 26 L. T., N. S., 180.

V. DEFECTIVE OR DOUBTFUL, AND RELIEF IN RESPECT THEREOF.

See also XXIV. VI. *post*.

1. *Defective. In General*, 7210.
2. *Defective as to Part of Property*, 7212.
3. *Doubtful Title*, 7213.
4. *Title made Good before Decree*, 7218.

1. Defective. In General.

2. Vendor filed a bill for specific performance, but, not being able to make a good title, his bill was dismissed, and he was ordered to return the deposit with interest. *Anson (Lord) v. Hodges*, 5 Sim. 227.

3. Acceptance or non-acceptance of title is the criterion of right of specific performance of contracts in equity. *Wyrill v. Ewster (Bishop)*, 1 Price 296.

4. Even after great delay and acquiescence, the Court will not compel a purchaser to complete, if the title appears to be manifestly bad. *Blackford v. Kirkpatrick*, 6 Beav. 232; 12 L. J., N. S., Ch., 108.

5. The vendor of a share in a co-partnership business filed a bill against the purchaser,

who had taken possession, charging that he had grossly mismanaged the property and destroyed its value, and praying that he might be declared to have accepted the title, and might be decreed to perform the contract specifically: the Court was of opinion that the title had not been accepted, and as a good title was not shown, a specific performance could not be decreed:—Held, that upon a record so framed no accounts nor inquiries could be directed as to the defendant's possession and management of the property, with a view to ascertain whether any and what sum ought to be paid or compensation made by him to the plaintiff. *Stevens v. Guppy*, 3 Russ. 171; 6 L. J., Ch., 164.

6. J. S., under the belief that he had the fee-simple in an estate, subject to a life interest in his mother, conveyed all his interest to trustees for the benefit of his creditors; the conveyance contained covenants for title, and for further assurance. It turned out that, at the time of the conveyance, the mother had the fee-simple, which, upon her death, descended to J. S. as her heir-at-law:—Held, that, although no estate passed by the conveyance, yet the transaction amounted to a contract for the sale of the specific estate, and that J. S., unless he could set aside the contract for fraud, was, in equity, compellable to carry it into execution. *Smith v. Baker*, 1 Y. & Coll. C. C. 223.

7. Specific performance decreed, though vendor's title was founded on destruction of contingent remainders. *Hasker v. Sutton*, 2 Sim. & S. 513. And see *Roake v. Kidd*, 5 Ves. 647.

8. Equity will not decree specific performance of agreement which is contrary to the powers in a settlement. *Stratford v. Aldborough*, 1 Ridgw. P. C. 281.

9. Specific performance resisted, on the ground that antecedently to the contract a trust for sale had been created in the purchaser, an incumbrancer in possession. *Chambers v. Walters*, Coop. temp. Brough. 91.

10. An estate was devised to a feme covert for her separate use. She entered into a contract for sale and died, having devised the estate to her husband, who sued for a specific performance. The purchaser objected, that the feme covert had neither power to enter into a contract nor to devise the estate. The Court declined to compel a specific performance in the absence of the heir. *Harris v. Mott*, 14 Beav. 169; 15 Jur. 978.

11. Lessee subject to covenants cannot compel specific performance of agreement to purchase the premises of him, though he offers to indemnify purchaser against performance of covenants. *Fildes v. Hooker*, 3 Madd. 193.

12. Bill by purchaser for specific performance ordered to be dismissed for defect of title, a necessary party not choosing to concur in conveying. Order to dismiss without costs, it being against the principles of the Court on dismissal of bill to order the defendant to pay the plaintiff his costs. *Lewis v. Loatham*, 3 Meriv. 429.

13. Specific performance refused of agreement to sell in fee, by one who supposed himself absolute owner, being only tenant for life, under a settlement, with proviso empow-

ing him to purchase an estate in fee-simple in possession, in some convenient place or places in England, of equal or better value, and to settle same to him in lieu of settled estate, which was then to be his own. *Honell v. George*, 1 Madd. 1.

1. A person who had entered into an agreement for the purchase of land, which was formerly part of the glebe of a rectory, and had been before sold for the redemption of the land-tax, is not bound to complete the purchase, when it appears that, upon the prior sale for the redemption of the land-tax, the rector was himself the actual purchaser in the name of his curate. *Grover v. Hagell*, 3 Russ. 428.

2. A person having contracted for the purchase of an estate in fee-simple, in possession, free from incumbrances, died intestate, before the completion of the contract; it subsequently appeared that a good title in possession could not be made in consequence of an outstanding lease, for the life of a person, at a low rent. A bill was filed by the heir-at-law of the purchaser for a specific performance of the contract, with an abatement of the purchase money as a compensation for the lease for life, and seeking to have the purchase money paid out of the personal assets of the purchaser:—Held, that the purchaser could not have been compelled to perform the contract, and that the heir was not entitled to have it completed for his benefit. *Collier v. Jenkins*, Younge 295.

3. A tenant for life under a settlement, with an ultimate reversion to himself in fee, enters into an agreement by himself as absolute owner to sell part of the settled land. This agreement the trustees of the settlement, who had a power to sell at the request and by the direction of the tenant for life, refused to adopt. Upon a bill filed against them and the tenant for life, it being held that the Court could not control the discretion of the trustees, a decree against the tenant for life for such performance as was in his power was refused, on the ground that it would be prejudicial to the other parties interested in the settlement. *Thomas v. Dering*, 1 Keen 729; 6 L. J., N. S., Ch., 267; 1 Jur. 211, 427.

4. A., supposing he has a right, enters into an agreement to sell to B., who brings a bill for specific execution against A., and also against C., who appears to be the true owner, and so insists in his answer. This bill dismissed, as well against A. as C., and the decree of dismissal was affirmed. *Cornwall v. Williams*, Colles' P. C. 117.

5. If a vendor enters into a contract on the supposition that he can sell and deal with the purchase money as he shall think fit, and it turns out that he has only a power of exchange, and is bound to re-invest in land, the Court will not decree specific performance against him. *Hood v. Oglander*, 11 Jur., N. S., 498; 13 W. R. 705; 12 L. T., N. S., 626; 34 L. J., Ch., 528.

The question whether he is absolute owner or has a mere power of exchange must be raised and decided at the hearing, and the defendant will not be permitted to insist upon this objection to specific performance after a reference has been made as to title. *Ib.*

6. Though an individual vendee may consent

to accept a defective title, it is doubtful whether the directors of a railway company, acting on behalf of the company, can do so. *Semble, Eastern Counties Railway Co. v. Hanks*, 5 H. L. Ca. 331; 24 L. J., Ch., 601. And see *Devenish v. Brown*, 2 Jur., N. S., 1043; 26 L. J., Ch., 23.

Where a contract for the purchase of land is made by the proprietors of a proposed line of railway, though an action at law may be maintained upon the contract, a court of equity will not simply on that account refuse its interference to compel specific performance. *Ib.*

In a contract for the sale of land for the purposes of a projected railway, the vendor was described as having, so far as regarded one part of the land, no more than a mere life estate, and the proprietors of the railway undertook to obtain from parliament powers to enable him to make a good title:—Held, that where they did not fulfil this stipulation, or but for their own default the title might have been perfected, they could not set up his deficiency of title as an answer to a bill for specific performance. *Ib.*

7. *Quære*, whether the Court, in the absence of express stipulation, or of conduct waiving the objection, will decree specific performance of a contract, where the execution by a necessary party can only be obtained under a power of attorney. *Beaufort (Duke) v. Glynn*, 3 Sm. & G. 213.

8. Where a person sells property which he is neither able to convey nor to enforce a conveyance from other proper parties, the purchaser may repudiate the contract, and is not bound to wait to see if the vendor can induce some third person to join in making a good title. *Forrer v. Nash*, 35 Beav. 167.

9. A vendor contracted to sell and a purchaser to purchase an agreement for a lease. The purchaser afterwards repudiated the contract. At the date of the agreement, and of the repudiation, the agreement to lease was voidable at the will of a third party, but the third party took no steps to avoid the agreement, but was willing to confirm it on certain conditions:—Held, that the purchaser was entitled to repudiate the contract. *Brewer v. Broadwood*, 22 L. R., Ch. D., 105; 52 L. J., Ch., 136; 47 L. T. 508; 31 W. R. 115.

10. If a purchaser on the completion of his purchase acquires a defective title, that defective title cannot afterwards be strengthened either by his own fraud or the fraud of any other person. *Heath v. Crealock*, 44 L. J., Ch., 157; 10 L. R., Ch., 22.

11. Although a sale of leaseholds by an administrator *durante absentia* the person entitled to administration will be good if that person is living at the time of the conveyance, it is not such a title as the Court will force upon a purchaser. *Webb v. Kirby*, 7 De G. M. & G. 376; 3 Jur., N. S., 73; 26 L. J., Ch., 145. Reversing 3 Sm. & G. 333; 2 Jur., N. S., 996; 25 L. J., Ch., 872; 4 W. R. 770.

Particulars of sale stated that the sale was by order of the executors, and one of the conditions stated, "The vendor shall sell under the will of H., deceased, and the concurrence of the persons beneficially interested in his estate, or the purchase money shall not be required":—Held, that the purchaser was not precluded

from requiring the concurrence of the *cestui que trustent*, it appearing that the vendor was selling, not as executor, but as administrator of the surviving trustee, who was also surviving executor, and that the testator had been dead thirty-five years. *Ib.*

2. Defective as to Part of Property.

1. *Quere*, how far the Court will go in compelling a party to complete a purchase, when no title can be made to some part of the property. *Poolo v. Shergold*, 1 Cox 273; 2 Bro. C. C. 118.

2. Specific performance refused of agreement to purchase, no good title being made to a small part which was essential to enjoyment of the rest, and on the ground of defendant having been let into possession and turned out again by plaintiff. *Knatchbull v. Grueber*, 1 Madd. 153. Affirmed 3 Meriv. 124.

3. An estate was sold, some part of which, material to the enjoyment of the rest, was subject to a defect of title known to the vendors, but not disclosed by the abstract, and unknown to the purchaser. The contract was rescinded, and the vendors were ordered to repay the purchase money, with all costs and expenses incident to the purchase and conveyance. *Edwards v. McLeay*, 2 Swan. 287. Affirming Coop. 308.

4. A. contracted to sell a wharf on the banks of the Thames with a jetty, which latter turned out to be liable to be removed by the Corporation of London, if they thought fit:—Held, that the jetty was essential to the beneficial occupation and enjoyment of the premises contracted to be sold, and that a specific performance could not be decreed. *Peers v. Lambert*, 7 Beav. 546.

5. A purchaser who had contracted for the entirety of an estate will not be compelled to take six undivided seventh parts of it. On a sale under a decree, the abstract stated that the vendor was devisee of A., who took as heir to B., and on inquiry, the vendor's solicitor confirmed that statement: the Master accordingly approved of the title. Just before the conveyance was executed, the purchaser discovered that C. was the heir of B., and it appeared that the vendor's solicitor had received information of that fact, but concealed it. A motion by the purchaser to be discharged from his purchase was granted, though the vendor had obtained a release from C. before the motion was made. *Dalby v. Pullen*, 3 Sim. 29; 1 Russ. & M. 296; 8 L. J., Ch., 74.

6. A person who purchases two lots is not justified in refusing to perform his contract for the purchase of the second lot, because a good title is not shown to the first lot. *Lewin v. Guest*, 1 Russ. 325.

7. Purchaser under decree of two-sevenths of estate in one lot is not obliged to take one-seventh, to which only title can be made. *Roffey v. Shalloross*, 4 Madd. 227.

8. Defect of title to a considerable part of the estate, though a good objection by the purchaser to a specific performance, is not by the vendor. *Western v. Russell*, 3 Ves. & B. 187.

9. Reference upon the title; an objection to the specific performance on the ground that premises to which no title could be made were

represented as included in the purchase, and were a principal inducement to the purchaser, failing upon the evidence; cross-bill for specific performance, according to answer, dismissed with costs. *Stapylton v. Scott*, 13 Ves. 425.

10. If A. agrees to sell an estate, and it is afterwards discovered that a small portion of it is the property of another person, the Court will not discharge the purchaser from his contract without giving A. an opportunity of acquiring a title to that portion. *Chamberlain v. Lee*, 10 Sim. 441.

11. Under a bill to have a contract delivered up on the ground of defective title of defendant, the vendor, and for compensation for the injury to the plaintiff by the failure of the contract, decree was made for delivering up the contract without prejudice to an action, instead of an inquiry before the Master. *Gwilliam v. Stone*, 14 Ves. 128.

12. The particulars of sale described the property as a family residence, with a right to a pew in the middle aisle of the parish church. The title to the pew being defective:—Held, that it was not essential to the enjoyment of the property. *Cooper v. —*, 2 Jur. 29.

13. A railway company takes land under a 35 of the Lands Clauses Act, and subsequently enters into an agreement with the owners for the purchase of the lands so taken. To a portion of the land the owners cannot make an effectual title by reason of an outstanding legal estate in an heir-at-law resident in America. The purchase money is paid into court, but no conveyance is prepared. Upon a petition by the owners to have so much of the purchase money as represented the portion of the land to which they could make a title transferred to an account entitled in their names and the dividend paid, they undertaking to execute to the company a conveyance of the portion of the land to which a title would be made:—Held, that they were entitled to have the apportioned part of the fund transferred as prayed by the petition. Although the defect of title was such that in ordinary cases the contract must have failed, the taking and occupation of the land by the company rendered it impossible to annul the contract. *Re Perkes's Estate*, 2 W. R. 24; 7 Rail. Cas. 605.

14. By a written agreement between the plaintiff and defendant, the plaintiff agreed to sell and the defendant agreed to purchase, upon the terms stated, a certain property called the Leigh estate, and by the same agreement the defendant agreed to sell, and the plaintiff agreed to purchase, another estate called the Haresfield estate; and it was not expressed that the two contracts were to be dependent on each other. The defendant was eventually unable to make good title to the Haresfield estate:—Held, that the plaintiff was entitled to a specific performance of the contract as to the Leigh estate. Evidence *aliunde* was not admitted to show that it was the real intention of the parties that the agreement should take effect on the basis of a mutual exchange. *Croome v. Lediard*, 2 Myl. & K. 251; 3 L. J., N. S., Ch., 98.

15. When vendors having agreed to sell the entirety of property could make a title to one moiety only:—Held, that the purchaser was entitled to have such moiety conveyed to him

on payment of one moiety of the purchase money. *Bailey v. Piper*, 43 L. J., Ch., 704; 18 L. R., Eq., 683; 22 W. R. 943; 31 L. T. N. S., 86.

1. A farm was put up for sale under the directions of the Court by particulars accompanied by a plan, and was described as "a compact small farm containing 41 a. 3 r. 35 p., divided as follows." Among the parcels was "490a, Bottlesey Green, containing 7 a. 1 r. 27 p.," opposite to which, in the column showing the amounts which made up the 41 a. 3 r. 35 p., was entered 4 a. 0 r. 38 p. The conditions provided that any error, misstatement, or omission in the particulars should not annul the sale, nor should any compensation be allowed except such (if any) as the judge in chambers should direct. G. bought the property in his own name, and was certified as purchaser. He in fact bought as agent for B., who was the owner of immediately adjoining property. On investigating the title it turned out that the vendors were only entitled to four undivided sevenths of 490 acres, which was a narrow close containing 7 a. 1 r. 27 p., having a long frontage to a highroad and at one end adjoined B.'s property. B. alleged that it was of great importance to the enjoyment of his property that he should have the whole of 490 acres, and G., by his directions, refused to complete. The vendors then entered into an arrangement with the owner of the other three-sevenths to give them up, receiving an equivalent out of another part of the farm having a frontage to another road:—Held, by the Master of the Rolls, that, as B. had not been substituted as purchaser, G. must be treated as the real purchaser, and could not take any objection depending on the circumstances of B.'s property, and that, as the arrangement must give the purchaser all he contracted to buy, he must complete without compensation:—But held, on appeal, that G., having only purchased as agent for B., could take any objection which B., had he been the nominal as well as the real purchaser, could have taken; that, for the purpose of resisting completion, the purchaser was entitled to say that he bought the farm as shown on the plan; that, as the possession of 490 acres was important to the enjoyment of B.'s property, completion could not be compelled unless he could get the whole of it, and that he was not bound to accept the arrangement by which he would obtain the whole of it by giving up another part of the purchased property; and that he must therefore be discharged from his purchase. *Re Arnold, Arnold v. Arnold*, 14 L. R., Ch. D., 270; 42 L. T. 705; 28 W. R. 635.

3. Doubtful Title.

2. Purchaser not compelled to take a doubtful title; no objection to a purchaser that the defect of title appeared on the abstract delivered before he filed his bill. *Stappilton v. Scott*, 16 Ves. 272.

3. A purchaser not compelled to take a doubtful title, nor will a case be directed without his consent. The Court also hesitated upon giving sanction to a title founded on the destruction of contingent remainders by tenant

for life, there being no trustees to support them. *Roake v. Kidd*, 5 Ves. 647.

4. Specific performance decreed, though vendor's title was founded on destruction of contingent remainders. *Hasker v. Sutton*, 2 Sim. & S. 513.

5. Specific performance decreed with costs, in a case where the defendant, objecting to title, had been served with notice of a prior decision in a different cause, in favour of the same title, against a similar objection. *Biscoe v. Wilks*, 3 Meriv. 456.

6. Where the validity of a deed depends upon the *bona fides* of the transaction, to be collected from extrinsic circumstances, a court of equity will not compel a purchaser to accept a title under the deed, because neither the purchaser nor the Court had adequate means of ascertaining the circumstances. *Hartley v. Smith*, Buck 368.

7. Purchaser discharged from his agreement upon a doubt whether the land was not bound by a covenant of which he had not notice. *Bristow v. Wood*, 1 Colly. 480; 14 L. J., N. S., Ch., 50; 9 Jur. 99.

8. Title depending on recovery suffered by tenant in tail, the reversion of which had vested in the Crown by attainder of reversion:—Held, not such a title as purchaser is bound to accept. *Blosse v. Clanmorris*, 3 Bligh 62.

9. Devise to executors and trustees of a freehold of inheritance for a term of ten years, in trust to pay debts and legacies, and, after testator's decease, to his wife for life; then "to my grandson T. C., son of the late R. C., all that my estate where I now live, and all that other estate and premises thereto belonging, situate, etc., called or known by the name of W. estate, now in the holding of T., for his own use during his natural life, with remainder to the first son of the body of the said T. C. lawfully begotten, severally and successively in tail male of the name of C. And for want of such lawful issue of that name, either by my said grandson T. C., or my son J. C., then I give and devise the said estate where I now live, and the W. estate, amongst my daughters and their children, share and share alike, to hold unto them, his, her, or their heirs for ever as tenants in common, and not as joint tenants." T. C. suffered a recovery. He had no child:—Held, on an exception to the title taken by a purchaser under a sale by order of the Court, that the devisee could make a good title in fee to the vendee. The question of title or no title being matter of opinion for the Court, the purchaser is bound thereby, and cannot object to complete the purchase on the ground of the difficulty of the question on which the title depends. *Rushton v. Craven*, 12 Price 599.

10. Devise of real estates to A. for life, with remainder to trustees to preserve contingent remainders, remainder to first and other sons of A. in tail male, remainders over, with power from the persons from time to time entitled to the estates devised to lease all such estates except an estate called Juts, or any part thereof, and that every such person should live and reside on the said estate called Juts; and for default thereof all the devised estates to go over to the person next in succession, as if the person refusing or neglecting to reside or live at Juts were actually dead:—Held, in a suit by parties making title under

a recovery suffered by A. and his eldest son, against a purchaser for specific performance, that it was too uncertain what the testator meant by "live and reside" for the Court to determine that there had been a forfeiture, and a specific performance decreed. *Fillingham v. Bromley*, T. & R. 530.

1. A court of equity will not, at the end of half a century, fix upon a purchaser a difficult construction of an ambiguous instrument, which it might have done as between the original parties in case there had been no sale. *Thompson v. Simpson*, 1 Dr. & War. 259.

When estates and other property forming a mixed fund are settled, subject to a power of appointment, there the Court, where the parties entitled to this mixed fund are numerous, will not, as against a purchaser of part of the mixed fund, in which purchase one of its objects acquiesced, act as against that purchaser without knowing all the dispositions of that mixed fund. *Id.*

2. By marriage articles, the husband agreed to settle out of the lands of K., in failure of A., his daughter by a former marriage, a jointure on his intended wife, the remainder of the lands on the issue male begotten on the wife, and in failure of issue male on the issue female; and in case A. should survive, and the lands of K. should not be made good, that then the lands of K., which were not settled on the former marriage, should be subject to the jointure, and be settled on the eldest son of the marriage, and, in failure of the said son, on the daughters of the said marriage. There was no male issue of the marriage, but female issue, B., C., and D.:—Held, that the lands of K. should be settled on them as tenants in common in tail. No settlement was executed, and the lands descended to A., B., C., and D., subject to the trusts of the articles, in 1763, when B., C., and D. went into possession. In 1783 they levied a fine, and conveyed to a purchaser for value, and covenanted that they were seised in fee. There were several subsequent conveyances for value. In 1847 the lands were contracted to be sold:—Held, in a suit for specific performance against the purchaser, that the legal title of A. and her heirs to one-fourth of the lands was barred by the Statute of Limitations, as a court of law would not notice the executory trusts of the articles, and the several conveyances operated as disseins. *Semble*, the equitable title of the heir of A., on failure of issue of B., C., and D., was also barred; but:—Held, that as a fine created no discontinuance in equity, the title was too doubtful to be forced on the purchaser. A conveyance of all her estate, etc., was obtained from the devisee of the heir-at-law of A., and was held to put an end to the objection; for although the reversion belonged to the heir of the settlor, he must trace title through the daughters, and all their right was extinguished by this conveyance and the fine. *Stewart v. Conyngham (Marquis)*, 1 Ir. Ch. R. 534.

3. Purchaser must get such a title as he can force down upon a re-purchaser from him. *Magennis v. Fallon*, 2 Moll. 578.

4. Purchaser is not bound to take a doubtful title. *Price v. Strange*, 6 Madd. 159.

5. Purchaser cannot be compelled to take

title, founded on matter of fact not admitting of satisfactory proof, or which cannot be well proved. *Smith v. Death*, 5 Madd. 371.

6. Where presumption in favour of title is so strong that a judge would feel himself bound to give a clear direction to a jury, the purchaser would be concluded thereby; but if the presumption would be left for a jury to determine, he would not be bound to take it. *Emery v. Grocock*, 6 Madd. 57.

7. Title reported good by deputy remembrancer in creditors' suit: purchaser not compellable to accept it, if only a *prima facie* title. *Eyton v. Dicken*, 4 Price 303.

8. Where, on a reference as to title in a suit against a purchaser for specific performance, the Master reports in favour of the title, but the Court holds it to be so doubtful that the purchaser should not be compelled to take it, the bill may be dismissed, without allowing the exceptions taken by the defendant to the report. *Robinson v. Milner*, 1 Hare 578. n.

9. Court will not decree a specific performance of a purchase where there is a doubtful title. *Cooper v. Denno*, 4 Bro. C. C. 80; 1 Ves. J. 565.

10. Purchaser is not to be compelled to take a doubtful title, depending on the decision of certain legal questions. *Sloper v. Fish*, 2 Ves. & B. 145.

11. Testator devised all his manor, messuages, lands, tenements, tithes, and hereditaments, and all his real estate whatsoever, "except what is hereinafter mentioned and devised," to the use of all his children successively, in strict settlement, and gave two of them annuities, which he charged upon a rectory held by him under a lease for lives, which he directed to be renewed if those two children or either should be living at his death, and that their lives or that of the survivor should be inserted in the new lease, and the fine to be paid out of his personal estate; he gave part of his personal estate specifically, and directed the residue to be laid out in land, to be settled to the same uses as his real estate; but afterwards, by a testamentary paper unattested, he disposed of his personal estate otherwise: the heir contracted to sell the lease of the rectory, and, upon a case directed to the Court of King's Bench on his bill for specific performance, the certificate was, that the lease did not pass by the will, but devolved on the heir as special occupant; but the Lord Chancellor considered that title too doubtful to be forced on a purchaser; an Act of Parliament was therefore obtained. *Sheffield v. Mulgrave (Lord)*, 2 Ves. 525.

12. Where the purchaser of an interest sold under the decree of the Court acquires by that means a knowledge of a defect in the title to that interest, and afterwards buys up the estate of the person interested in taking advantage thereof, the Court will not allow him to rely upon the doctrine, that a purchaser is not obliged to take a doubtful title, in support of an objection to the title founded upon that defect. *Quare*, whether, if the objection were valid, the Court would allow him to rely on it. *Sheppard v. Doolan*, 3 Dr. & War. 1; 5 Ir. Eq. R. 6. See S. C. Fl. & K. 598; 4 Ir. Eq. R. 654.

13. To force a title on a purchaser, the opinion of the Court must be so clear that

it does not apprehend that another judge would form a different opinion. *Rogers v. Waterhouse*, 4 Drew. 329; 6 W. R. 823.

Though the Court may entertain a strong opinion in favour of the title of a party, if it were a contest between him and another claiming title, that is not sufficient in a suit for specific performance. *Ib.*

In a suit for specific performance, where the title depends upon a will, the Court will not put a construction upon it, except to decide whether there is or is not any reasonable doubt as to the vendor's title. *Ib.*

1. A., being seised in fee of a piece of land, called New Hey, sold a portion thereof to B. The deed of conveyance to B. contained a mutual covenant between A., for himself, his heirs, executors, and administrators, B., for himself, his heirs, executors, and administrators, and that B. should not, on the portion remaining in his possession, erect any houses of less value than 300*l.*, and should not erect any steam engine or manufactory, or suffer any business to be carried on which might be considered a nuisance to the neighbourhood. A. subsequently contracted with C. to sell to him the remaining portion of New Hey, in fee-simple, free from incumbrances. No notice of the mutual covenant was taken in the contract, but C. had notice of its existence:—Held, that the title was too doubtful to force on C. *Briston v. Wood*, 9 Jur. 99.

2. By a marriage settlement of one of the daughters of a testator, who had bequeathed them rent-charges, and also bequeathed legacies, which were charged on the realty, one of the rent-charges and part of a legacy were vested in the children of the marriage, some of whom were minors, subject to an exclusive power of appointment in the parents. The minors were defendants in a suit to carry the trusts of the will into execution, in which the Master found, upon the consent of the connusee and trustee of the minors, that the legacies and rent-charges were in equal priority, and that the finding was in the nature of a compromise, and beneficial to the minor. The report was confirmed by a final decree, and the lands of P., among others, were decreed to be sold to pay the several sums reported, in the first instance subject to the rent-charge to the daughters, and if sufficient was not produced to pay the debts and legacies, then discharged of the said rent-charges; and, if the sum arising from such sale should be insufficient to pay the debts, legacies, and value of the rent-charges, and costs, the legatees and devisees of the rent-charges should abate ratably. The lands of P. were sold discharged of the rent-charges:—Held, allowing exceptions to the Master's report of good title, that the report and decree, being founded on a consent which the Court had no jurisdiction to take, were erroneous, and the title under it was bad. *Weir v. Chamley*, 1 Ir. Ch. R. 295.

Pending an appeal from the above decision, which was affirmed, a deed was executed by the father of the minors, appointing the rent-charge to a son who was adult when the consent was entered into, and was a party to it, and the legacy to him and two of the minors who had since come of age. The Lord Chancellor having, on the statement

that the plaintiff could then show a good title, referred it back to the Master, to review his report, who found that a good title could be made by reason of said deed; *semble*, that the appointment, having been made on an emergency, and not *bonâ fide* for the end designed by the donor of the power, was void:—Held, that the title was too doubtful to be forced on a purchaser, and the exceptions to the Master's further report of good title were also allowed. *Ib.*

3. Devise of copyhold estates, the legal estate being outstanding, "to my son R., to be entailed upon his male heirs, and, failing such, to pass to his next brother, and so on from brother to brother, allowing 2,500*l.* to be raised upon the estates, for female children each;" whether a trust executed or executory; and, if the latter, whether an estate tail in R., *quære*. The point too doubtful to compel a purchaser to take the title. *Jervise v. Northumberland*, 1 Jac. & Walk. 559.

In compelling a purchaser to take a title, the Court formerly acted upon its own opinion; but now it will not compel him to take it if the point is doubtful. *Id.* 569.

4. Specific performance will not be decreed where title is doubtful. *Collard v. Sampson*, 1 Eq. Rep. 26.

5. Devise to trustees and the survivor of them, and the heirs and assigns of such survivor, upon trust to sell, the surviving trustee having devised the trust estate to persons who sold and who filed a bill to enforce specific performance of the contract to sell. *Semble*, that the legal estate trust to sell passed by the devise, but that there was sufficient doubt upon the point to prevent the Court from forcing the title upon the purchaser. *Ashton v. Wood*, 3 Sm. & G. 436; 3 Jur., N. S., 1164.

6. Testator by his will, in his own handwriting, devised an estate to Ann Aspinall and her heirs, if she should be then living; but, if not, then to her issue and their heirs. He afterwards made a codicil commencing thus: "This is a codicil to the last will and testament of me, J. S., and which will I some time since made in my own handwriting, and thereby devised to John Aspinall as therein mentioned." At the date of the codicil, Ann Aspinall had a son named John. Part of the testator's estates having been sold in pursuance of a direction in the will, the purchaser objected to the title on the ground that the reference in the codicil afforded strong presumption of the existence of a subsequent will. But, as the will contained a gift which might take effect in favour of John Aspinall, the objection was overruled. *Howarth v. Smith*, 6 Sim. 161.

7. L., having a term of ninety-nine years, with a covenant that he may within twenty years purchase the fee, demised to F. for ninety-nine years and a half, at a ground rent, and then acquired the fee. The ground rent was put up for sale described as "a freehold ground rent issuing out of lands on lease, which will expire in December 1922," being the expiration of the ninety-nine years and a half term:—Held, that the title was too doubtful, in reference to the remedies which the purchaser would have for enforcing the rent, to be forced on an unwilling purchaser. *Langford v. Selmes*, 3 Kay & J. 220; 3 Jur., N. S., 859.

Under such a description the purchaser has right to expect a power of entry and distress in case of non-payment. *Ib.*

1. On a vendor's bill for specific performance, the opinion of the Court was much in favour of the title, the question on which turned on the construction of a particular will; but the Court, being unable to found that opinion upon any general rule of law, or upon reason so conclusive as to satisfy the Court that other competent persons might not entertain a different opinion, or that the purchaser taking the title might not be exposed to substantial and not merely idle litigation, refused to decree a specific performance. *Pyrke v. Waddingham*, 10 Hare 1.

A doubtful title, which a purchaser will not be compelled to accept, is not only a title upon which the Court entertains doubts, but includes also a title which, although the Court has a favourable opinion of it, yet may reasonably and fairly be questioned in the opinion of other competent persons; for the Court has no means of binding the question as against adverse claimants, or of indemnifying the purchase, if its own opinion in favour of the title should turn out not to be well founded. *Ib.*

If the doubts as to a title arise upon a question connected with the general law, the Court is to judge whether the general law on the point is or is not settled; and if it be not, or if the doubts as to the title may be affected by extrinsic circumstances, which neither the purchaser nor the Court can satisfactorily investigate, specific performance will be refused. *Ib.*

The rule rests upon the principle that every purchaser is entitled to require a marketable title. *Ib.*

It is the duty of the Court, on questions of title depending on the possibility of future rights arising, to consider the course which would be taken if the rights had actually arisen, and were in course of litigation. *Ib.*

A marketable title is a title which at all times and under all circumstances may be forced upon an unwilling purchaser. *Ib.*

2. A testator by his will directed that his trustees should stand possessed of 5,000l. stock in case a daughter (naming her) should be living at the death of his wife (which happened), upon trust to pay the income to his daughter for life, and after the decease of the daughter, as to a moiety, to her children living at her decease; and as to the other moiety, equally between his sons who should be living at the decease of his daughter; in case of the daughter dying without issue, for the benefit of the sons; if all of the sons should die in the lifetime of the daughter, then, as to the whole, to transfer the stock to his daughter, or as she should appoint. The daughter was living (a married woman), and there were four sons. The life interest of the widow and the reversion had been put up for sale by auction. The conditions of sale stated the terms of the will as above set out. The purchasers contended that the conditions of sale did not accurately describe the effect of the will:—Held, that the title was so doubtful as to the right of appointment in the daughter, and when to be exercised, that the purchaser was not bound to take such a title. *Hadley v. Robins*, 14 W. R. 387; 14 L. T., N. S., 100.

3. D., being entitled to an undivided moiety of a lease for lives, containing a covenant for perpetual renewal, devised her interest to A.: the day after the date of this will a renewal was granted by D. to the defendant, who was entitled to the other moiety, and to C., who was supposed to have some interest in the lease, A. having contracted with the defendant to sell his (A.'s) moiety:—Held, on a bill by A. for specific performance, that the renewal did not operate as a revocation of the devise to A. in equity, although it admittedly did at law, and that A.'s was such a title as the Court would compel a purchaser to take. *Poole v. Coates*, 2 Dr. & War. 493; 1 Con. & L. 531; 4 Ir. Eq. R. 497.

4. A purchaser not compelled to take a title depending upon the words of a will which were too doubtful ever to be settled without litigation. *Sharp v. Adcock*, 4 Russ. 374.

5. It is difficult to say what ground of defect of title is sufficient to induce the Court to refuse a decree for specific performance. *Bull v. Hutcheson*, 9 Jur., N. S., 954; 11 W. R. 866; 8 L. T., N. S., 716.

A purchaser refused to complete his contract to buy real estate, on the grounds that the original title was at least doubtful, and that *his pendens* was a charge on the property. The *lis pendens* was afterwards decided to form no charge on the property; after which the vendor offered to stay all further proceedings if the purchaser would complete his contract and pay the costs up to the time of the offer. He refused to do so:—Held, that the vendor was entitled to a decree for specific performance, and with costs up to and inclusive of the hearing. *Ib.*

6. When it appears from the abstract of title delivered to a purchaser in pursuance of conditions of sale, that the vendor has previously executed a conveyance—on the face of it voluntary—comprising the lands in question, but without evidence of its being void as against a purchaser for value, the purchaser may refuse to accept the title, seeing that its validity depends on a doubtful state of facts, and may recover back his deposit, although he might have made the title good by acceptance. *Clarke v. Willott*, 7 L. R., Exch., 313; 41 L. J., Exch., 197; 21 W. R. 73.

7. Properties held partly by an absolute owner and partly by several sets of trustees under several trusts and for different persons were, by the vendors as a single body, agreed to be sold together in one lot for one undivided sum—which the absolute owner, and the trustees and their several sets of *cestuis que trustent*, afterwards apportioned by agreement amongst themselves, but not, as it appeared, on any sufficient data—and with special conditions limiting the title, without, however, properly defining the portions of the properties effected by the limitations. The purchaser refused to complete the purchase, and the vendors filed a bill for specific performance of the contract:—Held, that the case was too doubtful to entitle them to the relief. *Rede v. Oakes*, 4 De G. J. & S. 505; 34 L. J., Ch., 145; 13 W. R. 303; 11 L. T., N. S., 549.

8. The bare possibility that another judge might think a title open to question is not a sufficient reason for refusing to compel a purchaser to complete, where the Court itself entertains a strong opinion in favour of the

title; but where there is an actual adverse decision, the Court, though thinking the question free from doubt, will not compel a purchaser to take the title. *Mullings v. Trinder*, 18 W. R. 1186; 23 L. T., N. S., 580; 39 L. J., Ch., 833; 10 L. R., Eq., 449.

The principles laid down in *Pyrke v. Waddingham* (10 Hare 1) approved of; but the decision disapproved of, and not followed under precisely similar circumstances. *Id.*

1. A title to real estate, accruing under a devise to trustees for an unmarried woman for her life, for her separate use, and on her death to convey it to her husband, is not too doubtful to be forced on an unwilling purchaser. *Radford v. Willis*, 20 W. R. 132; 41 L. J., Ch., 19. Reversing 40 L. J., Ch., 484; 12 L. R., Eq., 105; 19 W. R. 845; 24 L. T., N. S., 574.

A father gave his estates to trustees to pay the rents to his two daughters (both then unmarried) in equal shares during their lives, "independently of the control of any husband or husbands with whom they or either of them might happen to intermarry;" and after their respective decease to convey the estates "unto and equally between the husbands of them, my daughters, to hold to them, and their respective heirs and assigns;" with a proviso that if either of his daughters should depart this life unmarried, her share should go to the survivor for her life, and on her decease the whole should be conveyed to the husband of the surviving daughter. Both daughters married. One died in the lifetime of her husband. Then the husband of the other died, having devised his interest in the estate to his wife absolutely:—Held, that the surviving daughter could make a good title to a moiety of the estate; for that a gift to an unmarried woman for life, with remainder in fee to her husband, gives an indefeasible vested remainder in fee to her first husband. And that, as the question turned on a general rule of construction, unaffected by any special context in the will, the title would be forced on a purchaser. *S. C.* 7 L. R., Ch., 7; 25 L. T., N. S., 720.

2. A legatee of a reversionary interest under a will, which had been paid into court in an administration suit, presented a petition for liquidation in March 1873, and a trustee was appointed. In July he assigned his interest in the legacy to J., who obtained a stop-order on the fund in court. In November 1876 he assigned his interest to E., without notice of the liquidation, who also obtained a stop-order on the fund. Afterwards the trustee in liquidation obtained a stop-order. The plaintiffs purchased the interest of the trustee in liquidation and of J., and contracted to sell the legacy to the defendant. The defendant required E.'s mortgage to be abstracted as an incumbrance on the estate:—Held, by Jessel, M. R., that E. having obtained a stop-order before the trustee in liquidation, his interest was prior to that of the trustee, and was an incumbrance on the estate. *Re Bright's Settlement* (13 L. R., Ch. D., 413) considered:—Held, by the Court of Appeal, that the question of the priority of E.'s incumbrance was too doubtful to justify the vendor in omitting it from the abstract; and the decision of the Master of the Rolls was accordingly affirmed

Palmer v. Locke, 18 L. R., Ch. D., 381; 45 L. T. 229.

3. The Court will not enforce specific performance of a contract for sale against a purchaser, where a question of title has to be determined, upon which the Court is not clearly in favour of the vendor. *Burnell v. Firth*, 15 W. R. 546.

4. Devise to trustees and their heirs during the life of A. B., in trust to lay out the rents and issues thereof in Government securities, until A. B. should attain twenty-one, and, after that, to suffer her to receive and take the profits during her life, not subject to the debts or control of her husband, her receipt to be a sufficient discharge; and, after her decease, to her heirs. Upon a suit for a specific performance of an agreement for the purchase of part of the estates, the question was whether A. B. took the legal or only an equitable interest for life in the property, so as to bring the title within the rule in *Shelley's case* (1 Rep. 93). The Lord Chancellor would not compel the defendant to accept the title. *Playford v. Hoare*, 3 Y. & J. 175.

5. Real estate was assured by deed unto and to the use of a trustee, his heirs and assigns, for a married woman for life to her separate use, and from and after the determination of that estate to stand seised to such uses and upon such trusts as she should by will appoint, and in default of appointment to the use of the heirs and assigns of the married woman:—Held, that the legal fee was vested in the trustee; that all the subsequent limitations were merely equitable, and that, therefore, under the rule in *Shelley's case* (1 Rep. 93), the wife took an equitable estate in fee, and could, with the concurrence of the trustee after her husband's death, make a good title in fee to the property, and one which the Court would force on an unwilling purchaser. *Cooper v. Kynock*, 7 L. R., Ch., 398; 41 L. J., Ch., 296; 26 L. T. 566; 20 W. P. 503.

6. When in a suit between vendor and purchaser a decree has been made for specific performance of a contract, subject to the usual reference as to whether a good title can be made, the words "good title" mean not an absolutely good title, but a good title having regard to the terms of the contract, although the latter words are not inserted in the decree. *Upperton v. Nicholson*, 6 L. R., Ch., 436; 40 L. J., Ch., 401; 25 L. T. 4; 19 W. R. 733.

7. Observations on the duty of the Court to decide doubtful questions of title as between vendor and purchaser. *Osborne v. Rowlett*, 13 L. R., Ch. D., 774; 49 L. J., Ch., 310; 42 L. T. 650; 28 W. R. 365.

8. It is the duty of the Court to decide doubtful questions of title, and when so decided they can no longer be considered as doubtful, so as to entitle purchasers to resist specific performance. *Bell v. Hotby*, 42 L. J., Ch., 266; 15 L. R., Eq., 178; 21 W. R. 321; 28 L. T., N. S., 9.

Duty of Court of Appeal. 9. Where the title to an estate is doubtful, and has been held bad by a judge of the court, the Court of Appeal will not force it on a purchaser. *Sykes v. Sheard*, 9 Jur. N. S., 1262; 12 W. R. 117; 9 L. T., N. S., 430.

10 Where a bill for specific performance by

a vendor has been dismissed in the court below upon a question of title, it requires a very strong case for the Court of Appeal to force the title upon the purchaser. *Collier v. M'Bean*, 1 L. R., Ch., 51; 12 Jur., N. S., 1; 35 L. J., Ch., 144; 13 L. T., N. S., 484.

1. In a suit for specific performance, a purchaser will be forced to take a title which appears to the Court of Appeal to be good, although the judge of the Court below was of a different opinion; that fact not being sufficient to constitute a doubtful title. *Beioley v. Carter*, 4 L. R., Ch., 230; 17 W. R. 300.

2. When a question of title involves a question of general law applicable to all similar cases, the Court of Appeal is bound to say one way or another what the law is, and cannot escape from that duty by saying that the decision of the Court below in taking one view makes the other view, if held by the Court of Appeal, so doubtful that the latter will not force such a title on a purchaser. *Alexander v. Mills*, 40 L. J., Ch., 73; 6 L. R., Ch., 124; 24 L. T., N. S., 206; 19 W. R. 310.

4. Title made Good before Decree.

3. Where a person articles to sell an estate, and brings a bill for the execution of the agreement, though at the time of the agreement he cannot make a title to the purchaser, it is sufficient if he is able to do so when the decree or report is made. *Langford v. Pitt*, 2 P. W. 632.

4. Where time is not essence of contract, and there is no unreasonable delay, the vendor, though not having a good title till hearing of cause, is entitled to specific performance. *Wynn v. Morgan*, 7 Ves. 202.

5. Determined on a re-hearing to be sufficient if a party can make a good title in a bill for specific performance at any time before the final decree. *Bennet College v. Carey*, 3 Bro. C. C. 390.

6. The plaintiff in a bill for the specific performance of a contract is entitled to a decree, if, at the hearing, he can show a good title, although he had not such title at the time of the contract; but the defendant might, if he had thought fit, have retired from the contract, as soon as the want of title was discovered, and was not bound to wait till the plaintiff could acquire a good title. *Haggart v. Scott*, 1 Russ. & M. 293; Tambl. 500; 9 L. J., Ch., 54.

7. Vendor contracting to sell estate in which he has no title, purchaser not bound though real owner offers a title. *Tendring v. London*, 2 Eq. Abr. 680.

8. A specific performance of an agreement by a purchaser of an estate was decreed in equity, where he agreed with the vendor to buy if a good title could be made, and he afterwards bought up the claim of a stranger in his way. *Masters v. Cook*, Colles's P. C. 433.

9. Vendor not making good title, when bill filed, pays costs up to time title reported good. *Harford v. Purrier*, 1 Madd. 532.

10. The rule of compelling a purchaser to take the estate, where a title is not made till after the contract, not to be extended. *Lechmere v. Brasier*, 2 Jac. & Walk. 289.

11. If vendor can make a good title at hearing, on further directions, it is sufficient

for specific performance, vendor paying costs. *Paton v. Rogers*, 6 Madd. 256.

12. It being necessary, in order to make a title perfect, that a recovery should be suffered for the purpose of barring an old estate tail vested in a person who was not a trustee for the vendor, the deed making the tenant to the *practice*, and the warrant for suffering the recovery, were executed before the filing of the bill for specific performance, but the recovery was not completed till a few days afterwards:—Held, that a good title was not shown before the commencement of the suit. *Lewin v. Guest*, 1 Russ. 325.

13. The requiring additional evidence of title to be supplied by the vendor is consistent with the rule of not keeping the purchaser too long in the suspense of investigation, and the question always is, whether it is the same title as existed at first that is followed up, or whether the vendor has been put to cast about for a new title. *Magennis v. Fallon*, 2 Moll. 580.

Purchaser need not wait for a new title, but may call on the vendor to abide by the original abstract; but if he goes on to contest variations made in the title, that is acquiescence by which he waives the objection grounded on delay. *Id.* 581.

14. A purchaser who has contracted for the entirety of an estate will not be compelled to take six undivided seventh parts of it. On a sale under a decree, the abstract stated that the vendor was devisee of A., who took as heir to B., and, on inquiry, the vendor's solicitor confirmed that statement. The Master accordingly approved of the title. Just before the conveyance was executed, the purchaser discovered that C. was the heir of B., and it appeared that the vendor's solicitor had received information of that fact, but concealed it. A motion by the purchaser to be discharged from his purchase was granted, though the vendor had obtained a release from C. before the motion was made. *Dalby v. Pullen*, 3 Sim. 29; 1 Russ. & M. 296; 8 L. J., Ch., 74.

15. Purchaser cannot insist on being discharged upon a report of defective title, if capable of being made good within a reasonable time; as to which, the vendor will be put under terms. *Coffin v. Cooper*, 14 Ves. 205.

16. A., being entitled under a settlement to lands for life, remainder to trustees for 1,000 years to raise jointure and portions, remainder to himself in fee, and there being a power of sale and exchange, given by the settlement to the trustees with A.'s consent, conveys, by way of exchange, some of the settled lands to B., without any reference to the power, and without the concurrence of the trustees. B.'s heir afterwards contracts to sell such lands, and, after objection being taken by the purchaser before the Master, in a suit for specific performance against such purchaser, procures certain deeds to be executed by A. and the surviving trustee and himself, which, if executed at the time of the exchange, would have given it validity:—Held, that the Court would not compel the purchaser to take the title, but no decision was given as to whether the exchange was validated. An objection was also taken to the deeds, on the ground of the inaccuracies and clerical errors which they

contained. *Congill v. Osmantown (Lord)*, 3 Y. & Coll. 369; 3 Jur. 813.

Semble, that the after-executed deeds, although the surviving trustee of the marriage settlement was a party to them, did not make the transaction between A. and B. a due execution of the power. *Ib.*

1. In a suit for specific performance, where the vendor cannot make a good title, when the cause comes on to be heard on further directions, the Court will not allow the cause to stand over, in order that he may be able to cure the defects in his title. No counsel having appeared for the plaintiff at the hearing on further directions, and the bill having been dismissed, a petition to have the cause again heard will be refused, with costs, where the ground of application is, that the counsel were instructed on the very day of the hearing, and that, if they had obtained further time from the Court, the defect of the title could have been cured. *Boswell v. Mendham*, 1 L. J., Ch., 160.

2. Upon a bill filed by a vendor for specific performance of the contract, it appeared that he could make a good title before the commencement of the suit, but did not show a good title to the purchaser until afterwards:—Held, that though specific performance must be decreed, the purchaser was entitled to the costs of the suit generally. *Townsend v. Champenornon* 3 Y. & Coll. 505.

3. Where the vendor had no title to a small portion of the land contracted for, but such defect was not discovered till after the contract, the Court refused, with costs, a motion by the purchaser to be discharged from his contract, without giving the vendor an opportunity of acquiring a title to the portion. *Chamberlain v. Lee*, 10 Sim. 444.

4. Where there was at the time of the contract a want of competency or right to contract in one of the parties, as, for instance, where the trustees of a will, with power to sell with consent of tenant for life, make a contract without having obtained the consent of the tenant for life, *semble*, that subsequent consent will not cure the defect. *Adams v. Brooke*, 1 Y. & Coll. C. C. 627.

5. Specific performance of a contract for sale of an estate in fee-simple decreed (subject to the usual inquiry as to title) in favour of a vendor who, at the time of the contract, was tenant for life only; the purchaser not having rejected the purchase as soon as he had ascertained the real position of the vendor, and the vendor being able by means of the consent of the parties interested in remainder to make a good *prima facie* title to the fee-simple at the hearing. *Salisbury v. Hatcher*, 2 Y. & Coll. C. C. 54; 12 L. J., N. S., Ch., 68; 6 Jur. 1051.

6. A person contracted to sell an estate, who at the time of the contract had no legal or equitable title to it, by reason of the alienage of a party through whom he claimed. The purchaser by his own inquiries ascertained the defect of title, but did not till after some months of negotiation with the vendor repudiate the contract. The vendor then filed his bill for specific performance, and, pending the investigation of the title in the Master's office, obtained a grant of the estate from the Crown:—Held, that he was entitled to a de-

cree. *Byston v. Simonds*, 1 Y. & Coll. C. C. 608; 11 L. J., N. S., Ch., 376; 6 Jur. 817.

7. The assignee in bankruptcy having filed, as vendor, a bill for specific performance, alleging that defendant had accepted the title (which turned out not to be the fact), and the defendant having in his answer denied the validity of the bankruptcy, which was in fact valid, but it appearing, on a reference as to title, that the bankrupt had previously taken the benefit of the Insolvent Act, so that the concurrence of the insolvent assignee was required, which was given in the Master's office, the Court gave specific performance without making plaintiff pay costs. *Sidebotham v. Barrington*, 5 Beav. 261.

8. A bankrupt's estate is sold by auction. The purchaser, after having paid a deposit, gives notice that he means to abandon the purchase, on a supposed defect in the title. The commission is afterwards superseded, on the ground that there was no good petitioning creditor's debt, and another commission issues, and the same assignees are chosen:—Held, that as the assignees, at the time when they received notice from the purchaser, had not a good title to the estate, they could not enforce the contract, nor consequently retain the deposit. *Bartlett v. Tuckin*, 1 Marsh. 583.

9. A plaintiff may rely on a title acquired in point of form after he had filed the bill, if it be not inconsistent with his original claim, and is capable of having relation back; therefore, when the devisee of an insolvent debtor filed a bill for renewal, and the objection being raised, afterwards procured himself to be appointed assignee, and amended the bill stating that fact:—Held, that he could sustain the bill. *Doyle v. Callow*, 12 Ir. Eq. R. 241.

10. *Semble*, that, a vendor, who *bona fide* puts up a property for sale, believing himself absolute owner, when he has in fact only a partial interest, is entitled to enforce the contract if he can perfect the title. *Murrell v. Goodyear*, 1 De G. F. & J. 432.

11. Where specific performance of a binding contract is sought, and there is a reference to the Master to look into the title, or to ascertain who the parties to the conveyance are, that reference enables the vendor to make good any defect in his own title, or to procure a conveyance up to the date of the Master's report and of the decree; and there are cases in which an Act of Parliament has been obtained to remove defects; but when the Court had come to the conclusion upon the evidence that there was no binding contract, and refused to decree specific performance, on the ground that the assent of the proprietors was a term of the contract, and that, at the hearing, such consent was not proved, the Court declined to refer it to the Master to inquire whether the required consent could be obtained, or to make any reference to the Master. *Clay v. Rufford*, 5 De G. & Sm. 768.

12. The defendant having agreed to take part of a house upon certain conditions, with right to a lease for twenty-one years, afterwards repudiated the contract upon discovering that the plaintiff had power only to grant a lease for twenty years and a quarter, and that the performance of some of the conditions was beyond the plaintiff's control. The plaintiff

filed his bill for specific performance. After the bill was filed, but before the hearing of the cause, he was in a position to perform the contract fully:—Held, that the defendant was not bound to wait; and the bill was dismissed with costs. *Forrer v. Nash*, 6 N. R. 361.

1. The purchaser of a house in London having taken various objections to the title, the vendor filed a bill for specific performance, and obtained a reference as to title. The objections were overruled; but before the certificate had been signed the purchaser discovered in a long blank wall, which formed one side of the house and fronted on a street, a stone with an inscription dated in 1776, stating that the wall had been built by and belonged to the East India Company, who had thrown the adjoining ground into the street. It turned out that the wall had been rebuilt in 1831 by the tenant of the house, and the stone set up again; but under what circumstances did not appear. No rent had from that time been paid to the company, or any acknowledgment of their title given; but their successors in title, on being applied to, claimed the wall as theirs, and the vendor obtained a release from them:—Held, that the vendor had not a good title when the bill was filed, for that there was no ground for holding a title to have been gained by possession adversely to the East India Company. *Phillipson v. Gibbon*, 6 L. R., Ch., 428; 40 L. J., Ch., 406; 24 L. T. 602; 19 W. R. 661.

Held, that the vendor was to blame, as he might, with reasonable diligence, have informed himself of this defect before selling, and that therefore, although he had been right on all points which arose before the bill was filed, he ought not to receive costs. *Id.*

VI. PARTICULAR OBJECTIONS.

1. *General Principles*, 7220.
2. *Bankruptcy*, 7220.
3. *Charges*, 7221.
4. *Judgments and Lis Pendens*, 7222.
5. *Outstanding Estates and Interests*, 7222.
6. *Reservation of Minerals*, 7224.
7. *Tithes*, 7224.
8. *Voluntary Settlements*, 7225.
9. *Other Cases*, 7225.

1. General Principles.

2. Objections to title mean such objections as can only be properly the subject of adjudication upon the investigation of the title, and such are cases where the dispute is as to the application of the conditions of sale, the propriety or validity of the conditions themselves not being questioned. *Wood v. Machu*, 5 Hare 158.

3. Mere suspicion, upon opinions in the abstract, etc., will not support an objection by a purchaser. *McQueen v. Farguhar*, 11 Ves. 467.

4. As between a vendor and purchaser, a purchaser cannot object to the vendor's title on the ground that he is under a stipulation to do an act the nature of which is so uncertain that he could not, on bill filed, be compelled to do as stipulated. *Taylor v. Gilbertson*, 2 Drew. 391.

5. A vendor, after recognising an objection to the title, and undertaking to remove it, is,

by his misconduct, precluded from insisting that the objection is untenable. *Ashton v. Wood*, 3 Sm. & G. 436; 3 Jur., N. S., 1164.

6. A., having purchased lands, left the title to the investigation of C. and D., solicitors in partnership; upon whose advice the purchase was completed. D. was a trustee to uses to bar dower in the conveyance. A. died, and his devisee sold the property to D. On a bill for specific performance by the vendor, it was:—Held, that a solicitor who has been employed to advise on a title could not, on purchasing the property himself, set up an objection which he did not think important when advising his principal. *Bevor v. Simpson*, Tam. 69.

7. A party who has covenanted to remove and pay off an incumbrance on premises which are subject to a trust for sale, will not be allowed to raise an objection to the sale of the property, on the ground of the existence of that incumbrance. *Roberts v. Boson*, 3 L. J., Ch., 113.

8. If exceptions taken to report of good title are overruled, other objections to title cannot be made; but if allowed, and new abstract be delivered, other objections may be brought in. *Brooke v. —*, 4 Madd. 212.

2. Bankruptcy.

9. An act of bankruptcy a sufficient objection to title, without showing a debt upon which a commission could issue. *Lowe v. Lush*, 14 Ves. 547.

10. An act of bankruptcy, committed by the vendor, though no commission of bankruptcy issue, is a valid objection to the title. *Foster v. Gould*, 3 L. J., Ch., 200.

11. Where devisee of real estate, subject to debts and legacies, had contracted to sell estate in order to raise money to pay debts, and afterwards a bill was filed against her by legatees for administration of testator's estates, and purchaser consented to go before Master, upon reference as to title in that suit:—Held, he was not thereby bound to take equitable title, but might insist on having same title as though bill for specific performance had been filed against him; and that as two commissions of bankruptcy had issued against devisee before contract was entered into, though neither was proceeded in, he was not bound to accept title. *Cann v. Cann*, 1 Sim. & S. 284; 1 L. J., Ch., 219.

12. The bankrupts took a reversionary interest in some property as residuary devisees under their father's will, of which also they were constituted executors. The testator died more than forty years ago, and upon the death of the last tenant for life the bankrupts' assignees sold their interest in this property, and required the bankrupts to join in a conveyance to the purchasers. It was objected that some of the testator's debts, which were charged on this property, might be still unpaid, and that the assignees had no power to dispose of it, as it was thus subject to a trust:—Held, that, in the absence of all evidence of any outstanding debts, the assignees had a full right to dispose of this property, and that the bankrupts were bound to join in the conveyance. *Exp. Bolton, Re Moxon*, 1 M. D. & De G. 667.

At a meeting of the bankrupts' creditors, a

resolution was entered into by the majority then present, that if certain claims of the bankrupts for compensation, in respect of seizures made by the Danish government, should prove beneficial to the estate, the creditors would relinquish all right to the above reversionary property:—Held, that this was only a conditional and not a final arrangement, and did not prevent the assignees from selling the reversionary property. *Ib.*

1. By marriage articles of 1767 it was agreed that 1,000*l.*, secured by the bond of A., the intended husband, on which judgment was entered, should be divided among the younger children of the marriage. By a deed of 1795 A. conveyed the lands of K., of which he was seised in fee, to the use of himself for life, remainder, subject to 500*l.* secured by a term for his younger children, to J., his second son, for life, remainder to his third, fourth, and other sons in tail. In 1798 A. made his will, without noticing the deed of 1795, and devised the land of K., subject to 1,000*l.* for his younger children, to J. A. died, and bills were filed in 1803 and 1818, on behalf of some of the younger children, to raise the 2,000*l.* secured by the articles and the will, but not noticing or relying on the deed, which was afterwards put in issue by one of the answers. In 1818 G., the fourth son, who was entitled to an estate tail in remainder under the deed, became insolvent. He and his assignee were parties to the latter suit, but not in respect of that estate. A decree for the sale of the fee was pronounced for the sum due under the articles, and a part of the sum due under the deed. The abstract of title stated the insolvency of G., and that the heir of his assignee would join in the conveyance. The assignment under the insolvency had been lost, but the deed of 1795 was referred to in the schedule:—Held, on objections to title: first, that the abstract and schedule afforded sufficient evidence of an actual assignment of the estate tail in remainder under the Insolvent Act then in force; secondly, that the assignment, though *pendente lite*, was valid, being made under the authority of a statute, and conveyed a base fee to the assignee, and, the decree not being binding on him, the title was defective; thirdly, that the defect could not be cured by the heir of the assignee joining in the conveyance, as he was a trustee for the creditors of G., who did not appear to have been paid, and were not bound by the decree; and, fourthly, that, under the circumstances, the decree was not erroneous in directing a sale of the fee for a portion of the sum secured by the term in the deed of 1795. *Keogh v. Keogh*, 13 Ir. Eq. R. 284.

2. When a debtor has filed a petition for liquidation, and resolutions accepting a composition are afterwards passed as provided by the Act, such debtor remains absolute master of his property until the creditors take action under s. 126 of the Bankruptcy Act 1869, and a purchaser from him is not entitled to any evidence whether or not the instalments under the composition have been duly paid. *Re Kearley*, 47 L. J., Ch., 474; 7 L. B., Ch. D., 615; 26 W. R. 324; 38 L. T., N. S., 92.

[*Sale by Assignees.*] See BANKRUPTCY, XVII. xliii. 7.

3. Charges.

3. Devise of real estate in trust to pay debts and legacies, and subject thereto the residue to one of the devisors' co-heirs, who was also residuary legatee: mortgage by her, and (several years after) bill filed against mortgagor and against devisee in trust for foreclosure:—Held, on exceptions to title, by purchaser under the decree to sell made in that cause for all persons having proved charges prior to the mortgage, that the co-heirs who came in and proved their legacies charged on the lands were not necessary parties; that no account of testator's debts and legacies need be specifically directed; and that the same person being residuary devisee and legatee, the account of the testator's personal estate was immaterial. *Magennis v. Fallon*, 2 Moll. 569.

4. Where a purchaser goes on contesting the title without a protest against delay, that is a waiver of that ground of objection. But if he protests against the delay, but, not being sure that his protest is valid, goes on to make the best case he can, otherwise to be discharged; that goes only to costs, and does not amount to acquiescence. *Id.* 578.

5. A tenant for life mortgaged under power the inheritance for 500*l.* and 1,000*l.*, and afterwards paid the first mortgage, and took an assignment to a trustee. After his death B. became entitled to the mortgages. C., the tenant in tail, being a minor, covenanted by marriage articles in 1827 to convey the lands in trust to sell and pay off the debts then affecting them, and subject thereto for herself for life, remainder to her children, and a recovery was suffered on her majority. B. filed a bill and obtained a report, finding in 1835 that arrears of rent and fines due in the life of A. and after were paid off by loan on mortgage; and found this sum and the two mortgages, with interest on them all before the death of A. to the time of the report, to be due, and a sale was decreed to pay them. In 1840 B.'s assignee filed a bill, not making the trustee of C.'s settlement a party, and obtained a decree to carry the former decree into execution:—Held, that the first decree was erroneous, declaring the inheritance liable for interest, payable by the life estates of A. and C., and that a purchaser under the second decree, in which the inheritance was not represented, could not be held to his purchase. A report of good title, plaintiff's solicitor undertaking to procure a signature, is informal. *Maganley v. Brady*, 9 Ir. Eq. R. 59.

6. A testator devised his estates to his eldest son, and charged some of them with legacies to his younger children, specifically charging one (20,000*l.*) upon one of the estates, and directed that his residuary property should be sold in payment of his debts, and in ease of his real estates. The estates charged with the payment of debts not being sufficient for that purpose, the finding of the Master, that that legacy was a charge subject to the judgment and bond debts, was confirmed, though the Court might afterwards direct that the creditors should be paid out of the other estates first. *Bouverie v. Norbury*, 3 Cl. & F. 247; 9 Bl. N. S. 611.

7. When an estate is sold free from incum-

branches, and upon production of the abstract of title it appears that the estate is subject to a mortgage or other charge or incumbrance, the incumbrance does not afford an objection to the title, but is matter of conveyance only; and such is the rule even if the amount of the incumbrance be greater than the purchase money. *Townsend v. Campervoun*, 1 Y. & J. 449.

1. A testator devised his real estates to a devisee in fee, charged with certain annuities or annual rent-charges to two annuitants:—Held, on special case, that the annuitants took the annuities for life; that the 28th section of the Wills Act (1 Vict., c. 26) only applies to estates vested in, or in the power of, the testator, and not to estates or interests created *de novo* by his will; and that a purchaser could not maintain an objection to the vendor's title, or refuse to execute the contract for purchase, upon the ground that the annuities were given in fee, and not for lives. *Nicholls v. Hawkes*, 22 L. J., Ch., 255.

2. The legal estate in a term of years was vested in A., B., and C., as trustees for D. and E., mortgagees and joint tenants. By an indenture executed by all parties except E., the term was merged, the mortgage money being expressed to be paid to D. and E., and D. alone signed the receipt:—Held, that although the action to recover the money was gone by the release of one joint tenant, the land was not discharged, and specific performance of a contract to purchase the land under that title refused. *Matson v. Dennis*, 10 Jur., N. S., 461; 12 W. R. 926.

4. Judgments and Lis Pendens.

3. Purchaser not to be compelled to take an indemnity against a judgment, accounting to half of the purchase money. *Wood v. Bernal*, 19 Ves. 221.

4. Old judgments existing against a former owner of leaseholds, who parted with the property in 1770, and to enforce which no steps appeared to have been taken, are no objection to the title. *Causton v. Macklem*, 2 Sim. 242.

5. A father, tenant for life, with remainder to his son in tail, joined with his son in conveying the estate to trustees, in trust to sell and to pay 30,000*l.* to the father, and the residue to the son; and it was declared that the trustees' receipts should be sufficient discharges. The trustees contracted to sell to defendant, and afterwards judgments were entered up against the father:—Held, that the existence of the judgments was no objection to the title. *Lodge v. Lyneley*, 4 Sim. 70.

6. A registered *lis pendens* does not of itself create an incumbrance upon property, apart from the subject-matter in respect of which the *lis pendens* is registered. *Bull v. Hutchons*, 9 Jur., N. S., 954; 11 W. R. 866; 8 L. T., N. S., 716.

7. A mortgagee took, on the execution of his mortgage in 1844, an assignment of a term to a trustee, and relying on it, forbore to search for judgments. A judgment had been registered in November 1843. The mortgagee sold in 1846, under a power of sale in his mortgage; and on the purchaser objecting to complete without the concurrence of the judgment

creditor, the mortgagee and his solicitor, and the mortgagor, to obviate the objection, made a statutory declaration, that at the time of the mortgage neither the mortgagee nor the solicitor had any notice of the judgment. The purchaser still insisted on his requisition, and, in March 1848, the vendor filed a bill for specific performance. During the proceedings in the Master's office, the five years from the registration of the judgment expired, and it was not re-registered till 1850:—Held, that at the hearing on further directions, in 1853, the purchaser could not be compelled to complete without the concurrence of the judgment creditor. *Freer v. Hesse*, 4 De G. M. & G. 495; 17 Jur. 703; 22 L. J., Ch., 597; 23 L. J., Ch., 338; 1 W. R. 242, 487.

Held, also, that though the question was one of conveyance, yet, as it had occasioned the suit, the vendor submitting to obtain the concurrence required, must pay the costs. *Id.*

8. In 1842 the defendant contracted to purchase an estate: a suit for specific performance having in the same year been instituted by the vendors, it appeared that the vendors claimed under a testator who died in 1809, and subject to his debts: that a creditors' suit had been instituted in 1813, and a decree for an account and sale made in 1817, since which time nothing effectual had been done in the suit, and no report of debts had been actually confirmed. After so great delay, no further time was given to the vendors to complete their title, and the bill for specific performance was dismissed with costs. *Fraser v. Wood*, 8 Beav. 339.

Sales by the Court.] See XXIV. vi. 3 *post*.

5. Outstanding Estates and Interests.

9. Purchaser is not to be compelled to take an equitable estate. *Abel v. Heathcote*, 2 Ves. J. 100; 4 Bro. C. C. 278.

10. Re-conveyance of the legal estate presumed under obscure circumstances after a great lapse of time, though the possession originally not adverse, but under a trust; upon that presumption a specific performance decreed against a purchaser. *Hillary v. Waller*, 12 Ves. 239.

11. Outstanding term to attend the inheritance, the trusts being performed, may be an objection to the conveyance, not to the title. *Berkeley v. Daub*, 16 Ves. 380.

12. An attendant term having become vested in the wife of the owner of the inheritance as administratrix of the trustee, and her husband becoming bankrupt, his assignees agree to sell the estate, and file a bill for specific performance of the agreement, pending which suit the husband dies:—Held, that the widow was not entitled to dower, that she was to assign the term to the purchaser, and that he was bound to accept the title. *Mole v. Smith*, Jac. 490.

Whether the purchaser can be compelled to take an assignment of a term as a protection against dower, *quære*. An attendant term having become vested in the wife of the owner of the inheritance, as the representative of the trustee, whether an assignment of it to a purchaser to prevent dower can be compelled, *quære*. S. C. 1 Jac. & Walk. 665.

1. A. agreed to demise certain premises to B.: there was an outstanding equitable interest vested in C.:—Held, that B. was bound to accept a demise from A., in which C. joined, and was not justified in insisting on A. obtaining a release from C., in order to enable him alone to make a valid demise. *Reeves v. Gill*, 1 Beav. 375.

2. An abstract showed the equitable fee to be in the vendor and the legal estate to be in A., as a mortgagee for a term, and subject thereto in B. in fee. By a supplemental abstract it appeared that, before the first abstract was delivered, A. assigned the mortgage money to B., and was declared a trustee of the term for him, and that he had since died intestate; that his father, who first took out administration to him, was also dead; and that he remained unrepresented for some years, after which S. took out administration to him:—Held, that the first abstract showed a complete title, the tracing of the title to the legal estate being matter of conveyance merely. *Avarne v. Brown*, 14 Sim. 303; 14 L. J., N. S., Ch., 30; 8 Jur. 1037.

3. In 1772 a woman, who was a party to a suit in Chancery, and who was married, but whose marriage did not appear in any of the proceedings in the suit, was, by an order in the suit, treating her as a feme sole, directed to convey a freehold estate to F., a purchaser; she afterwards, together with her husband, executed a conveyance of the estate to F., in which conveyance the husband covenanted with F. that he and his wife would levy a fine on the estate. It did not appear that a fine was ever levied. On a bill filed by a vendor, claiming under F. against a purchaser, for specific performance, the purchaser objected to the title, on the ground of the want of a fine and the defectiveness of the proceedings in Chancery:—Held, that the objection was not one of title, but of conveyance, inasmuch as the order in Chancery, notwithstanding its informality, was binding on the married woman, and rendered her a trustee for the purchaser, and she was, therefore, compellable to complete the legal title. *Jumpson v. Pitchers*, 1 Colly. 13; 13 L. J., N. S., Ch., 166.

4. A tenant in tail, upon the marriage of his eldest son, conveyed the entailed lands, as if he were seised in fee, to trustees, for a term of years, to secure a jointure for his own wife, and a jointure for the intended wife of his son, in case certain other property upon which the latter was previously charged should be sold; and subject thereto to the use of himself for life, remainder to other trustees for another term of years, to raise portions for his younger children; and subject thereto, to the use of the son for life; remainder, subject to a third term, to his first and other sons in tail. No fine or recovery was ever levied or suffered by the father or by the son. A bill was filed to raise the portions, and a decree was pronounced, directing a sale of the term. After the decree, the eldest son of the marriage, his father and grandfather both being dead, executed a disentailing deed, and conveyed the lands in fee to a person not a party to the suit, expressly subject to the term. That person afterwards conveyed the fee to the widow of the father, who was a party to the suit, and had allowed the decree to be made upon sequestration

against her:—Held, upon an appeal from an order of the Master of the Rolls overruling the purchaser's objections to the title, that the acts of the eldest son operated as a confirmation of the settlement, and that a good title to the term could be made. *Massey v. Batwell*, 5 Ir. Eq. R. 382; 4 Dr. & War. 56.

Held, also, that the widow, having acquired her title after the decree, would be bound to give effect to that decree out of it. *Id.*

Held, also, that the judgments entered pending suit, against the eldest son of the marriage and his vendee, were not an objection to the title. *Id.*

5. T. C., the executor of S. E., purchased the equity of redemption of an estate for 615*l.*, subject to a mortgage in fee (which contained a power of sale), to secure the re-payment of 800*l.*; this security was transferred to Messrs. A. and D. T. C. was illegitimate. He died unmarried and intestate in December 1831. S. B. purchased the estate, which, on the 12th of August 1834, was conveyed to him in fee by A. and D., the mortgagees, and by S. A., the administratrix *de bonis non* of S. E. The deed recited that T. C. had purchased the estate in part with the money of S. E. T. B., the purchaser, died, and his estate was sold under the direction of the Court. Objections were taken to the title, because the mortgagees had not executed their power of sale under the mortgage, and because no person claiming through T. C. had conveyed the estate or was a party to the suit, because there was no evidence showing that T. C. was illegitimate, or that he died without heirs, or that he was a trustee for S. E.; and if those statements were true the estate had escheated to the Crown; and because, as the equity of redemption had not been foreclosed, it was assets for the payments of his debts, and his personal representative was not before the Court. The Master reported that a good title could not be made. Upon exceptions to his report:—Held, that the evidence of T. C., being a mere trustee, was not such that a purchaser could be compelled to take the title; that, assuming T. C. had a beneficial title, the equity of redemption had not escheated to the Crown; that, as the equity of redemption might possibly be assets for the payment of the debts of T. C. generally, and on covenant no title could be made in the absence of the legal personal representative of T. C. If it could, then mortgagees having the legal estate might hold the whole property against creditors discharged from the equity of redemption. The exceptions were therefore overruled; but as it was on grounds different from those on which the Master had relied, without costs. *Beale v. Symonds*, 22 L. J., Ch., 708.

6. In an agreement for sale of copyhold property the vendors contracted to give such title as they possessed at the time of the agreement "to extend over twenty years." The vendors were assignees of an unadmitted devisee, and had a complete equitable title, but refused to get in the legal estate on the ground that they were not bound to do so under the contract. A second term of the agreement was that "purchaser was to prepare his own conveyance and surrender at his own expense":—Held, that the purchaser was entitled to a surrender of the legal estate, and that vendors must pay all fines necessary

to enable them to make such a surrender. *Whiteley v. Taylor*, 35 L. T., N. S., 187.

1. A person contracted to sell property, and showed only an equitable title, and the purchaser required the vendor to get in the legal estate:—Held, that such requisition was as to a matter of conveyance only, and the vendor could not rescind the contract under a condition empowering him to rescind if any objection to title were made which he was unable or unwilling to remove. *Kitchen v. Palmer*, 46 L. J., Ch., 611.

2. Property was put up for sale by the following description: "Freehold estate. To be sold by auction (by order of the executors of the late Stephen Roose), by Mr. Hughes, at the Dinorben Arms Hotel, Amlwch, Anglesey, on the 18th September 1855 (subject to the undermentioned conditions), two tenements called Penybryn and Tynaur, containing thirty-one acres, more or less, together with several dwelling houses and gardens attached, now or late in the occupations of Hugh Roberts and others, situate at Moelfra, Anglesey. Also two extensive lime quarries, well situate for shipping. Sale to commence at two o'clock." One of the conditions of sale provided that the purchaser should, on completion, be let into the receipt of "the rents and profits" of the premises. Part of the property sold was, at the time of the sale, out upon leases for lives:—Held, that, under the particulars and conditions of sale, the vendors were bound to show a title to an estate in fee-simple in possession; and they were not relieved from that obligation by the condition as to the receipt of the rents and profits. *Hughes v. Jones*, 8 Jur., N. S., 399; 31 L. J., Ch., 88; 10 W. R. 139.

"Rents and profits" were held to mean ordinary rents and profits. *Id.*

6. Reservation of Minerals.

3. The omission in a rental of a reservation of mines, minerals, and of right of entry to search for them, is a valid objection to the title. *Barton v. Donnes (Lord)*, Fl. & K. 506.

4. In 1823 the lands of Minos were conveyed to J. C. and his heirs, "saving and excepting out of the conveyance the manorial rights belonging or appertaining to the manor of C., of which manor the lands hereby released are parcel, and the tolls and duties of the fairs and markets thereof, as also any liberty of turbary or limestone heretofore granted therein or thereout by Sir J. L. C. (a former owner), or his ancestors, to any of the tenants of the said manor, as expressed in their leases." Pursuant to a decree, the fee and inheritance in the lands of Minos was set up to be sold, under a recital, which did not advert to the reservation in the conveyance of 1823, and which stated that part of the lands was held under an article of agreement for lease for four lives, bearing date 1804, and one year. It did not appear that any fairs or markets had ever been held for the manor, or any court, for the last twenty years; and although there was no open limestone quarry, nor anything in the nature of turbary save a surface or top-sod on the lands, yet it did not distinctly appear that there was not either limestone or turf on them. It also appeared that

the agreement of 1804 was for a lease for four lives and one year from and after the expiration of the tenant's then present lease, which lease did not expire until 1843; and that the tenant claimed to be entitled to a lease for four lives to be then named by him. Upon exceptions to a report of bad title:—Held, confirming the report, that the reservation of the liberty of turbary and limestone, in the conveyance of 1823, was a valid objection to the title, but not to the reservation of the manorial rights and tolls of the fairs and markets of the manor. *Martin v. Cotter*, 3 J. & L. 496; 9 Ir. Eq. R. 351. And see S. C. 9 Ir. Eq. R. 44.

Held, also, that the description of the tenant's interest under the article of 1804 was calculated to mislead the purchaser, and that he was entitled either to compensation or to be discharged in consequence thereof. *Id.*

The abstract was delivered to the purchaser on the 25th February 1845; the article of 1804 on the 9th April: on the 25th April the purchaser confirmed the sale, and on the 24th October he lodged objections to the title:—Held, that he had not waived his objections. *Id.*

5. A good title can be made to lands enfranchised under the 15 & 16 Vict., c. 51 without proof of the lord's title. *Kerr v. Pawson*, 4 Jur., N. S., 425; 27 L. J., Ch., 594.

Under an agreement made in 1853 by a copyholder for the enfranchisement and sale of a copyhold estate, and for making out and delivering a good title to the same:—Held, in the absence of any stipulation to the contrary, that the agreement must be taken to have had reference to the Copyhold Enfranchisement Acts, and that the purchaser was bound to accept the title subject to the reservation of minerals and other rights contained in the 48th section of the 15 & 16 Vict., c. 51. *Id.*

6. Specific performance of a contract for sale of lands held under an inclosure Act refused, it appearing upon the context that the right of the lord to the minerals in the allotted lands had not been affected by the Act. *Pretty v. Solly*, 26 Beav. 606.

7. Land was described in a contract for sale as freehold, but it was shown by the abstract that it was formerly copyhold, and had been enfranchised. A decree was afterwards made at the suit of the vendor for specific performance, and a general inquiry directed as to title; in the course of which the purchaser for the first time objected that the minerals were reserved to the lord of the manor under the enfranchisement:—Held, that the objection was fatal to the title; but as the purchaser had taken the objection so late, he was not allowed his costs. *Upperton v. Nicholson*, 6 L. R., Ch., 436; 40 L. J., Ch., 401; 25 L. T. 4; 19 W. R. 733.

7. Tithes.

8. Upon a late decision of the Court of Exchequer, that a presumption from non-payment of tithes cannot bar even a lay impropiator, the Lord Chancellor, though holding the contrary opinion, would not compel a purchaser to take such a title, and dismissed the bill against him for a specific performance. *Rose v. Calland*, 5 Ves. 186.

1. On the sale of an estate as tithe free, the question whether tithe free is not a question of title. *Smith v. Lloyd*, 2 Swan 224. n.

8. Voluntary Settlements.

2. Purchaser objecting to title on the ground of a voluntary settlement made by the vendor, a bill for specific performance by the vendor was dismissed, and an exception to the Master's report, approving the title, allowed. *Smith v. Garland*, 2 Meriv. 123.

3. On a bill by a vendor for specific performance, the purchaser set up a voluntary settlement as an objection to the title, but said he was willing to complete the purchase on having a good title. He had been let into possession as purchaser, and paid part of his purchase money, and had paid off a mortgage and got a conveyance of the legal estate and possession of the title-deeds.—Held, that, notwithstanding the voluntary settlement, the vendor was entitled to a decree for completing the purchase. *Peter v. Nicolls*, 11 L. R., Eq., 391; 24 L. T. N. S., 381; 19 W. R. 618.

Semble, that the principle of *Smith v. Garland* (2 Meriv. 120) does not apply to a defendant who says he is willing to complete on having a good title. *Ib.*

4. A. insured his life, and afterwards assigned the policy to B. for a nominal consideration. B.'s executors then sold and assigned the policy to D. for valuable consideration, and then D.'s executors sell it to E.—Held, that they could make a good title to the policy, and that E. was bound to complete his purchase. *Ashley v. Ashley*, 3 Sim. 149.

5. The Court was of opinion that limitations in a marriage settlement to the brothers of the settlor and their issue were voluntary; but thought, under the circumstances, that a purchaser could not be compelled to take the title depending on the validity of those limitations, and dismissed a bill by the creditors of the vendor after his death for specific performance, there having been subsequent dealings with the estate, which might have confirmed the settlement, the agreement for purchase being suspicious, and it being doubtful whether the creditors could file such a bill. *Johnson v. Legard*, T. & R. 281.

The author of a voluntary settlement cannot file a bill for specific performance of a contract afterwards entered into by him to sell the settled estate. *Ib.*

6. A testator devised a copyhold estate to trustees, in trust for his wife for life, with remainder in trust for such persons as she should appoint by will or deed attested by three witnesses, with remainder over. The wife married again, and she and her second husband, after their marriage, by deed attested by three witnesses, in pursuance of the power, appointed the estate, and directed the surviving trustee of her former husband's will to surrender it to the use of a mortgagee in trust to secure the sum of 1,600*l.* and interest, and subject thereto to the use of the husband and wife for their joint lives, and the life of the survivor, and after the decease of the survivor, in case there should be any daughters or younger sons of the marriage, upon trust to sell and divide the produce among such

daughters or younger sons; and if there should be none such, then upon trust to surrender the estate to the use of such persons as the wife should, by will or deed attested by three witnesses, appoint, and, in default of such appointment, to the right heirs of the wife. A surrender was made to the mortgagee accordingly. The husband and wife afterwards sold the estate, and the mortgage was paid out of the purchase money; the husband and wife joined with the mortgagee in surrendering to the use of the purchaser, and they all released to him all their interest, by a deed attested by two witnesses only.—Held, that the purchaser could make a good title, by the assistance of the statute of 27 Eliz., c. 4 (against voluntary conveyances), without showing that there were no daughters or younger sons of the wife's second marriage. *Currie v. Nind*, 1 Myl. & C. 17; 5 L. J., N. S., Ch., 169.

7. Devise in trust for the testator's daughters, M. and C., for their lives, for their separate use; and in case both M. and C. should die without leaving issue, then over implied estates tail to M. and C., with cross-remainders in tail. M. died unmarried, and then C., conceiving herself tenant in fee-simple, in contemplation of marriage, conveyed her estate with the concurrence of her intended husband, by lease and release, to trustees and their heirs, in trust for herself until the marriage, and after the solemnization thereof in trust for herself for life, and then for her children, etc. There was issue of the marriage.—Held, that the trustees took a base fee, and that the husband was not tenant by the curtesy.—Held, also, that after C.'s death, her eldest son, having elected to take against the settlement, and barred the entail, could make a good title to a purchaser from him, and such as a court of equity would compel the purchaser to accept. *Stanhouse v. Gaskell*, 17 Jur. 157.

8. A purchaser must take a title, though depending on the invalidity of a voluntary conveyance, as against a purchaser for valuable consideration with notice. *Butterfield v. Heath*, 15 Beav. 408; 22 L. J., Ch., 270.

9. Other Cases.

9. Lands were sold as fee-simple, but the purchaser, after the sale, for the first time found that, though held in fee-simple, the owner was bound to raise and maintain the fences and keep the drains and watercourses clear, etc.—Held, that the purchaser could not be compelled to accept the title where the enjoyment of the estate was subject to such qualifications. *Larkin v. Rouse (Lord)*, 10 Ir. Eq. R. 70.

10. A railway company having under their act the usual power to sell surplus lands, with a direction to offer them in the first instance to the owners of the adjoining lands, entered into a contract for sale to a stranger, and then made an offer of the same lands to the parties who were entitled to the right of pre-emption, which offer was declined; the purchaser refused to complete his contract, because the last-mentioned offer had not been made prior to the contract with him, and the

company filed a bill to compel specific performance:—Held, that the objection was a question of conveyance and not of title, and that the purchaser must complete the contract; but the Court refused to give the plaintiffs the costs of the suit. *London & Greenwich Railway Co. v. Gnoodehild*, 3 Rail. Ca. 507; 13 L. J., N. S., Ch., 224; 8 Jur. 455.

1. Mortgage debt and premises were assigned by mortgagee to trustees, with power to sue and give acquittances, and all the same powers as mortgagee had. Mortgage estate was sold under a decree, and purchase money paid into court:—Held, on exceptions to title, because scheduled creditors were not parties to the bill, but only the trustees, that the trustees could make a good conveyance, and that the exceptions ought not to have been made to title, but to the conveyance. *Binks v. Rokeby (Lord)*, 2 Madd. 227.

2. Objection by a purchaser upon illegitimacy, upon the circumstance that the register of marriage could not be found, an inaccurate statement in a deed, and some particularity of description of a child in a will. Upon the time of the marriage, previous to the Marriage Act, and under circumstances, the Lord Chancellor's opinion was against the objection; but it was overruled upon a general release, which, though only reciting generally that objections were taken, was held sufficient as binding the party to inquire into the nature of the objections. *Braybroke (Lord) v. Inskip*, 8 Ves. 417.

3. Objections to title overruled. *Poole v. Poole*, 6 Ir. Eq. R. 50.

4. It seems to be no objection to a title that a person, who sixty years back was the survivor of three trustees appointed by will for sale of an estate, did not execute a conveyance purporting to be made by him and the parties beneficially interested, possession having gone under that conveyance, and the estate in equity being converted into personality. *Townsend v. Champenoren*, 1 Y. & J. 538.

5. When a necessary party to a title is neither in law nor equity under the control of the vendor, the Master ought to report against the title, unless there is produced to him a legal or equitable obligation on the part of the stranger to join in the conveyance. *Eadaile v. Stephenson*, 6 Madd. 366.

6. Where a contract of purchase is made, and delay is occasioned by the purchaser, and during that delay the legal estate descends to an infant heir, the purchaser cannot avail himself of that difficulty in the title to protect himself from specific performance. *Gunter v. Halsey*, Amb. 586.

7. It is no objection to the title to an estate that an extent had issued from the Crown against the owner, which remained in the hands of the sheriff unexecuted; it appearing that the lords of the treasury had, in fact, compromised the debt, though a writ of *amoveas manus* had not actually issued. *Poole v. Shergold*, 1 Cox 160; 2 Bro. C. C. 118.

8. On the sale of a house or stables in a *cui de sac*, the vendor is not bound to show a title to the roadway. *Curling v. Austin*, 2 Dr. & Sm. 129; 10 W. R. 682.

9. King Charles II. by letters patent granted some property in fee, subject to a fee-farm rent, and to a proviso of re-entry in case a decree should be made at the suit of the

king for repairing the property, and the same should afterwards remain for a year out of repair. The Crown afterwards granted away the rent:—Held, that the proviso for re-entry could not be exercised, and that it therefore formed no objection to the title to the property. *Flower v. Hartopp*, 6 Beav. 476; 12 L. J., N. S., Ch., 507; 7 Jur. 613.

10. It is no objection to title that two fee-farm rents, created by letters patent by James I., are not shown to have been extinguished, it being proved that no claim has been made by the Crown for the rents from the year 1706, and no proof of any claim previous. *Simpson v. Gutteridge*, 1 Madd. 609.

11. In a suit by a vendor for the specific performance of a contract to purchase an estate which, by deed, dated in 1841, was limited to the use of the vendor for life, without impeachment of waste; and after the determination of that estate, by any means in his lifetime, to the use of a trustee and his heirs during the life of the vendor, in trust, nevertheless, for the vendor and his assigns; and after the determination of the estate so limited to the trustee and his heirs, to the only use and behoof of the vendor, and his heirs and assigns for ever:—Held, upon objection taken by the defendant, that he was entitled to a conveyance of any interest which might have become vested, by forfeiture or otherwise, in the dower trustee (4 Jur., N. S., 431; 27 L. J., Ch., 295; 6 W. R. 348; 1 L. T., N. S., 148):—Held, on appeal by the purchaser, that the objection was frivolous and vexatious, and ought not to have been insisted on, and that costs ought not to be given to the purchaser. *Collard v. Roe*, 4 De G. & J. 525; 28 L. J., Ch., 560.

12. The father, vendor, claimed the estate by purchase from his son; the purchaser is entitled to evidence of the fairness of the transaction. *Boswell v. Mendham*, 6 Madd. 373.

13. Sale held bad from suppression of articles of marriage. *Beatniff v. Smith*, 1 Eq. Abr. 357.

14. Case sent to law, whether purchaser of lot 2 would, by a conveyance of vendor alone, without the concurrence of the lessee, acquire the same rights and remedies against lessee, in respect of the apportioned rent of 40l. therein to be reserved to him, as he would acquire in case no rent were mentioned in such conveyance from a vendor, by a jury, for that part of the reversion comprised in lot 2. *Bliss v. Collins*, 4 Madd. 229.

15. A. conveys lands to trustees on trust to sell, if the unsatisfied debt of a partnership in which he had been concerned should at a given time exceed 40,000l.; the trustees sell and convey to the purchaser by a deed which recites that the debts of the partnership exceeded the specific amount, and that A. had died intestate as to his real estate, and the heir-at-law of A. joins in that deed, and enters into a covenant for the title of the trustees, a covenant against all acts done by him or his father, and a covenant for further assurance. It afterwards appears to be uncertain whether A. had not devised his real estate, and the purchaser files a bill to have protection against a remedy of the alleged defect in his title which this discovery created:—Held, that the purchaser is not entitled to have an account

taken of the debts of the partnership in order to establish the fact of their having, at the specified time, exceeded the specified amount. *Hallett v. Middleton*, 1 Russ. 243.

1. The reversion of an estate having been put up to sale by auction, describing it as leased with a covenant on the part of the tenant to repair, and the purchaser objecting to the title, because no counterpart of the lease was in the possession of the vendors, it being stated to be in the hands of a party under partition of the estate, made some time before; the Court thought that such counterpart ought to be deposited for the benefit of all parties, before it could compel the purchaser to take. *Shore v. Collett*, Coop. 234.

2. Testator by his will, in his own handwriting, devised an estate to Ann Aspinall and her heirs, if she should be then living, but, if not, then to her issue and their heirs. He afterwards made a codicil commencing thus:—"This is a codicil to the last will and testament of me, J. S., and which will I some time since made in my own handwriting, and thereby devised to John Aspinall as therein mentioned." At the date of the codicil, Ann Aspinall had a son named John. Part of the testator's estates having been sold in pursuance of a direction in the will, the purchaser objected to the title on the ground that the reference in the codicil afforded strong presumption of the existence of a subsequent will. But, as the will contained a gift which might take effect in favour of John Aspinall, the objection was overruled. *Howarth v. Smith*, 6 Sim. 161.

See also Preceding Subdivisions.

See also *v. supra*—IX. ante—XV. *v. post*.—XXI. and XXII. *post*.

See also SPECIFIC TITLES.

VII. WAIVER OF TITLE.

1. *What is. In General*, 7227.
2. *By Taking Possession or Exercising Acts of Ownership*, 7228.
3. *By Delay*, 7230.
4. *On Sale of Leaseholds*. See XXII. 1. 1 *post*.

1. What is. In General.

3. The right of a good title does not grow out of the agreement between the parties, but is given by law; but a purchaser may waive his right, by going on with the agreement after he has full notice that he is not to expect a good title. This is, in such case, matter of notice, and not of contract. If the vendor of a leasehold interest means to sell, without producing his lessor's title, he ought to declare it. *Ogilvie v. Foljambe*, 3 Meriv. 53.

4. Specific performance decreed against purchaser, without reference as to title, upon possession, and no objection made to abstract. *Fleetwood v. Green*, 15 Ves. 594.

5. A. and B. agree to grant mutual leases upon terms stated in a letter by A.'s solicitor, and accepted by B.'s solicitor. A.'s solicitor sent B.'s a draft of a formal agreement, which was returned by B.'s unaccepted, as he considered the agreement already definite and

binding. Both A. and B. had antecedent knowledge of the title, and B. appeared to have acted on his knowledge:—Held, that there was a waiver of objections to the title on the part of B., and that A. was entitled to specific performance. *Herring v. Miles*, 3 W. R. 127.

6. A purchaser having retained the abstract for five months, made no objections to the title, but simply required the vendor to verify the abstract with the title deeds:—Held, that he must be deemed to have accepted the title. *Pegg v. Widen*, 16 Beav. 239; 16 Jur. 1105; 1 W. R. 42.

7. An agreement, dated the 16th August 1849, for the purchase of the equity of redemption in leaseholds, stipulated that the four joint purchasers should indemnify the vendors against the payment of the mortgage money and interest; that the purchasers should be entitled to possession of the rents from the signing of the contract; and that an abstract of title should be delivered by the vendors, at their expense, within one month from that date. The vendors were the trustees, and the purchasers were shareholders, of and in a joint-stock building company, and as such trustees they mortgaged the property. The purchasers took and remained in possession until September 1852. Shortly after the date and execution of the agreement, a memorandum, "that in consideration of not being charged the proportions of abstract required by the purchasers of property from the company, we do undertake to pay for our own abstract when required by us," was written at the foot of the agreement, and signed by one of the purchasers on behalf of the four. No abstract of title had ever been required by the purchasers, and no assignment had ever been executed by the vendors. The purchasers having allowed the interest on the mortgage money to fall into arrear, the mortgagees brought an action against the vendors for the payment of the mortgage money, and gave notice to the tenants to pay their rents to the agent of the mortgagees. The bill prayed a declaration that the purchasers had waived their right to investigate the title, and had accepted such title: and that they might be decreed specifically to perform the agreement, by accepting an assignment of the equity of redemption without previous investigation of the title, and by executing and delivering to the vendors a proper deed of indemnity against the mortgage money and interest:—Held, that the purchasers, not having required an abstract, and not having investigated the title, and having taken possession and dealt with the property, and violated the terms of the agreement by allowing the interest on the mortgage money to fall into arrear, had lost their right to investigate the title; and specific performance of the agreement was therefore decreed, with costs. *Sibbald v. Lowrie*, 18 Jur. 141; 23 L. J., Ch., 593; 2 W. R. 89; 2 Eq. Rep. 485.

The mere act of taking possession was not of itself a waiver of the right to investigate the title, but the acts and conduct of the parties materially varied, and amounted to a waiver of that right. *Id*.

8. Purchaser need not wait for a new title, but may call on the vendor to abide by the

original abstract; but if he goes on to contest variations made in the title, that is acquiescence, by which he waives the objection grounded on delay. *Magennis v. Fallon*, 2 Moll. 581.

Where a purchaser goes on contesting the title without a protest against delay, that is a waiver of that ground of objection. But if he protests against the delay, but, not being sure that his protest is valid, goes on to make the best case he can, otherwise to be discharged: that goes only to costs, and does not amount to acquiescence. *Id.* 578.

1. No objection to a purchaser that the defect of title appeared on the abstract delivered before he filed his bill. *Stapylton v. Scott*, 16 Ves. 272.

2. A defendant admitting by his answer that at the date of the contract the plaintiff was entitled, cannot at the hearing object that no abstract was delivered, and no title shown. *Phipps v. Child*, 3 Drew. 709.

3. Assignees of an insolvent put up for sale an estate, which had been impressed with the character of personality, and which, if it retained that character, belonged absolutely to the insolvent. A purchaser, upon investigation of the title, discovered that there was good reason to contend that a prior owner had elected to take the estate as realty, in which case the fee belonged to the heir of the insolvent's late wife, the insolvent himself being only tenant by the curtesy. The purchaser, after some correspondence, in which he required the concurrence of the heir, abruptly gave notice to determine the contract, and immediately afterwards brought up the title of the heir:—Held, that he could not avail himself of this purchase to defeat his contract, but that he had thereby removed the objections to the title, and specific performance was decreed against him, allowing him the expenses of his purchase from the heir. *Murrell v. Goodyear*, 1 De G. F. & J. 432.

Semble, that, a vendor who *bonâ fide* puts up a property for sale, believing himself absolute owner, when he has in fact only a partial interest, is entitled to enforce the contract if he can perfect the title. *Id.*

If a purchaser is entitled at all to insist that the vendor's having only a partial interest makes the contract void, he must insist upon the objection at once, and cannot avail himself of it after having treated the contract as good and required the concurrence of the persons who can complete the title. *Id.*

4. B., the purchaser of an advowson, had an abstract delivered to him, and, after the date for completion, sent in requisitions, and received answers thereto, and made no further reply, either accepting the same or otherwise. A. had a draft of the conveyance forwarded to him (without prejudice to the requisitions by B.), and he approved of it:—Held, that B. must be considered to have accepted the title. *Sweet v. Meredith*, 8 Jur., N. S., 637; 31 L. J., Ch., 817; 10 W. R. 402; 6 L. T., N. S., 413.

5. W. contracted to sell a dwelling-house to H., possession to be given on the 26th February; H. wanted the house for immediate occupation. On February 26th the vendor had not made a good title, and the purchaser

did not enter into possession. He continued, however, to negotiate for some time longer, when he gave a peremptory notice of immediate abandonment of the contract:—Held, that there must be a decree for specific performance of the contract. *Webb v. Hughes*, 39 L. J., Ch., 606; 10 L. R., Eq., 281; 18 W. R. 749.

2. By Taking Possession or Exercising Acts of Ownership.

6. Possession taken generally amounts to a waiver even of objections to title. *Fludger v. Cocker*, 12 Ves. 27.

7. A purchaser was held entitled to an investigation of the vendor's title, notwithstanding possession taken, acts of ownership incident to possession, and preparation of a conveyance. *Burroughs v. Oakley*, 3 Swan. 159.

8. Specific performance decreed against purchaser without reference as to title, upon ground of possession, a correspondence, and no objection to title till two years after delivery of abstract. *Anspach (Margravine) v. Noel*, 1 Madd. 310.

9. A purchaser who, in the full knowledge of certain objections to the title, grants a lease of the property to a third party, must be taken to have waived the objections to the title. *Exp. Sidebotham*, 3 Dea. & Ch. 818; 1 Mont. & A. 655; 3 L. J., N. S., Bky., 122. Affirmed 4 Dea. & Ch. 693; 2 Mont. & A. 146; 4 L. J., N. S., Bky., 27.

10. Specific performance decreed against purchaser, without reference as to title, upon possession, and no objection made to abstract. *Fleetwood v. Green*, 15 Ves. 594.

11. Where a purchaser had entered into possession, as it appeared, without prejudice to an inquiry into the title, but had afterwards continued twenty years in possession, during which time he had taken many frivolous and vexatious objections:—Held, that he had forfeited all right to a reference as to title, and he was decreed, with costs, to perform the agreement, and pay 4 per cent. on the purchase money from the time of taking possession. *Hall v. Laver*, 3 Y. & Coll. 191.

12. Consent to accept a title given under the influence of representations made on the part of the vendor, which turn out to be inaccurate, will not bind the purchaser. If a purchaser, entitled by agreement to possession, enters and exercises ownership, he is not thereby precluded from having a reference as to title, on objections not appearing upon any previous abstract delivered to him. *Johnes v. Cloughton*, 2 L. J., Ch., 113.

13. A purchaser who took possession under agreement in 1813, admitted by answer that in that year an abstract of title was delivered to him, and approved by counsel:—Held, that he had a right to a reference to the Master, though he had all along continued in possession without taking any objection to title. *Boothall v. Smithson*, 3 L. J., Ch., 100.

14. If a purchaser, after the delivery of the abstract, on the face of which part of the estate appears to be subject to a right of sporting, not mentioned in the particulars of

sale, enters into possession, he waives the objection. *Burnell v. Brown*, 1 Jac. & Walk. 168.

1. Where a party had contracted to purchase, and had been eight years in possession of, premises to which the vendor was unable to make a good title, and refused either to abandon the agreement or accept such title as the vendor could give, having paid no part of the purchase money and no rent; the Court, upon a bill filed by the vendor for relief, directed the agreement to be delivered up to be cancelled, and the rents and profits received by the purchaser to be accounted for, and ordered the purchaser to pay the costs of the suit. *King v. King*, 1 Myl. & K. 442.

2. A purchaser under a decree, who takes possession without the order of the Court, by an arrangement with the solicitor in the suit, accepts the title. *Wilden v. Andrews*, 4 L. J., Ch., 208.

3. A party who had contracted for the purchase of the benefit of an agreement for a lease, and who before the lease was granted entered into possession and paid part of the purchase money, the remainder being left a charge on the property, and who after the lease had been granted assigned his interest in it as a security for money lent; on a bill being filed against him by the lessee for specific performance and payment of the residue of the purchase money, or otherwise that the property might be sold:—Held, to have waived all objections on the score of title. *Haydon v. Bell*, 1 Beav. 337; 2 Jur. 1008.

4. The purchaser entered into possession early in 1836, under an agreement, that the consideration, which was deposited with trustees, should be paid to him if no title could be made. While in possession, in 1837, he made improvements, cut down timber, sold timber, also part of the materials of Fonthill Abbey, the subject of the contract, built kitchens, etc.:—Held, that these acts did not amount to an acceptance of the title. *Fraser v. Bennett*, 1 Jur. 473.

5. A purchaser of a share in a co-partnership business does not waive objections to the title by taking possession of the property, and acting as a partner, when the contract stipulates that a good title shall be made by a specified future day, and it appears to have been the intention of the parties that the purchaser should immediately, and before the day, have the possession. *Stevens v. Guppy*, 3 Russ. 171; 6 L. J., Ch., 164.

The vendor of a share in a co-partnership business filed a bill against the purchaser, who had taken possession, charging that he had grossly mismanaged the property, and destroyed its value, and praying that he might be declared to have accepted the title, and might be decreed to have performed the contract specifically. The Court was of opinion that the title had not been accepted, and, as a good title was not shown, a specific performance could not be decreed:—Held, that upon a record so framed, no accounts or inquiries could be directed as to defendant's possession and management of property, with a view to ascertain whether any or what sum ought to be paid, or compensation made by him, to the plaintiff. *Id.*

6. Although a purchaser entering into possession, and dealing with the property in a manner contrary to the usage in good husbandry, may be a ground for compelling him to pay the purchase money into court, or for the appointment of a receiver, it will not be a ground to force the title on him. *Osborne v. Harvey*, 1 Y. & Coll. C. C. 116; 11 L. J., N. S., Ch., 42.

7. An agreement is executed in August for purchase of the equity of redemption in certain property, with a stipulation for immediate possession, that the purchasers shall indemnify the vendors in respect of the mortgage money and interest, and that the abstract should be delivered when required by the purchasers. Possession is taken by the purchasers in the April following, no investigation of the title having been made, and retained for upwards of two years, when, the interest on the mortgage having fallen into arrear, the mortgagees take possession and sue the vendors upon the mortgage covenant. Upon bill by the vendors, specific performance of the agreement decreed with costs; the purchasers having by their conduct lost their right to investigate the title, and violated the terms of the contract under which they had taken possession. Where immediate possession is stipulated in an agreement, and also delivery of an abstract, the mere act of taking possession does not amount to a waiver of the title. *Sibbald v. Lomrie*, 2 W. R. 89; 18 Jur. 141; 2 Eq. Rep. 485; 23 L. J., Ch., 593.

8. S. entered into a negotiation with the plaintiff for the purchase and transfer to him of the plaintiff's business and property, and the terms of the agreement were, by a son of S., reduced into writing, in the form of a letter from the plaintiff to S. By that letter the plaintiff agreed to the terms proposed as to certain houses and rents, and agreed to give up to S. all deeds, etc., which he might require to carry on, and that might be necessary for him to take to, the whole of his business as a common brewer, and to sign and hand over all the necessary leases that might enable S. to have and possess the whole and sole control over the freehold, leasehold, and copyhold property of which the plaintiff was possessed or interested in, or about to become interested in, save the right of sale of his freehold property. The plaintiff was to use his best endeavours to secure to S. the whole of his trade, on the understanding that S. paid him 100*l.*, or such sum as should make up the deficiency between the two sums of 800*l.* and 900*l.* (the latter being the amount which the plaintiff considered his brewhouse and brewing utensils to be worth). If the brewhouse and utensils should not fetch 900*l.*, and if the brewhouse should not be sold within six months, S. agreed to pay interest at 4*l.* per cent. on the 550*l.*, being the value of that property without the utensils. The document contained a stipulation empowering S. to receive the rents; and at the foot of it a son of S., and on his behalf, signed his name, agreeing to the terms, but it was not signed by the plaintiff, nor did it contain his name. A duplicate copy was, however, signed by him and given to S., who subsequently took possession of some part of the property comprised in the agreement, including the brewery, and

received the rents of other parts of the property, and was introduced to the plaintiff's customers. S. also took possession of some of the utensils and casks, and others were sold, both by him and the plaintiff, on S.'s behalf. S. afterwards died, having bequeathed all his estate to the defendant, who refused to complete the purchase of the brewhouse and utensils. But, on a bill for specific performance, the Court declared that, according to the true construction of the agreement, the defendant was the purchaser of the brewhouse and utensils at the price of 900*l.*; that she, upon 550*l.*, part thereof, must pay interest at 4*l.* per cent.; and that she must account for and pay 350*l.* for the utensils, without interest, to the date of the decree; and ordered a general account to be taken. *Deller v. Simonds*, 5 Jur., N. S., 997.

Held, also, that the right to an investigation of the title of the brewery had been waived by the purchaser. *Ib.*

1. In a suit to compel the defendant specifically to perform an agreement to take a lease:—Held, that under the circumstances of the case the intended lessee had waived his right to call for the title of the intended lessor. *Simpson v. Sadd*, 4 De G. M. & G. 665; 1 Jur., N. S., 457; 24 L. J., Ch., 662; 2 W. R. 578; 2 Eq. Rep. 798.

Form of the decree in this case directed as in *Warren v. Richardson* (Younge 1). *Ib.*

The mere fact of taking possession does not, either in the case of vendor and purchaser, or in that of lessor and lessee, operate as a waiver of the purchaser's or lessee's right to call for the vendor's or lessor's title, though an intention to waive the right is less probable in the former than in the latter instance. *Ib.*

2. *Primâ facie* taking possession after an abstract has been delivered, and not in pursuance of any provision in the contract, is a waiver of the objections appearing on the abstract, and it lies on the purchaser to rebut that presumption. *Bown v. Stenson*, 24 Beav. 631.

A purchaser had taken possession by his tenant, and not under the contract, after an abstract had been delivered, and he had made no objection to the title till long after, when a suit was threatened, and he had promised payment of part of the purchase money:—Held, that by his conduct, and on the correspondence, he had waived all objections to the title arising upon that abstract; but held, secondly, that he had not waived any objection not arising on the abstract. *Ib.*

3. Taking possession by a purchaser does not, in all cases, amount to a waiver of a requisition which has not been answered, and, therefore, where a purchaser took possession with leave of the vendor pending an answer to a requisition as to the tenure of the property, and the purchaser discovered *aliunde* after taking possession that the description of the property was not correct, and gave up possession immediately, insisting on his right to rescind:—Held, that he was not precluded from rescinding by such taking possession. *Turquand v. Rhodes*, 16 W. R. 1074; 18 L. T., N. S., 844; 37 L. J., Ch., 830.

4. If a contract for the sale of land is silent

as to the title which is to be shown by the vendor, the legal implication that the purchaser is entitled to a good title may be rebutted by evidence that, before the execution of the contract, the purchaser had notice of defects in the vendor's title. But, if the contract expressly provides that a good title shall be shown, the purchaser is entitled to insist on a good title, notwithstanding that before the execution of the contract he had notice of defects in the vendor's title. If the contract contains no stipulation as to possession being taken by the purchaser before completion, and he takes possession with knowledge that there are defects in the title which the vendor cannot remove, the taking possession amounts to a waiver of the purchaser's right to require the removal of those defects, or to repudiate his contract. If, on the other hand, the defects are removable by the vendor, the taking of possession does not amount to such a waiver. *Re Gloag and Miller's contract*, 23 L. R., Ch. D., 320; 52 L. J., Ch., 654; 48 L. T. 629; 31 W. R. 601.

3. By Delay.

5. Specific performance decreed against purchaser without reference as to title, on ground of possession, a correspondence, and no objection to title till two years after delivery of abstract. *Anspach (Margravine) v. Noel*, 1 Madd. 310.

6. A delay of seven months held no waiver of an objection to the title, which turned upon a question of fact. Observations on clearing a title, by showing the non-existence of rights under a reservation, or onerous covenant not stated, and on the duty of being careful and explicit in preparing for a sale. *Martin v. Cottle*, 9 Ir. Eq. R. 351; 3 J. & L. 496. Affirming 9 Ir. Eq. R. 44.

7. A party to a contract becoming aware of an objection to the validity of the contract, must forthwith state it as an objection on which he means to resist performance of the contract; or if, after such knowledge, he treats the contract as subsisting, he will be considered to have waived the objection. *Flint v. Woodin*, 9 Hare 618; 16 Jur. 719.

8. Circumstances of delay considered not to amount to a waiver of requisitions on title. *Cooch v. Warden*, 46 L. J., Ch., 639.

9. Purchaser, having two distinct grounds, and contesting the right to enforce his contract upon one which failed:—Held, not to have waived the other, which was conclusive, although he did not bring it forward for a considerable time after he became aware of it, during which he continued to insist upon the first ground, but he was refused costs. *Magennis v. Fallon*, 2 Moll. 591.

10. Laches will be imputed to a vendor on account of delay, however long, in filing his bill for specific performance, where negotiations respecting the title have been going on the whole time. *M'Murray v. Spicer*, 16 W. R. 332; 5 L. R., Eq., 527; 37 L. J., Ch., 505.

[Where Special Conditions as to Time.] See *X. ante*.

VIII. REFERENCE AS TO.

1. *General Principles*, 7231.
2. *Order for. How Obtained*, 7231.
3. *Before Answer*, 7232.
4. *On Motion after Answer*, 7232.
5. *At the Hearing*, 7233.
6. *General Reference. When directed*, 7233.
7. *What Matters or Inquiries Referred*, 7233.
8. *Inquiry as to Time when Title First made*, 7234.
9. *Evidence in the Master's Office*, 7235.
10. *Form of Report*, 7235.
11. *Taking Exceptions or Objections and Waiver*, 7235.
12. *Report referred Back*, 7237.
13. *Practice on taking Exceptions or Objections*, 7237.
14. *Other Matters*, 7238.

1. General Principles.

1. General rule that Court will not decide upon a title without reference to Master, unless unequivocally, and without fraud or surprise, waived; a plaintiff seeking specific performance of contract being entitled to opportunity of making a better title before the Master, and the defendant having a right to further inquiry, beyond objections arising on abstract, upon principle that bill seeks relief beyond the law. *Jenkins v. Hiles*, 6 Ves. 646.

2. Bill for specific performance of a contract for sale of an estate, upon various objections to the title, dismissed in the first instance without a reference. *Omerod v. Hardman*, 5 Ves. 723.

3. Real estate ordered to be sold pending inquiries before the Master. *Martin v. Hadlow*, 1 W. R. 101.

4. Court refused to make an order under Act of Parliament for sale of estate upon opinion of conveyancer merely approving the conveyance, without reference to Master. *Exp. Newcastle (Duke)*, 6 Ves. 454.

5. Motion by a vendor for a reference as to title refused, because he had been guilty of laches in prosecuting the suit. *Dorin v. Harvey*, 15 Sim. 49; 9 Jur. 648.

6. Questions as to the validity of the contract, and as to whether it is inequitable to enforce its specific performance, must be determined at the hearing; questions of title are referred to chambers. *Hood v. Oglander*, 34 Beav. 513; 11 Jur. N. S., 498; 34 L. J., Ch., 528.

Circumstances under which a question of title may be discussed at the hearing of a suit for specific performance. S. C. 6 N. R. 57.

7. New practice as to the consideration of the vendor's title in suits for specific performance of a purchase. *Pegg v. Wisdon*, 16 Jur. 1105; 16 Beav. 239.

In a suit for specific performance, plaintiff directed to bring in objections to defendant's title before judge in chambers within one week, and vendor could then either remove them or argue them in open court. S. C. 1 W. R. 43; 16 Jur. 1105.

In a suit for specific performance, although in strictness the plaintiff had accepted the title, yet as the point had not been fairly

raised on the pleadings, the plaintiff was allowed to bring in objections. *Ib.*

8. If the common decree for specific performance and for inquiry as to title are made, and no special directions, the purchaser may under it raise objections which he had abandoned before suit. *Curling v. Austin*, 2 Dr. & Sm. 129; 10 W. R. 682.

The Court will not add any special inquiry on the subject to the decree, or direct the chief clerk to state special circumstances. *Ib.*

And on further consideration the Court will not, upon the question of costs or interest, look at any evidence but that in the cause, and will not look at the proceedings and evidence in chambers or on interlocutory motion. *Ib.*

9. In a suit for specific performance by the vendor against the purchaser, when the first question is on the contract, and the Court declares that the vendor is entitled to specific performance of the contract, and the purchaser then insists that no title has been shown, the Court may proceed to determine whether the purchaser is entitled to any further abstract, or let the cause stand over to be argued on that question, on a day to be named; and if the Court decides that the purchaser is entitled to a further abstract, the cause must again stand over, affording him the opportunity of taking any objection that may arise on that abstract. *Keyes v. Heydon*, 9 Hare (App.) v.

10. Manner of proceeding in a suit for specific performance of a contract, where the contract, the sufficiency of the abstract delivered, and the title of the vendor, are all disputed. *Keyes v. Heydon*, 9 Hare (App.) lviii.

11. In suits for specific performance where the contract is not disputed, it is in almost every case the duty of the vendor to obtain an immediate reference for title so as to save unnecessary costs. *Phillipson v. Gibbon*, 40 L. J., Ch., 406; 24 L. T., N. S., 602; 19 W. R. 661; 6 L. R., Ch., 428.

A vendor refused to take an order for reference for title by consent, but brought the suit to a hearing, when he obtained the ordinary decree only, subject to the usual inquiry as to title. The defendant took certain specific objections to the title by his answer, which were overruled by the Court; while the matter was in chambers, another and important defect, which did not appear on the abstract, was discovered by him on inspection of the property. This defect was only cured by the vendor shortly before the cause came on for further consideration:—Held, that although the plaintiff was entitled to a decree, no costs should, under the circumstances, be given to either party, except that the plaintiff should pay the cost of the original hearing occasioned by his refusal to take the reference for title by consent. *Ib.*

Principles on which costs are given in suits for specific performance stated. *Ib.*

2. Order for. How Obtained.

12. Motion for reference of title must be made on notice, if made by any of the parties to cause. *M'Cann v. O'Farrell*, 1 Hog. 121.

13. The Court will not, by one order, direct a reference as to the propriety of a proposed re-

investment, and as to title, and for the completion of the purchase by payment to the vendors, and for taxation and payment of costs. After the Master has approved of the title and settled the conveyance, the matter must come again to the Court for approval and further directions. *Exp. Duckle*, 16 Jur. 511.

1. A vendor filed a claim for specific performance, and gave notice of motion for a decree. The defendant did not appear, and a decree was made against him, directing a specific performance, without any reference as to title. Subsequently, upon the motion of the defendant, the Court allowed a reference as to title to be inserted in the decree upon his paying all the costs of the application. *Hughes v. Jones*, 26 Beav. 24.

2. An estate having been sold, in which the petitioners were interested, it was represented to them that a good title could not be made; and they were induced to give a brief to counsel to consent to the purchase being discharged; they subsequently discovered circumstances which led them to conclude they had been deceived, and that, in fact, a good title could be made, and thereupon petitioned the Court that the order might be discharged. The Court discharged the order, giving the purchaser his costs, and referred it to the Master to inquire whether a good title could be made; the solicitor for the petitioner to have the conduct of the inquiry. *Butter v. Ommanney*, Tambl. 344.

3. Before Answer.

3. Motion after bill filed, and before answer, for reference as to title, counsel for defendant stating there were other matters in question besides title, motion was refused. *Mathews v. Dana*, 3 Madd. 470.

4. Reference of title before answer; plaintiff the vendor undertaking to do all such acts for the purpose of executing what the Court thinks right, as if the answer was in, and the cause brought to hearing; direction, if the report shall be against the title, for compensation; refused as to indemnity. *Balmanno v. Lumley*, 1 Ves. & B. 224.

3. On Motion after Answer.

5. The practice to direct a reference upon title, on motion after answer, limited to the case where the title only is disputed. *Gompertz v. —*, 12 Ves. 17.

6. After answer submitting to perform contract, if good title can be made, reference was directed, on motion whether good title can be made, and whether it appears on the abstract. *Wright v. Bond*, 11 Ves. 39.

7. The Court of Exchequer will not, on bill for specific performance, make an interlocutory order to refer a title, the validity of which is denied by answer, and depends on facts, to the Deputy Remembrancer, until the cause is brought to a hearing, without consent. *Bowyer v. Bright*, 3 Price, 300.

8. Reference as to title before decree only made where title alone is in dispute. *Blyth v. Elmhirst*, 1 Ves. & B. 1.

9. Reference as to title before decree refused where purchaser, on other grounds, resists per-

formance of contract. *Paton v. Rogers*, 1 Ves. & B. 351.

10. Reference before decree confined to the case of title; where there was a further subject of dispute, under a claim of compensation, it was refused with costs. — *v. Skelton*, 1 Ves. & B. 516.

11. Reference of title before decree refused, where the purchaser, besides objecting to the title, claimed compensation for defect of quantity, even though he submitted to complete his agreement. *Love v. Manners*, 1 Meriv. 19.

12. There can be no reference of title except where the title only is in dispute. *Morgan v. Shaw*, 2 Meriv. 138.

13. Receiver appointed on the motion of the vendor pending a reference of title. *Boehm v. Wood*, 2 Jac. & Walk. 236.

Although the Court will not order a reference of title, on motion, when a purchaser resists the performance of the contract on another ground, yet it will take care that the latter is substantial, *semble*. The motion was therefore granted, where the only other ground insisted upon by the owner was, that the time of possession had been made of the essence of the contract, but which, upon looking into it, appeared not to be the case. Merely undertaking to deliver an abstract and possession at a particular time, does make it of the essence of a contract. S. C. 1 Jac. & Walk. 419.

14. In a suit for specific performance between vendor and purchaser, everything connected with the title may be the subject of the usual reference upon motion as to the vendor's title, and may be added by way of inquiry to that reference; but the Court will not allow any inquiry to be added as to matters which have no reference to the title, and which are not admitted by the answer. *Bennett v. Rees*, 1 Keen 405.

15. A reference of the title will not be ordered upon the coming in of the answer, if the purchaser, in his answer, objects to the performance of the contract on the ground that the premises are subject to a right of foot-path, and that the vendor represented to him that no such right of foot-path existed. *Amon*, 1 L. J., Ch., 177.

16. Although the defence of the purchaser was, that time was of the essence of the contract, and that the abstract had been delivered too late, yet the Court granted on motion a preliminary inquiry as to whether the title was good, and when it was first shown to be so. *Forlome v. Amcoats*, 3 Beav. 496; 4 Jur. 1053.

17. Reference as to title directed on motion after answer to a bill for specific performance by the vendor against the purchaser, notwithstanding the purchaser stated that his requisitions on the abstract had not been complied with, although the time for completion of the contract had long expired, and he had given notice of his intention to rescind the contract. *Wood v. Maohu*, 5 Hare 158.

18. Reference of title upon motion by the plaintiff (the vendor) after answer, notwithstanding the question in dispute in the cause might have been conveniently determined by the Court at the hearing without a reference. Whether the question in a cause be what evidence of title the vendor is bound to give, or whether he is able to give sufficient evidence, the question is equally one of title, and the

proper subject of a reference. *Curling v. Flight*, 5 Hare, 242, 243. And see S. C. 2 Ph. 613; 6 Hare 41; 17 L. J., N. S., Ch., 79; *id.* 359; 12 Jur. 423; *id.* 91. See also *Daves v. Betts*, 12 Jur. 709; *id.* 412.

1. Where answer to bill for specific performance raises other objections to performance beside defect of title, Court will not, on motion by plaintiff for reference of title, after the answer, decide whether other objections are frivolous or not, *semble*. *Withy v. Cottle*, 1 Sim. & S. 174; 1 L. J., Ch., 117. S. P. *Gordon v. Ball*, 1 Sim. & S. 178.

2. A contract for the purchase of a farm described it as containing "349 acres, or thereabout, be the same more or less"; and stipulated that the premises should be taken at the quantity above stated, whether more or less. In fact, the farm consisted of only 349 customary acres, which was less than the same number of statute acres by about 100 acres or upwards. On a bill being filed for specific performance, the purchaser admitting that he had been for several months in possession of the property, and had exercised acts of ownership over it, on the faith that a good title to 349 acres would be shown, insisted that in the contract "acres" meant "statute acres," and that he was not bound to perform the contract unless 349 statute acres were conveyed to him.—Held, that in such case a reference of title would not be directed on motion. *Portman v. Mill*, 2 Russ. 570.

3. In a suit for specific performance, the Court will not, if any other defence is set up besides want of title, direct a reference as to title on motion before the hearing:—*Semble*, in a suit by a vendor the Court will not in any case direct a reference upon a motion of the defendant. *Reed v. Dom Pedro North Del Rey Gold Co.*, 2 N. R. 473; 32 L. J., Ch., 773; 11 W. R. 935; 9 L. T., N. S., 132; 3 De G. J. & S. 593. Affirming 2 N. R. 413; 32 L. J., Ch., 773; 9 Jur., N. S., 865; 8 L. T., N. S., 601.

5. At the Hearing.

4. The vendor's bill, in a suit for specific performance of an agreement to take an assignment of a lease, stated a covenant in the lease, not to assign without the license of the lessor, but did not aver that the plaintiff had or could obtain such a license:—Held, upon demurrer, that the Court at the hearing would not on such facts dismiss the bill, but would refer it to the Master to inquire whether the vendor could make a good title, and that the demurrer must therefore be overruled. *Smith v. Capron*, 7 Hare 185; 19 L. J., N. S., Ch., 322; 14 Jur. 686.

5. Although a plaintiff is bound to prove his whole case at the hearing, yet if there be no failure of title, but an omission in the proof of it, the Court may in its discretion direct a reference to the Master to inquire into it. *McAllister v. Walsh*, 8 Ir. Eq. R. 250.

6. General Reference. When directed.

6. Upon a bill filed by the vendor for the specific performance of a contract, it appeared that the defendant, in the course of corre-

spondence between the solicitors, and upon a case stated on his part for the opinion of counsel, expressed himself willing to accept the title, if a particular objection then referred to were removed. That objection not being removed, the bill was filed, and the Court ruled that the reference to the Master as to the title must be in general terms, and not confined to the particular objection. *Lesturgeon v. Martin*, 3 Myl. & K. 255.

7. When money in court is subject to a trust for investment in land, and the tenant for life enters into a provisional contract for the purchase of an estate, subject to conditions of sale, the Court makes a general reference as to the title, and not whether a good title can be made subject to the conditions of sale. *Meyrick v. Lams*, 34 Beav. 58.

8. Where land is purchased for immediate occupation the Court will not direct a general enquiry as to title, so as to give the vendor an opportunity of making good defects which existed in the title when possession should have been given. *Hyde v. Warden*, 47 L. J., Exch. D., 121.

9. When in a suit between vendor and purchaser a decree has been made for specific performance of a contract, subject to the usual reference as to whether a good title can be made, the words "good title" mean not an absolutely good title, but a good title having regard to the terms of the contract, although the latter words are not inserted in the decree. *Upperton v. Nickolson*, 40 L. J., Ch., 401; 6 L. R., Ch., 436; 25 L. T., N. S., 4; 19 W. R. 733. S. C. in court below 39 L. J., Ch., 758; 10 L. R., Eq., 228; 23 L. T., N. S., 343.

7. What Matters or Inquiries Referred.

10. No reference of title upon a question whether the estate was tithe-free, having been sold as such. *Wallinger v. Hilbert*, 1 Meriv. 104.

11. On reference of title on bill for specific performance, the reference may extend to all that concerns the title, but not to other matters; it may be extended, therefore, to inquire whether it appeared by the abstract in the pleadings mentioned, that a good title could be made. *Jennings v. Hopton*, 1 Madd. 211.

12. The particulars of sale stated that the timber on the estate would be included in the purchase. Title was not made out to the timber on a very small portion of the lands. There being no misrepresentation, the Court referred it to the Master to inquire whether the timber on that portion was material to the possession and enjoyment of the estate. *Stewart v. Conyngham (Marquis)*, 1 Ir. Ch. R. 534.

13. Where the vendor, entitled as to part for life, and as to other part absolutely, and as to the remainder it was doubtful if he had any title at all, unless with the consent and approval of the trustees in whom it was vested, contracted to sell the whole, a reference ordered to inquire whether the vendor could, by application to the trustees, make a good title as to that part. *Graham v. Oliver*, 3 Beav. 124.

14. A reference will not be granted as to the

fact on which the foundation of plaintiff's title rests; and accordingly, where the assignee of an insolvent omitted to prove that a fund which he claimed to recover as having been fraudulently settled had ever been the property of the insolvent, a reference as to the fact was refused. *Holden v. Hearn*, 1 Beav. 445; 8 L. J., N. S., Ch., 260; 3 Jur. 428.

1. *Semble*, a trustee under an old trust creating successive limitations of equitable interests, some of which had failed, is entitled, before he can be required to convey, to have the equitable title of those who call for a conveyance ascertained by inquiry, and to have the deed of conveyance settled in the Master's office. *Goodson v. Ellison*, 3 Russ. 583.

2. A. contracts with B. to purchase an estate, and, after accepting the title, agrees to sell to C., who refuses to complete his purchase, on the ground of his having discovered another will made thirty years ago, not set forth in the abstract, but supposed to affect the title. Upon a bill for specific performance by the original vendor against A., who, by his answer (which was sent in, and the cause set down for hearing before this discovery was made), admitted the title, *quære*, if he may be allowed to set up the will as an objection to the title by a supplementary answer. By consent of both parties, a reference was directed to the Master to inquire whether a good title could be made, regard being had to the will only. *Const v. Barr*, 2 Meriv. 57.

3. The truth of a plea that the plaintiff is not executrix of her testator, must be tried under a reference, and not a replication. *Bourke v. Kelly*, 1 Hog. 172.

4. A vendor, by public auction of shares in a railway company, incorporated by Act of Parliament, at the request of the purchaser (who had paid his purchase money), executed a transfer to a third party, who did not accept the transfer, or register himself as a shareholder. On a bill filed by the vendor against the purchaser for a specific performance, the Court directed the usual reference as to title. *Shaw v. Fisher*, 2 De G. & Sm. 11; 12 Jur. 162.

5. Where the title to a contract is made out by showing the title to the land which is the subject of the contract, the Court will enter into the question of the title to the land at the time of the contract; and if the party insisting on the contract makes out a good title to the land at that time, the Court will direct a reference to the Master as to the subsequent title. *Cater v. Croydon Canal Co.*, 4 Y. & Coll. 405; 13 L. J., N. S., Ch., 89.

Upon a reference to the Master to inquire as to the title to compensation for damage done to lands, the Master ought regularly to inquire whether the damage was temporary or permanent. *Ib.*

6. In granting a decree for the specific performance of an agreement to purchase the plaintiff's lands, where the defendant has been guilty of delay, and other acts amounting to a partial waiver of his originally unrestricted right to investigate the vendor's title, the Court will refuse an inquiry in the case of the items as to which there has been such acceptance, allowing it to proceed as to the rest. *Corless v. Sparling*, 8 Ir. R., Eq., 335.

7. The defendant purchased an estate,

having agreed with the plaintiff that, if he made the purchase, he would cede part to the plaintiff. There was some uncertainty in the memorandum of agreement as to the exact portion which was to be ceded to the plaintiff. In an action by him for specific performance of the agreement, the Court directed a reference to chambers to ascertain what portion the plaintiff was entitled to, and decreed that the defendant should convey such portion to the plaintiff. *Chattock v. Muller*, 8 L. R., Ch. D., 177.

8. Inquiry as to Time when Title First Made.

8. Inquiry as to time when title could be made is the subject of further directions after report upon title, and is not to be combined with reference as to title. *Gibson v. Clark*, 2 Ves. & B. 108.

9. Court will not, on motion, after an order for reference, direct Master to inquire (if he have found that a good title can be made to premises, the subject of a suit for specific performance) when such good title could be first made. Such direction should have been applied for at hearing. *Lubin v. Lightbody*, 8 Price 606.

10. Decree for a reference upon the title; the cause coming on for further directions, after a report approving the title, the defendant is entitled to have an inquiry at what time a title could have been made. *Daly v. Osborne*, 1 Meriv. 382.

11. On a reference of title, the Master having reported that a good title could be made, order referring it back to the Master to see whether such title could have been made prior to the filing of the bill by the vendor for a specific performance. *Biroh v. Haynes*, 2 Meriv. 444.

12. Reference having been made as to title on one motion, party cannot afterwards, by another motion, have reference as to delivery of abstract. *Hyde v. Wroughton*, 3 Madd. 279.

13. The defendant, a purchaser of a public house, insisted that time was of the essence of the contract, and that the abstract had not been delivered within the time agreed on. A reference without prejudice was made on motion as to the title, and when it was first shown. *Foxlove v. Amcoats*, 3 Beav. 496; 4 Jur. 1053.

14. Motion may be made on bill for specific performance, for reference as to title, and whether title was shown prior to filing bill. *Anon.*, 3 Madd. 495.

15. In cases of specific performance, the Court will, for the future, add to the reference as to whether a good title can be made, a direction to the Master to inquire and report at what time a good title could have been shown, as interest on the purchase money will be payable from that date. *Enraght v. Fitzgerald*, 2 Dr. & War. 43; 1 Con. & L. 181.

16. Where, on a bill for specific performance, it is not only a question of title, but other questions are made on the terms of the contract, etc., the Court will not direct an inquiry as to when the title was first shown. *Potter v. Crossley*, 5 W. R. 35; 28 L. T. 137.

1. In a suit by vendor for specific performance the defendant disputed the contract. The Court only gave the common inquiry as to title, refusing an inquiry as to when first a good title could be made by the plaintiff. *Morris v. Wilson*, 5 Jur., N. S., 168.

2. Where under a decree, in a suit for specific performance, there is a reference as to "whether the vendor can make a good title, and if so, when such title was first shown," the making and showing a good title are intentionally distinct matters. *Parr v. Lovegrove*, 6 W. R. 709, 201; 4 Drew. 170; 4 Jur., N. S., 600.

3. The bill praying the inquiry into the title, and a specific performance, on the defendant's motion after answer, an inquiry was directed as to the title, at what time the abstract was delivered, and whether it was sufficient, but the Court would not decide upon any matter of relief. *Moss v. Mathews*, 3 Ves. 329.

4. On motion for the usual order of reference as to title, it being objected that the answer stated that a good title could not be made, and that a question of costs would arise on the point of notice of no title before filing the bill, the Court ordered the usual reference to the Master, and directed, that if a good title could not be made, the Master should state when it was first shown that a good title could not be made, with liberty to state special circumstances as to the time when it was first shown that a good title could or could not be made to the estate contracted to be sold. *Martin v. Jardine*, 7 L. J., N. S., Ch., 250.

5. Where specific performance of a binding contract is sought, and there is a reference to the Master to look into the title, or to ascertain who the parties to the conveyance are, that reference enables the vendor to make good any defect in his own title, or to procure a conveyance up to the date of the Master's report and of the decree; and there are cases in which an Act of Parliament has been obtained to remove defects; but when the Court had come to the conclusion upon the evidence that there was no binding contract, and refused to decree specific performance, on the ground that the assent of the proprietors was a term of the contract, and that, at the hearing, such consent was not proved, the Court declined to refer it to the Master to inquire whether the required consent could be obtained, or to make any reference to the Master. *Clay v. Rufford*, 5 De G. & Sm. 768.

9. Evidence in the Master's Office.

6. Order made on motion for a reference as to title ought to contain the directions usual in decrees, as for production of deeds, etc., and examination of parties upon oath. *Winterbottom v. Ingham*, 9 Sim. 654.

7. If a reference as to title is made on motion, the Master, under Lord Lyndhurst's 51st Order, has the same power to examine witnesses as he would have had if the reference had been made by decree. *Woodroffe v. Titterton*, 8 Sim. 238.

8. On reference to a Master to see whether a good title can be made, the Master proceeds

on the abstract only, unless the purchaser requires the production of the deeds themselves; and if he omits to make such requisition, he cannot except to the report, on the ground of the deeds not having been produced before the Master. *Pool v. Shergold*, 1 Cox 160.

9. *Quere*, whether a Master to whom a question of title is referred, has a right to require the parties to procure for him the opinion of any conveyancer whom he shall select, upon the abstracts of title which have been brought into his office. *Flower v. Walker*, 1 Russ. 408.

10. Under the usual reference as to title, a good title is made out when it is proved, but is first shown when the facts necessary to make it out are specifically alleged on the abstract, and are within a vendor's power to prove. *Parr v. Lovegrove*, 4 Drew. 170; 4 Jur., N. S., 600; 6 W. R. 201.

Where there is conclusive evidence of intestacy sufficient to satisfy the Court of the fact, yet without search for a will, a purchaser is entitled to require such search. *Id.*

When a person is alleged to have died intestate, the registers of the Bishop's Court or of the Prerogative Court should be searched for a will. *Id.*

10. Form of Report.

11. It is informal for the Master to state on his report that he has founded his opinion as to the vendor's title upon the opinion of a conveyancer. *Re Collard*, 10 Beav. 334.

12. Report generally that a good title could not be made out, irregular. The Master should state the precise points in which the title is defective. *Green v. Monks*, 2 Moll. 325.

13. It is informal to report a good title conditionally on performance of an undertaking to do certain acts for clearing the title. The Master ought to give a reasonable time to do the acts, and afterwards make his report. *Magennis v. Fallon*, 2 Moll. 575.

14. Upon reference to the Master as to the title, a report that A. B., with the concurrence of C. D., etc., can make a good title, is an excess of his authority, being a report upon the conveyance rather than upon the fact, title or not. Parties, therefore, having omitted to take exceptions to it, are not concluded by its confirmation. *Lewis v. Lozam*, 1 Meriv. 179.

15. A report that good title cannot be made out is an integral part of an estate sold in one lot, is tantamount to a general report that a good title could not be made out. *Prendergast v. Eyre*, 2 Hog. 80.

16. Title reported good by deputy remembrancer in creditors' suit, purchaser not bound to take it if only *prima facie* title. *Eyton v. Dicken*, 4 Price 303.

11. Taking Exceptions or Objections and Waiver.

17. Exception to report in favour of title on ground that reversion in fee might have been disposed of, so as not to have descended to

heir from whom the title was derived, overruled. *Sperling v. Trevor*, 7 Ves. 497.

1. Exceptions to Master's report in favour of title of vendor of bishop's lease, on ground of non-production of bishop's title, overruled. *Fane v. Spence*, 2 Madd. 438.

2. Bill by devisees in trust to sell, for specific performance of an agreement to purchase, that the heir of the deviser is not a party to the suit, is not matter of exception to the report in favour of the title. *Wakeman v. Rutland (Duke)*, 3 Ves. 234.

3. On a reference as to title, the Master by his report stated that he had looked into certain documents and states of facts, and that no title had been made. The counsel who were before the Master stated that the Master had disallowed the state of facts. Exceptions to the report allowed. *Wilkinson v. Hartley*, 14 Jur. 187.

4. A suit for specific performance of a contract, made subject to the final approbation of the Court, was instituted against a party appointed by the Court to enter into such contract for the benefit of an infant plaintiff in a cause then pending. The Master to whom such pending cause was referred having refused to hear, in a proceeding before him to consider the title, the vendors in defence thereof, and having *ex parte* decided against it:—Held, that the vendors were not bound by such *ex parte* decision, but that there ought to be a reference as to the title to the Master to whom the former cause was referred, with liberty for the plaintiff in that cause to attend. *Barrow v. Budd*, 4 Jur. 41.

5. Mortgage debt and premises were assigned by mortgagee to trustee, with power to sue and give acquittances, and all the same powers as mortgagee had. Mortgage estate was sold under decree, and purchase money paid into court:—Held, on exceptions to title, because scheduled creditors were not parties to the bills, but only the trustees, that the trustees could make a good conveyance, and that the exceptions ought not to have been made to title, but to the conveyance. *Binks v. Rokeby*, 2 Madd. 227.

6. A testator having directed his real estates to be sold, the decree in a suit for the performance of the trusts of his will directed the Master to inquire and state what estates passed by the will, and that all the estates which the Master should find to have passed should be sold with his approbation. The Master having ascertained, from a state of facts laid before him, what estates passed, proceeded to sell them. The purchaser objected to the title, because the Master had not made any report in pursuance of the first direction in the decree. But, it being the practice of the Masters in such a case to sell before they make any report, the objection was overruled. *Dykes v. Taylor*, 16 Sim. 563.

7. J. C. by his will devised all his estates, real and personal, to trustees, first, to pay all his debts, etc., next, to the use of his son G. C. for life, with remainder to his issue; and if G. C. should die without issue, to M. W. for life, with remainder to such of her children as should be living at her death, in equal shares. G. C. died without issue, and M. W. had several children living. In a suit by the creditors of J. C. to have the trusts of his will

for payment of his debts executed, and praying a sale of the real estate, the estate was set up to be sold; and three of the children being out of the jurisdiction, the highest bidder excepted to the Master's report of good title, on the ground that the absent children would not join in the conveyance, and were not bound by the decree:—Held, that the exceptions were irregular, being exceptions not to title, but to conveyance, but that the exceptant would not be compelled to complete his purchase, as the objection for want of parties was fatal. *Oldham v. Wilkins*, 1 Ir. Eq. R. 59.

8. A vendor took an exception, which contested the validity of his own title:—Held, that it was irregular. *Bradley v. Munton*, 15 Beav. 460.

9. A summons to vary the chief clerk's certificate, finding that a letter alleging a fact creating a good title, and offering to prove it in a short time, was the period at which a good title was first shown, dismissed with costs. *Parr v. Lovegrove*, 6 W. R. 709.

10. By the marriage settlement of one of the daughters of a testator, who had bequeathed them rent-charges, and also bequeathed legacies, which were charged on the realty, one of the rent-charges and part of a legacy were vested in the children of the marriage, some of whom were minors, subject to an exclusive power of appointment in the parents. The minors were defendants in a suit to carry the trusts of the will into execution, in which the Master found, upon the consent of the devisee and trustee of the minors, that the legacies and rent-charges were in equal priority, and that the finding was in the nature of a compromise, and beneficial to the minor. The report was confirmed by a final decree, and the lands of P., among others, were decreed to be sold to pay the several sums reported, in the first instance subject to the rent-charge to the daughters, and if sufficient was not produced to pay the debts and legacies, then discharged of the said rent-charges; and if the sum arising from such sale should be insufficient to pay the debts, legacies, and value of the rent-charges, and costs, the legatees and devisees of the rent-charges should abate ratably. The lands of P. were sold discharged of the rent-charges:—Held, allowing exceptions to the Master's report of good title, that the report and decree, being founded on a consent which the Court had no jurisdiction to take, were erroneous, and the title under it was bad. *Weir v. Chamley*, 1 Ir. Ch. R. 295.

Pending an appeal from the above decision, which was affirmed, a deed was executed by the father of the minors, appointing the rent-charge to a son who was adult when the consent was entered into, and was a party to it, and the legacy to him and two of the minors who had since come of age. The Lord Chancellor having, on the statement that the plaintiff could then show a good title, referred it back to the Master, to review his report, who found that a good title could be made by reason of said deed; *semble*, that the appointment, having been made on an emergency, and not *bonâ fide* for the end designed by the donor of the power, was void:—Held, that the title was too doubtful to be forced on a

purchaser, and the exceptions to the Master's further report of good title were also allowed. *Id.*

1. If exceptions taken to report of good title are overruled, other objections cannot be made; but if allowed, and new abstract be delivered, other objections may be brought in. *Brooke v. —*, 4 Madd. 212.

2. Where plaintiff has accepted the title in so far as that he had proceeded to examine the deeds:—Held, that although in strictness the title had been accepted, yet, as the point had not been fairly raised on the pleadings, the plaintiff was allowed to bring in objections to the defendant's title. *Pegg v. Wisden*, 1 W. R. 43; 16 Jur. 1105; 16 Beav. 239.

3. If a decree for specific performance and for an inquiry for title is made, the purchaser may raise objections which he abandoned before the suit, and the Court will not add any inquiry on the subject to the decree, or direct the chief clerk to state special circumstances. *Curling v. Austin*, 10 W. R. 682; 2 Dr. & Sm. 129.

4. A purchaser in a suit for specific performance moved for a reference to chambers, to inquire whether the vendor could make a good title, and that the reference should be without prejudice to any question in the cause. There were two grounds of defence—that the vendor could not make a good title; and that if he could he had failed to do so in time:—Held, that the purchaser could not make such a motion without waiving the other objection. *Reed v. Don Pedro North Del Rey Gold Mining Co.*, 9 Jur., N. S., 865; 32 L. J., Ch., 773; 8 L. T., N. S., 601; 2 N. R. 413. Affirmed 32 L. J., Ch., 773; 11 W. R. 935; 9 L. T., N. S., 132; 3 De G. J. & S. 593; 2 N. R. 473.

5. In granting a decree for the specific performance of an agreement to purchase the plaintiff's lands, where the defendant has been guilty of delay, and other acts amounting to a partial waiver of his originally unrestricted right to investigate the vendor's title, the Court will refuse an inquiry in the case of the items as to which there has been such acceptance, allowing it to proceed as to the rest. *Corless v. Sparking*, 8 Ir. R., Eq., 335.

6. The decree in a vendor's suit for specific performance directed the ordinary inquiry as to title, and the chief clerk found the title good:—Held, on summons to vary the certificate, that the purchaser could not then raise a valid objection waived before suit. *Upperton v. Nicholson*, 39 L. J., Ch., 758; 10 L. R., Eq., 228; 23 L. T., N. S., 843.

If a vendor wishes to prevent a purchaser raising objections in chambers on the reference for title on the ground that they have been waived before suit, he must guard himself by insisting at the hearing on a special decree based on such waiver. *Id.*

12. Report referred Back.

7. If, upon a question of title, the Master is satisfied with the evidence produced before him, but, upon the hearing of an exception to the report, the Court thinks the evidence not sufficient, the Court, upon the application of the vendor, will refer it back to the Master to review his report, in order to give the vendor

an opportunity of producing further evidence. *Andrew v. Andrew*, 3 Sim. 390.

8. Upon the allowance of exceptions to a report approving of a title, the Court will, on the application of the vendor, refer it back to the Master to review his report, in order to give the vendor an opportunity of producing evidence to remove the objection. *Egerton v. Jones*, 3 Sim. 392.

An exception to a report in favour of the title having been, on argument, allowed, leave was given to the plaintiff, some time afterwards, to go again before the Master, for the purpose of bringing evidence to show that the objection which the Court had sustained was, under the circumstances, immaterial. *S. C. 1 Russ. & M. 694.*

9. After exceptions allowed to the Master's report of good title in a suit for specific performance, the practice is, not to discharge the purchaser, but, at the request of the plaintiff, to refer it back to the Master to review his report, and to inquire whether a good title can be made to the lands. *Stewart v. Conyngham (Marquis)*, 1 Ir. Ch. R. 534.

10. Where the report is in favour of the title, the Court, on allowing exceptions to it, will give the vendor a reasonable time within which to remove the objection, although the exceptions and further directions were set down to come on together. *Portman v. Mill*, 1 Russ. & M. 696; 9 L. J., Ch., 193.

13. Practice on Taking Exceptions or Objections.

11. Where a party objects to a Master's report as to title, his proper course is to file exceptions, and set them down for hearing in the cause list. *Harwood v. Bland*, Fl. & K. 540.

A plaintiff cannot, after proceeding before the Master on a reference as to title, rely on previous acts of the purchaser as binding him to his purchase, notwithstanding a report of bad title. *Id.*

12. If exceptions taken to the report of a good title be overruled, other objections cannot be made; but if exceptions allowed, and new abstract of title delivered, other objection may be made. *Brooke v. —*, 4 Madd. 212.

13. Purchaser who is dissatisfied with deputy remembrancer's report of title of premises sold under decree, must move for leave to file exceptions thereto; otherwise, the motion to confirm may be made absolute in the first instance, but on moving, if prepared, he may show exceptions instantan. *Eyton v. Dioken*, 4 Price 303.

14. Where, in a suit by a vendor for specific performances, the Master reported in favour of the title, but the Court, on an exception taken by the purchaser, deemed the title doubtful, an order was made dismissing the bill without costs, but neither allowing nor disallowing the exception. *Willow v. Bellairs*, T. & R. 491.

15. Where on a reference as to title in a suit against the purchaser for specific performance, the Master reports in favour of the title, but the Court holds it to be so doubtful that the purchaser should not be compelled to take it, the bill may be dismissed without overruling

the exceptions taken by the defendant to the report. *Robinson v. Milner*, 1 Hare 578. n.

1. Objections to chief clerk's finding as to title should be made and at once referred to the judge in chambers before certificate made, as the cheapest mode of deciding the question. *Parr v. Lovegrove*, 6 W. R. 201; 4 Jur., N. S., 600; 4 Drew. 170.

14. Other Matters.

2. The Master's report on reference of title will not be suspended to await the event of a suit commenced against the vendor for recovery of part of the estate; but the two suits may be heard together. *Osbaldiston v. Ashew*, 2 Jac. & Walk. 539.

3. On a reference of title in a suit by vendor, for the specific performance of a contract for the purchase of lands, the mere fact that a suit has been subsequently instituted, and is pending, in which part of the lands is claimed adversely to the vendor, is not a sufficient ground for reporting that a good title cannot be made. *Osbaldiston v. Ashew*, 1 Russ. 160.

4. Order to dismiss a bill for want of prosecution, not of course, pending a reference on motion, the title alone being in question. *Biscoe v. Brett*, 2 Ves. & B. 377.

5. A decree for reference of title, on a bill for specific performance, should contain a declaration that the contract ought to be specifically performed. *Mole v. Smith*, Jac. 495.

6. Court will not make absolute the common order *nisi* to dissolve injunction (granted to restrain purchaser from proceeding at law to recover part of the purchase-money paid by him in advance, the vendor not being able to make title, and there being outstanding incumbrances) without Master's report as to sufficiency of title, although objections are fully stated in defendant's answer. *Church v. Leggett*, 1 Price 301.

XII. Proceedings under Vendor and Purchaser Act 1874 (37 & 38 Vict., c. 78), sect. 9.

- I. Jurisdiction and Powers of Court, 7238.
- II. Action for Specific Performance barred, 7239.
- III. Practice and Appeal, 7239.
- IV. Costs, 7239.

I. JURISDICTION AND POWERS OF COURT.

7. The summary jurisdiction created by sect. 9 of the Vendor and Purchaser Act 1874, is not intended to apply to cases where there are questions of controverted fact, but is intended for the settlement of short points of law or construction. *Re Popple*, 25 W. R. 248.

8. On a summons under sect. 9 of the Vendor and Purchaser Act 1874, 37 & 38 Vict., c. 78, the parties are placed in the same position, and the Court has exactly the same powers, as in the case of a reference to chambers as to title in a suit for specific performance, and

the same evidence is admissible as could be received on such a reference. *Re Burroughes*, 36 L. T., N. S., 778; 46 L. J., Ch., 528; 5 L. R., Ch. D., 601; 25 W. R. 520.

Evidence, therefore, by affidavit and cross-examination thereon, is admissible as to the vendor's title, and it is open to the purchaser to show that the vendor has no title. *Id.*

9. The Court has jurisdiction, upon a summons under sect. 9 of the Vendor and Purchaser Act 1874, to order the return of a purchaser's deposit with interest. *Re Smith & Stott's Contract*, 48 L. T. 512; 31 W. R. 411.

10. The tenant for life of lands, of which the tenant in tail in remainder was an infant, was desirous of making a voluntary grant of part thereof as a site for a church. An application was made to the Court under the Vendor and Purchaser Act 1874, sect. 9, for an opinion whether it was necessary, under the Places of Worship Sites Act 1873, sect. 1, to appoint a guardian to concur in the grant on behalf of the infant:—Held, that the Vendor and Purchaser Act 1874 did not apply to a voluntary grant, but that this defect might be cured by the admission of a contract for a nominal consideration. *Re Salisbury (Marquis)*, 23 W. R. 824; 20 L. R., Eq., 527; 44 L. J., Ch., 541.

11. Where executors with a charge of debts on the testator's real estate sold it under conditions of sale, by one of which it was stipulated that the "purchaser shall send in his objections and requisitions (if any) in respect of the title, and all matters appearing on the abstract . . . within ten days from the delivery of the abstract, and in this respect time shall be of the essence of the contract, and in default of such requisitions and objections (if none), and subject only to such (if any), the purchaser shall be deemed to have accepted the title"—Held, that, although the ten days had expired, the purchaser was entitled to raise the objection, by summons under the Vendor and Purchaser Act 1874; that the vendors had no power to sell, on the ground that the will did not create a charge. *Re Tanqueray-Williamson and Landau*, 20 L. R., Ch. D., 465; 51 L. J., Ch., 434; 46 L. T. 542; 30 W. R. 801. Affirming 45 L. T. 181.

12. A purchaser makes the following requisition: "Is there to the knowledge of the vendors or their solicitors any settlement, deed, fact, omission, or any incumbrance affecting the property not disclosed by the abstract?"—Held, that neither the vendors nor their solicitors were bound under the Vendor and Purchaser Act 1874 to answer any part of the requisition. *Re Ford and Hill*, 10 L. R., Ch. D., 865; 48 L. J., Ch., 327; 27 W. R. 371; 40 L. T. 41.

13. Application under Vendor and Purchaser Act 1874 for rescission of contract by vendor. *Re Jackson and Oakshott*, 14 L. R., Ch. D., 851; 49 L. J., Ch., 523; 41 L. T. 719; 28 W. R. 794.

14. A testator, by his will, dated in 1845, devised and bequeathed his real and personal estate to his wife for life, subject to the payment of his debts, and from and after her decease to A. and B., "their heirs, executors, and administrators, upon trust to sell and dispose thereof at such times and in such manner as they my said trustees shall deem expedient." A. and B. both predeceased the tenant for life, B., the surviving trustee,

having devised his trust estates. Upon the death of the tenant for life, B.'s devisees contracted to sell part of the real estate of the original testator:—Held, upon a summons under the Vendor and Purchaser Act 1874, B.'s devisees could make a good title, and one which the Court would force upon a purchaser. *Osborne to Rowlett*, 13 L. R., Ch. D., 774; 49 L. J., Ch., 310; 42 L. T. 650; 28 W. R. 365.

Observations on the duty of the Court to decide doubtful questions of title as between vendor and purchaser. *Ib.*

1. A requisition as to the competency of a married woman to give a discharge for a legacy, on the sale of land charged with the legacy, having been brought before the judge in chambers under the Vendor and Purchaser Act 1874, sect. 9, and afterwards adjourned into court, the judge decided the point, and, being of opinion that to make the unsuccessful party pay the costs would be to interfere with the beneficial operation of the Act, ordered each party to pay his own costs. *Re Conard*, 23 W. R. 606; 20 L. R., Eq., 179; 44 L. J., Ch., 384; 32 L. T., N. S., 682.

2. A testator after directing his debts to be paid, and setting apart certain sums to provide annuities for his two sons, devised and bequeathed all his real and personal estate to his four daughters to be equally divided between them; provided as follows—that the share of his wife should be divided after her death between his four daughters or the survivors and their children; and the testator appointed his wife and T. Davies, his executors, to act jointly in carrying out all the intentions of his will, and to invest his daughters' shares for their benefit and the benefit of their children:—Held, upon an application under the Vendor and Purchaser Act, that the legal estate in freeholds was vested in the executors who could make a good title to a purchaser. *Davies to Jones*, 24 L. R., Ch. D., 190; 52 L. J., Ch., 720; 49 L. T. 624.

3. On a summons under the Vendor and Purchaser Act 1874, the Court has power to direct a covenant to be inserted in a conveyance, and to settle the terms of the covenant. But, *semble*, the Court has no power in such a summons to determine a preliminary question of fact. *Re Gray & Metropolitan Railway Co.*, 44 L. T. 567.

II. ACTION FOR SPECIFIC PERFORMANCE BARRED.

4. A purchaser who has availed himself of the provisions of the Vendor and Purchaser Act 1874, and has thereby obtained an order on summons which has disposed of every objection which he thought fit to raise, and under which the vendor has been ordered to make compensation, is not entitled to bring an action for specific performance of the contract for sale and damages. If a vendor does not comply with the order made on the vendor and purchaser summons, the purchaser should apply in chambers to get it enforced:—Action dismissed without prejudice to any proceedings plaintiff (the purchaser) might adopt under the Vendor and Purchaser Act 1874. *Thompson v. Ringer*, 44 L. T. 507; 29 W. R. 520.

III. PRACTICE AND APPEAL.

5. On a summons under the Vendor and Purchaser Act 1874, sect. 9, heard in chambers, judgment ought to be given in Court if the purchaser desires it. *Coleman v. Jarrom*, 25 W. R. 137; 35 L. T. 614.

6. The time within which an appeal can be brought from an order under the Vendor and Purchaser Act 1874, sect. 9, is twenty-one days. *Re Blyth and Young*, 13 L. R., Ch. D., 416.

IV. COSTS.

7. A requisition as to the competency of a married woman to give a discharge for a legacy, on the sale of land charged with the legacy, having been brought before the judge in chambers under the Vendor and Purchaser Act 1874, sect. 9, and afterwards adjourned into court, the judge decided the point, and, being of opinion that to make the unsuccessful party pay the costs would be to interfere with the beneficial operation of the Act, ordered each party to pay his own costs. *Re Conard*, 23 W. R. 606; 20 L. R., Eq., 179; 44 L. J., Ch., 384; 32 L. T., N. S., 682.

8. The question of costs as between vendor and purchaser where the title is disputed considered. *Osborne to Rowlett*, 13 L. R., Ch. D., 774; 49 L. J., Ch., 310; 42 L. T. 650; 28 W. R. 365.

XIII. General Rights and Liabilities of Pending Completion.

- I. *In General*, 7239.
- II. *Deterioration or Loss*, 7240.
- III. *Rents and Profits*, 7241.
- IV. *Improvements or Increased Value*, 7243.
- V. *Vendor's Duty to let Premises*, 7244.
- VI. *Right of Purchaser to take Possession*, 7245.
- VII. *Injunction in Aid of Decree for Specific Performance*. See SPECIFIC PERFORMANCE, V.

I. IN GENERAL.

9. From the execution of the contract, the estate is in equity the property of the vendee, will descend, and is devisable as such. *Seton v. Slade*, 7 Ves. 274.

10. Where the equitable title is complete, a legal conveyance will be decreed, though the property may have been much enhanced or depreciated in value. Subsequent events will not in equity vary a contract fairly entered into. *Revell v. Hussey*, 2 Ball. & B. 287.

11. The purchaser, being in possession of part of the property under the arrangement, and being advised to rescind the contract, and assert his paramount title to the property, was not bound to give up possession before he could assert such paramount title, by making a formal entry on the property. *Southcomb v. Exeter (Bishop)*, 6 Hare 213; 16 L. J., N. S., Ch., 378; 11 Jur. 725.

12. If a purchaser for a valuable considera-

tion has not the legal estate properly conveyed to him, though the consideration cannot create a use by way of covenant to stand seised, yet the vendor will be considered a trustee for the purchaser. *Polleasfen v. Griffith*, 3 Atk. 273.

1. In the absence of express contract on the subject a person is to be treated as purchaser from the time at which, acting prudently, he could have taken possession, that is (usually though not universally) the time at which a good title was first shown. Up to the time at which the purchaser is to be treated as purchaser expenses and outgoings must be borne by the vendor, from that time by the purchaser. *Carrodus v. Sharp*, 20 Beav. 56.

Injunction against Re-sale, Waste, and Other Dealings with the Property pending Suit for Specific Performance.] See SPECIFIC PERFORMANCE, V.

II. DETERIORATION OR LOSS.

See also XXIV. IX. 1 post.

1. *Right of Purchaser to Compensation or Abatement*, 7240.
2. *Liability of Purchaser*, 7240.
3. *Loss by Fire*, 7241.

1. Right of Purchaser to Compensation or Abatement.

2. The amount of deterioration of an estate, pending a suit for specific performance, having been ascertained by an issue, the purchaser was allowed it out of his purchase money which he had paid into court, under an order, with interest from the time when he paid in his money. *Ferguson v. Tadmam*, 1 Sim. 530.

3. Distinction between a purchase and a lease for lives; as time is not essential in a purchase, any delay may be compensated, either by receipt of the rents and profits, or, in case a title cannot be made out, by interest on the deposit; but in a lease depending on lives, where time is most essential, delay does not admit of any compensation. *Ormond v. Anderson*, 2 Ball. & A. 370.

4. Deterioration of the estate, arising from delay in completing the purchase, is not a ground for rescinding the contract, but may be the subject of an allowance to the purchaser. *Lord v. Stephens*, 1 Y. & Coll. 222.

5. When the completion of a purchase is delayed through the default of the vendor in possession, and the property has diminished in value, or has been deteriorated by permissive waste, the purchaser is entitled to compensation. *Regent's Canal Co. v. Ware*, 23 Beav. 575.

6. Completion of contract being delayed for three years by difficulties in title, vendor is accountable for deterioration of the land during that period. *Forster v. Deacon*, 3 Madd. 394.

7. There is no instance of a court of equity compelling a purchaser who contracted for the purchase of a demesne with ornamental timber, where ornamental timber has been cut down between the contract and possession given, or title shown, to complete the purchase. Orna-

mental timber is essentially different from ordinary timber. *Magennis v. Fallon*, 1 Moll. 590.

8. Agreement for the sale of a lease, "with possession on the 1st December, the rent to commence at Christmas." Possession was not given until the 31st January, through the default of the vendor:—Held, that the purchaser was entitled to compensation, and an inquiry was directed. *Gedye v. Montrose (Duke)*, 26 Beav. 45.

9. Where, between the date of the contract and conveyance, any deterioration to the property occurs from accident, without the fault of either party, the loss falls on the purchaser. But where, without any improper neglect or delay, a purchase could not be completed for three years, and the death of a trustee for sale occasioned the expense of a fine on a new admittance, although by the contract the conveyance was to be at the expense of the purchaser:—Held, that the extraordinary expense of the fine should be borne by the trust estate. *Paramore v. Greenslade*, 1 Sm. & G. 541; 17 Jur. 1064.

10. The completion of a contract having been delayed for six years, the property became deteriorated by dilapidations:—Held, that as this delay in completion was occasioned by the default of the vendor, the loss by dilapidation must be set off against the interest on the purchase money. *Phillips v. Silvester*, 20 W. R. 406. Affirmed 42 L. J., Ch., 225; 8 L. R., Ch., 173; 21 W. R. 179; 27 L. T., N. S., 840.

11. The case of the purchase of a fee-simple is distinguishable from that of a life estate with respect to compensation for casualties. *Vesey v. Elwood*, 2 Con. & L. 47; 3 Dr. & War. 74; Fl. & K. 667; 5 Ir. Eq. R. 184.

12. A., on the 4th December 1857, at a sale by auction, entered into a contract for the purchase of a manor of which there were fifty-nine copyhold tenants. The 4th February 1858 was the day fixed for the completion of the purchase. On the 23rd January 1858 F., one of the copyhold tenants, died, and between that day and the 4th February the vendor admitted F.'s widow and her two sons to be tenants of the manor. A. filed a bill for specific performance of the contract, and prayed that an abatement out of the purchase money, as and for compensation for the loss of fines, might be made, and because the value of the manor had been depreciated by the admission of younger lives in lieu of the deceased tenant. To a bill the defendant demurred generally, and the demurrer was allowed, with costs. *Cuddon v. Tve*, 4 Jur., N. S., 579.

2. Liability of Purchaser.

13. Deterioration arising from the agreement between intended purchaser and tenant of vendor being misunderstood by tenant, purchaser held liable to the loss. *Harford v. Purrier*, 1 Madd. 532.

14. In August 1828 the plaintiff agreed to sell a property to the defendant. The contract was to be completed on the 9th October following, and the purchaser was to be entitled to possession up to that time; and if the purchase should not then be completed, the

purchaser was to pay interest at 5 per cent. from that day until full payment. The abstract having been delivered, all parties seemed to agree that a good title was not shown; and in November 1828 the time for completion was enlarged to the 21st February 1829, when the purchase money was to be paid without interest, and the defendant let into possession; and if the plaintiff should fail to make a good title, the deposit was to be returned with interest at 4 per cent. from the 9th October. The defendant refused to complete, and in 1829 brought an action for his deposit, and the plaintiff filed his bill for specific performance. The defendant had not taken possession, and great dilapidation had occurred. It was decided that a good title had been shown in August 1828. A decree was made against the defendant with costs; and it was determined that he should sustain the loss by dilapidation, and pay interest at 4 per cent. on his purchase money from the time of filing the bill. *Minchin v. Nance*, 4 Beav. 332.

1. The vendor of a share in a co-partnership business filed a bill against the purchaser, who had taken possession, charging that he had grossly mismanaged the property and destroyed its value, and praying that he might be declared to have accepted the title, and might be decreed to perform the contract specifically; the Court was of opinion that the title had not been accepted, and as a good title was not shown, a specific performance could not be decreed:—Held, that upon a record so framed no accounts or inquiries could be directed as to the defendant's possession and management of the property, with a view to ascertain whether any and what sum ought to be paid or compensation made by him to the plaintiff. *Stevens v. Guppy*, 3 Russ. 171; 6 L. J., Ch., 164.

3. Loss by Fire.

2. It is against natural justice that any one should pay for a bargain which he cannot have: as if A. articles to buy a house, and the house is burnt down before the day of payment, A. is not bound to pay the money. *Stent v. Bailis*, 2 P. W. 220.

3. Contract for sale of houses, which from defects in title, could not be completed on the day fixed: the treaty was proceeded in on proposal to waive objections on certain terms: the houses being burnt before conveyance, the purchaser is bound, if he accepted title; the circumstance of vendor suffering insurance to expire on the day on which the contract ought originally to have been completed without notice, makes no difference; a reference was, therefore, directed to Master to inquire whether the proposal was accepted or acquiesced in on behalf of the purchaser. *Paine v. Meller*, 6 Ves. 347.

[*Right to Insurance Policies.*] See INSURANCE, I. VI. 2.

III. RENTS AND PROFITS.

See also XXIV. IX. 3 post.

1. *General Principles*, 7241.
2. *Liability of Purchaser*, 7241.
3. *Account against Vendor*, 7242.

1. General Principles.

4. Where, in consideration of sale, there is no stipulation as to interest, and purchaser completes his part, he pays 4 per cent. interest, and takes rents and profits; but if rents and profits value under that rate, he pays no interest, and vendor takes them. *Eadaile v. Stephenson*, 1 Sim. & S. 122.

5. Purchaser is entitled to interest on his deposit, and to costs at law and in equity until the vendor has made his title good: but vendor is entitled to subsequent costs, and may enforce the contract, if his title be good, when the report is made; the rents belong to the vendor till his title is made good, and afterwards the purchaser must take to the rents, and pay interest on his purchase money, till the principal is discharged. *Pinoko v. Curteis*, 4 Bro. C. C. 329. And see *Id.* 333. n.

6. A statement in conditions of sale that a purchaser is to be led into the receipt of the rents and profits from a certain day, must be construed to mean ordinary rents and profits, and not rents reserved on leases for lives. *Hughes v. Jones*, 10 W. R. 139; 5 L. T., N. S., 408; 8 Jur., N. S., 399; 31 L. J., Ch., 83.

2. Liability of Purchaser.

7. On motion by vendor against purchaser in possession for reference to set occupation rent, title not being completed, order was accordingly made, and that interest at 5 per cent. on deposit should, under circumstances, be deducted from rent. *Smith v. Jackson*, 1 Madd. 618.

8. Where a party had contracted to purchase, and had been eight years in possession of premises to which the vendor was unable to make a good title, and refused either to abandon the agreement or accept such title as the vendor could give, having paid no part of the purchase money and no rent; the Court, upon a bill filed by the vendor for relief, directed the agreement to be delivered up to be cancelled, and the rents and profits received by the purchaser to be accounted for, and ordered the purchaser to pay the costs of the suit. *King v. King*, 1 Myl. & K. 442.

9. On a bill by a vendor for specific performance, where the purchaser had, in 1814, entered into possession under the agreement, and, pending the suit, continued in possession until 1823, the plaintiff, in consequence of a defect in the title, failing in his attempt to compel the performance of the contract, the Court refused to decree, under the prayer for general relief, an account of rents and profits against the purchaser, though he had stated, by his answer, that he was willing to pay a fair rent. *Williams v. Shaw*, 3 Russ. 178; 3 L. J., Ch., 157.

10. By an agreement entered into with executors for the purchase of a leasehold public-house, and the goodwill and licences connected with it, the household furniture, stock in trade, and other effects upon the premises were to be taken by the purchaser at a valuation, and possession was to be delivered up to him on the 29th September 1821. The valuation was made, but on the 29th September the purchaser alleging that there was a defect in the

title to the leasehold refused to perform his contract: the executors filed a bill for specific performance, but in the meantime remained in possession of the house, and carried on the business:—Held, that though the executors were entitled to a decree for specific performance, and though the purchaser had done wrong in refusing to perform the contract, he could not be made answerable for the trade which had been carried on in the premises since September 1821; that he could not be compelled to take that portion of the stock in trade on the premises at the time of the decree, which was not there at the date of the agreement, but had been substituted for such parts of the old stock as had been consumed in the usual course of the business; that the purchaser ought to be charged with rents and taxes and other outgoings paid by the executors since September 1821, and with interest on the same as paid by them; that the purchaser was not entitled to any occupation rent, or other allowance for the use of the house and fixtures by the executors during the period that elapsed after the 29th September 1821. *Dakin v. Cope*, 2 Russ. 170.

1. An admission by a defendant, in his answer, that he alone has been in the possession or receipt of the rents and profits of an estate since a time therein specified, will not, under a decree directing him to account for the rents received by him since that time, preclude him from showing, in the Master's office, that a part of such rents was not received by him, but was paid by the tenants to other parties. *Howell v. Howell*, 2 Myl. & C. 478; 1 Jur. 492.

The account of rents given against a purchaser for value, who, after being in possession, is evicted by a party having better title, ought not to extend to such rents as, without his default or neglect, might have been received, if no special case of fraud is made against him. *Id.*

The decree for such an account ought to contain a direction for just allowance. *Id.*

2. The vendor of a share of a co-partnership business filed a bill against the purchaser, who had taken possession, charging that he had grossly mismanaged the property, and destroyed its value, and praying that he might be declared to have accepted the title, and might be decreed to perform the contract specifically; the Court was of opinion that the title had not been accepted; and as a good title was not shown, a specific performance could not be decreed:—Held, that, upon a record so framed, no accounts or inquiries could be directed as to the defendant's possession and management of the property, with a view to ascertain whether any and what sum ought to be paid or compensation made by him to the plaintiff. *Stevens v. Guppy*, 3 Russ. 171; 6 L. J., Ch., 164.

3. Sale in 1808. The present suit was instituted in 1822, and in 1823 the principal defendant answered the bill. No further proceedings in the cause were had until 1839, when the suit was revived:—Held, that as the circumstances were such, that the purchase could not be sustained, the plaintiff was entitled to relief, notwithstanding the lapse of time. But costs were refused to both parties in consequence of the great delay; and an account of the rent was directed only from

the filing of the bill of revivor and supplement in 1839. *Thornhill v. Glover*, 3 Dr. & War. 195.

4. A bill to set aside, on the ground of lunacy and fraud, a conveyance of an estate by a party claiming the fee-simple. The lunacy was established, but it appeared that the plaintiff was only entitled to a life estate in the property:—Held, that the plaintiff (and his personal representative after his death) was entitled to an account of the rents and profits during the life of the plaintiff, as against the parties in possession under the conveyance. *Price v. Berrington*, 7 Hare 394.

3. Account against Vendor.

5. The title appearing on the abstract not being satisfactory, and the purchaser, for that reason, not having taken possession, the vendor to account for the rents received, or which, without his wilful default, might have been received. *Wilson v. Clapham*, 1 Jac. & Walk. 36.

6. By conditions of sale, the purchase money was to be paid in May, and, if not paid, from any cause whatever, interest was to be paid till the purchase was completed, and the purchaser to be let into possession from the quarter-day next preceding the day of payment. Payment was made in December:—Held, that the purchaser, paying interest from May, was entitled to the rents from the 25th March. *Nicholson v. Nicholson*, 5 L. J., N. S., Ch., 51.

7. By an agreement entered into with executors for the purchase of a leasehold public-house, and the goodwill and licenses connected with it, the household furniture, stock in trade, and other effects upon the premises, were to be taken by the purchaser at a valuation, and possession was to be delivered up to him on the 29th September 1821. The valuation was made, but on the 29th September the purchaser, alleging that there was a defect in the title to the leasehold, refused to perform his contract; the executors filed a bill for specific performance, but in the meantime remained in possession of the house, and carried on the business:—Held, that though the executors were entitled to a decree for specific performance, and though the purchaser had done wrong in refusing to perform the contract, he could not be made answerable for the trade which had been carried on in the premises since September 1821: that he could not be compelled to take that portion of the stock in trade on the premises at the time of the decree, which was not there at the time of the agreement; but had been substituted for such parts of the old stock as had been consumed in the usual course of the business: that the purchaser ought to be charged with rent and taxes, and other outgoings paid by the executors since September 1821, and with interest on the same so paid by them: and that the purchaser was not entitled to any occupation, rent, or other allowance, for the use of the house and furniture by the executors, during the period that elapsed after the 29th September 1821. *Dakin v. Cope*, 2 Russ. 170.

8. When the purchase is completed, the

purchaser is entitled to the rents and profits till possession given, and vendor to purchase money with interest: and if by neglect of vendor no rents, etc., have been received, he will be liable for what he might have received while purchaser was out of possession. *Ackland v. Cuming or Gaisford*, 2 Madd. 28.

1. A vendor who has to account to the purchaser for rents and profits, from the time fixed for completion, is not, unless a special case be made, liable to account for sums which he might have received but for his wilful default, nor entitled to an inquiry as to repairs or lasting improvements. *Sherwin v. Shakspear*, 5 De G. M. & G. 517; 2 Eq. Rep. 957; 2 W. R. 66; 18 Jur. 843; 23 L. J., Ch., 898; 1 W. R. 460.

In fixing occupation rent to be paid by a vendor, in such circumstances it is not according to the course of the Court to insert in the decree a provision respecting income tax, any just allowance in that respect being comprehended in the general and usual words. *Id.*

The established forms of decrees ought not to be lightly departed from. S. C. 2 W. R. 668.

2. Though the Court decreed specific performance of an agreement to let the plaintiff into a trade (contra 9 Ves. 357), it refused to direct an account of the profits from the time the plaintiff ought to have been admitted; his remedy for that having been at law. *Anon.*, 2 Ves. 630.

3. On a bill by a purchaser for specific performance of a contract for the sale of an estate, a vendor, who, during fifteen years, had retained possession of the whole estate and of one-third of the purchase money was, under the circumstances, charged with interest on one-third of the rents and profits. *Burton v. Todd*, 1 Swan. 255.

4. In July 1867 L. sold to a railway company a house in which he was carrying on the business of a victualler, the terms being that the purchase money was to be paid on the 25th March 1869, or at such earlier time as the company should choose, possession to be given on payment, they paying 5 per cent. interest in the meantime; and he was to be their tenant at a given rent, the tenancy not to be determined before the 25th March 1869, unless the company, after three months' notice, paid the money sooner, but to be determinable on the 25th March 1869, by a week's notice. The interest and rent were paid up to the 25th March 1869. L. gave due notice to determine the tenancy on that day; but the company not having the purchase money ready, he refused to give up possession, and in April filed a bill for specific performance. On the 18th November 1869 a decree for specific performance, with a declaration that the title had been accepted, and an order for payment of the purchase money, with interest from the 25th March 1869, was made; and an inquiry was added whether, having regard to the circumstances and conduct of the parties, the company was entitled to any and what allowance in respect of L.'s occupation of the premises after the 25th March 1869:—Held, that the company was not entitled to any allowance by way of occupation rent. *Leggott*

v. Metropolitan Railway Co., 5 L. R., Ch., 716; 18 W. R. 1060.

5. An agreement for purchase of real estate provided that the purchaser should be entitled to the possession or rents from the 25th March, and in the event of the purchase not being completed on that day, the purchaser should pay interest on the unpaid balance till completion. Disputes having arisen the purchase was not completed for several years, and the vendor refused to allow the purchaser to take possession in the meantime, but suffered the estate to remain unoccupied, and to fall into decay:—Held, that the purchaser was entitled to charge the vendor with rents and profits which, without wilful default, he might have received, and also with deterioration, and to set off what might be found due against his purchase money and interest. *Phillips v. Silvester*, 42 L. J., Ch., 225; 8 L. R., Ch., 173; 21 W. R. 179; 27 L. T., N. S., 840. Affirming 20 W. R. 406.

6. Houses described in the particulars as in the respective occupations of specified under tenants, and as let to Messrs. J., "at the very low rent of 50*l.* per annum, who have received notice to quit," at a day past, but with a subsequent written permission to occupy on the same terms as before until the tenements are sold, were contracted to be sold, subject to a condition, that the purchaser should be entitled to the rents from a specified day. On completion after that date, the purchaser claimed to be allowed a rent at the rate of 160*l.* a year, the sum which the under-tenants paid the tenant; on the ground that, in allowing the tenant to continue in possession at the rent of 50*l.* a year after the date of the contract for sale, the vendors were guilty of wilful default. On a claim by the vendors to enforce specific performance:—Held, that the purchaser not having required the vendors to turn the tenant out, they were not guilty of wilful default in allowing him to remain at the lesser rent; and specific performance was decreed, the plaintiffs accounting only for the lesser rent. *Crosse v. Beaumont (Duke)*, 5 De G. & Sm. 7.

7. In May a person agreed to purchase an estate, including hay and growing crops, for 9,000*l.* The purchase was to be completed in June, when the purchaser was to be let into possession, and if not, then he was to pay interest on the purchase money. By a subsequent agreement, November was substituted for June. The contract was not completed until the following February, and in the meantime the vendors sold the hay and used the garden produce:—Held, that under the altered contract, the purchaser was not entitled to this hay or produce. *Webster v. Donaldson*, 34 Beav. 461; 11 Jur., N. S., 404; 13 W. R. 515; 12 L. T., N. S., 69.

Held, also, that if he was entitled to the produce of the crops, his remedy was by action. *Id.*

IV. IMPROVEMENTS OR INCREASED VALUE.

1. Allowance for to Purchaser when Sale set Aside, 7244.
2. Allowance for to Vendor, 7244.
3. On Sale of Reversion, 7244.

1 Allowance for to Purchaser when Sale set Aside.

1. A purchaser who has laid out money in *bonâ fide* improvements on lands purchased by him upon a sale which was invalid but not exactly fraudulent, is entitled to an allowance for sums so expended by him. *Stepney v. Biddulph*, 13 W. R. 576; 12 L. T., N. S., 176.

Therefore, where a railway company authorised to purchase from tenants for life lands for the purpose of building warehouses, and to re-sell such portions of the land as should not be required for that purpose, treated with A. (the tenant for life for the time being) for the purchase of certain settled estates, and, before the sale was completed, contracted, with A.'s knowledge, to re-sell part of the land to B. and C., upon an understanding (which was carried into effect) that B. and C. should put up certain buildings and improvements thereon; and a new tenant for life and the remaindermen filed a bill to set aside the sale:—Held, that the sale must be set aside, but that, in the absence of fraud, B. and C. were entitled to the re-payment of the sums so expended in improvements, with interest at 5½. per cent. from the death of the last tenant for life. *Ib.*

2. There may be a degree of unfairness in obtaining articles for the purchase of an estate, for which this Court will not set them aside, but will refuse its aid to carry them into execution; and if the party who obtained such articles had been in possession, and made lasting improvements, he shall be allowed for them on consenting to deliver up the articles, and account for the profits; otherwise if he goes to law and fails there. *Savage v. Taylor*, Forrest. 234.

3. Pending a suit against an agent for re-conveyance of an estate purchased of his principal, defendant sold part of the property, after which a decree was made for re-conveyance with the usual accounts. After that a supplemental bill is filed against the purchasers, to which the personal representatives of the original defendant (who had died during the original suit) were made parties, as being interested in the account against the purchasers. In this suit a decree was made for re-payment to the purchasers of their purchase money by the representatives of the original defendant, and for an allowance to them for the substantial repairs and improvements. *Trevelyan v. White*, 1 Beav. 588.

4. In estimating lasting improvements, old buildings pulled down, if incapable of repair, to be valued as old materials only. *Robinson v. Ridley*, 6 Madd. 2.

5. Where the title is fraudulent, equity, in giving relief, will reimburse the party in possession for permanent improvements. *Shine v. Gough*, 1 Ball & B. 444.

6. If an assignee purchase part of the bankrupt's estate, and improve, the estate must be re-sold, and put up at the price given by the assignee, adding the sum laid out in improvements. *Exp. Hewitt, Re Johnston*, 2 Mont. & A. 477.

2. Allowance for to Vendor.

7. There is no consideration between the purchaser and the vendor's creditor to entitle

the latter to recover from the former the amount of the repairs done to the subject matter of the purchase. *Rattenbury v. Fenton*, 3 Myl. & K. 505; 8 L. J., N. S., Ch., 203.

8. In a decree for specific performance directing an account of rents against a vendor who has remained in possession pending the discussion upon the title, and directing an occupation rent to be fixed, it is irregular (where no special case has been made for it) to insert, as a matter of course, a direction that he shall be allowed for the expenses of needful repairs, or for income tax, in fixing the occupation rent. *Sherwin v. Shakspear*, 18 Jur. 843; 23 L. J., Ch., 898; 5 De G. M. & G. 517; 1 W. R. 460; 2 W. R. 668; 2 Eq. Rep. 957.

3. On Sale of Reversions.

9. In December 1812 A. agreed to become the purchaser of a reversionary estate. B., the vendor, agreed to make out a good title by the 1st May next, from which time A. was to be entitled to the rents and profits. Part of the purchase money was paid at the time of the agreement, and the remainder was to be paid on the 1st May, A. further agreeing to pay, at the same time, all such further sums as should be awarded by indifferent persons in respect of any increase in the value of the estate, by the deaths of any persons on whose lives leases had been granted. The purchase was not completed for a considerable period. In a suit for specific performance by the vendor, it had been referred to the Master to inquire as to whether vendor could make a good title, and report how much the value of the estate had been increased by the dropping of lives:—Held, affirming the judgment of the Court below, that the form of the order was correct, and that the vendor was not entitled to the benefit of any increase in the value of the estate from the wearing of lives. *Brooke v. Champenonne*, 4 Cl. & F. 589; 9 Bli. N. S. 199.

10. *Quære*, on what principle the increased value of an estate arising from the dropping of lives, between the commencement and completion of the contract, is to be calculated. *Townsend v. Champenonne*, 3 Y. & Coll. 506.

See also XXIV. IX. 2 post.

Rights to Interest on Sale of.] See XIV. IX. 2 post.

V. VENDOR'S DUTY TO LET PREMISES.

11. When the vendor of a farm subject to a yearly tenancy finds that, without default on the part either of himself or the purchaser, the purchase cannot be completed on the appointed day, and that the tenancy will determine before actual completion, it is his duty as trustee for the purchaser, whether the tenancy is determined in the ordinary course by landlord or tenant, or on a notice to quit given by the vendor at the request and for the convenience of the purchaser, to re-let the farm on a yearly tenancy so as to prevent it going out of cultivation, unless he obtains an indemnity from the purchaser against all risk arising from its remaining unlet. *Egmont (Earl) v. Smith*, 46 L. J., Ch., 356; 6 L. R., Ch. D., 469.

VI. RIGHT OF PURCHASER TO TAKE POSSESSION.

1. The rule that a purchaser shall have possession as from the quarter-day receding the sale, does not apply to a colliery, which is an article of trade, the profits accruing daily; the proper period is the month or week in which the purchase takes place, according to the usual course of taking the account. *Wren v. Kirton*, 8 Ves. 502.

2. A mortgagee purchased part of the mortgaged estate. His principal and interest, calculated up to the 24th March, exceeded the purchase money. He was let into possession from the preceding Christmas. *Bates v. Bonnor*, 7 Sim. 427.

3. Where the vendor of a piece of land, of which he was himself in occupation, contracted to sell the land under conditions of sale, by one of which it was provided that the purchaser should be entitled "to the possession or the receipt of the rents and profits" of the land from a specified date:—Held, that, on the construction of the written agreement, the vendor was bound to give possession to the purchaser on the date specified, and that no effect could be given to the words referring in the alternative to the receipt of the rents and profits; and that evidence was not admissible to prove an alleged contemporary parol agreement by which the vendor was to retain possession of the land to a later date, paying the purchaser in the meantime, by way of rent, interest on his purchase money. *Anker v. Franklin*, 53 L. T. 317.

4. A contract for sale of a house provided that the purchaser should be entitled to immediate possession upon depositing the purchase money, but the purchaser was not to be considered as accepting the vendor's title:—Held, that this clause had the same operation as s. 85 of the Lands Clauses Act (8 & 9 Vict., c. 18), and the purchaser was entitled, upon depositing the purchase money, not only to take possession but to pull down the house, that being the object for which the purchase was effected. *Bolton v. London School Board*, 7 L. R., Ch. D., 766; 26 W. R. 549; 47 L. J., Ch., 461.

XIV. Purchase Money and Deposit.

- I. *Deposit*, 7245.
- II. *Payment of Purchase Money*, 7248.
- III. *Risk and Increment*, 7249.
- IV. *Return of*, 7250.
- V. *Lien of Vendor*, 7251.
- VI. *Lien of Purchaser*, 7259.
- VII. *Application and Apportionment of*, 7260.
- VIII. *Payment into Court*, 7262.
- IX. *Interest*, 7265.

I. DEPOSIT.

1. *Forfeiture or Return of and Interest*, 7245.
2. *Injunction against Suits for*, 7247.
3. *Payment by Cheque*, 7247.
4. *Other Cases*, 7247.
5. *Lien for*. See V. *infra*.
6. *Investment of*. See III. *infra*.

7. *Rights and Liabilities of Auctioneer*. See AUCTION AND AUCTIONEER, II.
8. *Under Sales by the Court*. See XXIV. *v. post*.

1. Forfeiture or Return of and Interest.

5. Vendor filed a bill for specific performance, but not being able to make a good title, his bill was dismissed, and he was ordered to return the deposit with interest. *Anson v. Hodges*, 5 Sim. 227.

6. If a bill by a purchaser for specific performance be dismissed, the Court cannot order the deposit to be returned; but *secus* if the bill be filed by the vendor. *Aylett v. Ashton*, 5 L. J., N. S., Ch., 71. See *Bonnet (College) v. Cary*, 3 Bro. C. C. 390.

7. In dismissing a bill for specific performance by a vendor, the Court has jurisdiction to order a return of the deposit. *Turquand v. Rhodes*, 57 L. J., Ch., 830; 18 L. T., N. S., 844; 16 W. R. 1074.

8. Relief against forfeiture of the deposit, upon putting the other party in the same situation as if the contract had been performed at the time agreed. *Moss v. Matthews*, 3 Ves. 279.

9. The Lord Chancellor's jurisdiction as to acts done in the bankruptcy is not determined by the superseding of the commission; so, after the commission is superseded, a petition will lie on behalf of a purchaser of the estates put up to sale by the assignees, for the repayment of the deposit. *Exp. Fector*, Buck 428.

10. A. articles to buy land, and pays part of the purchase money; afterwards he enters into several orders of court to pay the residue by such a day, or, in default thereof, to give up the articles, and lose what he had before paid. Court will relieve, though these articles have not been complied with. *Vernon v. Stephens*, 2 P. W. 66.

11. A condition, that if any objection or requisition should be made which the vendor should be unable or unwilling to remove, it should be lawful for him to rescind the contract, and that in that case the purchaser should be entitled to a return of his deposit without interest, but should not be entitled to any costs or damages, does not entitle the vendor, after making numerous fruitless attempts to remove an objection made by a purchaser desirous of being discharged, to return him his deposit only, but the vendor must then pay interest upon the deposit and the costs of the purchaser. *McCulloch v. Gregory*, 1 Kay & J. 286; 24 L. J., Ch., 246; 3 W. R. 231; 3 Eq. Rep. 495.

12. Power of the Court to order the return of the deposit where the vendor's bill is dismissed, he having given an undertaking. *Royon v. Paul*, 28 L. J., Ch., 255.

13. Where there is no contract, or no contract which can be enforced, a purchaser is entitled to a return of his deposit. *Casson v. Roberts*, 31 Beav. 613; 32 L. J., Ch., 105; 7 L. T., N. S., 588; 1 N. R. 9; 8 Jur., N. S., 1199; 11 W. R. 102.

Therefore, where one contracted by parol for the purchase of lands, and paid a deposit, and afterwards declined to complete, his right to a return of the deposit constituted a

sufficient debt to support a creditor's suit against the representative of the vendor. *Ib.*

The purchaser having been guilty of delay in making his claim, interest on the deposit was not allowed. *Ib.*

1. A bill by a vendor for specific performance being dismissed, and the purchaser not wishing for a return of the deposit unless it was ordered to be returned with interest:—Held, that the Court ought not to order a return of the deposit, but to leave the purchaser to his remedy at law. *Rede v. Oakes*, 2 De G. J. & S. 518; 11 Jur., N. S., 229; 13 W. R. 420; 5 N. R. 391.

2. Where the vendor's bill for specific performance is dismissed, on the ground of his laches in instituting the suit, and without any decision on the question of title, the Court will not order the deposit to be returned to the purchaser, but will leave both parties to their legal remedies. *Southcomb v. Exeter (Bishop)*, 6 Hare 225; 12 Jur. 744.

3. One of the terms of an agreement was, that the contract should be void if the purchaser's counsel should be of opinion that a marketable title could not be made by a certain time. The counsel being of that opinion, a bill by the purchaser for a specific performance with a compensation, was dismissed with costs, and an application afterwards made by the plaintiff that his deposit might be set off against the defendant's costs, and the surplus (if any) paid to him, was refused with costs. *Williams v. Edwards*, 2 Sim. 78.

4. N. contracted to purchase an estate, and a bill was filed against him for specific performance. He then became bankrupt on his own petition, having brought an action to recover his deposit, which was restrained on the terms of the deposit being brought into court. The assignees were then made parties to the suit, and subsequently disclaimed in respect of the contract. The usual inquiry was directed as to title, and a good title certified:—Held, the assignees and bankrupt appearing, that all proceedings must be stayed, and the deposit paid out to the party paying it in, without prejudice to any proceeding under the Bankrupt Act 1849, s. 146. *Kell v. Nokes*, 14 W. R. 908; 14 L. T., N. S., 697.

5. In the particulars of sale of leaseholds, the premises were stated to be sold "by order of the executors;" they were in fact sold by the administrator *de bonis non* of the testator *durante absentia* of his next of kin. The sale was by auction, and the purchaser paid a deposit, but refused to complete on discovering the nature of the vendor's title:—Held, dismissing a bill for specific performance, that although the effect of the grant during the lifetime of the absent principal would have been perfectly valid, yet inasmuch as the principal might at the time of the sale have been dead, the title was not such as a purchaser was bound to accept, and the deposit with interest was ordered to be refunded. *Webb v. Kirby*, 7 De G. M. & G. 376; 3 Jur., N. S., 73; 26 L. J., Ch., 145. Reversing 3 Sm. & G. 333; 2 Jur., N. S., 996; 25 L. J., Ch., 872; 4 W. R. 770.

6. A contract for sale of superfluous land of a railway company which had been conveyed by the company to the vendor contained a stipulation that the purchaser should assume

and admit that everything (if anything was necessary) was done by the company to enable them to sell the land as surplus land, and should not call for or require production of any evidence to that effect; and a further stipulation that if the purchasers should fail to comply with the terms of the agreement the deposit should be forfeited to the vendor. The land was not situate in a town or used for building purposes. In the course of the investigation of the title the purchaser discovered that the prior owners had not waived their right of pre-emption; and as the vendor refused to remedy the defect, the purchaser brought an action claiming a return of the deposit and damages. The vendor then sold the land to one of the prior owners:—Held, that the purchaser was bound by the stipulations to admit the title of the company to sell to the vendor; and that as he had refused to abide by that stipulation he had broken the contract, and could not maintain the action, or claim a return of his deposit. *Best v. Hamand*, 12 L. R., Ch. D., 1; 48 L. J., Ch., 503; 27 W. R. 742.

7. S., being in the occupation of a public-house, contracted with W. to sell to him the residue of the lease, of which twelve and a half years at least were unexpired. W., the day after signing the contract, by which he agreed to take possession on the 15th April 1878, paid a sum as a deposit to S.'s agent. The abstract of title showed that S.'s lessors had a right of option to determine the lease at the end of five years, and W. at once rescinded the contract, and required the return of the deposit money. S. refused to repay the money, and W. issued a writ in his action on the 10th April to recover it:—Held, that W.'s objection to the title was valid; that he was not bound to wait till the 15th April before issuing the writ; and that he was entitled to repayment of the deposit money with interest. *Weston v. Savage*, 10 L. R., Ch. D., 736; 48 L. J., Ch., 229; 27 W. R. 654.

8. Where, in a suit by a vendor for specific performance, it was certified that a good title was not deduced, the Court ordered a return to the defendant of his deposit money, with interest at 4 per cent., and declared the defendant entitled to a lien on the estate of the same, and also for his costs, with liberty to apply; and, subject thereto, dismissed the bill. *Turner v. Marriott*, 3 L. R., Eq., 744; 15 L. T., N. S., 607; 15 W. R. 420.

9. When a purchaser by a decree in a suit for specific performance was decreed to pay the purchase money within a specified time, and failed to do so, the Court, on the application of the vendor, ordered the contract to be rescinded, and stayed all proceedings in the suit with costs, to be paid by the purchaser, and refused to make an order for the return of the deposit to him. *Dunn v. Vere*, 23 L. T., N. S., 432; 19 W. R. 151.

10. Where a purchaser became bankrupt after signing an agreement for the purchase of certain property sold by auction by order of the Court, and his assignees refused to complete the purchase:—Held, that the assignees were not entitled to the deposit which had been paid by the bankrupt on signing the agreement, though the conditions of sale did not stipulate for the forfeiture of the deposit in the event of the purchaser making default.

Depree v. Bedborough, 3 N. R. 187; 4 Giff. 479; 33 L. J., Ch., 134; 9 Jur., N. S., 1317; 12 W. R. 191; 9 L. T., N. S., 533.

Semble, where a purchaser makes default, no express stipulation is necessary to entitle the vendor to the deposit. *Id.*

1. When a contract for sale goes off by default of the purchaser, the vendor is entitled to retain the deposit. *Eap. Barrell, Re Parnell*, 10 L. R., Ch., 512; 44 L. J., Ch., 138; 23 W. R. 846; 33 L. T., N. S., 115.

By a contract for sale of real estate it was stipulated that a portion of the purchase money should be paid immediately, and the residue on the completion of the contract. There was no stipulation as to the forfeiture of the deposit in case the purchase went off through the purchaser's default. After the title had been accepted the purchaser became bankrupt, and the trustee disclaimed the contract under the Bankruptcy Act 1869, s. 23, and called upon the vendor to repay the deposit:—Held, that the vendor was entitled to retain the deposit. *Id.*

2. Injunction against Suits for.

2. Purchaser entering into possession, knowing of objections to abstract, but continuing to negotiate, cannot break off contract: an injunction will lie against his proceeding at law to recover back purchase money; but otherwise if he had declared off, on delivery of abstract. *Ward v. Jeffery*, 4 Price 294.

3. Court will not make absolute the common order *nisi* to dissolve injunction (granted to restrain purchaser from proceedings at law to recover part of the purchase money paid by him in advance, the contract being impracticable on the ground of want of title and outstanding incumbrances) without Master's report as to sufficiency of title, although objections are fully stated in defendant's answer. *Church v. Leggett*, 1 Price 301.

4. Auctioneer, on motion of vendor, ordered to pay deposit into Court, minus his charges and expenses; and purchaser restrained by injunction from proceeding in his action against the auctioneer for the deposit, in which action he had obtained a judgment to the whole amount of the deposit. *Annesley v. Muggridge*, 1 Madd. 593.

5. Motion for an injunction to restrain an action against the auctioneer for the deposit, refused where there had been a great delay on the part of the vendor. *Lloyd v. Collett*, 4 Bro. C. C. 469.

6. Vendor proceeding in treaty beyond the time for completing the contract, and the vendor having brought an action and withdrawn his record on finding he could not support it, not having got in a judgment amounting to half the purchase money, and the purchaser having brought an action for his deposit and obtained a verdict; an injunction to restrain his proceeding was refused. *Wood v. Bernal*, 19 Ves. 220.

7. Injunction granted to stay action against the auctioneer for the deposit, although the estate sold was represented as freehold, with leasehold adjoining, and turned out to be almost all leasehold; and although there had been great delay in making out the plaintiff's title. *Fordyce v. Ford*, 4 Bro. C. C. 494.

8. Injunction to stay proceedings in an action brought by a purchaser to recover the amount of his deposit, refused, the description in the printed particular of sale being calculated grossly to deceive as to the real nature and value of the estate sold. *Stewart v. Alliston*, 1 Meriv. 26.

9. There is no general rule of practice to the effect that the Court will not, in a suit for specific performance by a vendor, restrain an action by the purchaser to recover the deposit. *Kell v. Nokes*, 32 L. J., Ch., 785; 11 W. R. 978; 8 L. T., N. S., 824.

A purchaser of property by private contract having paid his deposit, considered the title defective, and brought an action for the recovery of such deposit. The vendor then filed a bill and moved for an injunction to restrain such action:—Held, that a court of equity is the proper tribunal to try a question of title, and that on bringing the deposit into court, the injunction must be granted. *Id.*

3. Payment by Cheque.

10. The custom of auctioneers to accept, on sales of large properties, a cheque in lieu of cash for the deposit, is reasonable, and a mortgagee vendor was held to be justified in acting on it, and not to be guilty of negligence in the conduct of the sale, though the cheque was dishonoured. *Farrer v. Lacy*, 25 L. R., Ch. D., 636; 53 L. J., Ch., 569; 50 L. T. 121; 32 W. R. 196.

In such a case a mortgagee, who has endeavoured to sell under his powers, is entitled to add the costs of the abortive sale to his security. *Id.*

4. Other Cases.

11. The Court will not compel vendor to pay deposit money into court, though he retains possession of the estate, if delay in completion of contract is caused by purchaser. *Wynne v. Griffith*, 1 Sim. & S. 147; 1 L. J., Ch., 110.

12. On a contract for purchase, a part of the purchase money was paid as "deposit" to the vendor's solicitor, who paid it away at the desire of the vendor, without the concurrence of the purchaser. This created a difficulty in completing the purchase, as a mortgagee of the estate would not join in the conveyance without payment to him of the deposit. In a suit by the purchaser for specific performance, the solicitors were declared liable to make good the money. *Wiggins v. Lord*, 4 Beav. 30. S. C. *nom. Wiggins v. Ford*, 2 Jur. 786.

13. On the occasion of a sale of a freehold estate it was agreed that the purchase money should be paid in railway bonds, and the purchaser deposited with and assigned to A., who alleged himself to be the solicitor of the vendor, one of such bonds in part payment of the purchase money. The contract turned out to be a fraud on the purchaser and went off, and on the purchaser applying to A. for the return of the deposited bond, he was informed that A. had placed it in the hands of B. to secure a debt due from himself to B. B. had no notice of the terms upon which A. held the bond:—Held, in a suit by the purchaser

against B. to restrain him from dealing with the bond, that the deposit and assignment of the bond by the purchaser to A. for the purpose mentioned did not make A., in the events which happened, a constructive trustee for the purchase, and that as B. was a *bond fide* purchaser of the bond for value without notice, he could not be restrained from dealing with it. *Ashwin v. Burton*, 11 W. R. 103; 9 Jur., N. S., 319; 32 L. J., Ch., 196; 7 L. T., N. S., 589.

II. PAYMENT OF PURCHASE MONEY.

1. *In General*, 7248.
2. *To Solicitor*, 7249.
3. *To Auctioneer*. See XXIV. v. 1 *post*.
4. *Indorsed Receipt*. See DEEDS, III. 8.
5. *Rescission of Contract for Non-payment after Decree in Suits for Specific Performance*. See SPECIFIC PERFORMANCE, XV. 1.
6. *On Exercise of Options to Purchase*. See XXIII. *post*.

1. In General.

1. Where conveyance is executed to purchaser, which expresses purchase money to have been paid, estate does not pass by the conveyance in equity till money actually paid, although receipt for same is indorsed on conveyance. *Winter v. Anson (Lord)*, 1 Sim. 444.

2. Where upon the sale of a ship to A. and B., in which A. was to be interested in one-third and B. in two-thirds, and upon the execution of the bill of sale, although expressing that B. had paid two-thirds of the purchase money, only one-third was actually paid, and A.'s acceptances given for the remainder, which were, from A. becoming bankrupt, dishonoured:—Held, that B. remained liable for the payment of the unpaid purchase money, notwithstanding the form of the bills given for the amount. *Lynn v. Chaters*, 2 Keen 521.

3. In an agreement for the purchase of an estate, the purchaser stipulated to pay the residue of the purchase money on a day specified, "upon the vendors making a good title or otherwise; if such title should not then be completed, upon his executing a bond to complete such title, and to convey the estate as soon as the estate could be completed;" the vendor is bound to show a good title; and till a good title is shown, the purchaser, though he had entered into possession, is not bound to pay the purchase money. *Clarke v. Fausa*, 3 Russ. 320. S. C. *sub. nom. Clarke v. Fausa*, 6 L. J., Ch., 17.

4. A. sold to B., and covenanted against himself and all claiming under him; B. secured the purchase money, and was evicted by a title paramount to A.'s title; B. was relieved from the payment of the purchase money. *Anon.*, 2 Ch. Ca. 19.

5. When eviction entitles a purchaser to relief. *Maynard v. Moseley*, 3 Swan. 661.

Different consequence of eviction before and after payment of purchase money. *Ib.*

6. A company, incorporated by an Act of

Parliament for making a dock, agreed for the purposes of its undertaking to purchase certain land for 4,000*l.*, of which 2,000*l.* was to be paid at once, the balance at a future date. The agreement contained a proviso empowering the vendor, on default in the payment of the balance or any part of it by a day named, to re-enter and re-possess the land without any obligation to repay any portion of the purchase money received:—Held, that this was a penalty from which the Court would relieve the purchaser. *Re Dagenham Thames Dock Co., Hulst's claim*, 43 L. J., Ch., 261; 8 L. R., Ch., 1022.

7. In an action by a vendor whose purchase money was to be paid by instalments, some of which were not yet due, for specific performance of his contract and a declaration of his lien, liberty was given to apply in respect of future instalments as they accrued due. *Nives v. Nives*, 15 L. R., Ch. D., 649; 49 L. J., Ch., 674; 42 L. T. 832; 29 W. R. 302.

8. A trader had, before adjudication,—the purchaser having had no notice of any act of bankruptcy,—contracted to sell a leasehold property, and had received a deposit in respect of the purchase money. After the adjudication had been made, but before it had been advertised, the purchaser, having no notice of the adjudication, paid the remainder of the purchase money to the bankrupt:—Held, that the trustee in the bankruptcy could not be compelled to assign the lease to the purchaser except upon the terms of his paying the purchase money. *Exp. Rabbidge, Re Pooley*, 8 L. R., Ch. D., 367; 26 W. R. 646; 38 L. T., N. S., 663.

9. When vendors having agreed to sell the entirety of property could make a title to one moiety only:—Held, that the purchaser was entitled to have such moiety conveyed to him on payment of one moiety of the purchase money. *Bailey v. Piper*, 18 L. R., Eq., 683; 43 L. J., Ch., 704; 31 L. T. 86; 22 W. R. 943.

Account. Rests.] 10. Where payments have been made by vendee at different times on account of purchase, all exceeding the interest due at the time of such payments, and the decree in suit by vendor for specific performance directs accounts to be taken of what is due to the plaintiff for principal and interest in respect of purchase, rests are always made therein. *Griffith v. Heaton*, 1 Sim. & S. 271; 1 L. J., Ch., 197. S. P. *Rome v. Dodson*, 1 L. J., Ch., 183.

Security for.] 11. On sale of estate, part of the consideration was to be an annuity, but it was not settled how it should be secured; the Court ordered it to be secured on the estate as well as by bond and judgment, which latter was the mode proposed by purchaser. *Remington v. Deverall*, 2 Anstr. 550.

Proof of Payment.] 12. After twenty years' possession, a purchaser shall not be put to prove the payment of his bond for the purchase money. *Anon.*, Mos. 37.

13. Receipt for purchase money indorsed not conclusive evidence in favour of the purchaser; and upon other evidence:—Held, that the payment was disproved. *Hankins v. Gardner*, 2 Sm. & G. 441.

To Agent acting under Power of Attorney.]

1. The owner of an estate, residing abroad, gave a power of attorney to his agent in this country to sell the estate and give a discharge for the purchase money. The agent sold the estate, and the conveyance sent abroad and executed was by the principal. *Semble*, the agent in England cannot give an immediate good discharge for the purchase money, by reason of the uncertainty whether the principal may be alive at the time of the payment. *Bailey v. Collett*, 18 Beav. 179; 2 W. R. 216; 23 L. J., Ch., 230.

2. To Solicitor.

2. Although a purchaser has not the right in every case to insist upon the vendor being present to receive his purchase money, yet should the requisition be made under the circumstances which justify it, the vendor should comply with the request. *Viney v. Chaplin*, 4 Jur., N. S., 619; 27 L. J., Ch., 434; 6 W. R. 562; 1 L. T. N., S., 142. Affirming 4 Drew. 237; 6 W. R. 302.

In any case where a vendor does not attend personally to receive his money, a purchaser has a right to insist upon a written authority to pay to the solicitor. *Id.*

A vendor's solicitor has no authority by virtue of his office to receive the purchase money, although he may have possession of the deed of conveyance, with the receipt endorsed or signed by his client.

3. On a sale by auction of shares in a ship, part of a bankrupt's estate, one of the conditions was that the purchase money should be paid to the solicitor of the assignees on or before a certain day, when the purchase was to be completed, and the purchaser to have possession and a bill of sale; the purchaser paid part of the purchase money to the solicitor before the day appointed for the completion of the purchase, and had possession, but not a bill of sale:—Held, that the payment and the execution of the bill of sale ought, in pursuance of the condition, to have been contemporaneous; that the assignees, not having received the money from the solicitor, or executed the bill of sale, would not be restrained from taking proceedings to recover possession of the ship; and that the purchaser was not entitled to a decree for specific performance of the contract, by the execution of the bill of sale by the assignees, upon payment to them of the balance of the purchase money. *Hughes v. Morris*, 9 Hare 636. And see S. C. 16 Jur. 603; 21 L. J., Ch., 761.

4. It is well settled that it is not within the ordinary business of a solicitor to receive purchase money belonging to his client, or money due to him on mortgage, nor to receive money from him for the purpose of investment generally, and one partner is not liable for the misapplication of money so received by another without his privity. *Bourdillon v. Rooke*, 27 L. J., Ch., 681.

Secus, where the money is received for the purpose of being invested on a particular security. *Id.*

5. A. purchased an estate from B., and on the completion one solicitor acted for both parties, and the purchase money was paid

into his hands. Afterwards the purchaser was defeated by C., who had a paramount mortgage. The purchaser presented a petition against the solicitor, asking payment by the solicitor out of the purchase money of the losses occasioned, or that he might indemnify the petitioner. The petition was dismissed with costs, the Court holding, first, that it had no jurisdiction to award compensation or damages in such a case; and, secondly, that the money having come to the hands of the solicitor as agent of the vendor, and not of the petitioner, it could not interfere. *Tylee v. Webb*, 14 Beav. 14; 15 Jur. 1023.

6. The 56th section of the Conveyancing Act 1881 does not authorise vendors who are trustees with a power of sale to require the purchaser to pay the purchase money to their solicitor on production of the deed of conveyance duly executed in cases where, before the Act, they could not have required the purchaser to pay the purchase money to their solicitor under a special authority. Trustees of real estate, with a power to sell and give receipts, sold the estate. The purchasers required that the vendors should attend in person to receive the purchase money, or should authorise the purchasers to pay it into a bank to the joint account of the vendors. The vendors insisted that the money should be paid to their solicitor, on his producing the conveyance duly executed. They gave no special reason why the money should be paid to the solicitor, but relied on the 56th section of the Conveyancing Act 1881. A summons having been taken out under the Vendor and Purchaser Act:—Held, (dissentiente Bagallay, L. J.), that the 56th section had no application, and that the purchasers had a right to insist on their requisition. *Re Bellamy & Metropolitan Board of Works*, 24 L. R., Ch. D., 387; 52 L. J., Ch., 870; 48 L. T. 801; 31 W. R. 900. Reversing 52 L. J., Ch., 89.

III. RISK AND INCREMENT.

7. Vendor, resisting an application by the purchaser for payment into court of the deposit in the hands of the vendor's agent, charged with a loss by the agent's failure. *Fenton v. Browne*, 14 Ves. 144.

8. When purchase money is agreed to be paid, and a conveyance made at a given time, and disputes arise as to title, and the purchaser proposes to vendor to lay out the purchase money in Exchequer bills till wanted, but vendor returns no answer, and money is so laid out, the purchaser is at the risk, and the vendor is entitled to the money, with 4 per cent. interest. *Ackland v. Cuming*, or *Gaisford*, 2 Madd. 28.

9. Effect of a deposit by vendee, with notice to vendor to stop or determine the rate of interest, not as a tender and appropriation, transferring the risk as to the principal: therefore, upon an investment in stock by the vendee, the title not being ready, and the vendor having notice, but returning no answer, the advantage by a rise, as the loss by a fall, is the vendee's. *Roberts v. Massey*, 13 Ves. 561.

10. Money paid in as earnest at a sale of an

estate, and ordered to be laid out in the funds, is part payment of the purchase money, and the vendor must abide by the rise or fall of the funds. *Poole v. Rudd*, 3 Bro. C. C. 49.

1. A deposit made on opening a bidding having been laid out in the public funds, this deposit is considered as part of the purchase money paid, and therefore the depositor is not entitled to the dividends accruing between the time of the deposit and the completion of the purchase; but only interest on the deposit at 4 per cent. *D'Oyley v. Powis (Countess)*, 1 Cox 206; 2 Bro. C. C. 33.

2. The deposit made upon opening a bidding is considered as part of the purchase money paid, although, in the event of the depositor not being reported the best bidder, it must be returned to him; and therefore, where the deposit is laid out in the public funds, which rise between the time of the deposit and the purchase being completed, the estate will have the benefit of the rise. *Ambrose v. Ambrose*, 1 Cox 194.

3. Purchase money invested under order of Court, obtained by purchaser without notice to all parties, is at risk of purchaser; but investment is at risk of estate, if order for investment is made on motion, of which all parties had notice. *McCann v. Forbes*, 1 Hog. 18.

4. Pending a dispute respecting the title to land contracted to be sold, and to avoid the question as to the interest of the purchase money, the vendor gave the purchaser the opportunity of investing the purchase money in consols, in the joint names of the vendor and purchaser, provided the investment was made by a certain day, and the purchaser made the investment accordingly:—Held, that the vendor, having proposed the investment, could not have charged the purchaser with the loss if the funds had fallen, and that the vendor was entitled to the benefit accruing from the funds having risen. *Burroughes v. Browne*, 9 Hare 609; 22 L. J., N. S., Ch., 148.

A purchaser cannot throw upon a vendor the risk of an investment of the purchase money; and if he makes a payment to or on account of the vendor in respect of the purchase money, the money paid becomes the property of the vendor, so that the purchaser can claim no benefit of any investment which the vendor may make. *Id.*

5. If a purchaser agrees to pay, on a specified day, for an estate in 3 per cent. consols, taken at a given value, but, in consequence of intervening difficulties, the purchase cannot be completed on that day, and he continues to hold the stock; he holds it as a trustee for the vendor, and, when the purchase is completed, must pay by a transfer of the stock at a value fixed, unless the vendor desired him distinctly to convert it into money, so as to have thrown the risk of keeping it unsold upon the purchaser. *Puddicombe v. Bythesea*, 1 L. J., Ch., 186.

6. A mortgagor contracted to sell the estate, and one of the conditions was, that the purchaser should pay a deposit to the auctioneer. The mortgagee afterwards concurred and adopted the contract. A loss having occurred by the insolvency of the auctioneer:—Held, that, as between the purchaser and mortgagee, the latter stood in the shoes of the

vendor, and must bear the loss. *Rowe v. May*, 18 Beav. 613.

7. A sale in chambers under a decree in a partition suit having been declared invalid on the ground that the sale took place before the certificate in an answer to the inquiries directed by the decree was made:—Held, that the vendors could not avail themselves of a condition enabling them, if unwilling, or unable for any reasonable cause to remove or comply with any objection or requisition by the purchaser, to rescind on repayment of the deposit without interest and without costs on either side; and that the discharged purchaser was entitled to the stock arising from his deposit, which had been paid into court and invested, with the dividends thereon, or the actual amount of deposit and the produce, with costs, charges, and expenses. *Powell v. Powell*, 19 L. R., Eq., 422; 44 L. J., Ch., 311; 23 W. R. 482; 32 L. T., N. S., 148.

8. The plaintiff contracted to sell land to the defendant, for the purposes of their works, for 4,069*l.* The parties subsequently agreed that 4,000*l.* should be deposited in a bank in their joint names pending the completion of the purchase, and that the defendants should enter into possession and pay the plaintiff interest:—Held, that the loss sustained in consequence of the failure of the bank subsequent to the deposit must be borne by the plaintiff. *St. Paul v. Birmingham, Wolverhampton, & Stour Valley Railway Co.*, 1 Eq. Rep. 274; 1 W. R. 494; 17 Jur. 1176; 11 Hare 305.

IV. RETURN OF.

9. I. S. bought an estate of A., who gave him a bond to suffer a recovery within three years, or to return him his money upon a re-conveyance. A. tendered a recovery, but before it was suffered, a third person made a title to the land, whereupon I. S. brought his bill for the purchase money, but the Court could not relieve him, for having consented to take the bond, he must resort to A.'s covenant against incumbrances. *Maynard's case*, 2 Freem. 42.

10. A. agrees with B., lord of the manor, to purchase a copyhold for two lives, such as A. shall name; A. pays 200*l.* part of the purchase money, and was to pay the rest in three months. A court is held; three months pass. B. died suddenly, and the money came to one who was not bound by the contract. The executors of B. to refund the 200*l.* *Ambrey v. Keen*, 1 Vern. 472.

11. A. purchased an estate from B., and on the completion one solicitor acted for both parties, and the purchase money was paid into his hands. Afterwards the purchaser was defeated by C., who had a paramount mortgage. The purchaser presented a petition against the solicitor, asking payment by the solicitor out of the purchase money of the losses occasioned, or that he might indemnify the petitioner. The petition was dismissed with costs, the Court holding, first that it had no jurisdiction to award compensation or damages in such a case; and, secondly, that the money having come to the hands of the solicitor as agent of the vendor, and not of

the petitioner, it could not interfere. *Tylee v. Webb*, 14 Beav. 14; 15 Jur. 1023.

1. If an estate be conveyed away in the lifetime of the party to whom it belonged, and he dies within forty days from the execution of the conveyance, his heir may recover it from the purchaser. Under such circumstances, if the heir has received the purchase money, he cannot have the estate restored without refunding the price paid for it. But where the price has been paid to other persons, the purchaser cannot call upon the heir to repay it, but must recover it as he can from those to whom it has been given by the deceased. *Marrett v. Jennes*, 1 Knapp 103.

2. A vendor and his solicitor fraudulently, and in the absence of the purchaser's solicitor, obtained from a purchaser (who was desirous of completing the purchase, and had entered into possession) the purchase money and covenants for the production of title deeds, while the title as to a part of the purchased premises was still under investigation. On a bill filed by the purchaser against the vendor and his solicitor, it was:—Held, that the plaintiff was entitled to have the contract rescinded, and his purchase money, together with all costs, charges, and expenses (including auction duty), repaid to him, and to have the deeds of covenant executed by him delivered up to be cancelled. *Berry v. Armistead*, 2 Keen 221; 5 L. J., N. S., Ch., 370.

3. Purchaser entering into possession knowing of objections to abstract, but continuing to negotiate, cannot break off contract, and injunction will lie against his proceeding at law to recover back purchase money. *Secus*, if he had declared off, on delivery of abstract. *Ward v. Jeffery*, 4 Price 294.

4. The defendant, having sold and conveyed land to the plaintiff, suggesting that he had a title, and it afterwards appearing that he was not entitled to part, the same being an encroachment from a common, though no eviction had happened, or was threatened, a bill lies to set aside the conveyance, and for a return of the purchase money and all expenses. *Edwards v. McLeay*, Coop. 308.

5. A. purchases an estate from B., and pays part of the purchase money; it is afterwards discovered that B. has no title to it, or interest in it, except that, under the trusts of a will, he is to have a share of the money arising from the sale of it:—Held, that a court of equity cannot give the purchaser any relief beyond directing an account of B.'s share of the proceeds of the estate. *Williams v. Hignett*, 6 L. J., Ch., 125.

6. A. purchases from B. a share in a concern, and gives for it a price which he understands to be four times the amount of the yearly profits, but which, in consequence of a mistake made by B. in the estimate of the profits, turns out to be more than that; the deed of assignment purports to be for an absolute sum; there is evidence that B. never intended to sell for less than that absolute sum, and no evidence to the contrary:—Held, that a court of equity will not decree the sum, which A. alleges to be overpaid, to be refunded to him. *Stewart v. Stuart*, 1 L. J., Ch., 61.

7. Where a purchaser was not bound to take property agreed to be sold to him without compensation, and the compensation could

not be ascertained:—Held, that he was entitled to the return of his purchase money with interest at 4 per cent., and to a lien on the estate for the amount. *Westmacott v. Robins*, 4 De G. F. & J. 390.

Return of Deposit.] See I. *supra*.

V. LIEN OF VENDOR.

1. *In What Cases*, 7251.
2. *Sale in Consideration of an Annuity*, 7252.
3. *Discharge of*, 7253.
4. *Priority*, 7255.
5. *Remedies*, 7258.
6. *Other Matters*, 7259.
7. *On Sale of Goods*. See SALE OF GOODS, III. 1.
8. *Exoneration under the Locke-King Acts*. See EXECUTOR AND ADMINISTRATOR, XXVII. VII.
9. *Sales under Compulsory Powers*. See LANDS CLAUSES ACT, XIII. II.

1. In What Cases.

8. In a suit by a vendor, to establish a lien upon the estate for the amount of the unpaid purchase money, the Court decreed that the plaintiff, notwithstanding the recital in the deed of conveyance of the payment of the consideration money, and the receipt indorsed on it, was entitled to an inquiry whether the full amount of the consideration money was paid; and to a lien as an unpaid vendor, on the lands, for so much of the consideration money as should, upon inquiry, appear to be unpaid, with interest from the date of the conveyance. *Croly v. Callaghan*, 5 Ir. Eq. R. 25.

Held, that the onus of proving the payment of the consideration money lay upon the defendant (the assignee of the vendee); and that neither the recital nor the receipt was any evidence of the fact. *Id.*

9. If a vendor who knows that the purchase money is trust money suffers one of the trustees to retain part of it, without the knowledge of the co-trustees, or the *cestui que trust*, he has no lien on the estate for the part so retained. *White v. Wakefield*, 7 Sim. 491; 4 L. J., N. S., Ch., 195.

10. Testator had, according to his usual course of dealing with the bankrupts, sold them land, allowing the purchase money to remain as a charge, and made them advances for the purpose of building, such advances, as well as the purchase money, being stated in a written memorandum to be a charge upon the land. The executors and devisees in trust of the testator, being authorised by the will to continue the same course of dealing, sold other land to the bankrupts, leaving the purchase money unpaid, and made advances to them for the purpose of building, without taking any memorandum:—Held, these latter advances, as well as those made by the testator, and the purchase money in each case, were a charge upon the lands. All claim to costs as to the claim of the executor was waived by them. *Exp. Linden, Re Baker*, 1 M. D. & De G. 428; 10 L. J., N. S., Bk., 22; 5 Jur. 57.

11. A son conveys an estate to his father

nominally as purchaser, but really as a trustee, and in order that the father, who was in better credit than the son, might raise money upon it by way of mortgage, for the use of the son; the father died shortly afterwards, and before any money was raised, having, by a will, subsequent to the conveyance, made a general devise of all his real estate: the case is within the Statute of Frauds, and parol evidence is not admissible to prove the trust; but the son has a lien on the estate as vendor for the apparent consideration, no part of which was paid. *Leman v. Whitley*, 4 Russ. 423; 6 L. J., Ch., 152.

1. The lien of a vendor upon the land and title deeds until payment of the purchase money does not apply to a conveyance to the purchaser executed by some, but not all of the parties, where the contract has gone off by the vendor's default; and if there be any lien on such a conveyance, it is vested in the purchaser as security for his deposit. *Owenham v. Esdail*, 3 Y. & J. 263.

2. A. sells lands to B., who afterwards becomes bankrupt, part of the purchase money not being paid. A. shall not be bound to come in as a creditor under the statute; but the lands shall stand charged with the money unpaid, though no agreement for that purpose. *Chapman v. Tanner*, 1 Vern. 267, 268.

3. A trustee for the sale of a brewhouse and plant (the *cestuis que trustent* being infants) contracts to sell them, and lets the purchaser into possession:—Held, that the purchaser was in possession within the statute 21 Jac. 1, c. 19, and therefore the plant, upon his becoming bankrupt, passed to his assignees without being subject to the lien for the purchase money. *Earp, Dale*, Buck 365.

4. Upon the bankruptcy of the purchaser of timber felled, *quære*, whether the vendor has a lien, and can prove for the deficiency. *Erp. Gwynne*, 12 Ves. 379.

5. A firm of solicitors was employed in May 1853 by trustees to sell copyhold estates; the purchaser also employed them to complete the purchase. They had money of his in their hands more than sufficient to pay the purchase money, and the purchaser directed the solicitors to apply it and pay the purchase money. The purchaser was let into possession in October 1853. In December following the vendors executed a deed of covenant to surrender the estates purchased, and they signed the receipt for the purchase money indorsed thereon. The title deeds were retained by the solicitors, who deposited them in a box containing other title deeds and documents of the purchaser. The steward of the manor was one of the firm of solicitors, and in 1854 he admitted the purchaser to the land purchased. The purchase money was not actually paid by the solicitors, as directed by the purchaser, but they settled accounts with the vendors, the trustees, and gave them credit for the purchase money as received by them; and after allowing costs and charges, there was a balance due to the parties. Four-fifths of this balance were paid to four of the five *cestuis que trustent* entitled to the proceeds of the sale. The solicitors retained the other one-fifth in their hands, and upon the remaining *cestui que trust* requiring payment of his share the solicitors stated that the purchaser

had not paid the purchase money, and that they had retained the deeds which the trustees required them to hold as security. The solicitors did not pay the purchase money, and in 1856 became bankrupt. Upon a bill by the vendors:—Held, that they were entitled to a lien upon the estate for the balance of the purchase money remaining unpaid. *Wrost v. Davies*, 27 L. J., Ch., 635; 25 Beav. 369; 4 Jur., N. S., 396; 1 L. T., N. S. 261.

6. A trustee for the sale of certain real estate entered into a contract for the sale of a house and garden at the price of 300*l.*, the house being insured for 100*l.* Before the time fixed for completion of the contract the house was burnt down, and the trustee received the insurance money. The property was subsequently conveyed to the purchaser, who paid 200*l.* to a mortgagee of the property, and the insurance money was taken to cover the rest of the price. The trustee subsequently absconded without accounting for any of the money, and it was discovered that the mortgage which had been paid off by the purchaser was fraudulent. On a bill by one of the *cestuis que trustent*:—Held, that the purchaser having had notice of the fraudulent nature of the mortgage, the plaintiff was entitled to a lien on the property for the whole amount of the purchase money, including the insurance money. *Poole v. Adams*, 4 N. R. 9; 32 L. J., Ch., 639; 12 W. R. 683; 10 L. T., N. S., 287.

7. A vendor agreed with a trustee for a joint-stock company about to be formed for the sale of the goodwill, plant, etc., of his business for 8,000*l.*, to be paid as to 6,000*l.* in cash and 2,000*l.* in paid-up shares. After the formation and registration of the company he executed an assignment to them, whereby, after reciting that he had agreed for the sale of the property to the company for 6,000*l.* to be paid as thereafter mentioned, that is to say, 50*l.* per cent. of all sums of money to be received by the company on the sale of shares, and 50*l.* per cent. upon all money borrowed; in consideration of the sum of 6,000*l.*, to be paid to him in manner thereinbefore stated, he assigned the property to the company. 2,000*l.* worth of paid-up shares were all allotted to him. No other shares were ever subscribed for, and no money borrowed. The company was wound up, and the only assets consisted of the proceeds of sale of the property conveyed to them by the vendor, and which had been resold:—Held, that the vendor had no lien on those proceeds for his unpaid purchase money, his lien being excluded by the nature of the contract. *Re Brentwood Brick and Coal Co., Rowe's claim*, 46 L. J., Ch., 554; 36 L. T., N. S., 343; 4 L. R., Ch. D., 532; 25 W. R. 481.

See also 4 infra.

2. Sale in Consideration of an Annuity.

8. A. conveys an estate to B., in consideration of B.'s entering into the covenant contained in the deed, for paying an annuity to A., and 3,000*l.* to certain persons, in the event of his (B.'s) marrying:—Held, that the covenants did not create a lien on the estate. *Clarke v. Royle*, 3 Sim. 499.

1. A. agreed to sell an estate to B. for an annuity, and B. was to pay off a mortgage to which the estate was subject. Accordingly, B. executed a deed, by which he granted the annuity to A., and covenanted to pay it; and by a conveyance of even date but executed after the annuity deed, after reciting the agreement and the annuity deed, A. and the mortgagee, in pursuance of the agreement, and in consideration of the annuity having been so granted as aforesaid, and of the payment of the mortgage money, conveyed the estate to B. The annuity afterwards became in arrear:—Held, that A. had no lien on the estate for the annuity. *Buckland v. Poole*, 13 Sim. 406.

2. A vendor, in lieu of the price of 3,000*l.*, agreed to accept an annuity of 100*l.* a year for the joint lives of her intended husband and herself, in case the purchaser should so long live, the purchaser engaging that his personal representatives should, within three months after his decease, in certain events, but not in all events, pay a further sum of 3,000*l.* This is not a security, but a substitution for the price; and the lien of the vendor on the land is discharged. *Parrot v. Sweetland*, Myl. & K. 655.

3. Sale and assignment of a life interest in leaseholds in consideration of a weekly sum to be paid to the vendor during her life, with a covenant by the purchaser, for himself, his heirs, executors, and administrators, to make the weekly payment to the vendor, and to repair and insure the premises, and otherwise perform the covenants in the lease:—Held, that the vendor was entitled to a lien on the life interest in the leaseholds, which was the subject of the assignment for the weekly payment. *Matthew v. Bowler*, 6 Hare 110; 16 L. J., N. S., Ch., 239; 11 Jur. 297.

4. A. conveyed her life estate in lands to her son, in consideration of his paying the rent of a house for her, and supplying her with sufficient hay and corn, and he covenanted to pay the rent and supply the hay and corn:—Held, that A. had a security on the estate conveyed in the nature of a vendor's lien for the purchase money, for the performance of the son's contract. *Richardson v. M'Cauley*, Beat. 457.

5. An agreement to purchase land for an annuity for the life of the vendor, to be a charge on the land, and to be paid quarterly, entitles the vendor, not only to the security of the charge, but to the covenant of the purchaser for the payment of the annuity. *Bower v. Cooper*, 2 Hare 408; 11 L. J., N. S., Ch., 287; 6 Jur. 681.

6. An agreement to sell land, in consideration of an annuity for three lives "to be secured by bond":—Held, that the annuity was not a lien upon the land. *Dixon v. Gayfer*, 6 W. R. 52; 1 De G. & J. 655; 27 L. J., Ch., 148; 8 Jur., N. S., 1157; 1 L. T., N. S., 162. Affirming 4 W. R. 39; 25 L. J., Ch., 189; 1 Jur., N. S., 1180; 21 Beav. 118.

Where there was an agreement for the sale of an equitable estate in land, in consideration of the grant of an annuity for three lives and the life of the survivor, to be secured by bond, but neither the bond was given nor the estate conveyed in the lifetime of the purchaser; upon the annuity falling into arrear:—Held,

that the principle of vendor's lien did not apply, the agreement evidencing a contrary intention; but that the Court would not decree a conveyance of the legal estate until a valid and sufficient bond should be given to secure the arrears and future payments of the annuity. 8 C. 3 Jur., N. S., 1157.

Whether a vendor who takes an annuity as the consideration has or has not a lien on the estate for his annuity must depend upon the particular circumstances of each case. *Id.*

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(a) *By taking Collateral Securities or Bills*, 7253.

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7. The rule of equity, in the case of an implied lien, is that the vendor's lien is not gone by accepting a bond or note from the purchaser, nor will a receipt for the purchase money discharge the lien till the money be paid; this rule is strengthened when applied to the case of an express charge. *Saunders v. Leslie*, 2 Ball & B. 514.

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14. Purchase money unpaid is *prima facie* a lien on the lands sold; and if a security is taken for that money, it lies on the vendee to show that the vendor agreed to rest on that security, and to discharge the lands. A note passed by a vendee to a trustee for part of the purchase money, out of the amount of which

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Whether a vendor who takes an annuity as the consideration has or has not a lien on the estate for his annuity must depend upon the particular circumstances of each case. *Ib.*

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14. Purchase money unpaid is *prima facie* a lien on the lands sold; and if a security is taken for that money, it lies on the vendee to show that the vendor agreed to rest on that security, and to discharge the lands. A note passed by a vendee to a trustee for part of the purchase money, out of the amount of which

incumbrances then not ascertained were to be satisfied, and the balance only paid to the vendor, is not such a security as will discharge the lien on the lands. *Hughes v. Kearney*, 1 Sch. & Lef. 132.

1. Vendor's equitable lien upon estate for purchase money is lost by taking special security by way of pledge of stock. *Nairn v. Promse*, 6 Ves. 752.

2. Vendor's lien for purchase money unpaid, against the vendee, volunteers, and purchasers with notice, or having equitable interest only, claiming under him, unless clearly relinquished, of which another security taken and relied on, may be evidence according to the circumstances, the nature of the security, etc.; the proof being upon the purchaser, and, failing in part, upon the circumstances; another security being relied on, may prevail as to the residue. *Macbreth v. Symmons*, 15 Ves. 329.

3. By an agreement for the sale of an estate, the purchase money, with interest, was to be secured by the bond of the purchaser, and was to remain so secured during the life of the vendor. The conveyance which was afterwards executed expressed that the purchase money had been paid, and the vendor's receipt was indorsed upon it; but, in fact, only a part of the price had been paid, and the residue was secured by the purchaser's bond, conditioned by payment of the principal with interest within twelve months after the death of the vendor; and of interest in the meantime. The vendor was held to have a lien on the estate for the amount of the bond. *Winter v. Anson*, 3 Russ. 488; 6 L. J., Ch., 11. Reversing 1 Sim. & S. 434; 6 L. J., Ch., 7.

There is no distinction between copyholds and freeholds as to the doctrine of the vendor's lien for his purchase money. *Id.* 492.

4. A vendor who has taken, as security for part of the purchase money, the bond of the vendee and a mortgage of part of the property sold, has not, on the bankruptcy of the vendee, a lien on the whole estate. *Capper v. Spottiswoode*, Taml. 21.

5. The vendor of a plantation in the colony of Berbice takes, in payment of his purchase money, certain bills of exchange, drawn by the purchaser upon persons in England, and also a mortgage and hypothecation upon the plantation to secure the due payment of the bills. The bills are returned to the colony under protest:—Held, that the vendor has a preferent right to payment out of the proceeds of the estate, not only for the amount of the bills, but also in respect of interest, costs, and damages, although, at the time of the purchase, another creditor had a judgment, or tacit hypothec, against the purchaser, the Court being of opinion, that the damages, in fact, formed part of the purchase money. *Cameron v. Gillard*, 6 Jur. 113.

A. sold B.'s plantation in Berbice. The purchase money was secured by bills of exchange drawn by B. on houses in England; and as a further security B., on receiving a transport of the estate, hypothecated the same to A. for amount of the purchase money then due on the bills, with interest and damages accruing thereon, declaring such mortgage to be a first and preferent charge. Some of the bills were protested, and returned to the colony, and the plantation was in consequence sold

under an execution sale at the suit of A. The Supreme Court of British Guiana, in adjudicating the claim of A. and the other creditors of B., held A. to have a preferential claim for the principal and interest due upon the protested bills, but refused to allow such right for the damages consequent thereon. The decree, so far as it refused the preferential right for damages, held erroneous, and reversed. S.C. on appeal *nom. Cameron v. Fraser*, 4 Moo. P. C. 1.

6. A vendor, in lieu of the price of 3,000*l.*, agreed to accept an annuity of 100*l.* a year for the joint lives of her intended husband and herself, in case the purchaser should so long live, the purchaser engaging that his personal representatives should within three months after his decease, in certain events, but not in all events, pay a further sum of 3,000*l.* This is not a security, but a substitution for the price; and the lien of the vendor on the land is discharged. *Parrot v. Sweetland*, 3 Myl. & K. 655.

7. Upon a sale of a debt proved in an administration suit the purchaser gave a bond for the purchase money, payable by instalments:—Held, that the vendor had not lost his lien on the debt for payment of the unpaid purchase money. *Collins v. Collins, Donnes v. Donnes*, 31 Beav. 346.

8. An estate was expressed to be conveyed in consideration of 150*l.* paid down and an acceptance of a bill of exchange for 300*l.*:—Held, that the vendor might give evidence of the real nature of the transaction, and that his lien was not discharged; and a mortgagee having notice through the solicitor who had been employed in all the transactions, was bound to see that the vendor's claim for his purchase money was satisfied. *Frail v. Ellis*, 1 W. R. 72; 22 L. J., Ch., 467; 16 Beav. 350.

9. A trustee purchased an estate on behalf of the trust. The vendor executed a conveyance to the trustees, which recited the trust, and that the trustee had called in trust moneys sufficient to pay the purchase money, and it contained a receipt for the whole purchase money. In fact, only part was paid, and the trustee gave his bond, and a memorandum of deposit for the deficiency, the latter reciting that the vendor had lent the trustee that sum to enable him to complete:—Held, that the vendor had no lien on the title deeds in his possession for the unpaid purchase money. *Muir v. Jolly*, 26 Beav. 143.

10. A plaintiff agreed with H., in consideration of his erecting some houses thereon, to grant him a building lease of some land, with the option of purchasing the fee. The plaintiff advanced H. 970*l.* to enable him to build. Afterwards E. and P. jointly made further advances to H. for the same purpose. Subsequently E. (who was the solicitor both of the plaintiff and of P.) induced the plaintiff to execute a conveyance to H. without receiving the consideration, in order that H. might then execute a mortgage to E. and P. to secure their advances, but on the promise of E. alone, that the conveyance and the mortgage should be held on behalf of the plaintiff until the "land could be sold, or a transfer of the mortgages obtained, and that in either case the plaintiff should, in the first place, out of the moneys obtained by such sale or transfer be paid the purchase money" and advances:—Held, that

the plaintiff had lost his lien for his purchase money and his priority for it, and his advances over the mortgage. *Smith v. Evans*, 28 Beav. 59.

1. An agreement by a vendor to take a bond for the payment of the consideration for land sold exonerates the land from all claim for the purchase money in the hands of a subsequent *bonâ fide* purchaser. *Dixon v. Gayfer*, 21 Beav. 118; 25 L. J., Ch., 189; 1 Jur., N. S., 1180; 4 W. R. 39. Affirmed 6 W. R. 52; 1 De G. & J. 655; 27 L. J., Ch., 148; 3 Jur., N. S., 1157; 1 L. T., N. S., 162.

(b) Other Cases.

2. A special contract for the payment of purchase money must be explicit to deprive a vendor of his lien upon the estate sold; and though a contract is stated in the conveyance of the estate, evidence may be given to show the real nature of the transaction, and a subsequent purchaser is bound to inquire whether it was accepted in substitution of the lien. *Frail v. Ellis*, 22 L. J., Ch., 467; 1 W. R. 72; 16 Beav. 350.

3. *Semble*, that a vendor by retaining, under a special agreement, possession of the title deeds of the estate, does not waive or exclude his lien. *Wreford v. Lethorn*, 2 L. J., Ch., 173.

4. Covenant between vendor and purchaser, that purchase money should be repaid within two years after resale, discharges the vendor's lien. *Exp. Parkes*, 1 G. & J. 228.

5. Case in which vendor of estate loses his lien, by a contract between all parties for a second sale, the first vendor being unable to complete his contract. *Cood v. Pollard*, 9 Price 544. Affirmed 10 Price 109.

6. A rule in equity in the case of an implied lien is, that the vendor's lien is not gone by accepting a bond or note from the purchaser, nor will a receipt for the purchase money discharge the lien till the money be paid; this rule is strengthened when applied to the case of an express charge. *Saunders v. Leslie*, 2 Ball & B. 514.

7. The agent of vendors who had authority to receive the purchase money had in his hands a sum belonging to the purchaser sufficient for that purpose, and was directed by him to apply it in payment. The agent accordingly debited the purchaser's account, and credited the vendor's account with the amount, and he rendered to the vendors an account charging himself with that sum as received from the purchaser:—Held, that this was not a valid payment to the vendors, and that they had still a lien on the estate for a part of the money lost by the bankruptcy of the agent. *Wrouth v. Davies*, 25 Beav. 369; 4 Jur., N. S., 396; 1 L. T., N. S., 261; 27 L. J., Ch., 635.

The vendors had executed the conveyance, and signed a receipt, which remained in the hands of the common agent of the vendors and purchaser, and the purchaser had been admitted to the copyhold estate and obtained possession:—Held, that this did not vary the case. *Id.*

8. Judgment against the purchaser of a leasehold house and furniture for damages and costs does not destroy the lien of the vendor upon the house and furniture; and

therefore proof allowed under a commission against the purchaser for the deficiency. *Exp. Seaforth (Lord)*, 11 Ves. 235; 1 Rose 302.

9. J. M. devised his real estate, charged with the payment of his debts, to T. M. in fee. In 1811 T. M. contracted to sell part of the testator's real estate to J. S., who was immediately let into possession, although the purchase money was not paid. In 1812 J. S. sold part of the estate to C. S., who was let into possession of that part, but never paid his purchase money. T. M. became a bankrupt, and in 1844 his assignees filed a bill against the trustees of the will of J. S. and the parties claiming under him, seeking to establish a lien on the estate for the purchase money and interest. Suits had previously been instituted for the administration of the estates of J. M. and J. S.:—Held, overruling the decision of the Vice-Chancellor, upon evidence not then before the Court, that the right of the vendor was not barred, a letter to the plaintiffs from the solicitor of the parties representing the purchaser taking the case out of the operation of the Statute of Limitations. *Toft v. Stephenson*, 1 De G. M. & G. 28; 21 L. J., N. S., Ch., 129; 15 Jur. 1187. Reversing 7 Hare 1.

10. A trustee for the sale of a brewhouse and plant (*the cestuis que trustent* being infants) contracts to sell them, and lets the purchaser into possession:—Held, that the purchaser was in possession within the stat. 21 Jac. 1, c. 19, and therefore the plant, upon his becoming bankrupt, passed to his assignees, without being subject to the lien for the purchase money. *Exp. Dale*, Buck 365.

4. Priority.

11. Vendor's lien for purchase money unpaid against the vendee, volunteers, and purchasers with notice, or having equitable interests only claiming under him, unless clearly relinquished. *Mackreth v. Symmons*, 15 Ves. 329.

12. An equitable mortgagee from vendee who has not paid purchase money can sell only bankrupt's interest, unless vendor consents; and the Court will not act till he is served. *Exp. Wright, Re Watts*, 3 Mont. & A. 49.

13. The plaintiffs conveyed an estate, but retained the conveyance and title deeds, as security for unpaid purchase money. The purchaser mortgaged the estate, but the mortgagee neglected to ask for the first conveyance:—Held, that the plaintiffs had a lien upon the estate prior to that of the mortgagee. *Worthington v. Morgan*, 16 Sim. 547; 18 L. J., N. S., Ch., 233; 13 Jur. 316.

14. Judgment against the purchaser of a leasehold house and furniture for damages and costs does not destroy lien of the vendor upon the house and furniture; and therefore proof under a commission of bankruptcy against the purchaser for the deficiency allowed. *Exp. Seaforth (Lord)*, 19 Ves. 235; 1 Rose 306.

15. Subsequent transactions, even under authority of a special Act of Parliament, cannot affect a vendor's lien for unpaid purchase money. *Nash v. Worcester Improvement Commissioners*, 1 Jur., N. S., 973.

16. An estate was devised to trustees, upon

trust, by sale or mortgage, to discharge a specific debt, and to apply the residue for the benefit of the testator's children. A. purchased the estate of the surviving trustee (who was A.'s father), but left the purchase money, except what was required to satisfy the debt, unpaid, giving his bond as a collateral security for the payment of it. Between the time of the contract and the actual conveyance of the premises, A. entered into marriage articles, whereby he covenanted to settle the premises on his intended wife and her issue. After A.'s marriage and the execution of the conveyance, a settlement was made in pursuance of the articles. The settlement recited the conveyance, and the conveyance referred to the will:—Held, that the settlement conveyed notice to the will, and that such notice was binding on the wife and children of A., although the articles were silent as to the will, and consequently that the testator's children were entitled as against the children of A., to a lien on the estate to the amount of the purchase money left unpaid. *Davies v. Thomas*, 2 Y. & Coll. 234; 7 L. J., N. S., Exch. Eq., 21.

1. Where a vendor signs a receipt for the whole purchase money, but suffers the purchaser to retain part of it, and remains in possession of the estate as tenant to the purchaser, his possession is no notice, to a subsequent purchaser or incumbrancer, of his lien on the estate for the sum retained. *White v. Wakefield*, 7 Sim. 401; 4 L. J., N. S., Ch., 195.

2. A. and B. were equal partners in certain mills and concerns, of which A. was the lessee. In November 1810 they took in C. as a partner, for 8,500*l.* In January 1811 B. proposed to A. and C. to sell them his share for 8,500*l.*, and to let his name continue in the firm for five years, they paying interest at 8 per cent. on his money remaining in their hands; this was accepted, and thenceforward A. had two-thirds, and C. one-third of the profits. In July 1812 A. conveyed to C. the legal estate in one-third of the mills and concerns, by a deed which was never registered. In August 1812 C., by his marriage settlement, conveyed his one-third to A. and D., as trustees for himself for life, with remainder for plaintiffs as tenants in common; this deed was registered in 1814. In 1819 B. withdrew his name from the firm, and furnished A. and C. with an account current, showing a balance due to him of about 24,000*l.* This was made up of the 8,500*l.*, and interest at 8 per cent., and of advances made to the firm since 1814 on the credit of C. A mortgage of the mills was then executed by A. and C. to B., to secure this 24,000*l.* It was soon after registered. C. died in 1820, and A. in 1823. In 1826 B. procured, from the representatives of A., an assignment of the equity of redemption, and entered into possession of the mills. The bill charged that, before the execution of the mortgage, B. was informed by A. and C. of the previous settlement. It prayed for an account and partition, and allotment of one-third. The only evidence of notice was by E., who swore that he had apprised B. of the settlement:—Held, that the defendant had no claim of lien against the plaintiffs, as an unpaid vendor. *Stuart v. Ferguson*, Hayes 452.

3. M., in 1862, obtained a decree against H for specific performance of an agreement for payment of the residue of the purchase money, and in default, for a sale of the hereditaments under the direction of the Court. S. and others were judgment creditors of H. prior to the date of the decree; they alleged that they were not bound thereby, and they claimed interests in the hereditaments, but M. charged that their interests were subordinate to his lien, and he applied to S. and the other judgment creditors to release and disclaim. That application was refused; and thereupon M. filed a bill, charging that such refusal had rendered it necessary, and that they ought to pay the costs. All the defendants other than S. had, prior to the hearing, agreed to release; and as to S.'s interest, the Court declared that the hereditaments were freed and absolutely discharged, and ordered him to pay all the costs of the suit. *Moscrop v. Sandeman, Twynam v. Sandeman*, 9 Jur., N. S., 1146.

4. Vendor conveyed without receiving his purchase money; the receipt of it was indorsed on the deed, and the title deeds delivered to the purchaser. The purchaser then made a mortgage by deposit, and absconded:—Held, as between the vendor's lien for his unpaid purchase money and the right of the mortgagee, that the possession of the title deeds and the fact of the indorsement of the receipt on the deed gave the mortgagee the better equity. *Rice v. Rice*, 2 Drew. 73; 23 L. J., Ch., 289; 2 W. R. 139; 2 Eq. Rep. 341.

Principles of the rule as to the effect of priority in point of time. *Id.*

5. T. assigned a piece of ground, with a message thereon, to L. for the residue of a term, to secure certain sums and interest; and he subsequently charged the premises with other sums due to A. and the plaintiff. T. afterwards contracted to sell the premises to O., and by a deed, dated the 4th August 1855, they were assigned to O. for the residue of the term, subject to a mortgage thereon to L. On the same day (Saturday, the 4th August) O. handed to T. a cheque, drawn by the firm of which he was a partner, upon their private bankers, for the amount of the purchase money; but afterwards, fearing that the insurance money might not have been paid, or that interest on L.'s mortgage might be in arrear, O., on the following Monday morning, stopped the payment of the cheque. On Wednesday, the 8th August, however, O. was induced to withdraw his countermand, and the money was paid on the same day. On Tuesday, the 7th, O. had been made acquainted with the existence of the second and third incumbrancers. A bill was filed by the third incumbrancer, praying to be allowed to redeem the first and second incumbrancers, and that O. might redeem him. He contended that the purchase was not completed on the 4th August by the delivery of the cheque, and that before the 8th August O. had notice of the second and third incumbrances. O. contended that the purchase was completed on the 4th August, and asserted his right to redeem L. in priority to the plaintiff. The Court held that the purchase was not completed on the 4th August, by the delivery of the cheque, considering the circumstances that took place afterwards, and a decree was made

in conformity with the prayer of the bill. *Tildesley v. Lodge*, 3 Jur., N. S., 1000.

1. A. conveyed an estate to B., and, according to the conveyance, an acceptance was given in full satisfaction for the absolute purchase; but in reality it was agreed that the vendor should have a mortgage for the money. Before the acceptance became due, B. mortgaged to C., who employed the same solicitor as had been engaged in the purchase, and C. had notice that the bill had not been paid, and of the form of the conveyance:—Held, first, that C. was affected by the notice to his solicitor; and, secondly, that, under the circumstances, he was bound to inquire into the true nature of the transaction between A. and B., and consequently that his security ought to be postponed to A.'s. *Frail v. Ellis*, 16 Beav. 350; 22 L. J., Ch., 467; 1 W. R. 72.

2. S., owner of a piece of land, agreed with a builder, upon his completing divers houses, to grant him a lease, or to allow him to purchase the land. S. advanced money to the builder for the erection of the houses. He afterwards applied for advice to a solicitor, but finally, being dissatisfied, he ceased to make further advances. The solicitor and P., with a knowledge of these circumstances, made advances to the builder out of the funds of which they were trustees. The solicitor then obtained a conveyance of the land from S. to the builder, who mortgaged the land and houses to the solicitor, and P., to secure the advances made by them; the builder then became insolvent, and the solicitor afterwards became bankrupt:—Held, that the conveyance was executed upon the faith of representations made by the solicitor, that S. should be first paid his purchase money and advances; that P. was no party to such representations; that the conveyance was made to the builder to enable him to secure the advances made by the solicitor, and P.; and that the mortgage so made gave a priority to the solicitor and P. over the lien of S. for his unpaid purchase money and advances. *Smith v. Evans*, 6 Jur., N. S., 388; 29 L. J., Ch., 531.

3. A solicitor purchased through a third party property belonging to his clients; the solicitor paid no purchase money to his clients, but their trustee, acting under his direction, indorsed on a conveyance to a third party, whom the client treated as the real purchaser, a receipt for the purchase money payable to the third party; the solicitor afterwards deposited the title deeds by way of equitable mortgage, became bankrupt, and left the country:—Held, that notwithstanding the relation of solicitor and client, the claim of the equitable mortgagee had priority over the clients' lien for unpaid purchase money. *Worthington v. German*, 16 W. R. 187.

4. A person through his son, as solicitor, lent money on mortgage of property. The son did not inquire whether the purchase money had been paid by the mortgagor, and there was no receipt for it on the mortgagor's purchase deed. The money so lent was applied in paying off a mortgage held by a third person on the property, and the deeds were handed to the son by such third person, not as mortgagee, but as solicitor of the mortgagor:—Held, that, under the circumstances, the representative of the vendor was entitled to

his lien for unpaid purchase money in priority to the mortgagee. *Bowen v. Cobb*, 18 W. R. 911. Affirmed 19 W. R. 614.

5. A vendor of land situate in a register county, part of whose purchase money remains unpaid, is under no obligation to obtain for the unpaid amount any written security which can be registered, but is entitled to rely simply on his equitable lien, which he can enforce against sub-purchasers who have notice of it, actual or constructive; and such a vendor will not, by registering the conveyance to his purchaser, if he retains the deed in his possession, lose his lien as against sub-purchasers from the original purchaser. *Kettlewell v. Watson*, 21 L. R., Ch. D., 685; 51 L. J., Ch., 281; 46 L. T. 83; 30 W. R. 402.

Land belonging to the trustees of a charity situate in the suburbs of Leeds, in the West Riding of Yorkshire, was sold by the trustees, with the sanction of the charity commissioners, to some estate agents who occupied a good position in Leeds. They bought the land with the intention of re-selling it in small lots for building purposes. A receipt for the whole purchase money, signed by the vendors, was indorsed on the conveyance, but only part of it was in fact paid. The vendors retained the deed in their possession, but at the request of the purchasers, the vendor's solicitors registered a memorandum of it in the West Riding registry. The vendors took no written security for their unpaid purchase money, but relied only on their equitable lien. The purchasers sold the land again in lots, some of which were very small. None of the sub-purchasers had actual notice of the lien of the original vendors:—Held, that the original vendors were entitled to enforce their lien against such of the sub-purchasers as had constructive notice of it. *Id.*

One of the sub-purchasers, who bought a small lot for 42*l.*, allowed the purchasers, at their suggestion, to employ their own solicitor to prepare the conveyance to him. He did not in any other way employ a solicitor in the matter, and he made no inquiries about the title or the deeds, nor did he search the register:—Held, that, under these circumstances, it was not the duty of the solicitor to communicate the existence of the lien to the sub-purchaser, and that consequently notice of it could not be imputed to him through the solicitor. *Id.*

Held, also, that having regard to all the circumstances, and especially to the smallness of the purchase money, and the expense which a regular investigation of the title would have occasioned, it could not be said that the sub-purchaser had wilfully abstained from making inquiries with the view of not receiving notice of any prior charge, and that, consequently, he could not be fixed with constructive notice of the original vendor's lien, but was entitled to hold his plot free from it. *Id.*

Another sub-purchaser employed no solicitor in the matter, and made no inquiries himself, but, as he said, left it to the original purchasers "to manage the business," and they prepared the conveyance to him, charging him for it:—Held, that he had made them his general agents in the matter, and that it was their duty as such to communicate the lien to him; that, consequently, it must be assumed that

they did so, and that notice of the lien must be imputed to him. *Ib.*

The vendors, at the request of two of the sub-purchasers, released the plots which they purchased from the lien:—Held, that it not being shown that when these releases were given the vendors knew that the original purchasers had parted with any other portions of the land, the releases did not affect the right of the vendors to enforce their lien against the other sub-purchasers. *Ib.*

The action was brought by the original vendors against some of the sub-purchasers to enforce the lien against them. The plaintiffs in their statement of claim alleged that three of the sub-purchasers whose conveyances were expressed to be made for value had in fact given no consideration for them, and they adduced evidence which proved this allegation in this case of one of the three:—Held, that, under the circumstances, the onus was on the plaintiffs to prove the allegation in the case of the other two, and that they had failed to do so. *Ib.*

See also JUDGMENT.

5. Remedies.

1. Where an estate has been sold to a person who has since died, the Court will direct an account to be taken of the personal estate, and decree that the vendor shall have a lien on the land for so much as the personal estate will not extend to pay. *Topham v. Constantine*, Taml. 135.

2. Vendor of an estate obtained a decree for specific performance, with a declaration that if the purchase money was not paid by a given day the estate should be sold and the proceeds paid in discharge of principal, interest, and costs, and that the purchaser should be made personally liable in the event of any deficiency. Before the day of payment arrived the purchaser died insolvent, and a creditor's suit was instituted for the administration of the assets. The estate was afterwards sold, but the proceeds were insufficient to pay the whole amount due to the vendor. Held, on further direction, that by the construction of the decree which rendered the purchaser liable only for the deficiency, the vendor was entitled to prove in the creditor's suit for the balance only of his debt, but *semble* that independently of the decree he would have been entitled to prove for the balance, only the case of a vendor's lien being different in this respect from the case of a mortgagee's security. *Rome v. Young*, 4 Y. & Coll. 204; 3 *id.* 199; 9 L. J., N. S., Exch. Eq., 41; 2 Jur. 963.

3. Vendor may acquire a lien on fund in court, under contract for sale, and, if vendee refuses to complete contract, may prevent him by injunction from drawing out of court fund which was appropriated by the contract to be applied in part discharge of purchase money. *Doyno v. Harvey*, 1 Hog. 3.

4. A vendor of some mines, who by express agreement had a lien for his unpaid purchase money, filed a bill to enforce that lien, and to recover from the purchasers the value of the minerals they had got, and by getting which they had made the premises an inadequate

security: a demurrer for want of equity was overruled. *Attwood v. Small*, 8 L. J., N. S., Ch., 145; 9 *id.* 132; 6 Cl. & F. 523. n.

5. The purchaser of a real estate became insolvent after part but before the whole of the purchase money was paid, or the conveyance executed. The vendor died, having devised the estate to the plaintiffs and appointed one of them his executor. The bill was filed against the provisional assignee of the insolvent and an equitable mortgagee by deposit of the agreement for purchase; and it prayed the payment of the residue of the purchase money by the defendants or by sale of the estate. The plaintiffs did not prove their title as devisees: the defendants disclaimed:—Held, that the Court could not make the decree sought without evidence of the devise, but that, upon payment of the costs of the defendants, the Court might (the defendants not opposing) declare the plaintiffs absolutely entitled to the estate. *Gabriel v. Sturgis*, 5 Hare 97; 15 L. J., N. S., Ch., 201; 10 Jur. 215.

6. A. sells land to B., who afterwards becomes a bankrupt; part of the purchase money not being paid, A. shall not be bound to come in as a creditor under the statute, but the land shall stand charged with the money unpaid, though no agreement for that purpose. *Chapman v. Tanner*, 1 Vern. 267.

7. Application by vendor who has not conveyed for a sale of the premises in discharge of his lien for the unpaid purchase money, and to prove for any deficiency, granted. *Exp. Gyde*, 1 G. & J. 323.

8. The vendor's title and the contract being admitted, decree will be made for sale, and satisfaction to the vendor out of the moneys, and for payment of the deficiency, if any, by the purchaser, notwithstanding an Act of Parliament has dealt with the lands in question since the date of the contract. *Nash v. Worcester Improvement Commissioners*, 1 Jur., N. S., 973.

Mode of directing sales of lands held in trust. The order should direct the sale to be made by the trustee or by the judge at chambers, not by the trustee with the approbation of the judge. *Ib.*

9. When a landowner seeks to enforce his lien for unpaid purchase money against a railway company, the Court will order a sale of the land, but will not grant an injunction to restrain the company from running trains over the land. *Lycei v. Stafford & Uttoxeter Railway Co.*, 25 L. T., N. S., 870.

10. In a suit by an unpaid vendor, the Court decreed a specific performance, and the payment of the purchase money and damages. The purchasers were unable to pay, and the property was in the possession of a receiver in another suit instituted by persons claiming charges under the purchasers. A petition by the vendor, served upon the purchaser and the plaintiffs in the other suit to enforce his lien and obtain a sale of the property, was dismissed with costs, the proper remedy being by bill. *Att.-Gen. v. Sittingbourne Railway Co.*, 35 Leav. 268; 14 W. R. 414; 1 L. R., Eq., 636; 25 L. J., Ch., 318; 14 L. T., N. S., 92.

11. In an action by a vendor whose purchase money was to be paid by instalments, some of which were not yet due, for specific perform-

ance of his contract and a declaration of his lien, liberty was given to apply in respect of future instalments as they accrued due. *Nives v. Nives*, 15 L. R., Ch. D., 649; 49 L. J., Ch., 674; 42 L. T. 832; 29 W. R. 302.

1. Where the Court had declared that certain devised estates were devised, subject to incumbrances charged thereon, and a vendor had a lien for unpaid purchase money on one of such estates:—Held, that the vendor's lien stood precisely in the same position as any other incumbrance, and that it must be paid out of the particular estate on which it attached. *Harnewell v. Ironmonger*, 1 Dr. & Sm. 255.

2. In 1845 P. became purchaser from A. of a piece of land, the purchase money to be paid in 1852 and 1855, as mentioned in the agreement. A. retained the title deeds of the land, and in 1851 deposited them with the plaintiff to secure the payment of a sum then advanced. Between P. and A. there were various cash dealings, and in 1848 the amount due by P., in respect of the purchase money, was, by means of the money due to him, reduced. The accounts between the parties continued unsettled, and no appropriation of the balance due to P. was made by him by way of satisfaction of the residue of the purchase money due to A., who, in 1855, was adjudicated bankrupt. The evidence as to when P. received notice of the plaintiff's equitable mortgage was conflicting:—Held, that the plaintiff was entitled to a decree against P. to the extent of the equitable interest which A. had in the land, no appropriation of the debt due to P. having been made before he had notice of the equitable lien of the plaintiff. *Rayne v. Baker*, 6 Jur., N. S., 366.

3. On the 4th March 1811 an agreement was entered into for the purchase of freehold land for 6,900*l.*, to be paid on the 13th May 1811, and the purchasers were immediately put into possession. In 1827 the purchaser, before any conveyance was made to him, and before he had paid any part of the purchase money, died, having devised the lands to trustees. The trustees disclaimed, and others were appointed by the Court. In 1834 the attorney of these trustees wrote to the assignees of the vendor (who had become bankrupt), stating that the purchase money was ready to be paid on the purchase being completed. On a bill filed by the assignees in 1844, to enforce the lien, to which the Statute of Limitations, 3 & 4 Will. 4, c. 27, was set up as a defence by answer:—Held, on evidence not before the Court below, that the trustees were persons by whom the purchase money was payable, within the meaning of the Statute of Limitations, 3 & 4 Will. 4, c. 27. *Toft v. Stephenson*, 1 De G. M. & G. 28; 21 L. J., N. S., Ch., 129; 15 Jur. 1187. Reversing 7 Hare 1.

In 1849 the assignees of the vendor filed a bill, seeking to enforce the vendor's lien on the estate for the purchase money:—Held, that the 42nd section of the statute did not apply to the arrears of interest, but that the whole was recoverable from the 13th May 1811. S. C. 5 De G. M. & G. 785.

See also LANDS CLAUSES ACT, XIII. II.

6. Other Matters.

4. The benefit of the vendor's lien for purchase money unpaid may be assigned by parol to a third party, *semble*. *Dryden v. Frost*, 3 Myl. & C. 670; 8 L. J., N. S., Ch., 235; 2 Jur. 1030. Reversing on this point 1 Jur. 330.

5. J. S. being indebted, sold his lands, and took the purchaser's bond, which he assigned to one of his creditors. This assignment is good in equity. *Munn v. East India Co.*, Finch 299.

6. Extent of lien on a fund, where the grantor of an annuity agreed to sell to the grantee the fund on which the annuity was secured, and to re-purchase the annuity, but, in consequence of a mutual mistake, the contract for the sale of the fund could not be specifically performed. *Colyer v. Clay*, 7 Beav. 188.

VI. LIEN OF PURCHASER.

7. Lien of vendee, having paid prematurely, is analogous to that of vendor. *Mackreth v. Symmons*, 15 Ves. 345.

8. Although the vendor of an estate has fraudulently concealed an incumbrance, yet the purchaser has no lien on the purchase money after it has been paid over. *Cator v. Bolingbroke*, 1 Bro. C. C. 301.

Purchaser, without notice of a rent-charge, transfers stock in payment; the party entitled for life grants an annuity out of the dividend, secured by a letter of attorney to receive the dividend, to a person who had no notice of the transaction; the purchaser of the estate is evicted by grantee of the rent-charge; he has no lien on the stock. *Id.*

9. Remainderman having sold property to a purchaser, by whom money is advanced to pay off a heavy and pressing incumbrance, the remainderman representing himself as having a right to sell, with the concurrence of the tenant for life for that purpose, whereupon a draft of conveyance is prepared, to which the tenants for life and remaindermen are made parties, and the purchaser takes possession, gives the purchaser such an equitable title to the purchase as, having cleared the estate from a charge to which the tenant for life was liable, to establish a lien on the property, which equity will protect by enjoining the tenant for life from proceeding by ejectment to obtain possession, until the cause shall be finally determined on the hearing, whatever case may be made by the answer, on merits stated on the part of defendant in equity. *Ludlow v. Grayall*, 11 Price 58.

10. The wife, being entitled in equity to real estate under a contract of sale entered into before her marriage, the husband, after their marriage, completed the purchase, and took the conveyance to himself. Afterwards, acting upon the supposition that the estate was his own, the husband laid out money in improvements upon it, and ultimately, in the lifetime of the wife (under the same mistake), sold the estate, and the purchasers took a conveyance from him. The husband survived the wife. After the death of the husband, the heir-at-law of the wife recovered the estate from the purchasers by a suit in equity:—Held, that the husband, and the purchasers

from him, were entitled in that suit to a lien on the estate in respect of the purchase money paid by the husband; and *semble*, also, in respect of the moneys expended on lasting improvements. *Neesom v. Clarkson*, 4 Hare 97; 9 Jur. 82.

1. A purchaser, who has accepted a conveyance with knowledge of an incumbrance, has no lien on the fund in court in respect of the incumbrance. *Miller v. Pridden*, 3 Jur., N. S., 78; 26 L. J., Ch., 183.

2. The lien of a vendor upon the land and title deeds until payment of the purchase money, does not apply to a conveyance to the purchaser executed by some, but not all of the parties, where the contract has gone off by the vendor's default; and if there be any lien on such a conveyance, it is vested in the purchaser as security for his deposit. *Ozenham v. Esdaile*, 3 Y. & J. 263.

3. An hotel keeper, who was also the owner, agreed, on the 24th March 1851, to sell his hotel, and to assist in carrying on the business for two years, receiving half the profits. The purchaser's wife (who was the hotel keeper's daughter) went on the premises and assisted in managing the concern. From the purchaser's letters, it appeared that he was not able to supply the funds necessary to carry on the business; and in a letter of the 24th May 1851 he wrote thus to the hotel keeper: "You must mortgage or sell the premises." He subsequently asked the hotel keeper to give him a mortgage on the hotel, for sums which he claimed to be due to him, and brought an action against the hotel keeper for, among other things, a remuneration in respect of the services of his (the purchaser's) wife above mentioned. The hotel keeper became bankrupt. Upon a claim filed by the purchaser against the assignees, claiming that they should elect specifically to perform the agreement, or that it should be declared that the purchaser was entitled to a lien for the sums he had advanced under the contract:—Held, that although the purchaser would have been entitled to a lien, if the contract had failed through the vendor's default, yet that, as the purchaser had himself abandoned the contract, the purchaser was not entitled to any lien, and his claim was dismissed. *Dinn v. Grant*, 5 De G. & Sm. 451.

4. L. having contracted in writing to sell estates for 350,000*l.* to H., by a defeasance and subsequent agreement, on the same stipulations, re-sells to W. for 380,000*l.*, not subject to defeasance. W. claims 76,084*l.*, compensation for misdescription and defects of title, and L. gives him notice in writing that unless in three months he complies with the contract, he shall re-sell. The three months elapse, and W., having paid 38,000*l.* deposit of 10*l.* per cent. on the purchase money, files a bill for the return of such deposit and other moneys advanced, costs, interest, and expenses; and for a declaration that he has a lien on the estates for such sums; for an account, receiver, inquiries, and injunction, to restrain a sale to any other person. On a general demurrer to this bill for want of equity, demurrer overruled without costs, on the ground that *prima facie* a purchaser who has paid his deposit, where the contract goes off for defect of title, ought to have a lien

upon the estate for such deposit, on the dicta and opinions of Sir Thomas Clarke, in *Burges v. Wheate* (1 Eden), and Lord St. Leonards, in his *Treatise on Vendors and Purchasers*. *Wythes v. Lee*, 4 W. R. 184; 3 Drew. 396; 25 L. J., Ch., 177; 2 Jur., N. S., 7; 26 L. T. 192. S. C. on appeal 4 W. R. 316; 25 L. J., Ch., 389; 2 Jur., N. S., 130.

5. Under a contract for the purchase of an estate, where the money is to be paid in portions, every payment is a part performance of the contract by the vendee, and in equity transfers to him a corresponding portion of the estate. *Rose v. Watson*, 10 H. L. Ca. 672; 10 Jur., N. S., 297; 33 L. J., Ch., 385; 12 W. R. 585; 13 L. T., N. S., 106. Affirming 10 W. R. 745; 6 L. T., N. S., 804.

An owner of an estate, part of which was subject to a contract for sale, executed a mortgage upon it. The mortgagee gave to the vendee notice of the fact of the mortgage, but in all other respects left matters as they were before the mortgage. The vendee was bound by his contract to pay certain sums at stated intervals, together with interest on all that remained unpaid. He made several of these payments, but at length declined to complete the purchase, on the ground that the representations on which he had been induced to enter into the contract for purchase were unfulfilled:—Held, that he was entitled, so far as the payments extended, to claim a lien on the estate for their amount, and to enforce that claim against the assignees of the vendor. *Id.*

Interest was allowed the purchaser on the sums paid by him at the rate of 4*l.* per cent. per annum, simple interest. S. C. 3 N. R. 673.

6. Where, in a suit by a vendor for specific performance, it was certified that a good title was not deduced, the Court ordered a return to the defendant of his deposit money, with interest at 4 per cent., and declared the defendant entitled to a lien on the estate of the same, and also for his costs, with liberty to apply; and, subject thereto, dismissed the bill. *Turner v. Marriott*, 3 L. R., Eq., 744; 15 L. T., N. S., 607; 15 W. R. 420.

VII. APPLICATION AND APPORTIONMENT OF.

1. *In General*, 7260.
2. *In Discharge of Incumbrances by Vendor*, 7261.
3. *Allowance for Incumbrances bought up by Purchaser*, 7261.
4. *Apportionment*, 7261.
5. *Sale by Executors*. See EXECUTOR AND ADMINISTRATOR, XXII.
6. *Sale by Trustees under Powers and Powers to give Receipts*. See POWER, XXI. and XXII.

1. In General.

7. Where a mortgage was made to secure stock, which was for the purpose sold by trustees who had power to give receipts for moneys and power to vary securities, the mortgage held, as between vendor and purchaser, not to be sufficiently discharged on payment of a sum of money to the trustees,

the money not appearing to have been again invested in stock or upon security. *Pell v. De Winton*, 2 De G. & J. 13; 4 Jur., N. S., 225; 27 L. J., Ch., 230.

C., in consideration of the transfer to him of stock to enable him to purchase an estate, created a mortgage of the property to the trustees of the will of Y., and covenanted to replace the stock at a specified time, and pay so much interest in the meantime as the stock would have produced in the funds, such interest to be held upon the trusts of the will. The plaintiff purchased the mortgaged estate, at which time the parties entitled to the proceeds of the mortgage were J. and the trustees of the marriage settlement of M.; J. being entitled absolutely as to one moiety, and to two-thirds of the other moiety as the surviving trustee under the marriage settlement of C., and the trustees under the settlement of M. being entitled to the remaining one-third. Both settlements contained the usual clauses making trustees' receipts good discharges, and giving them power to vary the securities. The plaintiff having agreed to sell the estate, objection was raised by the vendee, that as money had been paid to the trustees instead of a transfer of stock, he was entitled to have it ascertained that the purchase moneys had been properly invested in stock according to the trusts of the settlements. The plaintiff having filed a bill for specific performance of the agreement:—Held, that the objection to the title was valid. *Id.*

1. *Semble*, that an innocent vendor of lands, discovering before completion that the purchasers are trustees, is not concerned to see that the investment is authorised by the trust. *Mansfield v. Childers*, 46 L. J., Ch., 30; 2 L. R., Ch. D., 82.

2. A. B. contracted to purchase a mortgaged estate, the mortgagee to be paid off out of the purchase money. The mortgagee held his debt as trustee (as to part) for a third party, who, while the contract was pending, filed a bill in Chancery to establish the trust, and gave notice to the purchaser. In the meantime the mortgagee filed a petition in lunacy to carry out the sale, and the purchaser paid the purchase money to the receiver, to be administered under the order in lunacy:—Held, in a suit by the *cestui que trust*, that the purchaser was bound to see to the application of the purchase money; but the suit was ordered to stand over in order that the plaintiff might go in under the petition and establish his right in lunacy. *Morris v. Stuart*, 1 W. R. 94. S. C. *nom. Norris v. Dudley Stuart (Lord)*, 16 Beav. 359.

3. *Semble*, the rule requiring purchasers of property to see to the application of the purchase money, does not apply to the case of debtors, so as to implicate them in trusts created by their creditors. *Fernie v. Maguire*, 6 Ir. Eq. R. 137.

2. In Discharge of Incumbrances by Vendor.

4. It is not a rule of equity that upon the purchase of property, subject to incumbrances, for its full value, the vendor is bound to apply the purchase money in payment of the incumbrances according to their priorities.

Such a duty can only be the result of express agreement, or of a contract to be implied from the circumstances of the case. *Att.-Gen. v. Cox, Pearce v. Att.-Gen.*, 3 H. L. Ca. 240. Reversing S. C. *sub. nom. Greenwood v. Taylor*, 14 Sim. 505; 9 Jur. 480.

5. Where a purchaser is in possession of lands under an executed conveyance, and part of the purchase money has been secured by a bond, the purchaser may come into equity to have it employed in the discharge of an arrear of ground-rent due at the date of the conveyance, and is not confined to his remedy at law on the covenants in his conveyance. *Woods v. Martin*, 11 Ir. Ch. R. 148.

6. Purchaser not permitted to apply part of his purchase money in discharge of a mortgage on the estate, though some of the parties consented, others being infants; and that there was such an incumbrance not appearing on the report. *Quære*, could it be done if all were competent, and consented. — *v. Stratton*, 1 Ves. J. 266.

7. The plaintiff by one contract purchased an estate and a judgment for 1,000*l.*:—Held, that he was entitled to apportion the purchase money between the estate and the judgment, and to have separate conveyances of each. *Clark v. May*, 16 Beav. 273; 2 L. J., Ch., 302.

On Sales by the Court.] See XXIV. v. *post*.

3. Allowance for Incumbrances bought up by Purchaser.

8. If a purchaser compromises debts charged on purchased premises (the vendor being bound to relieve the incumbrances), he ought not to charge the vendor more than he actually pays, as that is the amount of damage he sustains by breach of covenant. *Cane v. Allen (Lord)*, 2 Dow. 296.

9. A purchaser is not at liberty to use information derived from the abstract for his own advantage, adversely to the vendor. *Murrell v. Goodyear*, 2 Giff. 51; 6 Jur., N. S., 91; 29 L. J., Ch., 298. Affirmed 29 L. J., Ch., 425; 8 W. R. 398.

Therefore, where a purchaser having ascertained that the concurrence of the heir was required to complete the title, gave notice to rescind the contract and bought up the interest of the heir, the Court decreed specific performance of the contract with costs, but allowed him to deduct from the price he had paid the heir. *Id.*

See also XXIV. v. *post*.

4. Apportionment.

10. On a bill for specific performance of an agreement, for the sale of a lease, the Court cannot apportion the price according to the time already expired. *King v. Wightman*, 1 Anstr. 80.

11. If the legatee in remainder of a term of years which was converted into stock, the legatee in remainder not being a party to the conversion, sues for a portion of the purchase money in the lifetime of the tenant for life, whether the Court will do more than secure

the fund, or whether it will apportion it according to the value of the respective interests, *quære*. *Phillips v. Sarjent*, 7 Hare 33.

1. A purchaser of property included in one contract may divide the property purchased and apportion the purchase money, and he may direct its conveyance to be made by the vendors in such a manner as he may deem most expedient, and by one or more deeds; but in this case, the objections on both sides being frivolous, the decree was made without costs. *Clark v. May*, 22 L. J., Ch., 302; 16 Beav. 273.

2. Under the will of the uncle of A., made in 1818, A. was tenant for life, with remainder to B., his eldest son, in fee, of lands in which the legal estate was outstanding. In 1849 A. mortgaged his equitable life estate, and in 1852 B. mortgaged his remainder in fee to the same persons, with powers of sale. Default was made, and in 1864 the mortgagees in exercise of the power of sale conveyed a portion of the lands to C., by a deed, which recited (as the fact was) that the purchase money had been apportioned between the life estate and the remainder according to the valuation, the propriety of which was not disputed. C. devised the purchased lands to D., his nephew, for life, with remainders over. A portion of the purchased lands was afterwards sold:—Held, that the mortgagee's powers of sale were properly exercised. *Re Cooper*, 46 L. J., Ch., 133; 4 L. R., Ch. D., 302; 35 L. T., N. S., 890; 25 W. R. 301.

3. When a vendor succeeds in a suit for specific performance, he is entitled to costs, notwithstanding the title was first shown in the Master's office, if the suit was occasioned solely by the conduct of the defendant. Interest on arrears of rent and an apportionment, as between landlord and tenant, disallowed. *Peers v. Sneyd*, 17 Beav. 151.

4. Where a testator had created a term of 500 years for the payment of his debts and legacies, and, subject thereto, had devised the property in strict settlement; and the fee simple had been sold under a private Act of Parliament:—*Somble*, that the difference between the price realised by the sale of the fee, and that which would have been realised by the sale of the term, ought to be apportioned between the reversion and the term. *Brook v. Mustyn*, 4 N. R. 41.

5. A message belonged to one who devised his real estate in trust for sale. An adjoining message was vested in the trustees of his settlement upon trust for sale, and the purchase money, subject to the payment of definite sums, belonged to the testator's estate. Under a decree for administering the estate the two messages were put up for sale together in one lot, and it was provided that the purchase money should be paid into court to the credit of the cause, "The proceeds of the sale of the testator's real estate." The trustees of the settlement had obtained liberty to attend the proceedings as to the sale. The purchaser objected to the title on the ground that the two properties were sold together for one lump sum, without any provision for apportioning it, and that it was to be paid into court in a suit unconnected with the settlement:—Held, that this objection

was not sustainable, for that the Court, having the money in its custody, would see it properly applied. The Court, however, for the satisfaction of the purchaser, ordered that the purchase money should be apportioned, and the part apportioned to the settled message paid into court to a separate account. *Cavendish v. Cavendish*, 10 L. R., Ch., 319; 33 L. T., N. S., 219; 23 W. R. 313.

See also LANDS CLAUSES ACT, XIII.—POWER

VIII. PAYMENT INTO COURT.

See also XXIV. v. *post*.

1. *Order for. In General*, 7262.
2. *Where Purchaser in Possession. In General*, 7263.
3. *Where Purchaser in Possession but Title not Accepted*, 7263.
4. *On Exercise of Acts of Ownership by Purchaser*, 7264.
5. *Deduction of Income Tax*, 7264.
6. *Practice on Application*, 7265.
7. *Other Matters*, 7265.
8. *Sales of Land taken under Compulsory Powers*. See LANDS CLAUSES ACT, XIII.

1. Order for. In General.

6. Purchase money ordered to be paid into court till the hearing. *Grundy v. Masters*, 1 Jur. 669.

7. A purchaser who is not in possession, and has not accepted the title, will not be ordered to pay his purchase money into court. *Asen*, 1 L. J., Ch., 177.

8. The bill stated a parol agreement for sale, and possession had been given of five acres. The answer admitted an agreement to purchase three acres only. Motion, that the purchase money for the five acres, or otherwise for the three acres, might be brought into court, refused. *Benson v. Glastonbury Canal Co.*, 1 Coop. C. C. 350; C. P. C. 42.

9. Parties interested in an estate which was sold for a large sum of money asked that the purchaser might pay a part of the purchase money into court without prejudice to objections to the title:—Held, that such an order would be contrary to the rule of the court; and though such rule was not inflexible, the Court refused to make the order even with the consent of the purchaser. *Ouseley v. Anstruther*, 11 Beav. 399; 18 L. J., N. S., Ch., 157.

Offer by Purchaser. 10. Purchaser under circumstances allowed to pay his purchase money into court, and to be let into the possession and receipt of the rents and profits without prejudice to any subsequent objection which he might be advised to make to the title. *Marfell v. Rudge*, 2 Y. & Coll. 566; 2 Jur. 78.

11. Offer of a purchaser before conveyance to pay into court instalments due, and interest, according to the contract, the subject being a coal mine, and the purchaser in possession and working it. *Buck v. Lodge*, 18 Ves. 450.

2. Where Purchaser in Possession. In General.

1. Motion, for a purchaser in possession to pay money into court, refused, under the circumstances of possession given independently of the agreement to purchase, and laches on the part of the vendor in completing his title. *Fbw v. Birch*, 1 Meriv. 105.

2. A motion by vendor that a purchaser who had taken possession should pay the purchase money into court, refused; the agreement admitted by the answer differing from that stated by the bill. *Benson v. Glastonbury Navigation Co.*, C. P. C. 42; Coop. C. C. 350.

3. Generally a purchaser shall not be allowed both to retain possession of the estate, and to keep his purchase money; but in a case where he was willing to give up possession, which he had taken under the agreement, and it was a question whether there was or was not a subsisting contract, the Lord Chancellor refused to order payment of the purchase money into court. *Morgan v. Shan*, 2 Meriv. 138.

4. Bill for specific performance against vendor, the vendee being in possession, and an account being necessary of the vendee's personal estate, referred to the Master to fix a short day for the payment of the purchase money; otherwise the bill to be dismissed, as against those defendants, with costs. *Lowther v. Andover*, 1 Bro. C. C. 396.

5. Court will not compel vendor to pay deposit money into court, though he retains possession of the estate, if the delay in the completion of the contract is occasioned by purchaser. *Wynne v. Griffith*, 1 Sim. & S. 147; 1 L. J., Ch., 110.

6. Vendor permitting purchaser to take possession before completion of title, without stipulation as to purchase money, cannot, on motion, have purchase money paid into court. *Clarke v. Elliot*, 1 Madd. 606.

7. Motion by one tenant in common, who had agreed to sell to the other, that the latter should pay his purchase money into court, refused, where such purchaser had been before and at the time of the purchase in possession of the whole, with the approbation of the other tenant in common. *Freebody v. Perry*, Coop. 91.

8. Where a purchaser was allowed to enter into possession by consent before the time fixed for completion, and, when that time arrived, delayed payment of the purchase money, alleging that the title had not yet been sufficiently shown, the Court ordered payment of the purchase money into court. *Lilley v. Allen*, 12 Jur., N. S., 181; 14 L. T., N. S., 52.

9. Where purchasers were entitled under the contract to possession and receipt of the rents from a certain day, and obtained possession previously thereto from the tenants, the Court refused to order payment in of the purchase money, though the corpus of the estate was being dealt with, but directed the rents to be paid into court. *Robertshaw v. Bray*, 12 Jur., N. S., 224; 35 L. J., Ch., 844; 14 L. T., N. S., 101.

10. Possession by a purchaser given or permitted by the vendor, without receipt of rents and profits by the purchaser, does not render the purchaser liable to pay the purchase money into court, but he will be ordered to give up possession, or to pay the purchase money into

court. *Curling v. Austin*, 2 Dr. & Sm. 129; 10 W. R. 682.

11. C. contracted with a railway company to sell land, with a stipulation that he should have possession and pay the purchase money in two years, with interest. They took possession, but only paid one-third of the purchase money, and a bill was filed for specific performance and payment of the purchase money unpaid and interest. Before answer the plaintiff moved for payment of the balance of the purchase money into court, or delivery up of the land. Order made for payment or delivery up within a month; and if the land should be delivered up, payment into court by the vendors of the one-third received by them in a fortnight after delivery up of possession. *Cooper v. London, Chatham, & Dover Railway Co.*, 14 W. R. 985.

3. Where Purchaser in Possession but Title not Accepted.

12. Purchaser having taken possession, but objecting to the title, required to pay in the purchase money, or deliver up possession. *Clarke v. Wilson*, 15 Ves. 317.

13. Purchaser in possession objecting to title, ordered to pay purchase money into court. (*Smith v. Lloyd*, 1 Madd. 83); and though possession not admitted by answer, and only shown by affidavit. *Boothby v. Walker*, id. 197.

14. Vendee in possession, objecting to title, required to pay his purchase money into court, although the fact of possession appeared, not upon the pleadings, but upon affidavits only. *Burroughs v. Oakley*, 1 Meriv. 52.

15. Purchaser in possession not ordered to pay money into court where he objects to title. *Gell v. Watson*, 3 Madd. 225.

16. Purchaser in possession, and objecting to title on the ground of a claim to dower, ordered to pay the purchase money into court, on the objection being removed by the widow consenting to accept an equivalent from the vendor. *Mole v. Smith*, 1 Jac. & Walk. 665.

17. By an agreement for the sale of an estate, the purchaser was to pay part of his purchase money on the 24th December then next, when the conveyance was to be executed, and the residue was to be secured by a mortgage of the estate, payable at not less than twelve months from the date of the conveyance. The purchaser entered into possession immediately after the execution of the agreement, but on some objections to the title refused to pay his purchase money. A bill was filed by the vendor, for the specific performance of the contract; and more than twelve months having elapsed from the time when the conveyance ought to have been executed, the defendant was on motion ordered to pay the purchase money into court. *Younge v. Duncombe*, Younge 275.

18. A purchaser, who had been three years in possession, and who had not paid the purchase money on the ground that a good title had not been made out, was ordered either to pay the purchase money within two months, or to give up possession. *Tindal v. Cobham*, 2 Myl. & K. 385; 4 L. J., N. S., Ch., 98.

See also Next Subdivision.

the fund, or whether it will apportion it according to the value of the respective interests, *quære*. *Phillips v. Sarjent*, 7 Hare 33.

1. A purchaser of property included in one contract may divide the property purchased and apportion the purchase money, and he may direct its conveyance to be made by the vendors in such a manner as he may deem most expedient, and by one or more deeds; but in this case, the objections on both sides being frivolous, the decree was made without costs. *Clark v. May*, 22 L. J., Ch., 302; 16 Beav. 273.

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4. Where a testator had created a term of 500 years for the payment of his debts and legacies, and, subject thereto, had devised the property in strict settlement; and the fee simple had been sold under a private Act of Parliament:—*Somble*, that the difference between the price realised by the sale of the fee, and that which would have been realised by the sale of the term, ought to be apportioned between the reversion and the term. *Brook v. Mustyn*, 4 N. R. 41.

5. A message belonged to one who devised his real estate in trust for sale. An adjoining message was vested in the trustees of his settlement upon trust for sale, and the purchase money, subject to the payment of definite sums, belonged to the testator's estate. Under a decree for administering the estate the two messages were put up for sale together in one lot, and it was provided that the purchase money should be paid into court to the credit of the cause, "The proceeds of the sale of the testator's real estate." The trustees of the settlement had obtained liberty to attend the proceedings as to the sale. The purchaser objected to the title on the ground that the two properties were sold together for one lump sum, without any provision for apportioning it, and that it was to be paid into court in a suit unconnected with the settlement:—Held, that this objection

was not sustainable, for that the Court, having the money in its custody, would see it properly applied. The Court, however, for the satisfaction of the purchaser, ordered that the purchase money should be apportioned, and the part apportioned to the settled message paid into court to a separate account. *Cavendish v. Cavendish*, 10 L. R., Ch., 319; 33 L. T., N. S., 219; 23 W. R. 313.

See also LANDS CLAUSES ACT, XIII.—POWER

VIII. PAYMENT INTO COURT.

See also XXIV. v. post.

1. *Order for. In General*, 7262.
2. *Where Purchaser in Possession. In General*, 7263.
3. *Where Purchaser in Possession but Title not Accepted*, 7263.
4. *On Exercise of Acts of Ownership by Purchaser*, 7264.
5. *Deduction of Income Tax*, 7264.
6. *Practice on Application*, 7265.
7. *Other Matters*, 7265.
8. *Sales of Land taken under Compulsory Powers*. See LANDS CLAUSES ACT, XIII.

1. Order for. In General.

6. Purchase money ordered to be paid into court till the hearing. *Grundy v. Masters*, 4 Jur. 669.

7. A purchaser who is not in possession, and has not accepted the title, will not be ordered to pay his purchase money into court. *Anon.*, 1 L. J., Ch., 177.

8. The bill stated a parol agreement for sale, and possession had been given of five acres. The answer admitted an agreement to purchase three acres only. Motion, that the purchase money for the five acres, or otherwise for the three acres, might be brought into court, refused. *Benson v. Glastonbury Canal Co.*, 1 Coop. C. C. 350; C. P. C. 42.

9. Parties interested in an estate which was sold for a large sum of money asked that the purchaser might pay a part of the purchase money into court without prejudice to objections to the title:—Held, that such an order would be contrary to the rule of the court, and though such rule was not inflexible, the Court refused to make the order even with the consent of the purchaser. *Ouseley v. Anstruther*, 11 Beav. 399; 18 L. J., N. S., Ch., 157.

Offer by Purchaser. 10. Purchaser under circumstances allowed to pay his purchase money into court, and to be let into the possession and receipt of the rents and profits without prejudice to any subsequent objection which he might be advised to make to the title. *Marfell v. Rudge*, 2 Y. & Coll. 566; 2 Jur. 78.

11. Offer of a purchaser before conveyance to pay into court instalments due, and interest, according to the contract, the subject being a coal mine, and the purchaser in possession and working it. *Buck v. Lodge*, 18 Ves. 450.

2. Where Purchaser in Possession. In General.

1. Motion, for a purchaser in possession to pay money into court, refused, under the circumstances of possession given independently of the agreement to purchase, and laches on the part of the vendor in completing his title. *Fbz v. Birch*, 1 Meriv. 106.

2. A motion by vendor that a purchaser who had taken possession should pay the purchase money into court, refused; the agreement admitted by the answer differing from that stated by the bill. *Benson v. Glastonbury Navigation Co.*, C. P. C. 42; *Coop. C. C.* 350.

3. Generally a purchaser shall not be allowed both to retain possession of the estate, and to keep his purchase money; but in a case where he was willing to give up possession, which he had taken under the agreement, and it was a question whether there was or was not a subsisting contract, the Lord Chancellor refused to order payment of the purchase money into court. *Morgan v. Shaw*, 2 Meriv. 138.

4. Bill for specific performance against vendor, the vendee being in possession, and an account being necessary of the vendee's personal estate, referred to the Master to fix a short day for the payment of the purchase money; otherwise the bill to be dismissed, as against those defendants, with costs. *Lowther v. Andover*, 1 Bro. C. C. 396.

5. Court will not compel vendor to pay deposit money into court, though he retains possession of the estate, if the delay in the completion of the contract is occasioned by purchaser. *Wynne v. Griffith*, 1 Sim. & S. 147; 1 L. J., Ch., 110.

6. Vendor permitting purchaser to take possession before completion of title, without stipulation as to purchase money, cannot, on motion, have purchase money paid into court. *Clarke v. Elliot*, 1 Madd. 606.

7. Motion by one tenant in common, who had agreed to sell to the other, that the latter should pay his purchase money into court, refused, where such purchaser had been before and at the time of the purchase in possession of the whole, with the approbation of the other tenant in common. *Freebody v. Perry*, *Coop.* 91.

8. Where a purchaser was allowed to enter into possession by consent before the time fixed for completion, and, when that time arrived, delayed payment of the purchase money, alleging that the title had not yet been sufficiently shown, the Court ordered payment of the purchase money into court. *Lilley v. Allen*, 12 Jur., N. S., 181; 14 L. T., N. S., 52.

9. Where purchasers were entitled under the contract to possession and receipt of the rents from a certain day, and obtained possession previously thereto from the tenants, the Court refused to order payment in of the purchase money, though the corpus of the estate was being dealt with, but directed the rents to be paid into court. *Robertshaw v. Bray*, 12 Jur., N. S., 224; 35 L. J., Ch., 844; 14 L. T., N. S., 101.

10. Possession by a purchaser given or permitted by the vendor, without receipt of rents and profits by the purchaser, does not render the purchaser liable to pay the purchase money into court, but he will be ordered to give up possession, or to pay the purchase money into

court. *Curling v. Austin*, 2 Dr. & Sm. 129; 10 W. R. 682.

11. C. contracted with a railway company to sell land, with a stipulation that he should have possession and pay the purchase money in two years, with interest. They took possession, but only paid one-third of the purchase money, and a bill was filed for specific performance and payment of the purchase money unpaid and interest. Before answer the plaintiff moved for payment of the balance of the purchase money into court, or delivery up of the land. Order made for payment or delivery up within a month; and if the land should be delivered up, payment into court by the vendors of the one-third received by them in a fortnight after delivery up of possession. *Cooper v. London, Chatham, & Dover Railway Co.*, 14 W. R. 985.

3. Where Purchaser in Possession but Title not Accepted.

12. Purchaser having taken possession, but objecting to the title, required to pay in the purchase money, or deliver up possession. *Clarke v. Wilson*, 15 Ves. 317.

13. Purchaser in possession objecting to title, ordered to pay purchase money into court. (*Smith v. Lloyd*, 1 Madd. 83); and though possession not admitted by answer, and only shown by affidavit. *Boothby v. Walker*, *id.* 197.

14. Vendee in possession, objecting to title, required to pay his purchase money into court, although the fact of possession appeared, not upon the pleadings, but upon affidavits only. *Burroughs v. Oakley*, 1 Meriv. 52.

15. Purchaser in possession not ordered to pay money into court where he objects to title. *Gell v. Watson*, 3 Madd. 225.

16. Purchaser in possession, and objecting to title on the ground of a claim to dower, ordered to pay the purchase money into court, on the objection being removed by the widow consenting to accept an equivalent from the vendor. *Mole v. Smith*, 1 Jac. & Walk. 665.

17. By an agreement for the sale of an estate, the purchaser was to pay part of his purchase money on the 24th December then next, when the conveyance was to be executed, and the residue was to be secured by a mortgage of the estate, payable at not less than twelve months from the date of the conveyance. The purchaser entered into possession immediately after the execution of the agreement, but on some objections to the title refused to pay his purchase money. A bill was filed by the vendor, for the specific performance of the contract; and more than twelve months having elapsed from the time when the conveyance ought to have been executed, the defendant was on motion ordered to pay the purchase money into court. *Younge v. Duncombe*, *Younge* 275.

18. A purchaser, who had been three years in possession, and who had not paid the purchase money on the ground that a good title had not been made out, was ordered either to pay the purchase money within two months, or to give up possession. *Tindal v. Cobham*, 2 Myl. & K. 385; 4 L. J., N. S., Ch., 98.

See also Next Subdivision.

4. On Exercise of Acts of Ownership by Purchaser.

1. Purchaser in possession having made alterations and improvements on estate, ordered to pay purchase money into court. *Bramley v. Teal*, 3 Madd. 219.

2. Possession by a purchaser, according to the contract, not a ground for payment of the money into court, on objections to the title; acts of alteration or destruction against the nature of the contract, are; and slight acts after the objections discovered more effectual for that purpose, than if done with an understanding one side that there is a title, on the other that there is not. *Dixon v. Astley*, 19 Ves. 564; 1 Meriv. 133.

3. On bill by vendor for a specific performance, the Court will not, before answer, make an order for payment of the purchase money, by the defendant in possession, unless under special circumstances, such as unreasonable delay, committing acts of ownership in alteration of the property, etc. In this case, the defendant being in possession, not under the agreement to purchase, but as tenant to the plaintiff at the time of the purchase, no order was made. *Bonner v. Johnston*, 1 Meriv. 366.

4. Acts of ownership amounting to waste, by alteration and conversion of property, sufficient to induce the Court to order payment of purchase money into court, upon the ground that a vendor has a lien on the estate for the amount, and might have filed his bill to restrain the purchaser in possession from committing such acts of ownership. Though the bill contained no charge of such acts having been committed, the order was made on an affidavit supplying the fact, the defendant not having answered, nor being in contempt, nor under any decree for time. *Cutler v. Symons*, 2 Meriv. 103.

5. Defendant being in possession, and having exercised acts of ownership, payment of the money ordered, although an infant heir was a necessary party to the conveyance. *Bradshaw v. Bradshaw*, 2 Meriv. 492.

6. Purchaser having taken possession, and exercised ownership, although good title was to be made before purchase money paid, which was not done, must nevertheless pay purchase money into court. *Wickham v. Evered*, 4 Madd. 53.

7. Where a purchaser is let into possession of the estate under contract, his dealing with the property (contrary to former usage, or contrary to the usual course of husbandry) may be ground for ordering him to pay the purchase money into court, or for the appointment of a receiver, but will not authorise a decree against him, to compel him to accept the title on the ground of waiver of objections. *Osborne v. Harvey*, 1 Y. & Coll. C. C. 116; 12 L. J., N. S., Ch., 66; 7 Jur. 229.

8. Purchaser (a trustee acting on behalf of himself and others, his co-trustees, and of the *cestui que trust*) ordered to pay purchase money into court, the agreement having been entered into in the name of himself alone, upon affidavits that the plaintiffs (the vendors) had no notice of his acting for others, and of acts of ownership committed since possession given to him under the agreement, in opposition to the answer alleging notice, and denying any act of ownership by himself, or by any other person

to his knowledge. *Crutskley v. Jerningham* 2 Meriv. 502.

9. A purchaser, who entered into possession in the year 1827, without prejudice to any question of title, took objections to the title, and, in consequence of the minority of a party necessary to the conveyance, the conveyance was postponed. The purchaser remained in possession down to the present time, doing various acts of ownership, and still objects to the title:—Held, upon the motion of the vendor, in a suit for specific performance, that under the circumstances, the defendant should pay the purchase money into court, with interest. *Adams v. Heathcote*, 10 Jur. 301.

10. A railway company having contracted with the ground landlord for the purchase of freehold house property, entered into possession and turned out the weekly tenants, to whom the property was sub-let by lessees under the ground landlord. After the weekly tenants had been turned out, the property was greatly damaged by strangers, who entered forcibly and pulled some of the houses to pieces:—Held, that the damage, to the deterioration of the property, having been occasioned by the act of the railway company, in entering upon the houses and turning the tenants out of possession, they must pay the purchase money into court without being allowed the option of giving up possession. *Pope v. Great Eastern Railway Co.*, 3 L. R., Eq., 171; 36 L. J., Ch., 60; 15 W. R. 192.

5. Deduction of Income Tax.

11. Where purchase money and interest are to be paid into court, no deduction is to be made on account of income tax. *Danson v. Danson*, 11 Jur. 984.

12. A purchaser paying his purchase money, with interest, into court, is not to deduct the income tax payable on the interest. *Humble v. Humble*, 12 Beav. 43.

13. Where interest is payable on purchase money upon a sale by order of the Court, the purchaser must pay the full purchase money and interest into court without deducting the income tax. *Holroyd v. Wyatt*, 1 De G. & Sm. 126; 16 L. J., N. S., Ch., 174; 11 Jur. 261.

14. Upon the question whether when a purchaser pays his purchase money into court he is entitled to deduct income tax:—Held, that he is not. *Semble*, there is no difference between the former and modern statutes. *Flight v. Comac*, 2 W. R. 437; 2 Eq. Rep. 1134.

15. A purchaser liable to pay interest on his purchase money may deduct income tax from such interest. It was the practice to deduct the tax from the interest on debts upon promissory notes, and the like, in the offices of the Masters in Chancery. *Bebb v. Bunney*, 1 Kay & J. 216; 1 Jur., N. S., 203.

The tax is not deducted on payment of purchase money into court, but the purchaser, it seems, may apply to have it deducted when the purchase money is paid out of court; the words "yearly interest" in s. 40 of 16 & 17 Vict., c. 34, mean not only interest accruing *de anno in annum*, but any interest at a fixed rate per cent. per annum, though accruing *de die in diem*. *Id.*

16. Where a vendor in the occupation of

property is charged with an occupation rent, a direction for the deduction of income tax ought not to be inserted in the decree. *Sherwin v. Shakespear*, 2 W. R. 668; 2 Eq. Rep. 957; 5 De G. M. & G. 517; 18 Jur. 748; 23 L. J., Ch., 898; 1 W. R. 460.

6. Practice on Application.

1. Purchaser taking possession without consent or privity of vendor, ordered, on motion, before answer to pay purchase money into court. *Blackburn v. Stace*, 6 Madd. 69.

2. On bill by vendor for a specific performance, the Court will not, before answer, make an order for payment of the purchase money, by the defendant in possession, unless under special circumstances, such as unreasonable delay, committing acts of ownership in alteration of the property, etc. In this case, the defendant being in possession, not under the agreement to purchase, but as tenant to the plaintiff at the time of the purchase, no order was made. *Bonner v. Johnston*, 1 Meriv. 366.

3. Purchaser in possession objecting to title, ordered to pay purchase money into court, though possession not admitted by answer, and only shown by affidavit. *Boothby v. Walker*, 1 Madd. 197.

4. Affidavits admitted, after answer, to be read in support of a motion to pay purchase money into court. *Bradshaw v. Bradshaw*, 2 Meriv. 492.

5. Acts of ownership amounting to waste, by alteration and conversion of property, sufficient to induce the Court to order payment of purchase money into court, upon the ground that a vendor has a lien on the estate for the amount, and might have filed his bill to restrain the purchaser in possession from committing such acts of ownership. Though the bill contained no charge of such acts having been committed, the order was made on affidavit supplying the fact, the defendant not having answered, nor being in contempt, nor under any decree for time. *Cutler v. Symons*, 2 Meriv. 103.

6. Purchaser (a trustee acting on behalf of himself and others, his co-trustees, and of the *cestui que trust*) ordered to pay purchase money into court, the agreement having been entered into in the name of himself alone, upon affidavits that the plaintiffs (the vendors) had no notice of his acting for others, and of acts of ownership committed since possession given to him under the agreement, in opposition to the answer alleging notice, and denying any act of ownership by himself, or by any other person to his knowledge. *Crutchley v. Jerningham*, 2 Meriv. 502.

7. A purchaser may be committed for disobeying an order to pay in his money. *Lansdown v. Elderton*, 14 Ves. 512.

7. Other Matters.

8. Payment to the solicitor for all parties in the suit is equivalent to payment into court. *Price v. North*, 2 Y. & Coll. 620; 7 L. J., N. S., Exch. Eq., 9.

9. Conditions of sale provided that the purchase should be completed on a given day,

and that "if from any cause whatever the purchase should not be then completed," the purchaser should pay interest from that time till the day of completion. The title was accepted, and the deeds prepared and tendered some days before the time fixed. Two days before that time the vendor died, having devised her estates to an infant, which rendered a suit necessary to obtain completion, and delay was occasioned. After filing the bill, the purchaser paid his money into court, to the general credit of the cause:—Held, that the death of the vendor was an event within the contemplation of the parties, and the purchaser was liable to pay interest, that the payment into court was not a payment to the purchaser; and that, there being no fault in either party, the decree must be without costs. *Bannerman v. Clarke*, 3 Drew. 632; 26 L. J., Ch., 77; 5 W. R. 37.

10. Where, pending a demurrer to bill, the vendor is ordered to place proper conveyance into hands of Court, purchaser is ordered to place purchase money there also; the purchaser will not be permitted to take out conveyance, though he consents to vendor taking out the money. *Cutler v. Broughton*, 3 Madd. 95.

11. Purchase money paid into court is the property of vendor. *Gell v. Watson*, 2 Sim. & 8. 402; 3 L. J., Ch., 199.

12. The vendor dying intestate, and having an infant heir, the purchase money, being paid into court in a suit for a specific performance instituted after his death, will be retained till the heir attains twenty-one, and conveys. *Bullock v. Bullock*, 1 Jac. & Walk. 603.

13. A purchaser is not conclusively bound by the acceptance of the title by his counsel, but if he pays his purchase money into court he is bound. This rule, however, does not apply to a case where the counsel is misled by the abstract of title. *McCulloch v. Gregory*, 1 Kay & J. 286; 24 L. J., Ch., 246; 3 W. R. 231; 3 Eq. Rep. 495.

IX. INTEREST.

1. *From what Time*, 7265.

2. *Rate*, 7267.

3. *After Appropriation of Purchase Money*, 7267.

4. *On Sale of Reversions*, 7268.

5. *Right of Purchaser to Interest. In General*, 7269.

6. *Right of Vendor to Interest. In General*, 7269.

7. *Right of Vendor to Interest under Express Conditions*, 7271.

1. From what Time.

14. A purchaser taking possession without a conveyance was compelled to pay interest, though the money was to be paid at a particular day, on the execution of the conveyance. *Fludyer v. Cocker*, 12 Ves. 25.

15. Specific performance prayed both by original and cross-bill, after considerable delay upon the title; the rents to be received, and interest paid, from the time stipulated. *Fenton v. Brown*, 14 Ves. 144.

16. Purchaser, after long possession and

vexatious objections to complete the purchase:—Held, to have waived his right to an investigation of the title, and decreed to perform the agreement specifically, to pay interest at 4 per cent. on the unpaid purchase money from the time of taking possession, and to pay the costs of the suit. *Hall v. Laver*, 3 Y. & Coll. 191.

1. Circumstances under which it was held, that the ordinary relation of vendor and purchaser existed between a railway company and the owner of certain lands taken by the company; and that the owner was entitled to interest on the purchase money, from the time the company took possession of the lands, up to the time of lodging the money in the bank. *Blount v. Great Southern & Western Railway Co.*, 2 Ir. Ch. R. 40.

2. Sale of an annuity before the Master takes effect from the confirmation of the report, and the sale being on the 11th August, and the report confirmed in Michaelmas term, interest was given upon the purchase money from the first day on which the report could have been confirmed, viz., the first seal before the term. *Twigg v. Fyfield*, 13 Ves. 517.

3. A purchaser under a decree for sale, having accepted, and (on a report of an objection to the title for which compensation was ordered) retained possession, must pay interest on the purchase money from the time at which he might have safely taken possession, and is entitled to an allowance for prior, not for subsequent, deterioration of the estate. *Binks v. Rokeby (Lord)*, 2 Swan. 222.

4. Under an Inclosure Act an allotment had been made to the improprator in lieu of tithes; and by the Act the tithes were to cease on the allotment being made, but the Act did not authorise the sale of allotments before the execution of the award; in the interim, the improprator agreed to sell his allotment for 700*l.*, to be paid on the 25th March then next, on a good and valid title being made and executed. The award was not made until several years after the agreement, but the purchaser had been all along in possession of the allotment. The Court ordered him to pay 4 per cent. interest on his purchase money from the 25th March next after the date of the agreement, although a good title could not be made until the award was executed. *Att.-Gen. v. Christ Church (Dean)*, *Oxford*, 13 Sim. 214; 12 L. J., N. S., Ch., 28; 5 Jur. 1007.

5. A purchaser who has not been in possession is bound to pay interest on the purchase money, and take the rents and profits only from the time when a good title was first shown, and not from the time fixed by the agreement for the completion of the purchase. *Jones v. Mudd*, 4 Russ. 118; 6 L. J., Ch., 27.

6. On decree for a specific performance to purchase lands, the general rule is that the purchase money carries interest from the day when the contract ought to have been performed. But in a suit against an executor for specific performance of a contract by his testator to purchase lands, the plaintiff having taken a decree on consent for specific performance, and a reference to take an account of real and personal assets, was held entitled to interest only from the date of the report, the

executor having admitted assets by his answer and the accounts having been unnecessarily taken. *Enraght v. Fitzgerald*, 8 Ir. Eq. R. 87.

7. A purchaser will be charged with interest on his purchase money, only from the time when, with reasonable diligence on his part, the conveyance might have been completed. *Boehm v. Wood*, 1 L. J., Ch., 234.

8. Where, on a reference as to title in a suit for specific performance, the plaintiff, the vendor, showed a good title in the opinion of the Master from the time of producing before him certain evidence, the existence of which was well known to the defendant; but it had formed no subject of dispute between him and the vendor:—Held, that interest on the purchase money ought to be allowed from the time fixed by the contract for completion, and not merely from the time of the good title actually shown; held, also, that the plaintiff was, under the same circumstances, entitled to the costs of the suit. *Monro v. Taylor*, 3 Macn. & G. 713; 21 L. J., N. S., Ch., 525. Affirming 8 Hare 51.

9. The decree in a suit for specific performance established, that a good title had been shown within a few days of the original contract. There had been, however, after that time a second agreement between the parties, qualifying the terms of the original contract, and which was made under the impression that a good title had not then been shown since the date of the original contract, which was more than thirteen years before the decree, but only fifteen months before the bill was filed. There had been great dilapidation in the property:—Held, that the whole of the loss incurred thereby fell upon the purchaser, but that interest on the purchase money only ran from the filing of the bill, and interest also was given to the purchaser in the terms of the second agreement, between the date of that agreement and the filing of the bill, upon the balance of his purchase money then lying unproductive. *Minchin v. Nanoe*, 4 Beav. 332.

10. A purchaser is liable to pay interest on his purchase money from the time when he could prudently take possession; but held, that he could not prudently take possession at the time a good title was shown, if he had no assurance that a person having a charge on the property would join in the conveyance. *Wells v. Maxwell*, 32 Beav. 550.

11. In the course of the winding-up of a company, it was ordered that the hereditaments which constituted the real estate of the company should be sold. The hereditaments had been, at the time when the company purchased them, conveyed to each of the shareholders, his heirs and assigns, in so many undivided one-hundredth parts as represented the number of his shares in the company. In pursuance of the order the official manager put up the hereditaments for sale, and sold the same according to certain conditions. By one of such conditions it was provided that the vendor should deliver to the purchaser an abstract of the documents affecting the shares into which the company was divided, but that he should nevertheless accept a conveyance of the entire property from the official manager, under the powers contained in the Winding-up Acts, without requiring the concurrence of

any of the shareholders, or of any other person. Also, that if the purchaser should consider the legal estate to be outstanding, and should require a conveyance thereof, he should bear the expenses of obtaining such conveyance, and all other expenses incidental thereto:—Held, that the contract was completed when the conveyance of the equitable interest by the official manager was made; and that the purchaser must pay interest on the remainder of the purchase money from that time. *Sheerness Well or Waterworks Co. (Official Manager) v. Polson*, 9 W. R. 113; 3 De G. F. & J. 35; 29 Beav. 70; 7 Jur., N. S., 12; 30 L. J., Ch., 326; 4 L. T., N. S., 568.

Under Express Conditions.] See 7 *infra*.

2. Rate.

1. Where no stipulation as to interest, and purchaser completes his part, he pays 5 per cent. interest, and takes rents and profits; but where rents and profits do not value at 5 per cent. he pays no interest, and vendor takes rents and profits. *Edaile v. Stephenson*, 1 Sim. & S. 122.

2. Purchaser charged with 5l. per cent. interest on the purchase money unpaid. *Burnell v. Brown*, 1 Jac. & Walk. 168.

3. Agreement for the payment of the purchase money of an estate, by half-yearly instalments, the four last of which are to be retained by the purchaser as an indemnity until a good title shall be made, does not entitle the vendor to compound interest on such instalments upon a bill by him for specific performance of the agreement, it appearing that until such bill was filed he was not prepared to make a good title to the premises in question. *Stratton v. Symon*, 2 Moore 125.

4. On motion by vendor against purchaser in possession for reference to set occupation rent, title not being completed, order was accordingly made, and that interest at 5 per cent. on deposit should, under circumstances, be deducted from rent. *Smith v. Jackson*, 1 Madd. 618.

On Promissory Notes (Ireland).] See XXIV. v. 3 (b) *post*.

3. After Appropriation of Purchase Money.

5. To excuse a purchaser from paying interest during the delay in clearing difficulties as to the title, it is not sufficient that the money was appropriated and unproductive, but the vendor must have notice thereof. *Powell v. Martyr*, 8 Ves. 146.

6. Effect of a deposit by vendee, with notice to vendor to stop or determine the rate of interest, not as a tender and appropriation, transferring the risk as to the principal: therefore, upon an investment in stock by the vendee, the title not being ready, and the vendor having notice, but returning no answer, the advantage by a rise, as the loss by a fall, is the vendee's. *Roberts v. Massey*, 13 Ves. 561.

7. When purchase money is agreed to be

paid, and a conveyance made at a given time, and disputes arise as to title, and the purchaser proposes to vendor to lay out the purchase money in exchequer bills till wanted, but vendor returns no answer, and money is so laid out, the purchaser is at the risk, and the vendor is entitled to the money, with 4 per cent. interest. (See 13 Ves. 563. n.) When the purchase is completed, the purchaser is entitled to the rents and profits till possession given, and vendor to purchase money with interest: and if by neglect of vendor no rents, etc., have been received, he will be liable for what he might have received while purchaser was out of possession. *Ackland v. Cuming or Gaisford*, 2 Madd. 28.

8. A contract having been made for sale of an estate, it afterwards appeared that there were several outgoing from the estate which were not disclosed at the time of the contract, yet these being matters which be in compensation, the contract shall be carried into execution, with an allowance only to the purchaser for these particulars which diminish the value; the agreement not being completed within the time specified, the purchaser shall be allowed interest for such time as the purchase money shall appear to have been kept dead for the especial purpose of completing the contract. *Howland v. Norris*, 1 Cox 59.

9. Purchaser paying purchase money into his banker's, where it remained four years with notice to vendor:—Held, not liable for interest on difference between his average balance in banker's hands during a few days, when less than the purchase money was therein, and during the three preceding years. *Winter v. Blades*, 2 Sim. & S. 393; 4 L. J., Ch., 81.

10. Where the Great Western Railway Company have paid the purchase money of property under settlement into the Bank of England, the vendors (the trustees) cannot apply under the Act, by petition, to charge them with interest during the time it has lain idle, on the ground, that the company ought to have paid it to the trustees who were authorised by the settlement to receive it. *Exp. White, Re Great Western Railway Co.*, 9 L. J., N. S., Exch. Eq., 9.

11. Where interest was to be paid, if delay arose from any cause in payment of the purchase money:—Held, that it was not payable where notice was given that the money was lying unproductive, and the delay arose from the state of the title. *Donning v. Henderson*, 1 De G. & Sm. 689; 17 L. J., N. S., Ch., 8; 12 Jur. 89.

12. By the conditions of sale it was stipulated that the purchaser should pay the remainder of the purchase money, after deducting the deposit, into court on or before the 26th December 1845; but, if he should fail in making such payment, etc., then, and from whatever cause the delay might have arisen, he should pay interest at 5 per cent. per annum on the said balance from that day until the day of payment. The purchaser deposited the balance on the 23rd December with his bankers at 2½ per cent. per annum, and gave notice thereof to the vendors. The title was not completed until August 1847, but the purchaser, being satisfied with the title, paid the balance and interest at 5 per cent. into court in the July previously, reserving the

question of his right to compensation for loss of the difference between interest at 2½ and 5 per cent. occasioned by the delay of the vendors:—Held, that the purchaser must bear the loss arising from the unproductiveness of the purchase money, it being his own voluntary act to invest it. *De Visme v. De Visme*, 1 Macn. & G. 336; 1 H. & Tw. 408; 19 L. J., N. S., Ch., 52; 18 L. J., N. S., Ch., 159; 13 Jur. 205, 1037.

1. A purchaser agreed that, "if from any cause whatever" the purchase should not be completed by a day named, interest should be payable. He spent a considerable part of the intervening time without taking any steps towards investigating the title, having been prevented from paying the purchase money before the appointed day only by reason of his being disappointed in procuring the discounting of some bills for that purpose; on receiving a note, after the day, from the vendor that he should be charged with interest he paid the money into a banker's, and informed the vendor that it should lie there until the completion of the purchase, having meanwhile raised some objections of little weight to the title, which were removed after a reasonable time:—Held, that under these circumstances the vendor was entitled to the stipulated interest. *Stocks v. Holdsworth*, 2 W. R. 450.

Quære, if the vendor is a maltster, is that fact notice to a purchaser that he is a Crown debtor. *Ib.*

2. The rule that, where a vendor fails to complete at the time agreed upon, the purchaser, by providing himself with the money, and giving notice that it is lying idle, may free himself from payment of subsequent interest, is settled by well-established authorities, and could not have been intended to be rendered doubtful by the dicta in *De Visme v. De Visme* (1 Macn. & G. 352). *Dyson v. Hornby*, 4 De G. & Sm. 481.

3. Vendor held accountable for the rents, but not entitled to any interest on the purchase money, the purchase not having been completed through the default of the vendor, and the purchase money having, after notice to the vendor, been lying idle. *Regent's Canal Co. v. Ware*, 23 Beav. 575. See *Storry v. Walsh*, 27 L. J., Ch., 338.

4. A purchaser contracted for the purchase of real estate at the price of 38,500*l.*, which was to carry interest at 5 per cent. until payment, and he was let into possession. Afterwards, difficulties having arisen in completing the purchase, he paid 38,000*l.* into a bank to a separate account, and gave notice to the vendors that this sum was appropriated for the purposes of the purchase, and that he would refuse to pay interest under the contract. The vendors replied that they disputed the sufficiency of the notice, but did not point out that the sum paid in was deficient by 500*l.* On discovering the deficiency, the purchaser paid in 500*l.*, with interest at 5 per cent.:—Held, that the purchaser was not liable for interest subsequently to the time when he paid 38,000*l.* into the bank. *Kershaw v. Kershaw*, 9 L. R., Eq., 56; 18 W. R. 477; 21 L. T., N. S., 651.

5. The decree in a suit for specific performance established, that a good title had been

shown within a few days of the original contract. There had been, however, after that time a second agreement between some parties qualifying the terms of the original contract, and which was made under the impression that a good title had not then been shown since the date of the original contract, which was more than thirteen years before the decree, but only fifteen months before the bill was filed. There had been great dilapidation in the property:—Held, that the whole of the loss incurred thereby fell upon the purchaser, but that interest on the purchase money only ran from the filing of the bill, and interest also was given to the purchaser in the terms of the second agreement, between the date of that agreement and the filing of the bill, upon the balance of his purchase money then lying unproductive. *Minchin v. Nance*, 4 Beav. 332.

4. On Sale of Reversions.

6. The purchaser of a reversion, under a decree for sale, had, by one of the conditions of sale, stipulated to pay the purchase money by a certain day. The vendors did not deliver an abstract of their title until after the day named for payment of the purchase money:—Held, notwithstanding the non-delivery of the abstract, that the vendors were entitled to interest from that day. *Lewis v. Tucker*, 5 Jur. 1105.

7. A purchaser of a future interest, after a term, shall not pay interest on an increased price for a part of the term elapsing before the purchase is completed unless the delay be his fault. *Growscock v. Smith*, 3 Anstr. 877.

8. The purchaser of a reversionary interest under the decree of the Court is bound to pay interest at the rate of 3*l.* 10*s.* per cent. on the three-fourths of his purchase money from the date of the report of good title, he not having been guilty of any laches up to that period, to the date of the lodgment. *Hutchinson v. Cathcart*, Jon. & C. 260; 11r. Eq. R. 452.

The rule is the same if the property be in its nature reversionary, though there be a small present profit arising from it. *Ib.*

Upon obtaining the report of good title, it is the duty of the purchaser to bring in the remainder of his purchase money; and if he is afterwards discharged on account of defect of title, he will be entitled to interest thereupon: he is therefore properly chargeable with interest from that time. *Ib.*

9. Where purchaser has an advantage by dropping in of lives, the Court will direct an inquiry what interest he should pay on that account. *Davy v. Barber*, 2 Atk. 489. See *quære*. And see *White v. Nutt*, 1 P. W. 61.

If purchaser by private contract does not pay the purchase money at a time fixed he will be chargeable with interest; as he must bear any loss, so, likewise, will he be entitled to any profits that may arise from the estate. *Ib.*

10. The advantage a purchaser receives from the extinction of lives has never been considered in equity as a reason for his paying interest on his purchase money. It is not a general rule that a purchaser of estates, under

a private agreement, or a decree for a sale, shall, from the time of possession, pay interest. The Court, in awarding interest, never regards the purchase, but the time of executing the conveyances; and even then the purchaser shall pay interest only from the time the possession is delivered. Where lives drop in after a man is reported the best bidder, the Court will direct the purchaser to make some compensation in respect to the estates being bettered. *Blount v. Blount*, 3 Atk. 636, 638.

1. A reversion expectant on an estate for life is decreed to be sold; B. is confirmed the best purchaser, and the order made absolute 1st January. 1724; in January 1726 B. is ordered to bring his money into the bank; the life drops; if the life had dropped the next day after the report of B.'s being the best purchaser made absolute, the purchase must have stood, and as for that time the life was wearing, so from that time the purchaser ought to pay interest. *Exp. Manning*, 2 P. W. 410.

2. A purchaser of a reversion must pay interest on his purchase money from the time of his purchase. *Trefusis v. Clinton (Lord)*, 2 Sim. 359.

3. Upon the sale of a reversion, interest is payable from the time appointed for completion. *Bailey v. Collett*, 18 Beav. 179; 23 L. J., Ch., 230; 2 W. R. 216.

4. The purchaser of a reversion, expectant on a lease for lives, must pay interest on the purchase money from the day on which the Master reports that a good title could have been made by the vendor to the time of payment. *Enraght v. Fitzgerald*, 2 Dr. & War. 43; 1 Con. & L. 181.

5. The purchaser of a reversion must pay interest from the time at which the contract ought to have been completed. *Williams v. Glenton*, 84 Beav. 528; 11 Jur., N. S., 801; 13 W. R. 1030; 13 L. T., N. S., 10. Affirmed 12 Jur., N. S., 175; 35 L. J., Ch., 284; 14 W. R. 294; 13 L. T., N. S., 727.

6. Real estate, including property in possession and in reversion, was put up for sale by auction in lots, under a condition that the vendors should confirm the Master's report of purchases on or before the 25th December 1849, and that, on or before that day, each purchaser should pay his purchase money into court, and be entitled to the rents of his lot from that day; and that if, from any cause whatever, the purchase money should not be so paid, he should pay interest on it at 5l. per cent. from that day. A. purchased a reversion in fee, being one of the lots. Through the default of the vendors, the Master's report was not confirmed until August 1851. Motion, that A. should pay his purchase money into court, with interest from the 25th December 1849:—Held, that interest was payable from that day at 4l. per cent. *Wallis v. Sarel*, 21 L. J., Ch., 717.

5. Right of Purchaser to Interest. In General.

7. On a bill by a purchaser for specific performance of a contract for the sale of an estate, a vendor, who during fifteen years had retained possession of the whole estate, and of one-third of the purchase money, was,

under the circumstances, charged with interest on one-third of the rents and profits. *Burton v. Todd*, 1 Swan. 255.

8. A sum not exceeding the interest of the purchase money, or the rents of the estate, paid to the purchaser when the money had been lodged three years, but the title was not yet completed. *Piers v. Piers*, 11 Ir. Eq. R. 358.

9. Purchaser is entitled to interest on his deposit, and to costs at law and in equity, until the vendor has made his title good; but vendor is entitled to subsequent costs, and may enforce the contract if his title be good when the report is made. The rents belong to the vendor till his title is made good, and afterwards the purchaser must take to the rents and pay interest on his purchase money till the principal is discharged. *Pincke v. Curteis*, 4 Bro. C. C. 329. And see *Id.* 333. n.

10. The amount of deterioration of an estate pending a suit for specific performance having been ascertained by an issue, the purchaser was allowed it out of his purchase money, which he had paid into court under an order, with interest from the time when he paid in his money. *Ferguson v. Tadmam*, 1 Sim. 530.

11. Where sale by trustee to purchaser with notice of trust is set aside, neither purchaser nor trustee pays interest on the rents. *Macartney v. Blackwood*, 1 Ridgw. L. & S. 602.

On Return of Deposit.] See I. 1 *supra*.

6. Right of Vendor to Interest. In General.

12. Where vendor has improperly delayed performance of contract, and refused to give possession, he is not entitled to benefit of general rule as to interest on purchase money. *Paton v. Rogers*, 6 Madd. 257.

13. Purchaser not to pay interest on the deposit even where he has rendered a suit necessary by refusing to perform the contract on the ground of an objection to the title which could not be supported. *Bridges v. Robinson*, 3 Meriv. 694.

14. A purchaser, complaining that his conveyance did not comprise the whole of the property which he had contracted for, filed his bill for a conveyance of the remainder, and obtained an injunction, restraining the vendor from suing him for the purchase money, part of which was afterwards ordered to be paid into court to abide the event of the suit. The bill was dismissed:—Held, that the vendor was entitled to the residue of the purchase money, and the interest upon it, to the time of payment, although the purchase money in court had not been laid out; and no interest therefore had accrued thereon. *Humphries v. Horne*, 3 Hare 276.

15. Though a purchaser has the benefit of the increased value of ornamental timber, by reason of its growth during the years that have intervened between his agreement and the time from which he is considered as in possession of the land, he will not, in respect of that benefit, be charged with interest on any part of the purchase money. *Boehm v. Wood*, 1 L. J., Ch. 234.

16. Where in the contract the word "produce" a good title is used, the vendor is only entitled

to interest from the day on which he has verified the title. *Parr v. Lovegrove*, 6 W. R. 201, 709; 4 Drew. 170; 4 Jur., N. S., 600.

1. A purchaser taking possession without a conveyance was compelled to pay interest, though the money was to be paid at a particular day, on the execution of the conveyance. *Fludyer v. Cocker*, 12 Ves. 25.

2. Interest against a purchaser for delaying payment. Court will not make purchaser appoint a clerk in court, which is only necessary where the party is to appear. *Child v. Abingdon (Lord)*, 1 Ves. J. 94.

3. Specific performance of an agreement for sale of an estate decreed, notwithstanding a variance from the description, with compensation for the deficiency in value, though a minute examination might have discovered the defects, as in the state of the house, etc., but not for a variance from the description, as lying within a ring fence; the premises consisting of leasehold farm, and three years having expired pending the suit, interest was given to the vendor, and a rent set upon it in respect of his possession. *Dyer v. Hargrave*, 10 Ves. 505.

4. Where sale by trustee to purchaser, with notice of trust, is set aside, neither purchaser nor trustee pays interest on rents. *Macartney v. Blackwood*, 1 Ridgw. L. & S. 602.

5. On a sale of real estate by a trustee under a will, open to suspicion, as having been obtained by an undue influence, the title was approved; but before the actual completion of the contract the heir-at-law gave notice that he intended to dispute the will, and brought an action against the tenant for rent; the purchaser thereupon refused to complete, and a bill for specific performance was filed, but before it came to a hearing the action brought by the heir was tried, and a verdict given against the heir; a reference as to title was then directed, and the Master having reported in favour of the title, a decree was made for specific performance. On appeal, however, by the purchaser, the Lord Chancellor ordered the case to stand over generally, with liberty for the vendor to take such proceedings for establishing the will as he should be advised. The vendor then instituted a suit against the heir, which resulted in the will being established. The Lord Chancellor thereupon confirmed the decree for specific performance, and directed the purchaser to pay interest from the time when under the contract the sale ought to have been completed, and also to pay the costs of the suit subsequently to the hearing, when the reference as to title was directed. His Lordship held, that at that time there had been such reasonable inquiry into the title as ought to have satisfied the purchaser; and that, therefore, the consequences of the further proceedings by which the will was established, both in reference to the costs of the suit for specific performance, and the payment of interest, must fall on the purchaser. The judgment of Lord Cottenham in this case (3 Ph. 619; 17 L. J., N. S., Ch., 351; 12 Jur. 385) observed upon. *Grove v. Bastard*, 1 De G. M. & G. 69. And see *Grove v. Young*, 5 De G. & Sm. 38; 21 L. J., N. S., Ch., 95; 15 Jur. 1099.

6. Where conditions of sale provide that interest shall be paid from a certain day, if

purchase not then completed, purchaser cannot relieve himself therefrom, though vendor caused delay. *Esdaile v. Stephenson*, 1 Sim. & S. 122.

Otherwise where no stipulation. *Id.*

7. Under a contract to take together with a mill the machinery in it at a valuation, the purchaser was held not liable to pay interest on the amount of the estimate down to the time at which a good title to the mill was first shown. *Carrodus v. Sharp*, 20 Beav. 56.

8. In a suit by purchasers of certain mines to set aside a sale, it was ordered at the hearing as a condition of obtaining an injunction to stay proceedings at law, that the plaintiff should pay into court from time to time interest on the balance of purchase money, under which order five instalments were paid in and invested in stock, which, upon judgment being given for the plaintiff, were transferred to him with the accumulations and sold out by him. The payment of interest, however, had been suspended before the hearing in consideration of some indulgence to the defendant. The House of Lords reversed the decree, and remitted the cause to the Court below, and that Court directed re-payment to the defendant, without interest, of the produce of the sale of the stock; also the instalments of interest which became due between the order for suspension and the original decree, but no interest thereon. But as to the interest on balance of purchase money between the decree and judgment of reversal, the Court had no jurisdiction. *Small v. Attwood*, 3 Y. & Coll. 105.

9. The plaintiff, having purchased the defendant's interest in two leases, was allowed by the defendant to go into possession without completing the contract by paying the purchase money, and was afterwards dispossessed by force by the defendant. The plaintiff filed a bill for specific performance, and prayed a direction for an assessment of the damages sustained by him by reason of the non-performance of the contract, including the entry upon, and the detention of, the premises from him, and that the defendant should be decreed to pay to him those damages:—Held, that, once possession was taken by the defendant, it should be treated not as that of a trespasser, but as the ordinary possession of a vendor; that the plaintiff should be charged with interest on the purchase money during the time of his possession; and that, from the date when possession was resumed by the defendant, interest on the unpaid purchase money should not be charged against the plaintiff, nor should the rents, profits, or damages be charged against the defendant. *Johnston v. Johnston*, 3 Ir. R., Eq., 328.

10. The putting up of a notice board for the purpose of selling or letting building land by a purchaser:—Held, to render him liable to pay interest on the purchase money. *Ballard v. Shutt*, 15 L. R., Ch. D., 122; 49 L. J., Ch., 618; 43 L. T. 173; 29 W. R. 73.

11. A railway company having agreed to let its line to another, which had taken possession under the agreement, filed a specific performance bill against the other, which thereupon gave notice that it would pay the rent into court. The plaintiffs then gave the defendants notice, that, unless the rent were paid to the

plaintiffs, interest would be claimed on it under the 3 & 4 Will. 4, c. 42, s. 28. The defendants obtained *ex parte* an order that they might be at liberty to pay the rent into court, and paid it accordingly:—Held, that they thereby obstructed the recovery of interest at law, and that the Court had jurisdiction to order payment of interest. *Hull & Selby Railway Co. v. North Eastern Railway Co.*, 5 De G. M. & G. 872.

7 Right of Vendor to Interest under Express Conditions.

1. Where conditions of sale provide that interest shall be paid from a certain day, if purchase not then completed, purchaser cannot relieve himself therefrom, though vendor caused delay. *Esdaile v. Stephenson*, 1 Sim. & S. 122. But see 4 Russ. 121. n.

Otherwise in case of no stipulation. *Id.*

2. By conditions of sale the purchase money was to carry interest; a deposit of 20*l.* per cent. was to be paid, and the auction duty was to be borne equally by the purchaser and the vendor; the purchaser paid only the amount of the deposit, and out of it the auctioneer paid the whole of the auction duty:—Held, that the portion of the deposit applied in discharge of the purchaser's moiety of the auction duty was to be considered as an unpaid part of the purchase money, and that the vendor was entitled to interest on it. *Townshend v. Townshend*, 2 Russ. 303.

3. A contract of purchase contained a stipulation, that if, by reason of any unforeseen or unavoidable obstacles, the conveyance could not be perfected for execution before the day fixed for the completion of the purchase, the purchaser should from that day pay interest at 5 per cent. on his purchase money, and be entitled to the rents and profits of the premises: the vendor did not show a good title till long after the specified day:—Held, that he was not entitled to interest, except from the time when a good title was first shown. *Monck v. Huskisson*, 4 Russ. 121. n.; 5 L. J., Ch., 163.

4. If parties stipulate that interest shall be paid from a certain time, and the rents and profits shall belong to the other party from that time, that contract must be carried into effect, notwithstanding the delay that may arise in the completion of the contract. *Portman v. Mill*, 8 L. J., N. S., Ch., 161.

5. On the sale of an estate, subject to mortgages by trustees, one of the conditions was, that the purchaser should pay a deposit, and agree to pay the remainder of the purchase money on or before the 11th October 1840; and, on payment thereof, the purchaser should be entitled to the rents from that day, up to which time all outgoings, including interest to the mortgagees, were to be borne by the vendors; but if, from any circumstances, the money should not be paid at the time fixed, the purchaser should pay interest at 5 per cent. until the time of payment. The purchaser was ready with his money on the day appointed to complete his purchase, and also to pay off the mortgagees, to whom he had given the usual notices; but the contract for sale could not be carried into effect on that day, in consequence of an order of the Court made

subsequently to the contract, and which was not contemplated at the time the contract was entered into, subjecting all contracts entered into by the trustees to the approbation of the Court:—Held, that, under the above condition, the purchaser was bound to pay interest on his purchase money at 5 per cent. from the 11th October 1840, and not from the time when the Court ordered the contract to be carried into execution; and also to the mortgagees, at 5 per cent., the rate payable on their mortgages; and that he was not entitled to be relieved in these respects as against the vendors and the trust estate, although he had only made 3*½* per cent. by his money pending the delay in procuring the approbation of the Court to the contract, and would be obliged to give some of the mortgagees fresh notices. *Matson v. Swift*, 5 Jur. 645.

6. On a sale under the Court in June 1839, it was provided by the conditions that the abstract should be delivered in twenty-one days; that the purchaser should be entitled to the rents from October, and pay his purchase money in November; and if, "from any cause whatever," it should not be paid at that time, he should pay interest at 5 per cent. The vendors were unable to deliver the abstract within the time, and there was great delay and difficulty on their part in making out their title, which was not complete till 1845. The purchaser had entered into possession. On a motion made in 1845 to pay the purchase money and interest into court:—Held, that the purchaser would not be relieved from payment of interest, but the order to pay was made without prejudice to any application for compensation. *Greenwood v. Churchill*, 8 Beav. 413; 14 L. J., N. S., Ch., 143; 9 Jur. 196.

7. Agreement that purchase money of certain property taken by a railway company should remain in their hands until completion of the purchase, and should then, with interest at 5 per cent. per annum, be handed over to vendor:—Held, under the circumstances, that the words "completion of the purchase" meant completion on the part of a purchaser by payment of the purchase money to the vendor. *Lewis v. South Wales Railway Co.*, 1 W. R. 45; 10 Hare 113; 22 L. J., Ch., 209; 16 Jur. 1149.

8. A purchaser covenants with his vendor to pay interest at 5 per cent. upon the unpaid portion of his purchase money; but the vendor covenanted that, if interest at the rate of 4 per cent. was regularly paid, he would accept that in lieu of the larger rate. The purchaser did not pay the 4*½* per cent., but alleged that an agreement had been entered into between him and the vendor for the payment of 2*½* per cent. only. The vendor being dead, and an administration suit having been instituted, and the purchaser not having paid even the 2*½* per cent., an action was brought on the covenant against the purchaser. The purchaser thereupon filed a bill for an injunction to restrain the action. On motion for injunction:—Held, that the agreement as to the 2*½* per cent. not having been satisfactorily proved, there was in that respect no equity for an injunction; but that as the non-payment of the 2*½* per cent. had been, to a certain extent, condoned, execution in the action would be restrained upon terms. *Houghton v. Crawford*, 23 L. T. 340.

1. In conditions of sale a time was fixed for the delivery of the abstract, and also for the payment of the purchase money, or for interest to run, if the money were not paid at that time, "from whatever cause the delay might have arisen." The vendor did not deliver the abstract at the time stipulated:—Held, that the purchaser was only liable to pay interest from the time a good title was shown. *De Visne v. De Visne*, 1 Macn. & G. 336; 1 H. & Tw. 408; 19 L. J., N. S., Ch., 52; 13 Jur. 1037. Reversing 18 L. J., N. S., Ch., 159; 13 Jur. 205.

2. The case of *De Visne v. De Visne* (1 Macn. & G. 336) must be acted on with some caution; and it is not in every case of delay in the delivering of a sufficient abstract that a vendor is to lose the interest which he has stipulated for. *Rowley v. Adams*, 12 Beav. 476.

Upon a sale under the Court, on the 14th September, there was a condition that the purchaser should confirm the report, and before the 10th November pay his purchase money and interest from the 29th September, and be entitled to the rents from that time; and "under no circumstances" was he to be excused paying interest from that time. The purchaser was unable to obtain and serve the order of confirmation until the 29th November. The abstract was delivered on the 6th December, and the requisition finally answered on the 17th January:—Held, that there was no such delay on the part of the vendor as to release the purchaser from payment of interest. *Id.*

3. A condition that if from any cause whatever the purchase money shall not be paid by a particular day, the purchaser making defaults shall pay interest from that day, does not render the purchaser liable to pay interest where he has given notice (according to the fact) that his money is lying unproductive, and the delay arises from the state of the title. *Denning v. Henderson*, 1 De G. & Sm. 689; 17 L. J., N. S., Ch., 8; 12 Jur. 89.

4. By conditions of sale, interest was payable from November 1846, if, "from any cause whatever," the purchase should not be then completed. The vendors did not make out their title until March 1849:—Held, that interest was payable only from the last-mentioned period. *Robertson v. Shelton*, 12 Beav. 363; 19 L. J., N. S., Ch., 140.

5. It is a general rule of equity, that if a purchaser is in possession of an estate, receiving the rents, he is liable to pay the purchase money, and that the purchase money being retained by him will carry interest, to be paid by him to the seller. An agreement, which appears to prevent the application of this rule, will be examined in a court of equity by its aid, and will or will not be enforced according to circumstances. *Birch v. Joy*, 3 H. L. Ca. 565.

B., in March 1812, contracted for the purchase of an estate from C., for 90,000*l.* The estate was very much incumbered, and C. was to make a title free from all incumbrances, except one mortgage of 12,000*l.* B., on being put into possession of part of the estates, was to pay 16,000*l.* on the 24th June 1812, "and a further sum of 4,000*l.* at Michaelmas next, on C. putting B. into the actual possession of

the remainder, free from all incumbrances, except the mortgage for 12,000*l.*; the further sum of 25,000*l.* in March 1813; 16,500*l.* in March 1816; and 16,500*l.* in March 1818." B. was to grant C. a mortgage of all the estates for securing these three sums at the respective times aforesaid, "with legal interest from Michaelmas next." The 20,000*l.* thus agreed to be paid in two sums within the first year not having been paid by B., nor any of the incumbrances cleared off by C., a new agreement was entered into in October 1812. B. was forthwith to advance 10,000*l.* to pay off certain incumbrances, he was to be let into immediate possession, to be entitled to the rents and profits "from Michaelmas last," and to be at liberty to cut timber, etc. The conveyances were to be executed as soon as existing difficulties could be removed; and every possible exertion was to be made to that end. It was further agreed that "the interest of the remainder of the purchase money shall not commence till Lady-day next, in case the title shall be perfected, and the conveyances and other assurances executed at that time; and if not, then to commence on the execution of such assurances." B. was let into possession, but the business was not completed. In a suit by B. for specific performance, an account having been directed:—Held, first, that under the clause in the second agreement, exempting "the remainder of the purchase money" from the payment of interest, the sum remaining unpaid of the 20,000*l.*, and the three sums constituting the 58,000*l.*, must be taken to come under that description; secondly, that the exemption of a purchaser in possession of the estate from liability to interest on the purchase money, though permissible if the agreement had been speedily executed, would not be enforced by any court of equity where that state of things continued for many years; and, thirdly, that the second contract must be taken to have failed by circumstances, and that the first contract must be decreed to be executed so far as it had remained unexecuted; and the House of Lords ordered the accounts to be settled on these principles. No costs were given. *Id.*

6. A purchase was to be completed on a given day, when the purchaser was to have possession, and it was provided, "that if from any cause whatever" the purchase money should not be then paid, the purchaser should pay interest. A delay of six months occurred, from the default of the vendor in not furnishing proper abstracts:—Held, that the purchaser must pay interest, unless he gave up the rent, during that period. *Cowpe v. Bakerell*, 13 Beav. 421.

7. Where conditions of sale provide that interest shall be paid by the purchaser from a fixed time, if the completion should be delayed by any cause whatever, delay merely occasioned by the state of the title, and not wilful on the part of the vendor, falls within the provision. *Sherwin v. Shakspear*, 5 De G. M. & G. 517; 18 Jur. 843; 23 L. J., Ch., 898; 1 W. R. 460; 2 W. R. 668; 2 Eq. Rep. 957.

Where, in addition to such a provision, there were stipulations that the vendor might rescind on the title being objected to, and that if a good title should not be made to a definite proportion of the property, compensation

should be allowed:—Held, that the non-delivery of a complete abstract, at a time fixed by the conditions, would not of itself exempt the purchaser from payment of interest. *Id.*

Where the execution of an agreement fixing a time for completion, and requiring payment of interest in case of delay, was intercepted by negotiations, ending in an alteration of the agreement, but not of the time of completion:—Held, that in fixing the period for the payment of interest this circumstance ought to be regarded. *Id.*

By a contract for sale dated the 30th November 1843, it was stipulated that the abstract of title should be delivered within two months (i.e., before the 25th January 1844), and that, if, from any cause whatever, the purchase was not completed on the 25th April, the purchaser should pay interest on the purchase money from that day. The vendors delivered an abstract within the two months, but it did not embrace the whole of the property by about seven acres. A supplemental abstract relating to the seven acres was accordingly delivered on the 30th November 1844. Various objections were taken to the title, and a good title was not completely made out till July 1847. The vendor continued in possession of the property:—Held, on a bill for specific performance of the contract for sale, that the delay having been caused by the state of the title, and not by wilful default on the part of the vendor, the purchaser was not discharged on account of the delay from paying interest from the time stipulated in contract. But the Court, under the circumstances, decreed that interest was payable from the 1st March 1845, allowing the same period from the delivery of the second abstract as the original contract had allowed from the delivery of the first abstract. *Id.*

1. By a contract for the sale of an estate, it was stipulated, "that if, from any cause whatsoever, the purchase should not be completed" on a day named, the purchaser should pay interest on his purchase money from that day to the completion. It became necessary to institute a suit to rectify the power under which the vendors sold, in order to make a good title, and a delay occurred in completing. There being no wilful default on the part of the vendor:—Held, that the purchaser was bound to pay interest, and was entitled to the corresponding rents. *Palmerston (Lord) v. Turner*, 33 Beav. 524; 10 Jur., N. S., 577; 33 L. J., Ch., 457; 12 W. R. 816; 10 L. T., N. S., 364.

The principle of *Sherrin v. Shakespear* (5 De G. M. & G. 517) applies as well to an actual defect of title as to imperfections in the abstracts delivered. 8 C. 4 N. R. 46.

2. Where the condition is that interest on the purchase money is to be paid from a certain day, "if from any cause whatever" the purchase money be not then paid, the vendor will be entitled to interest where the delay in perfecting the title has arisen from circumstances under which no blame could attach to him, though the purchaser also was not to blame. *Exp. Durham (Dean and Chapter), Temart v. Lawson, Temart v. Tewart*, 4 W. R. 419; 2 Jur., N. S., 345.

Real estate having been ordered by the

Court to be sold, the particulars and conditions of sale, as well as the abstract of the vendor's title, were settled by the chief clerk, and were afterwards approved by the conveyancing counsel of the Court. By the fifth condition of sale the purchaser of each lot was, at his own expense, to obtain the necessary order for paying, and should pay, his purchase money into the Bank of England on or before the 2nd January 1854, on which day the purchases should be completed, and the purchasers let into the receipt of the rents and profits; but if from any cause whatever the purchase money should not be paid, the purchasers should pay interest from the 2nd January 1854; and by the sixth condition of sale the vendors undertook that they would, at their own expense, within fourteen days from the day of the date of the certificate certifying the result of sale, deliver an abstract of title. At the auction no sale took place, but on the 12th October 1853 the petitioners entered into a contract for the purchase of part of the estate, but subject in every respect to the conditions of sale, and subject also to such sale and purchase and the title being approved of, on the part of both parties, by the Court of Chancery. The abstract was not delivered by the time fixed, and when it was delivered the conveyancing counsel did not approve of the title, and great delay was consequently occasioned by the necessary inquiries. The certificate of the chief clerk, that a good title could be made, was not given until the 31st January 1856, and it was approved by the Vice-Chancellor on the 6th February 1856. The purchase money had remained unproductive, and the petitioners submitted that they ought not to be ordered to pay interest on the purchase money, but that under the circumstances the vendors ought to be ordered to accept the rents and profits, which would not amount at 5l. per cent. to the interest on the purchase money by the sum of 578l. :—Held, that the stipulations contained in the fifth condition of sale were the substantial terms of the agreement, which must be treated as having their full force and effect; and that as neither the vendors nor the purchasers were in fault, the former were entitled to interest, and the latter to the rents and profits. *Id.*

3. One of the conditions at an attempted sale by auction under a decree provided that the purchase should be completed on a day named, and that if from any cause whatever the purchase money should not then be paid, interest should be paid from that date. The purchase was by private contract, subject to the conditions of sale, and also subject to the purchase being approved by the Court. The purchase money was a fund in court, and after a long delay the conveyancing counsel approved of the title for the purchasers:—Held, that neither party being to blame for the delay, the purchasers could not be relieved from their obligation to pay interest. *Stewart v. Lamson*, 3 Sm. & G. 307.

4. Where conditions of sale fix periods for the delivery of the abstract and the completion of the purchase, and provide that interest shall run, "if, from any cause whatever," the purchase should not be completed, the purchaser must pay interest from the time fixed, though the completion is delayed beyond the

time specified in consequence of the state of the title, if there be no fraud or wilful delay on the part of the vendor. *Vickers v. Hand*, 26 Beav. 630.

By conditions of sale, the abstract was to be delivered before the 18th February. The purchaser was to take the rents from the 25th March, and the purchase was to be completed on the 24th June. And if, from any cause whatever, the completion should be delayed after that time, the purchaser was to pay interest at 5l. per cent. Imperfect abstracts were delivered, and a complete abstract was not delivered until the 17th June. Further delay having occurred in completing, the vendor deposited the purchase money at a banker's, and gave notice, in August, that he would pay no interest:—Held, that as there was no fraud or wilful delay on the part of the vendor, and as the delivery of an imperfect abstract arose simply from the state of the title, the purchaser must pay interest. *Ib.*

1. A contract was entered into for the sale of property, and it was stipulated that the purchaser should pay 10l. per cent. deposit on the purchase money, and the purchase was to be completed on the 11th October, when the rest of the purchase money was to be paid, and the purchaser was to be entitled to the rents from that day; and if, from any cause whatsoever, the purchase should not then be completed, the purchaser was to pay interest at the rate of 5l. per cent. per annum from that period, until the purchase should be completed. The conveyance was ready for signature when the vendor died, two days before the time fixed for the completion of the contract. The vendor, by will, left the property to an infant; and a suit for specific performance was thereby rendered necessary. The purchaser paid the purchase money into court:—Held, that interest upon the purchase money must be paid by the purchaser from the time fixed for completing the contract; held, also, that payment into court was not a payment to the purchaser. *Bannerman v. Clarke*, 26 L. J., Ch., 77; 3 Drew. 632; 5 W. R. 37.

2. By a contract for purchase, interest was to be paid on the purchase money from the 26th December 1852, if the purchase was not then completed. Certain objections and requisitions were made with regard to the title. The purchaser declining to complete until these were satisfactorily answered, the vendor filed a claim for specific performance on the 2nd May 1853, and in the following month sent copies of certain deeds, upon receiving which the purchaser, in November, accepted the title. The claim came on to be heard, when the Court, considering that these deeds were not essential to the title, decreed specific performance, with costs, and interest to be paid by the purchaser from the 26th December 1852. *Litchfield v. Brown*, 23 L. J., Ch., 176.

3. S. entered into a negotiation with the plaintiff for the purchase and transfer to him of the plaintiff's business and property, and the terms of the agreement were, by a son of S., reduced into writing, in the form of a letter from the plaintiff to S. By that letter the plaintiff agreed to the terms proposed as to certain houses and rents, and agreed to give up to S. all deeds, etc., which he might require to carry on, and that might be necessary for

him to take to, the whole of his business as a common brewer, and to sign and hand over all the necessary leases that might enable S. to have and possess the whole and sole control over the freehold, leasehold, and copyhold property of which the plaintiff was possessed or interested in, or about to become interested in, save the right of sale of his freehold property. The plaintiff was to use his best endeavours to secure to S. the whole of his trade, on the understanding that S. paid him 100l., or such sum as should make up the deficiency between the two sums of 800l. and 900l. (the latter being the amount which the plaintiff considered his brewhouse and brewing utensils to be worth). If the brewhouse and utensils should not fetch 900l., and if the brewhouse should not be sold within six months, S. agreed to pay interest at 4l. per cent. on the 550l., being the value of that property without the utensils. The document contained a stipulation empowering S. to receive the rents; and at the foot of it a son of S., and on his behalf, signed his name, agreeing to the terms, but it was not signed by the plaintiff, nor did it contain his name. A duplicate copy was, however, signed by him and given to S., who subsequently took possession of some part of the property comprised in the agreement, including the brewery, and received the rents of other parts of the property, and was introduced to the plaintiff's customers. S. also took possession of some of the utensils and casks, and others were sold, both by him and the plaintiff on S.'s behalf. S. afterwards died, having bequeathed all his estate to the defendant, who refused to complete the purchase of the brewhouse and utensils. But, on a bill for specific performance, the Court declared that, according to the true construction of the agreement, the defendant was the purchaser of the brewhouse and utensils at the price of 900l.; that she, upon 550l., part thereof, must pay interest at 4l. per cent.; and that she must account for and pay 350l. for the utensils, without interest, to the date of the decree; and ordered a general account to be taken. *Deller v. Simonds*, 5 Jur., N. S., 997.

Held, also, that the right to an investigation of the title of the brewery had been waived by the purchaser. *Ib.*

4. On a sale under the decree of the Court, in October 1849, of a reversion in fee, subject to a term of ninety-nine years, determinable on the death of the survivor of two lives at a small chief rent, it was provided by one of the conditions that the vendors should procure and confirm the Master's report, and obtain an order for the purchaser to pay his purchase money into court on or before the 25th December 1849, when the purchaser was to pay his purchase money, and be entitled to the receipt of the rents; "but if from any cause whatever the purchase money should not be so paid in" on or before that day, the purchaser should pay interest at the rate of 5 per cent. from that day to the time of payment. The vendors delivered their abstract of title in September 1851, but did not make out a good title till March 1852. On a motion then made, that the purchaser might pay his purchase money into court with interest, according to the condition:—Held, that the condition did not apply, but that, as the purchaser had had the benefit

of the wearing out of the lives, he must pay interest at the rate of 4l. per cent. *Wallis v. Sarel*, 5 De G. & Sm. 429; 21 L. J., Ch., 717.

1. On the sale of an advowson, the purchase money was to be paid on a fixed day, and the conveyances to be executed; but, in default of payment, the purchaser was to pay interest. The purchase was not completed, through the default of the vendor:—Held, that no interest was payable. *Weddall v. Nixon*, 17 Beav. 160; 17 Jur. 642; 22 L. J., Ch., 939.

2. An estate was mortgaged in 1841 for 2,000l., with interest at 5l. per cent. In 1842 the mortgagor died, and in the same year the devisees of the equity of redemption sold by auction the mortgaged premises, together with other lands of the mortgagors, for 2,700l., to the mortgagee. The usual deposit was paid at the time of the sale, and by the conditions of sale 4l. per cent. was payable on the balance of the purchase money. The mortgagee entered into possession in 1842, and remained in such possession until her death in 1847, when her devisees entered into possession. Upon a claim filed by the devisees of the mortgagor against the devisees and executors of the mortgagee for specific performance of the contract to purchase, eleven years after the sale, no demand having been made during that period either for the payment of the residue of the purchase money into court, or for interest on the mortgage:—Held, under the circumstances, that a set-off *pro tanto* was to be inferred at the date when possession was taken by the mortgagee, and that, from that period, interest at 4l. per cent. only was payable upon the balance of the purchase money. *Wallis v. Bastard*, 4 De G. M. & G. 251; 17 Jur. 1107.

3. Where a purchaser agrees that if, "from any cause whatever," the purchase is not completed by a certain day, he will pay interest on the purchase money, there must be something amounting almost to serious misconduct on the part of the vendor to disentitle him to the payment of interest. *Williams v. Glenton*, 12 Jur., N. S., 175; 35 L. J., Ch., 284; 14 W. R. 294; 13 L. T., N. S., 727. Affirming 34 Beav. 528; 11 Jur., N. S., 801; 13 W. R. 1030; 13 L. T., N. S., 10.

The mere existence of difficulties in making out the title is not sufficient. *Id.*

Therefore, where several years elapsed before the vendor succeeded in making out his title, by reason of adverse claims being set up, such delay, in the absence of misconduct on the part of the vendor, is not sufficient to disentitle him to the payment of interest. *Id.*

Upon a bill by the vendor against the purchaser to compel specific performance, the purchaser was ordered to pay the costs of the suit, except so far as they had been increased by reason of the vendor having to get in an outstanding legal estate which had become vested in an infant by devise. *Id.*

4. Where a purchaser knowingly enters into a definite contract to pay interest on his purchase money, and in certain events a higher rate of interest, and those events occur, it is not open to him afterwards, and in the absence of fraud, to complain of the contract into which he has so entered. *Herbert (Lady) v. Salisbury & Yeovil Railway Co.*, 14 L. T., N. S., 507.

A contract for sale of land provided that the purchaser should pay interest on the pur-

chase money, at 4l. per cent., from the time of taking possession until the 1st July 1858, the day appointed by the contract for the payment of the purchase money, and after that day at 5l. per cent., if the purchase money should not be then paid, and after the 1st January 1859 at 8l. per cent., with a proviso, that this should not give the purchaser the right to delay the payment of the purchase money on paying such higher rate of interest. The purchaser took possession of the land in 1857, but owing to circumstances not caused by the misconduct or negligence of the vendor, the purchase was not completed until 1865:—Held, that the stipulation for payment of a higher rate of interest was not in the nature of a penalty to secure the punctual payment of the purchase money, against which the purchaser was entitled to be relieved, but a separate and distinct contract, which he was bound to perform. S. C. 2 L. R., Eq., 221; 14 W. R. 706.

See also 3 supra.

XV. Conveyance.

See also XIV. II. ante—DEEDS.

- I. *Form of*, 7275.
- II. *Execution of*, 7276.
- III. *Construction of*, 7276.
- IV. *Covenants*, 7276.
- V. *Parties*, 7277.
- VI. *Expenses of*. See XX. *post*.
- VII. *Parties Ordered to Convey under Trustee Acts*. See TRUSTEE ACTS.
- VIII. *Order to Convey under the 11 Geo. 4. and 1 Will. 4. c. 47*. See EXECUTOR AND ADMINISTRATOR, XI. VI. 4.
- IX. *Order on Trustees to Preserve Contingent Remainders*. See VESTED CONTINGENT AND FUTURE INTERESTS.

I. FORM OF.

5. In a suit between the vendor and purchaser of an estate where the only question related to the form of the conveyance:—Held, that the purchaser had a right to choose the form of the conveyance, but no costs given on either side. *Clark v. May*, 1 W. R. 69; 22 L. J., Ch., 302.

6. A vendor of land may be required by the purchaser to convey the land in parcels by separate conveyances at the same time on tender of the entire purchase-money and the additional costs thereby occasioned; but, *semble*, he cannot be required by the purchaser to convey the land in parcels by separate conveyances at intervals of time, without an express stipulation that he shall be bound to do so. *Egmont (Earl) v. Smith*, 46 L. J., Ch., 356; 6 L. R., Ch. D., 462.

7. Where, on a conveyance of building land, put up for sale in lots, the vendor takes a separate deed of covenant, the object of so doing is not to keep the notice of the covenant off the face of the title, but to obviate the necessity of executing the conveyance in duplicate. *Sydney v. Clarkson*, 13 L. T., N. S., 659.

Where building land was put up for sale in several lots, two of which were purchased, the vendor was, having regard to the conditions of sale, entitled to have it stated in the conveyances to the purchasers that they were bound, but that he was not bound, by certain building covenants affecting the unsold, as well as the purchased, lots. *Ib.*

1. Trustees for sale who sell under a condition that "the property is sold and will be conveyed subject to all free rents, quit rents, and incidents of tenure, and to all rights of way, water, and other easements, if any, without any obligation on the vendors to define any such rights or claims," are entitled to have a saving in general terms inserted in the habendum of the conveyance, although it was not shown or asserted that the property was subject to any of the liabilities so specified. *Gale v. Squier*, 5 L. R., Ch. D., 625; 46 L. J., Ch., 672. Affirming 4 L. R., Ch. D., 226; 46 L. J., Ch., 373; 25 W. R. 226; 36 L. T., N. S., 632.

II. EXECUTION OF.

2. *Semble*, that there is no rule that the purchaser may in all cases require the purchase deed to be executed in the presence of himself or his agent, and the purchase-money paid directly to the vendor, but that he may so require in the absence of special circumstances rendering a different course proper. *Viney v. Chaplin*, 2 De G. & J. 468; 4 Jur., N. S., 619; 27 L. J., Ch., 434; 6 W. R. 302, 562; 4 Drew. 237.

Where a purchaser requires the deed of conveyance to him to be executed by the vendor in the presence of, and to be attested by, his (the purchaser's) solicitor, that requisition ought not to be refused unless there are special circumstances justifying the refusal. *Ib.*

Where a purchaser requires the vendor to execute the conveyance in the presence of the purchaser or his solicitor, the onus of justifying the refusal is on the vendor. *Ib.*

3. Form of order in a suit for specific performance where the draft conveyance had been approved of by the vendor and purchaser, but retained by the latter. *Hirst v. Stokehill*, 1 W. R. 479.

4. Conveyance of an estate to which defendant is entitled in equity suspended till an account of the rest of the estate should be taken in the original suit, from the danger of the plaintiff's losing his demand. *Shish v. Foster*, 1 Ves. 88.

III. CONSTRUCTION OF.

5. In June 1870 an agreement was entered into by a railway company for the purchase, at a price named, of land for the purpose of carrying a road over the line at an incline, and the agreement contained a proviso that the vendor, etc., should have a right of access to other lands belonging to him by and over any of the slopes which the company might arrange on their intended works, and through, over, and upon any occupation roads which they might form adjacent to the said lands. This agreement was executed by the secretary of the company, but was not under seal.

Possession was taken by the company, and a bridge was constructed over the line which was reached by a road carried over the land purchased at a steep incline. In April 1871 the land, with all ways, rights of pre-emption, and other rights, members, easements, and appurtenances, was, in consideration of the price named in the agreement, which was stated to include the value of the mines and also all right of pre-emption and compensation for damage sustained by vendor in the execution of the works, conveyed to the company without reserving any right of access to the vendor, or in any way referring to the proviso contained in the agreement of June 1870:—Held, in an action by the vendor to restrain the company from obstructing, by fences and retaining walls rendered necessary by a widening of the road, the right of access stipulated for by the proviso in the preliminary agreement, but not claiming a rectification of the subsequent conveyance, that as the vendor by the terms of the conveyance had absolutely conveyed to the company every interest which he possessed in the land, any right of access previously stipulated for was thereby absolutely extinguished. *Teebay v. Manchester, Sheffield, & Lincolnshire Railway Co.*, 24 L. R., Ch. D., 672; 52 L. J., Ch., 613; 48 L. T. 808; 31 W. R. 739.

6. Lands were vested in trustees for a term of years without impeachment of waste, the trusts of the term being by sale, assignment, demise, or mortgage, to raise a sum of money. In execution of the trust the trustees sold the land for the term, and in the deed of conveyance the words "without impeachment of waste" were omitted:—Held, that the estate of the purchaser was unimpeachable of waste. *Beaumont v. Salisbury (Marquis)*, 19 Beav. 198; 24 L. J., Ch., 94; 1 Jur., N. S., 458; 3 Eq. Rep. 369.

7. Mere knowledge of the manner in which property conveyed was used by a vendor for the convenience of an adjoining tenement will not affect the purchaser, if the property is conveyed without reservation. He was not entitled to an injunction. *Suffield v. Brown*, 10 Jur., N. S., 111; 33 L. J., Ch., 249; 12 W. R. 356; 9 L. T., N. S., 627.

A grantor cannot claim rights over property absolutely granted even if such rights were, at the time of the grant, continuous and apparent easements enjoyed in respect of an adjoining tenement which remains the property of the grantor. *Ib.*

If an owner of two adjoining tenements conveys one of them to a purchaser absolutely, the tenement so sold is discharged from any quasi-servitudes to which it was subjected by the vendor during his ownership of both properties, and the purchaser is not bound to take notice of the manner in which the tenement purchased has been used for the convenience of the adjoining and unsold tenement. *Ib.*

IV. COVENANTS.

8. In a contract for a purchase of land, there is a stipulation that the conveyance shall be made subject to certain conditions and restrictions as to building upon the land, and to a covenant for their observance, and

proper provisions for securing the due performance thereof:—Held, that this contract entitled the vendor to have a power of entry inserted in the conveyance in case of a breach of the covenant, but not to have a term of years or a rent charge limited to a trustee. Form of the power of entry, which the vendor is entitled to have. Whether such covenants as the above run with the land, *quare. Eesp. Ralph, Re Dobbs*, 1 De G. 219.

1. A vendor of freehold property, who, on his own purchase of it, had entered into a covenant to observe the covenants entered into with a former vendor, and which prohibited building on the land, put it up for sale, pursuant to particulars and conditions, noticing the existence of the covenant, but not stipulating that the purchaser should enter into any covenant on the subject. On a bill for specific performance, filed by the purchaser:—Held, that the plaintiff was not entitled to a conveyance, unless on the terms of giving or providing for the vendor a sufficient indemnity against any breach of the covenant on the part of the plaintiff, his heirs, appointees, or assigns. *Mozhay v. Inderwick*, 1 De G. & Sm. 708.

Held, also, that a covenant on the part of the plaintiff, his heirs, executors, administrators, appointees, and assigns, with the defendant, his heirs, executors, and administrators, to the same effect, *mutatis mutandis*, as the covenant entered into by the vendor on his own purchase, ought to be considered as a sufficient indemnity. *Id.*

2. Where, by a memorandum of agreement, the defendant agreed to sell certain cottages and gardens lately purchased by him to the plaintiff, for an annuity payable to the defendant during his life, which was to be charged on the premises, and the defendant was empowered to sell for the purpose of raising any arrears:—Held, that the vendor was entitled not only to the security of the charge, but also of the covenant of the purchaser, for payment. *Boner v. Cooper*, 2 Hare 408; 11 L. J., N. S., Ch., 287; 6 Jur. 681.

3. A purchaser contracted to purchase a piece of land. On the abstract it appeared that the land was subject to covenants. The purchaser tendered a draft conveyance, to which the vendors added similar covenants on the part of the purchaser. The purchaser refused to execute these covenants. The vendors thereupon filed a bill for specific performance:—Held, that the purchaser could elect either to take a conveyance with the covenants or to rescind the contract. *Lukey v. Higgs*, 1 Jur., N. S., 200; 24 L. J., Ch., 495; 3 W. R. 306; 3 Eq. Rep. 510.

4. Building land was sold in a number of lots, subject to certain conditions as to fencing, repairing the roads, and to restrictions as to the class of houses to be built. The conditions also provided, that statements to this effect should be inserted in the conveyances. By the 15th condition the vendor reserved the right of selling the unsold lots under different arrangements, "and either subject to or not subject to the stipulations as to fencing and other stipulations contained in the particulars or the conditions":—Held, first, that as to the unsold lots the vendor was subject to none of the restrictions; secondly,

that the purchasers were bound to have not only the restrictive conditions stated on their conveyances, but also the 15th in favour of the vendor; and thirdly, that a separate deed of covenant by a purchaser as to the restrictions was a sufficient compliance with the provision as to the statement on the conveyances. *Sidney v. Clarkson*, 35 Beav. 118.

5. In a sale by the Court the particulars of sale contained certain reservations and stipulations as to the property, and one of the conditions of sale provided that the conveyances should contain covenants by the purchasers for securing the liabilities and rights under such reservations and stipulations, the form of such covenants, in case of dispute, to be settled by the judge. A dispute having arisen between a purchaser and the vendor concerning the form of the covenant, the judge settled the covenant, adding a proviso that if the purchaser assigned his purchase, and the assignee entered into a similar covenant, the purchaser should be freed from further liability:—Held, that the vendor was entitled to an unqualified covenant, and that the proviso must be struck out. *Pollock v. Rabbits*, 21 L. R., Ch. D., 466; 47 L. T. 637; 31 W. R. 150.

The order of a judge settling the form of a conveyance is subject to appeal. *Id.*

6. D. in 1824 agreed with S. for the purchase of an estate, and that the purchase deed should contain a covenant by D. that he, his heirs, and assigns would pay to S., his executors, administrators, and assigns the sum of 6s. for each chaldron of coals gotten out of the estate and shipped for sale. The purchase deed was subsequently executed by S., but not by D. D., however, entered upon the land, and he and his devisees and their assigns enjoyed the property. Coal was also got and shipped for sale:—Held, that the execution by D. of a counterpart of the deed containing the covenant could not be presumed, and that although the persons who had taken and enjoyed the coal with notice of the covenant might be liable, there was no liability in D. or his representative under the covenant. *Witham v. Vane*, 41 L. T. 718.

For Title.] See XVII. *post.*

Restrictive.] See XVIII. *post.*

V. PARTIES.

1. *In General*, 7277.
2. *Dower Trustee*, 7278.
3. *Heir-at-Law*, 7278.
4. *Judgment Creditors*, 7279.

1. In General.

7. It being one of the terms of a contract between vendor and purchaser, that certain parties were to join in the conveyance, the Court would not enter into the question whether they were necessary or proper parties. *Benson v. Lamb*, 9 Beav. 502; 15 L. J., N. S., Ch., 218.

8. In a decree for specific performance, a direction that the vendor shall convey has the same effect as a direction that the vendor and all other necessary parties shall convey. *Min-*

ton v. Kirkwood, 37 L. J., Ch., 606; 18 L. T., N. S., 781; 3 L. R., Ch., 614; 16 W. R. 991.

1. Where a bill stated a contract by the defendant to purchase parts of the plaintiff's estate subject to a mortgage, which contract was afterwards partially varied by a parol agreement without the consent of the mortgagee; that the sale of the property was made with the sanction and concurrence of the mortgagee, and that the purchase-moneys were to be paid to him, but that, owing to incapacity through age and infirmity, he was then incompetent to execute the deed of conveyance; the Court, on a prayer for specific performance, overruled, with costs, a demurrer to the bill, which was made on the grounds that a variation had been made in the contract, and that the plaintiff had stated in his bill his inability to procure the execution of the deed by a necessary party thereto, but who was not a party to the suit. *Beaufort (Duke) v. Glynn*, 1 Jur., N. S., 888.

2. R.'s wife was owner of a remainder in fee, and had issue by R. R. took the benefit of the Insolvent Debtors Act in 1850, and a vesting order was made. The remainder came into possession in 1853. In 1854 R. and his wife made an equitable mortgage of the estate to C., who had notice of the insolvency. In 1855 the wife died, and R. became tenant by the curtesy. No further proceedings having been taken to perfect the title of the assignees:—Held, in a suit by the assignees for specific performance, that the question whether C. had not a valid charge on the estate by the curtesy was sufficiently doubtful to entitle the purchaser to require C.'s concurrence, although a decree for a conveyance to the assignees had been made in another suit, to which C. was a party, in which, however, this point did not appear to have been distinctly put in issue. *Murrell v. Goodyear*, 1 De G. F. & J. 432.

3. Where property was devised to trustees for A. for life, for her sole and separate use, and after her decease for such person as she should appoint; and A. conveyed to B.:—Held, on a conveyance to a third person, C. (A. being still living), that the trustees were necessary parties. *Hall v. London, Chatham, & Dover Railway Co.*, 14 L. T., N. S., 351.

4. A. devised the residue of his property to his wife, in trust to divide it among their children in such manner as they should deserve: one of the seven children sold her share, and covenanted to make it up a full seventh; this is good, and on a specific performance she can make a good conveyance without the mother joining. *Musprat v. Gordon*, 1 Anstr. 34.

5. A copyhold was devised to trustees for certain persons, who, after the testatrix's death, sold it, and the purchaser was admitted on the surrender of the customary heir:—Held, that although the purchaser had thus obtained both the legal and equitable title, still, to make a good title, there must be a release from the trustees of their bare right to be admitted. *Steele v. Waller*, 28 Beav. 466.

Bare Trustee.] See TRUSTS, XII. XIII.

Sales in Bankruptcy.] See BANKRUPTCY.

Sales by Mortgagee.] See MORTGAGE.

Sales by Executors.] See EXECUTOR AND ADMINISTRATOR.

2. Dower Trustee.

6. A vendor being entitled under a limitation to uses to bar dower without a power of appointment, the purchaser insisted on the concurrence of the dower trustee. The trustee being abroad, the vendor filed a bill to enforce specific performance without his being a party to the conveyance. The Vice-Chancellor held that the objection was well founded, and made a decree for specific performance with an order vesting the estate of the dower trustee in the purchaser upon the execution of the conveyance by the vendor, but considering the objection, though tenable, to be frivolous and vexatious, he gave no costs to either party:—Held, on appeal by the purchaser, that the objection was frivolous and vexatious, and ought not to have been insisted on, and that costs ought not to be given to the purchaser. *Collard v. Roe*, 4 De G. & J. 525; 28 L. J., Ch., 560. Reversing 27 L. J., Ch., 295; 4 Jur., N. S., 295; 6 W. R. 348; 1 L. T., N. S., 148.

Dower. In General.] See DOWER.

3. Heir-at-Law.

7. A. articles to sell lands, and dies before a conveyance made; the heir decreed to convey, and the purchase money to be paid to the executors. *Baden v. Pembroke (Countess)*, 2 Vern. 215.

8. A purchaser of real property, the title to which is derived under a will, is not entitled to have the will established, or to have the concurrence of the testator's heir in the conveyance to him, unless some reasonable ground exists for doubting the validity of the will. *McCulloch v. Gregory*, 3 Kay & J. 12.

9. The vendor of real estate, which was subject to a mortgage in fee, died before completion of the contract for sale, intestate as to his real estate; his heir-at-law is a necessary party to the conveyance, in addition to his executor and the mortgagee. *Duly v. Nalder*, 11 Jur., N. S., 921; 35 L. J., Ch., 52; 13 W. R. 269; 14 W. R. 45.

10. The fact that an heir-at-law may, at some future stage of the proceedings, turn out to be a necessary party to the conveyance, is not a ground for refusing a specific performance of a contract to purchase lands where the heir-at-law has no arguable or reasonable claim to any beneficial interest in the premises, and his concurrence is matter merely of conveyance, not of title. *Minton v. Kirkwood*, 37 L. J., Ch., 606; 18 L. T., N. S., 781; 3 L. R., Ch., 614; 16 W. R. 991.

11. A., having made a will devising all his property to his wife, and having contracted to sell the land, and afterwards died:—Held, in a suit for specific performance by the purchaser, that the heir-at-law of A. was not a necessary party to the conveyance, as he had no legal estate in the lands, and no equitable estate, and no right to institute a suit to set aside the contract, having regard to the will of A., devising all his property to his wife, who, if the contract was set aside, would be entitled to the lands, and if the contract was not set aside, would be entitled to the purchase money. *Fowler v. Lightburn*, 11 Ir. Ch. R. 495.

Infant.] 1. No objection to sale in court under a will, that infants interested in will cannot join in conveyance. *Powell v. Powell*, 6 Madd. 53.

2. In a suit for partition, it appeared that the estate was vested as to one moiety in A. in fee and as to the other moiety in B. in fee, but in trust for infants:—Held, that a conveyance from B., and a decree of the Court, would give A. a good title to the tenements allotted to him, and, therefore, that it was not necessary to order the infants to convey when they came of age. *Cole v. Sewell*, 17 Sim. 40.

3. Defendant being in possession, and having exercised acts of ownership, payment of the money ordered, although an infant heir was a necessary party to the conveyance. *Bradshaw v. Bradshaw*, 2 Meriv. 492.

4. Where confirmed purchaser of estate under a decree died before conveyance made, having in meantime devised his interests therein to trustees, Court ordered conveyance to be made to them without consent of testator's heir-at-law, he being an infant. *King v. Gregory*, 4 Price 380.

5. The vendor dying intestate, and leaving an infant heir, the purchase-money being paid into court in a suit for a specific performance instituted after his death, will be retained till the heir attains twenty-one, and conveys. *Bullock v. Bullock*, 1 Jac. & Walk. 603.

4. Judgment Creditors.

6. A. devised his estate at H. to his second son, who survived him and afterwards died intestate, whereupon the estate descended to N., his elder brother. Pending a suit instituted by A.'s creditors, judgments were entered up against N., which remained unsatisfied when the estate at H., together with the testator's other estates, was sold under the decree in the suit for payment of his debts:—Held, that N.'s judgment creditors were necessary parties to the conveyance of the estate at H., and, as they could not be compelled to join in the conveyance, because they were not parties to the suit, that a good title could not be made to the estate. *Craddock v. Piper*, 14 Sim. 310.

7. A judgment was obtained against a party under a warrant of attorney. He afterwards took the benefit of the Insolvent Debtors Act:—Held, that the judgment creditor was a necessary party to the conveyance of the insolvent's real estate to a purchaser, notwithstanding the 1 & 2 Vict., c. 110, s. 61. *Hotham v. Somerville*, 9 Beav. 63; 14 L. J., N. S., Ch., 385; 9 Jur. 702.

8. A mortgagee took, on the execution of his mortgage in 1844, an assignment of a term to a trustee, and, relying on it, forbore to search for judgments. A judgment had been registered in November 1843. The mortgagee sold in 1846, under a power of sale in his mortgage; and, on the purchaser objecting to complete without the concurrence of the judgment creditor, the mortgagee and his solicitor, and the mortgagor, to obviate the objection, made a statutory declaration that, at the time of the mortgage, neither the mortgagee nor the solicitor had any notice of the judgment. The

purchaser still insisted on his requisition, and, in March 1848, the vendor filed a bill for specific performance. During the proceedings in the Master's office, the five years from the registration of the judgment expired, and it was not re-registered till 1850:—Held, that, at the hearing on further directions, in 1853 the purchaser could not be compelled to complete without the concurrence of the judgment creditor. And, *semble*, that a title depending on the fact of the vendor having been a purchaser, without notice of a registered judgment, cannot be forced upon a purchaser. *Freer v. Hesse*, 4 De G. M. & G. 495; 17 Jur. 703; 22 L. J., Ch., 597; 23 L. J., Ch., 338; 1 W. R. 242, 487.

Held, also, that though the question was one of conveyance, yet, as it had occasioned the suit, the vendor, submitting to obtain the concurrence required, must pay the costs. *Id.*

9. A. agreed to sell land to B., who accepted the title, paid part of his purchase-money, and was let into possession, but took no conveyance. A. subsequently obtained a decree against B. for sale of the property, and payment of the balance of purchase-money out of the proceeds:—Held, that a purchaser, under the decree, could not be compelled to complete without the concurrence of the registered judgment creditors of B., whose judgments were prior to the decree, and who were not parties to the suit. *Grey Coat Hospital v. Westminster Improvement Commissioners*, 1 De G. & J. 531; 3 Jur., N. S., 188; 26 L. J., Ch., 843; 5 W. R. 855.

XVI. Title Deeds and Copies.

- I. *Loss of and Right to Production of*, 7279.
- II. *Covenants for Production of*, 7281.
- III. *Sale in Lots. Purchaser of Largest Lot*, 7282.
- IV. *Costs of Attested Copies*, 7282.
- V. *Inspection of*, 7283.
- VI. *Production of by Bonâ fide Purchaser for Value without Notice*. See XXV. VI. *post*.
- VII. *On Sales by the Court*. See XXIV. XII. *post*.

I. LOSS OF AND RIGHT TO PRODUCTION OF.

10. Purchaser not bound to complete purchase without title deeds, unless he has legal covenant to produce them. *Barclay v. Raine*, 1 Sim. & S. 449.

11. A purchaser objected to a title for want of a deed which had been inrolled, but could not be found. A copy of it, taken in 1632, attested by five witnesses, was produced in court:—Held, that this copy would have been sufficient even without an attestation. *Sed acus*, if the original deed has been in a private hand. *Harvey v. Philips*, 2 Atk. 541.

12. Vendor, having lost title deeds, agrees to give real security for title:—Held, personal security not sufficient, and that he must purchase real estates for that purpose. *Walker v. Barnes*, 3 Madd. 247.

13. Where, in title deed, there is a recital of prior deeds which are lost, and presumption

is in favour of the title, purchaser cannot object to title on the ground of the absence of those deeds. *Prosser v. Watts*, 6 Madd. 59.

1. If after contract for sale of an estate before the title is accepted the title deeds be destroyed by fire, this Court will not compel the specific performance of the contract, unless the vendor can furnish the purchaser with the means of showing what were the contents of the destroyed deeds, and of proving that such deeds were duly executed and delivered. *Bryant v. Rush*, 4 Russ. 1.

2. Right of the purchaser to the production and to an abstract of all the documents relating to the property in the vendor's possession, whether a good title is made without them or not. *Sparrow v. Hilton*, 1 W. R. 87.

3. If counsel for the purchaser waive the production of a particular document stated in the abstract to be lost, and the purchaser adopt the opinion and deal with the seller upon that view, he will not be permitted to repudiate the opinion of his counsel. *Alexander v. Crosby*, 1 J. & L. 666; 7 Ir. Eq. R. 445. Affirming 6 Ir. Eq. R. 513.

An abstract of title stated a deed of March 1814, making a tenant to the præcipe, which recited articles of February 1814, between a father, tenant for life, and his son, tenant in tail, empowering them to revoke the uses thereby declared, and the recovery was declared to enure to the uses in the articles. In 1815 the father and son revoked the uses and resettled the estates, and possession had gone accordingly. The abstract stated that the articles had been lost, and it appeared that search had been made for them:—Held, that their non-production was not an objection to the title. *Ib.*

In 1745 I. executed a settlement of lands, reserving power, with the consent of A., to revoke the uses. The abstract of title set forth a will of I., dated in 1761, whereby he, with the consent of A., revoked the uses; and it referred to a copy of the will. P., the son and heir of I., by indenture of 1763, reciting the will of his father, resettled the estates, and possession had since gone accordingly. The will was not forthcoming:—Held, that its non-production was not an objection to the title. *Ib.*

J. C. conveyed his real estate to trustees, to whom he was indebted, in trust to sell and pay themselves, and to pay the surplus arising from the sale to J. C., and to convey to him the residue of the lands (if any remained unsold), the receipt of the trustees to be sufficient discharge to a purchaser. The deed contained covenants for the repayment of the money by a certain day, for good title and quiet enjoyment. On a sale of the estate, under a decree to execute the trusts of the deed:—Held, that judgments confessed by J. C., subsequently to the execution of the deed, and still outstanding, were not objections to the title. *Ib.*

4. By conditions of sale it was stipulated that the vendor of an estate, which was sold in lots, should deliver an abstract of the title to the purchasers, and deduce a good title; but that as to a part of the estate, acquired under an inclosure Act, he should not be bound to show any title thereto prior to the award;

and it was further stipulated, that the vendor should deliver up to the largest purchaser in value all the title deeds and other documents in his custody, but should not be required to produce any original deed or other documents than those in his possession, and set forth in the abstract:—Held, that the construction of these conditions did not excuse the vendor from verifying the title shown upon the abstract by producing the deeds, or, if any of them were not in his possession, by other satisfactory evidence. *Southby v. Hutt*, 2 M. & C. 207; 1 Jur. 100.

5. A mortgagee, who was a party to the suit, consented to a sale of the mortgaged property:—Held, that he must produce, and leave in the Master's office, the title deeds which were necessary in order to complete such sale. *Livesey v. Harding*, 1 Beav. 343.

6. A purchaser objected to complete, alleging a bad title, because three deeds were not produced, and there were covenants for the production of only two. The deeds were collateral only to the title; as to two, the purchaser had had their production, and attested copies; and as to the third, an opportunity of inspecting it, with an undertaking to have an attested copy of it:—Held, that the purchaser must complete his contract. *Offen v. Harman*, 6 Jur., N. S., 487; 29 L. J., Ch., 307.

7. By the terms of an auction the title deeds were to be produced by a certain day; they were not then ready; but the purchaser received them afterwards without objection: he cannot afterwards, on disliking the title, object to the delay. *Smith v. Barnam*, 2 Anstr. 527.

8. In an abstract of title was contained a conveyance in 1797, in which were recitals of earlier deeds. Neither the conveyance nor the deeds mentioned in the recitals were produced, but secondary evidence was given, consisting of a draft of the release, which was produced, and proved to have been ingrossed; and extracts of entries in the books of a deceased solicitor of charges for preparing and attesting the execution of the deeds were also furnished:—Held, that as a sixty years' title was shown, the purchaser was not bound to verify the recitals contained in the earlier deeds. *Moulton v. Edmonds*, 6 Jur., N. S., 305; 29 L. J., Ch., 1818; 6 W. R. 153; 1 De G. F. & J. 246.

The proper test in such a case is, whether the recited deeds cast reasonable suspicion on the title. *Ib.*

Held, also, that the affidavit of a solicitor verifying the entries in the books of the deceased solicitor was sufficient, and that the purchaser was not entitled to have such books delivered up to him. *Ib.*

A., evidence of whose seisin in 1797 was furnished, became bankrupt, and in 1815 his assignees, and certain persons claiming as mortgagees, conveyed the property. This deed also contained recitals of several other deeds, which were stated to be lost. An old abstract was produced of the missing deeds, which was not verified, from which it was stated that the deed of 1815 was drawn:—Held, that the recitals and the abstract together were sufficient secondary evidence of the missing deeds. *Ib.*

II. COVENANTS FOR PRODUCTION OF.

1. *Right to*, 7281.
2. *Rights of Third Parties*, 7281.
3. *Costs of*, 7282.

1. Right to.

1. The vendor of a piece of copyhold land enfranchised in 1799 delivered to the purchaser two abstracts commencing in 1736: one of the title to the land, the other of that of the manor. The deed of 1799 was forty years old, and recited that the then lord and the then owner of the land were respectively seised in fee, and several of the deeds relating to the lord's title were bargains, and sales inrolled; and, therefore, copies of them, as well as of the surrenders and admittances, which would be good evidence, might be procured by the purchaser at any time. The vendor was unable to deliver to the purchaser the deed of 1799, or any of the prior instruments, but was willing to covenant to produce that deed:—Held, that he was bound to give the purchaser covenants for production not only of that deed, but of all the prior instruments noticed in the abstracts. *Cooper v. Emory*, 10 Sim. 609. This was varied on appeal as to the copyholds, but affirmed as to the rest. S. C. 1 Ph. 388; 13 L. J., N. S., Ch., 275.

The period for which a good title is required to be shown is sixty years, notwithstanding the 3 & 4 Will. 4, c. 27:—Held, also, that the right to a covenant for production of documents, etc., does not extend to copies of court rolls, nor indentures of bargains and sale inrolled, unless in the possession or power of the vendor, and the purchaser cannot, as of course, require a covenant for the production of any others than such as are necessary to make out a sixty years' title, and not of such as are contained in the abstract, but not delivered to him. S. C. on appeal, 1 Ph. 388; 13 L. J., N. S., Ch., 275; 8 Jur. 181.

2. A. conveys lands to trustees in trust to sell if the unsatisfied debts of a partnership in which he had been concerned should at a given time exceed 40,000*l.*; the trustees sell, and convey to the purchaser by a deed, which recites that the debts of the partnership exceeded the specified amount, and that A. had died intestate as to his real estates; and the heir-at-law of A. joins in that deed, and enters into a covenant for the title of the trustees, a covenant against all acts done by him or his father, and a covenant for further assurance. It afterwards appears to be uncertain whether A. had not devised his real estate, and the purchaser files a bill to have protection against or remedy for the alleged defect in his title which this discovery created:—Held, that he is not entitled to a covenant either from the heir or from any other person for the production of the partnership books and papers. *Hallett v. Middleton*, 1 Russ. 243.

3. Purchaser not bound to complete purchase without the title deeds, unless he has legal covenant to produce them. *Barclay v. Raine*, 1 Sim. & S. 449.

4. If vendor retains title deeds, and cove-

nants for further assurance only, the purchaser may, under that covenant, compel him to enter into a covenant for production of deeds. *Fain v. Ayres*, 2 Sim. & S. 533; 4 L. J., Ch., 166.

5. An agreement on the sale of an estate, that the title deeds should be delivered to the purchasers on the completion of the contract; but, as the deeds related also to other property belonging to the vendors, the purchasers should enter into, or procure to be entered into, one or more proper and sufficient covenant or covenants with the vendors for the production and delivery of copies of such deeds. The purchasers were trustees, and entered into the contract in pursuance of the directions in the will of their testator for the investment of his personal estate in the purchase of lands, to be settled to certain uses creating estates for life, with remainder over in strict settlement. The estate was conveyed by the vendors to the purchasers to the uses declared by the will of their testator:—Held, that the agreement to enter into a proper and sufficient covenant for the production of the deeds did not mean that the vendors should be entitled to a covenant which would secure to them their production at all times and under all circumstances; that the word "sufficient" was connected with the word "proper"; that the extent and sufficiency of the covenant must in a great degree depend on the mode in which the conveyance was taken; that releasees to uses do not stand in worse position than trustees, who, according to the ordinary rule of the Court, are required to covenant for their own acts only; and that the Court would not compel the purchasers, who were only releasees to uses, especially after the uses were executed by the statute, to enter into such covenants. *Onslow v. Lonsborough (Lord)*, 10 Hare 67.

6. Where a manor is sold subject to the existing copyhold tenancies, the vendor must covenant for the production of the Court rolls anterior to the time of sale. *Poulett v. Hood*, 37 L. J., Ch., 224; 5 L. R., Eq., 115; 16 W. R. 323; 17 L. T., N. S., 486.

2. Rights of Third Parties.

7. Covenant to produce title deeds remains with lands for benefit of purchasers, but not for benefit of vendors. *Barclay v. Raine*, 1 Sim. & S. 449.

8. A defendant entitled to the benefit of a covenant to produce deeds for the "maintenance, manifestation, or justification" of his own title, is not compellable to inspect and discover the contents of such deeds, or procure their production in a hostile suit to which the covenantor is not a party. *Semble*, a defendant required to produce or obtain information respecting deeds not in his possession is entitled to have his expenses of obtaining such production or information tendered to him before doing so. *Bethell v. Casson*, 3 N. R. 29; 9 L. T., N. S., 321; 12 W. R. 200.

Where a defendant holds a covenant for the production of deeds for the maintenance and manifestation of his title, he is not bound, in answer to interrogatories, to set out such deeds in a suit, the object of which is to show

that a disputed piece of land is not comprised in the defendant's title. 8 C. 1 Hem. & M. 806.

1. A title deed of the defendant was ordered to be produced where it contained a recital that might affect him with constructive notice of the plaintiff's interest in the estate. *Neesom v. Clarkson*, 2 Haro 166. n.; C. P. C. 93; 12 L. J., N. S., Ch., 99; 6 Jur. 1055.

3. Costs of.

2. The costs of covenants to produce title deeds which cannot be delivered up fall, by the practice of conveyancers, on vendors; yet where, by the conditions of sale of property, in lots, under an order of the Court, provision was made for the largest purchaser to have the deeds, and to covenant to produce them, or give copies thereof to the purchasers of smaller lots, without reference to the manner in which the costs were to be paid, each purchaser, and not the estate, was ordered to bear his own costs of such covenants. *Strong v. Strong*, 4 Jur., N. S., 943; 6 W. R. 455.

III. SALE IN LOTS. PURCHASER OF LARGEST LOT.

3. Where an estate is sold under a decree in several lots, and there is no condition of sale as to the title deeds, the purchaser of the largest lot is to have the custody of the title deeds common to all the lots, on the terms of giving to the purchasers of the smaller lots attested and compared copies, and a covenant for the safe custody and the production of them when necessary. *Cunningham v. Hume*, 1 Ir. Eq. R. 150.

4. By conditions of sale, the title deeds were to be delivered to "the purchaser of the largest lot." A. purchased the largest lot in value and extent, but B. purchased several lots whose aggregate value and extent exceeded those of A.'s lot:—Held, that A. was entitled to the custody of the deeds. *Scott v. Jackman*, 21 Beav. 110.

5. Ground-rents and building sites were put up for sale at the same time, in different lots. The conditions of sale stipulated that counterparts of the ground-rent leases would be delivered to the respective purchasers, but that the deeds relating to the remainder of the property would be retained till the whole property should have been sold, when the purchaser of "the largest lot" should be entitled to possession of the deeds:—Held, that "largest lot" had reference to quantity, and not to price. *Griffiths v. Hatchard*, 2 W. R. 672; 18 Jur. 649; 1 Kay & J. 17; 23 L. J., Ch., 957.

Costs. 6. Although, by the practice of conveyancers, the costs of covenants to produce title deeds which cannot be delivered up fall on the vendors, yet where, by the conditions of sale of property in lots, provision is made for the largest purchaser to have the deeds, and to covenant to produce them to the purchaser of smaller lots, without reference to the manner

in which the costs are to be paid, each purchaser, and not the vendor, is bound to bear his own costs of such covenants. A purchaser is entitled to his costs of appearing upon a petition for paying his purchase-money out of court, although he is informed in the notice of the petition that he is not required to appear, and that the petitioner will object to his costs of appearance. *Strong v. Strong*, 6 W. R. 455; 4 Jur., N. S., 943.

IV. COSTS OF ATTESTED COPIES.

7. Purchaser who cannot have the original title deeds, the estate being sold in number of lots, is entitled to attested copies at expense of vendor. *Dars v. Tucker*, 6 Ves. 460.

8. Where title deeds cannot be delivered, assignees must, like any other vendor, give attested copies of them at the expense of the estate; but their covenant, for the production of the deeds, should be confined to the time of their continuance as assignees. *Exp. Stuart*, 2 Rose 215.

9. Purchaser of small lots entitled to attested copies of the title deeds, accompanying the principal purchase, at the expense of the vendor, no stipulation having been made upon the subject. *Boughton v. Jewell*, 15 Ves. 176.

10. A. agreed to sell to B. certain lands, and the following was one of the conditions of sale: "As the title deeds of the property comprised in this particular of sale relate to other property of greater value, the vendor shall retain the custody thereof; and a covenant will be entered into for the production of such of them as are not inrolled, and for giving attested or other copies thereof to the respective purchasers at their expense":—Held, that B. could not on completion compel A. to deliver to B. attested copies of the deeds at the expense of A. *Cotton v. Soudamore*, 1 Kay & J. 321.

11. One of the conditions of a sale by public auction stated that the purchaser should not require the production of any title deeds which were not in the possession of the vendors, and all recitals of births, etc., or other facts contained in any deed dated thirty years since, should be deemed conclusive evidence thereof; and all attested copies of or extracts from deeds, and all other evidence as to deaths, etc., which might be required by the purchaser for the purpose of examination with the abstract, should be respectively sought for and procured at the expense of the purchaser. A. became the purchaser of two lots. After the title had been approved, and a deed of conveyance prepared, a question arose as to whether or not the purchaser was entitled to attested copies of the title deeds at the expense of the vendors; and thereupon the vendors, under the power contained in the fourth condition, annulled the sale. On a bill filed for the specific performance of the contract:—Held, that the purchaser was not entitled to attested copies of the title deeds at the expense of the vendors and dismissed the bill, with costs. *Abbott v. Darnell*, 2 Jur., N. S., 631; 4 W. R. 314.

12. In a sale under the order of the Court, the purchaser of the largest lot in extent and value is, in the absence of express condition, entitled to the deeds relating as well to the lot bought by him as to other lots of less extent and value; and in the absence of express con-

dition, the purchaser of a smaller lot is entitled, at the expense of the estate, to attested copies of all such deeds. A condition which provided that all attested copies of deeds, "whether required for the verification of the abstract or delivery to the purchaser, or for any other purpose, shall be procured at the expense of the purchaser"—Held, not sufficiently express to vary the rule, and to throw on the purchaser of the smaller lot the expense of attested copies of deeds handed over to the purchaser of the larger lot. *Peterson v. Elmes*, 6 W. R. 611.

V. INSPECTION OF.

1. Where a title commenced by a general devise and seisin, and only proved by a deed more than sixty years old, reciting the seisin, and there was ground to assume that the vendor had deeds earlier than those on the abstract:—Held, the purchaser was entitled to inspection of those deeds, if in the vendor's possession, but not to have them in the abstract. *Parr v. Longgrove*, 4 Drew. 170; 4 Jur., N. S., 600; 6 W. R. 709, 201.

Quære, whether a purchaser is generally entitled to inspection of deeds earlier than a sixty years' title. *Ib*.

It is generally admitted that a purchaser may inspect the earlier deeds in the vendor's possession, but cannot require to have them abstracted. *Ib*.

2. A purchaser who agrees not to require an abstract of title has nevertheless a right to inspect the deeds which constitute the vendor's title. *Harding v. —*, 4 L. J., Ch., 213.

XVII. Covenants for Title.

See also XXI. IV. *post*.—XXII. I. 9 *post*.

- I. *General Principles*, 7283.
- II. *For Quiet Enjoyment*, 7283.
- III. *For Freedom from Incumbrances*, 7285.
- IV. *For Further Assurance*, 7285.
- V. *For Lawful Seisin*, 7285.
- VI. *By Whom*, 7285.

I. GENERAL PRINCIPLES.

3. It was said in this case to be a rule among conveyancers, that where an estate had been long in a family, the vendor's covenant must go as far back as the first purchaser of the estate; but where the vendor claims immediately under the person who first bought the estate, there he need not covenant any further back than from that person, because whoever buys the estate has the benefit of the covenants in the deed to the vendor's purchaser. Lord Hardwicke said, he never heard of such a rule; yet, where conveyances are to be made by a decree of the Court, they should be settled by such rule as learned conveyancers would direct. There are many cases where a person covenants no further than his own acts; as, where an estate is decreed to be sold for

payment of debts, and no surplus remains, the Court will not require the heir to covenant beyond his own acts; so as to a devisee; but where, after such sale, the surplus is considerable, the heir or devisee in many cases has been directed to covenant that neither he (the heir), nor his immediate ancestor, nor the devisee, nor his devisor, has done any act to incumber. *Lloyd v. Griffith*, 3 Atk. 287.

4. Implied covenant by vendor of a freehold estate for the title, though an assignee in bankruptcy, selling by a general description, not restrained to his actual interest. *Deverell v. Bolton (Lord)*, 18 Ves. 512.

5. Covenants for title are merely a bargain by the covenantor to pay damages if he has no such title. *General Finance, Mortgage, & Discount Co. v. Liberator Permanent Building Society*, 27 W. R. 210; 39 L. T. 600; 10 L. R., Ch. D., 15.

II. FOR QUIET ENJOYMENT.

6. A. sold some building land to B., and he covenanted for title. After some houses had been built on the land, the purchaser was evicted:—Held, that the purchaser was entitled to recover upon the covenants, not only the value of the land, but also that of the houses subsequently built thereon. *Bunny v. Hopkinson*, 27 Beav. 565; 6 Jur., N. S., 187; 29 L. J., Ch., 93; 1 L. T., N. S., 53.

Held, also, that the estate of the vendor was liable to make good the amount, and the legatees under his will must contribute to make up the requisite sum. *Ib*.

7. In the absence of fraud, a purchaser is not entitled, on the ground of want of title, to a decree for delivering up the contract to be cancelled without prejudice to an action. An agreement was entered into to take and grant a lease, by indenture, of property, for a short term of years, and that covenants should be inserted by the lessees to repair, and by the lessor for quiet enjoyment. The lessees being in possession under the agreement put the premises in repair, but damage having accrued, as they alleged from mining operations, they filed a bill for specific performance. No title could be shown to the minerals:—Held, nevertheless, that the lessees were entitled, upon their electing to take the property, to a decree for the execution of a lease by deed containing an absolute covenant for quiet enjoyment. *Onions v. Cohen*, 2 Hem. & M. 354; 11 Jur., N. S., 198; 34 L. J., Ch., 338; 13 W. R. 426; 12 L. T., N. S., 15.

Secus, if the case had been that of an agreement to sell an estate in fee simple. *Ib*.

8. N., the mother of A., was seised in tail, *ex provisione viri*, reversion in fee to her husband. A. and W., her husband, created a mortgage term on this estate, and joined in levying a fine to the mortgagee; remainder to such uses as W. should appoint. W., before levying the fine, on sale of an estate, covenanted with I., the purchaser, for quiet enjoyment, and afterwards made an appointment to trustees for paying off the mortgage, and other purposes, of the wife's estate. I., being evicted of the lands he purchased, brought his bill against A. and her children, to subject her estate to his demand, under the covenant of W. It being doubtful whether plaintiffs' debt

accrued by breach of covenant till after the appointment of W., the bill was dismissed. *White v. Sansum*, 3 Atk. 410.

1. Covenants for title and quiet enjoyment do not extend to protect a purchaser against defects of title, which the recitals in his own purchase deed are sufficient to disclose. *Hunt v. White*, 37 L. J., Ch., 326; 16 W. R. 478; 19 L. T., N. S., 141.

Therefore, where a vendor who, under a will, had only a fee subject to an executory devise over, which ultimately took effect, sold and conveyed to a purchaser as if absolutely entitled, though the covenant for quiet enjoyment by the vendor extended to meet adverse claims by persons claiming under the vendor's testator, and incumbrances, estates, etc., created by such testator, yet as the will was recited in the purchaser's conveyance:—Held, that there was no breach of the covenant, which could not protect the purchaser against his own misconstruction of the written instrument under which he took. *Id.*

2. Under a settlement A. had power to charge estates; he did so charge them, but in excess of his powers: he then assigned 5,000*l.* of the sums charged to the plaintiff, which was also beyond his powers. The assignment to the plaintiff contained a covenant by A. for the quiet enjoyment of the premises assigned against "any person or persons there or thereafter having or possessing any title or interest in, out of, or respecting the same":—Held, that the right of the owners of the estate not to have the 5,000*l.* raised was a right respecting it, and that A.'s estate was liable on the covenant to make good the plaintiff's purchase-money. *Henty v. Wrey*, 19 L. R., Ch. D., 492; 45 L. T. 752; 30 W. R. 317.

3. The plaintiff, in April 1842, purchased for 180*l.* of the defendant a freehold property, and took a conveyance thereof, in which there were no covenants for title, but which contained a covenant for quiet enjoyment by the vendor. In the same month the plaintiff mortgaged the property to secure 200*l.* and interest, and in 1846, after defending an action of ejectment, was evicted by the verdict of the jury. The plaintiff then brought an action for damages upon the covenant against the defendant, but was stopped in such action by a plea, on the part of the defendant, that at the date of the eviction the legal estate in the premises was not in the plaintiff, but in the mortgagee. Shortly afterwards the defendant paid off the mortgagee, taking from him the mortgage deed, and an acknowledgment, by indorsement thereon, of the receipt of the mortgage money and interest from the defendant, and that the same was in full satisfaction and discharge of the mortgage debt, and of all right of action or demand on the part of the mortgagee against the defendant, under the covenant contained in the deed of conveyance to the plaintiff. Upon a bill being then filed by the plaintiff against the defendant, praying that the plaintiff might be declared entitled to the benefit of the covenant for quiet enjoyment, and for a reference to the Master to assess the damage sustained by the plaintiff in consequence of the breach of such covenant, the Court held, upon appeal, reversing the decision of the Court below, that the

plaintiff had clearly a right to have such damages assessed, and gave him leave to bring an action upon the covenant within a time limited in the order, at the same time restraining the defendant from setting up the mortgage deed, or the indorsement thereon, by way of defence to such action. *Thornlon v. Court*, 17 Jur. 151; 22 L. J., Ch., 361.

4. A deed contained a covenant for quiet enjoyment, free from quit-rent and crown-rent; and, by a contemporaneous deed of indemnity, lands were conveyed to a trustee and his heirs, upon trust to permit and suffer the vendors and their heirs to take the rents and profits, until the purchaser and his heirs, or any person deriving title under him, should be molested, disturbed, or damaged, by reason of certain judgments and incumbrances, or any judgment or incumbrance affecting the lands, or any of them, or until some suit at law or in equity should be commenced or proceeded on against the purchaser, his heirs, or assigns, or the purchased lands and premises or any part thereof, for the recovery of or on account of the said or any other incumbrance or incumbrances; and immediately after any such disturbance, molestation, or injury, out of the rents and profits of the indemnity lands, by sale, demise, or mortgage of a competent part, to raise and levy from time to time such sums as might be sufficient to pay off and discharge the incumbrances affecting, or that might affect the lands. In 1827 quit-rent and crown-rent were claimed and paid out of the purchased lands. In 1828 the indemnity lands were mortgaged by persons claiming under the vendors. In 1839 a report, finding that there were no incumbrances except those named in the report on the indemnity lands, was made, and confirmed by a decree in a suit in which the sums then paid for quit-rent and crown-rent might have been, but were not claimed. In 1858 an order was made giving leave to the owner of the purchased lands to go before the Master, and file a charge in respect of his demand for quit-rent and crown-rent accrued since the date of the report and decree:—Held, first, that the claimant was not precluded by the finding in the report and decree from proving his demand. *Massy v. O'Dell*, 10 Ir. Ch. R. 22.

Held, secondly, that the demand was not barred by the Statute of Limitations. *Id.*

Held, thirdly, that the trust in the indemnity deed to indemnify the purchaser was not void for remoteness. *Id.*

5. In a conveyance of land by the defendant to the plaintiff, the defendant covenanted for title and quiet enjoyment notwithstanding any act or thing done or suffered by him or by any of his ancestors or predecessors in title. After the conveyance a decree was made in a suit in Chancery in which the plaintiff, though not a party, was represented as being one of a class of persons against whom the suit was brought, and by the decree the land so conveyed by the defendant was declared to be subject to a general right of common over it:—Held, that the decree alone, without any entry or actual disturbance of the plaintiff in his possession, was no breach of the defendant's covenant for quiet enjoyment. *Howard v. Maitland*, 11 L. R., Q. B. D., 695.

Held, also, that the Court, in the absence of evidence of a grant of such right of common by some predecessor in title of the defendant, would not infer that there must have been such grant so as to be a breach of his covenant for title within the meaning of the covenant. *Id.*

See also LANDLORD AND TENANT, I. VII. 5—XII. VI.

III. FOR FREEDOM FROM INCUMBRANCES.

1. J. bought an estate of A., who gave him a bond to suffer a recovery within three years, or to return him his money upon a reconveyance. A. tendered a recovery, but, before it was suffered, a third person made a title to the land, whereupon J. brought his bill for the purchase-money; but the Court could not relieve him, for having consented to take the bond, he must resort to A.'s covenant against incumbrances. *Maynard's case*, 2 Freem. 42.

2. In articles, there was to be a covenant in the conveyance that certain lands were free from incumbrances. Lord Chancellor said, this is not a covenant that the lands are free; and if any incumbrance is discovered between the execution of the articles and sealing the conveyance whereof the party had no notice that incumbrance shall be discharged before the sealing of the conveyance, as the concealment of it would be a fraud, though, against all incumbrances discovered afterwards, there is only the party's own covenant to protect a purchaser. *Vane v. Bernard (Lord)*, Gilb. Eq. Rep. 6.

3. The plaintiff sold two leasehold houses, one to the defendant and another to L. The conveyance to the defendant contained by mistake a part of the property intended to be sold to L., but which the defendant believed he was purchasing. Upon a bill filed against the defendant by L., he was directed to reconvey to L. that portion which by mistake was included in the assignment to him. The defendant then brought an action against the plaintiff, the vendor, for damages made under his covenant against incumbrances. An equitable plea was put in by the plaintiff, who filed a bill for an injunction to restrain the action, but the injunction was refused. *Wild v. Hillas*, 28 L. J., Ch., 170; 7 W. R. 82; 32 L. T. 116.

IV. FOR FURTHER ASSURANCE.

4. A purchaser of Crown lands, during the late wars, sold part to plaintiff, with a covenant for further assurance: on the restoration he obtained a lease from the Crown. He shall assign to the plaintiff his term in the part he sold him. *Taylor v. Debar*, 1 Ch. Ca. 270; 2 Ch. Ca. 212.

5. If vendor retains title deeds, and covenants for further assurance only, the purchaser may, under that covenant, compel him to enter into a covenant for production of deeds. *Fain v. Ayres*, 2 Sim. & S. 533; 4 L. J., Ch., 166.

V. FOR LAWFUL SEISIN.

6. S. purchased church lands in fee, under the usurper's title, and sold them to defendant's testator, covenanting that he was lawfully seised. The church being restored, S. was relieved from his covenant, upon proof that at the time of the sale he undertook for his own acts only. *Caldecot v. Hill*, 1 Ch. Ca. 13.

VI. BY WHOM.

7. Estates were devised to A. for life, remainder to his sons successively in tail male. A. and B., during the infancy of B.'s eldest son, obtained an Act of Parliament vesting the estates in trustees in trust to sell:—Held, that A. and B. must covenant with the purchaser for the title. If settled estates are sold under a power to sell them, with the consent of the tenant for life, he must covenant for the title. *Re London Bridge Acts*, 13 Sim. 176.

8. A testator devised real estate upon trust for sale, and to divide the proceeds among his children equally. A sale of such real estate having been made under a decree of the Court of Chancery, not for the payment of the testator's debts, but for the division of the proceeds among the parties beneficially entitled thereto:—Held, that the purchaser was not entitled to covenants for title from those parties. *Cottrell v. Cottrell*, 2 L. R., Eq., 330; 12 Jur., N. S., 285; 35 L. J., Ch., 466; 14 W. R. 572; 14 L. T., N. S., 220.

9. An estate was being sold, with the approbation of the Court, by trustees of a settlement under a power of sale and exchange contained in the settlement to raise a sum to which, in the events which had happened, the tenant for life was entitled:—Held, that the tenant for life must enter into covenants for title. *Poulett v. Hood*, 37 L. J., Ch., 224; 5 L. R., Eq., 115; 16 W. R. 323; 17 L. T., N. S., 486.

XVIII. Restrictive Covenants.

See also ALE AND BEER HOUSE—COVENANT—LANDLORD AND TENANT, I. VII.—VIII. IV.—XII.

- I. *Construction of and Breach of*, 7285.
- II. *Covenants Running with the Land*, 7288.
- III. *Covenants Binding on an Assignee with Notice*, 7289.
- IV. *Effect of Alteration of Character of Property*, 7291.
- V. *Sale in Lots. Rights of Purchasers Inter se*, 7292.
- VI. *Waiver and Acquiescence*, 7294.
- VII. *Other Cases*, 7296.

I. CONSTRUCTION OF AND BREACH OF.

1. *Building Covenants*, 7286.
2. *Covenants as to User of Premises and Trade*, 7287.

1. Building Covenants.

1. In 1808 the plaintiff was the owner in fee simple of a piece of ground forming a public square in London, and also of several houses in the same square. He conveyed the piece of ground to E. in fee simple, and E. covenanted for himself, his heirs, executors, administrators, and assigns, with the plaintiff, his heirs, executors, and administrators, to keep the piece of ground and the iron railing round the same in its then present form and in proper repair, as a pleasure ground, in an open state, uncovered with any buildings, in neat and ornamental order; and that the plaintiff and his tenants might have keys at their own expense, and the privilege of admission therewith into the pleasure ground. The neighbourhood of the square had become thickly populated, and a thoroughfare had been made through it by Act of Parliament. The piece of ground had become greatly neglected, and was in a ruinous condition, and for many years neither the plaintiff nor his tenants had used or claimed to use it as a pleasure garden. The defendant, who claimed by purchase under E., removed some of the iron railings, and intended to make footpaths across the ground, and claimed the right of building thereon:—Held, that this was a breach of the covenant, and he was restrained by injunction, although the plaintiff had not established the validity of the covenant at law as binding upon the assignee of the land. *Tulk v. Moxhay*, 2 Ph. 774; 1 H. & Tw. 105; 18 L. J., N. S., Ch., 83; 13 Jur. 89. Affirming 11 Beav. 571; 18 L. J., N. S., Ch., 83; 13 Jur. 26.

2. A vendor conveyed to a purchaser a piece of land with a house, being No. 7 in a particular row of houses called Windsor Terrace, on the west side of a road, and covenanted with the purchaser that no building, excepting monuments and tombs, should be erected on any part of the land belonging to the vendor "lying on the east side of the said terrace, and opposite to the plot of land thereby conveyed":—Held, affirming the decision of one of the Vice-Chancellors, that the covenant applied only to that part of the vendor's land which was opposite to, and of the same width as the piece conveyed. *Patching v. Dubbings*, 23 L. J., Ch., 45; 2 Eq. Rep. 71. Affirming 1 Kay 1; 2 W. R. 2.

Held, also, that the Vice-Chancellor was right in dismissing, with costs, a bill filed to restrain the erection of a building not immediately opposite to any part of the premises comprised in the purchase deed. *Ib.*

3. An owner of building ground upon which houses of uniform height and depth had been built sold it in plots, and conveyed each plot in fee, subject to a perpetual rent-charge; and each purchaser covenanted with the grantor that there should be no trees or any building whatever in the garden that should exceed the level of the parlour floor:—Held (affirming 1 L. R., Eq. 499; 12 Jur., N. S., 366; 35 L. J., Ch., 190), that it was a breach of the covenant to erect any building above the prescribed height extending beyond the back of the house, though the ground upon which such building was erected had never been

used as a garden. *Western v. M'Dermot*, 3 L. J., Ch., 76; 15 W. R. 265; 16 L. T., N. S., 641; 2 L. R., Ch., 72.

Upon a covenant not to build or allow trees to grow above a certain height, the object of which was to prevent obstruction of the view from certain houses:—Held, that substantial injury was not requisite in order to enable the Court to interfere and restrain a breach of covenant. *Ib.*

4. A railway company, in purchasing land covenanted with the owner not to build upon it above a certain height. They afterwards obtained an Act of Parliament empowering them to widen their line:—Held, first, that it would prevent them from building so as to widen the line. *Lloyd v. London, Chatham, & Dover Railway Co.*, 11 Jur., N. S., 380.

Held, secondly, that if the covenant was not invalid at law, as being against public policy, the Court would not be prevented from interfering on that ground, and that when the Court refuses to enforce a covenant, because the damage would be inappreciable, the case must be perfectly clear. *Ib.*

5. A covenant by a purchaser of land not to build above a certain height does not amount to a reservation to the vendors of a right to use the upper surface of light and air for their own purposes, as for building, or throwing any covering thereover. *Pinchin v. London & Blackwall Railway Co.*, 2 Eq. Rep. 1172; 2 W. R. 696; 1 Jur., N. S., 241; 21 L. J., Ch., 417.

6. Land having been laid out for building, and streets projected across it, the defendant bought one plot with a right of way over the projected streets, the vendors reserving a similar privilege over the street in front of the plot sold, and the defendant covenanted with the vendors that he would not erect any building on the same plot within the distance of six feet from the intended streets:—Held, that the erection of a wall fifteen feet high at right angles to the principal street, and extending quite up to it, was an infringement of this covenant, but that it was not broken by the projection a few inches too far of the lower part of the wall of a house, nor by a brick porch which came forward one foot within the limit. *Child v. Douglas*, 1 Kay 560. And see *S. C.* 1 Kay 575; 2 Jur., N. S., 350, 950; 2 W. R. 461, 701; 5 De G. M. & G. 739.

7. A covenant to the effect that private houses only, of a certain minimum value, are to be built on certain plots of land, is not broken by the erection on one of them of a stable with a bedroom over it of such dimensions and in such a position that it would still be possible to build a house of the stipulated value upon the plot. *Russell v. Baber*, 18 W. R. 1021.

8. A. purchased a building plot of G., and covenanted to build on it a dwelling-house of the value of 250*l.* at least, under the inspection and to the satisfaction of C.'s architect, in twelve months. The twelve months expired, and A. proceeded to build a house of the required value, but as to situation contrary to the opinion of the architect:—Held, that it was a breach of the covenant, and an injunction was granted. *Goolden v. Antee*, 18 L. T., N. S., 898.

9. Land was sold subject to a covenant

entered into with a neighbouring landowner, that "no buildings, except dwelling-houses," to front a certain road, should be built thereon. The purchaser threw the land into his garden, and inclosed it, by erecting thereon, along the side of the road, a wall, eight feet six inches high for the greater part, but carried up in one part to the height of eleven feet six inches for the purpose of forming the back of vineries and a greenhouse. In suit for an injunction to restrain the wall from continuing:—Held, that the boundary garden wall eight feet six inches high was no breach of covenant, but the raising it for the purposes of the vineries was; but no substantial injury being caused, the Court awarded damages instead of granting an injunction in respect of the breach. *Bones v. Law*, 39 L. J., Ch., 483; 9 L. R., Eq., 636; 18 W. R. 640; 23 L. T., N. S., 267.

1. The purchaser of a plot of land, part of an estate laid out for building, covenanted with the vendors, who were the mortgagees in fee in possession of the estate, their heirs and assigns, not to erect any building on his plot nearer to the road in which it was situate than the line of frontage of the then present houses in that road, which houses were about forty feet apart, and about eighty feet from the road. He then erected two houses on his plot, each of which had a bay window projecting three feet beyond the line of the existing houses, and carried from the foundation up to the roof. Upon a bill for an injunction by the transferee from the mortgagees, and by a subsequent purchaser from them of a contiguous plot, who had entered into similar covenants:—Held, first, that the bay windows were buildings within the meaning of the covenant, and the erection of them a violation of it. *Manners (Lord) v. Johnson*, 1 L. R., Ch. D., 673; 45 L. J., Ch., 404; 24 W. R. 481.

Held, secondly, that there being a clear breach of covenant, the covenantees were entitled to the injunction without the necessity of showing damage. *Id.*

Held, thirdly, that invasion of privacy constituted damage. *Id.*

Held, fourthly, that the covenant being not to do an act the doing of which caused an invasion of privacy, it was not necessary for the covenant in terms to purport to preserve privacy. *Id.*

Held, fifthly, that both the plaintiffs had material interests sufficient to support the suit. *Id.*

2. Covenants as to User of Premises and Trade.

2. The owner of an estate covered it with houses, and sold some of them subject to a covenant not to carry on any trade, business, or calling therein, or to otherwise use, or suffer the same to be used, to the annoyance, nuisance, or injury of any of the houses on the estate:—Held, that the carrying on of a girls' school in one of the houses was a breach of the covenant. *Aemp v. Sober*, 1 Sim., N. S., 517; 20 L. J., N. S., Ch., 602; 16 Jur. 458.

3. On a sale of an estate as building land in

309 plots each purchaser executed a covenant with trustees to observe certain conditions as to the user of the land. The conditions stated that certain plots were reserved for two taverns; that "no houses, other than detached or semi-detached," were to be erected except on the portion on which shops were permitted to be built; and that shops would be allowed to be built on sixty specified plots. A purchaser of one of the plots set apart for shops was restrained from building a public-house on it. *Hall v. Box*, 18 W. R. 820.

4. A person who has covenanted not to use a building for certain purposes will not be restrained from erecting a building seemingly adapted only for such purposes. *Worsley v. Swann*, 61 L. J., Ch., 576.

5. A grantee in fee of a piece of building land covenanted by a separate deed with the grantor that the piece of land should not for the space of twenty years be used "as a site for any hotel, tavern, public-house, or beer-house," nor should "the trade or calling of an hotel or tavern keeper, publican or beer-shop keeper, or seller by retail of wine, beer, spirits, or spirituous liquors, be used, exercised, or carried on, at or upon" the same:—Held, that the sale of wine and spirits in bottle by a grocer in the course of his trade was not such a breach of the covenant as the Court of Chancery would restrain. *Jones v. Bone*, 9 L. R., Eq., 674; 39 L. J., Ch., 405; 18 W. R. 489; 23 L. T., N. S., 304.

6. The erection of a building to be used for the education and lodging of 100 girls in connection with a charitable institution for the daughters of missionaries, supported by voluntary contributions:—Held, to be a breach of a covenant entered into by the purchaser that "no house or other building to be erected or built upon the land shall be used or occupied otherwise than as and for a private residence only, and not for any purpose of trade." *German v. Chapman*, 26 W. R. 149; 7 L. R., Ch. D., 271; 47 L. J., Ch., 250; 37 L. T., N. S., 686. Reversing 25 W. R. 802; 37 L. T., N. S., 265.

7. C. being entitled to a conveyance of a piece of land subject to a covenant by him with E., his vendor, not to do or suffer anything to be done which should be a nuisance to E. or his tenants, etc., the occupiers of the adjoining property put up for sale and sold the land in lots subject to a condition in the terms of the covenant, and the purchaser of each lot entered into a covenant with C. not to do or suffer anything to be done which should be a "nuisance" to E. or any of the tenants or the occupiers "of the adjoining property or the houses to be built thereon." Upon a bill filed by several of the owners of the lots to restrain the establishment of a national parochial school on one of the lots:—Held, first, that the words "adjoining property" in the last-mentioned covenant meant the property adjoining the lots purchased, and accordingly the owner of any lot was entitled to enforce the covenant against the owner of any other lot. *Harrison v. Good*, 40 L. J., Ch., 294; 11 L. R., Eq., 338; 24 L. T., N. S., 263; 19 W. R. 346.

Held, secondly, that the word "nuisance" meant only a legal nuisance for which an

action would lie, and that the establishment of a national school, although it would injure and depreciate the adjoining property, was not a nuisance within the meaning of the covenant, but the bill was dismissed without costs, on the ground that another site might have been chosen so as to avoid annoyance. *Id.*

1. By a deed of partition of a freehold estate between S. and P., portions of the estates, which were laid out for roads, were conveyed to S. in fee, and he covenanted with P., his heirs and assigns, that P., his heirs and assigns, and all owners and occupiers for the time being of all or any parts of the lands limited to P., and of the houses to be built thereon, should at all times for ever thereafter have right of passage over the roads, which was given in the most ample terms, and also the full use and enjoyment of the roads in as full, free, complete, and absolute manner to all intents and purposes whatsoever as if they were public roads. Thirty years afterwards, the occupiers of houses on these lands of P. applied to a gas company to supply them with gas, and the company proceeded to lay down pipes for the purpose in the above roads. It was admitted under the Companies Act this would have been lawful if the roads had been public roads. The devisees of S. filed a bill in equity to restrain the company from interfering with the roads. The Master of the Rolls having dismissed the bill:—Held, that the bill had rightly been dismissed, for that the covenant entitled the occupiers to the same use of the roads for the purpose of obtaining gas as if they had been public roads. *Selby v. Crystal Palace Gas Co.*, 4 De G. F. & J. 246; 8 Jur., N. S., 830; 31 L. J., Ch., 595; 10 W. R. 636; 6 L. T., N. S., 790. Affirming 30 Beav. 606; 8 Jur., N. S., 422; 10 W. R. 432.

2. A deed contained a covenant by the grantee of a piece of land that no building to be erected on the land should be used as a public-house, tavern, or beer-shop. A lessee of the grantee obtained an off-licence, authorising him to sell at his shop, on the land, beer not to be drunk on the premises, and sold beer there accordingly:—Held, that this was a breach of the covenant. *Bishop of St. Albans v. Battersby* (3 L. R., Q. B. D., 359) approved. *London & Suburban Land and Building Co. v. Field*, 16 L. R., Ch. D., 645; 50 L. J., Ch., 549; 44 L. T. 444.

II. COVENANTS RUNNING WITH THE LAND.

3. A conveyance of an estate to a purchaser and his heirs to the use that certain trades should not be carried on upon the premises is a stipulation in the nature of a covenant running with the land. *Hodgson v. Coppard*, 30 L. J., Ch., 20; 29 Beav. 4; 9 W. R. 9.

The grantee had let the property to a tenant who had committed and was committing the breaches complained of, but who was not made a party to the suit:—Held, that an injunction might be granted to restrain the grantee, his agents or servants, from carrying on such a trade, but that the injunction could not be extended to his tenants. *Id.*

4. A covenant by a purchaser of land not

naming assigns that no building on the land should be used for the sale of beer does not run with the land. *Wilson v. Hart*, 2 Hem. & M. 551. Affirmed 1 L. R., Ch., 463; 12 Jur. N. S., 460; 33 L. J., Ch., 569; 14 W. R. 748; 14 L. T., N. S., 499.

5. A purchaser of a piece of land with a well or spring upon it covenanted with the vendor, who retained land adjoining intended to be disposed of for building sites, to erect a pump and reservoir, and to supply water from the well to all houses built on the vendor's land:—Held, first, that both the benefit and the burden of the covenant ran with the land, and that the case was not within the second resolution in *Spencer's case* (5 Rep. 16a; 1 Sm. L. C. 60), but if not, a sub-purchaser with notice of the covenant was bound by it. *Cooke v. Chilcott*, 3 L. R., Ch. D., 694; 34 L. T., N. S. 207.

Held, secondly, that, though the covenant was not one of which the Court would decree specific performance directly, as being for the construction of works which the Court could not superintend, it could be enforced indirectly by an injunction restraining the defendant from allowing the work to remain unperformed. *Id.*

6. Covenant upon a conveyance in fee with the grantors, lessees of the waterworks, not to sell or dispose of water from a well to the injury of the proprietors of the said waterworks, their heirs, executors, administrators, and assigns. Whether the covenant runs with the land so as to bind and be enforced by assignees, whether it is contrary to the policy of the law, and as to the effect of a renewal of the lease, *quære*. The parties left to law, and a demurrer allowed, from the inconvenience of enforcing such a covenant by injunction. *Collins v. Plumb*, 16 Ves. 454.

7. A. being the owner of a building estate, sold a plot of it to B., who, by the conveyance, entered into restrictive covenants with A. as to the mode of using the land. A. afterwards contracted for the repurchase, and the land was conveyed by B. to C. as mortgagee of A. During the interval, A. sold several other plots of the estate to various persons, but it did not appear whether he entered into any or what arrangement with them as to the use of the land. The mortgagee foreclosed:—Held, that the land was not bound by the restrictive covenants entered into by B.; and the land being sold without any condition as to these covenants, the title was forced upon the purchaser. *Keates v. Lyon*, 38 L. J., Ch., 357.

8. Land was granted in fee in consideration of a rent-charge, and the deed of grant contained a covenant to build houses on the land, the rent of which should be double the value of the rent reserved by the deed without limiting any time within which such building was to be required:—Held, that such covenant was unusually restrictive. *Andrew v. Aitken*, 22 L. R., Ch. D., 218; 52 L. J., Ch., 294; 48 L. T. 148; 31 W. R. 425.

Semble, that although the assignee of the grantee of the land was not liable affirmatively on such covenant, he might be called on to allow the house to be built in accordance with the covenant. *Id.*

9. Where there are mutual covenants by owners of land, their heirs and assigns, with

the owners of adjoining land, their heirs and assigns, to comply with certain stipulations, the subsequent lessee of one of the owners is entitled to the benefit of the covenants as an assign, and can sue to restrain a breach. *Taito v. Gosling*, 11 L. R., Ch. D., 273; 48 L. J., Ch., 397; 27 W. R. 394; 40 L. T. 251.

III. COVENANTS BINDING ON AN ASSIGNEE WITH NOTICE.

1. A. being seised of the centre garden and some houses in Leicester Square, conveyed the garden to B. in fee, and B. covenanted for himself and his assigns to keep the garden unbuilt upon, etc.:—Held, that a purchaser from B., with notice of the covenant, was bound by it in equity, whether he was bound at law or not, and an injunction was granted to restrain him from infringing the covenant. *Tulk v. Moxhay*, 11 Beav. 571. Affirmed 2 Ph. 774; 1 H. & Tw. 105; 18 L. J., N. S., Ch., 83; 13 Jur. 89.

A covenant between vendor and purchaser, on the sale of land, that the purchaser and his assigns shall use, or abstain from using, the land in a particular way, will be enforced in equity against all subsequent purchasers, with notice, independently of the question whether it be one which runs with the land, so as to be binding upon subsequent purchasers at law. *Id.*

2. Where land was intended to be sold by lots, on the sale of the two lots first sold an indenture was executed between the owner of the one part and the two purchasers and all others who should subsequently execute the indenture whereby, after declaring that it should be an indispensable condition of the sale of any part of the land that the proprietors for the time being should observe the covenants and restrictions of the indenture, the parties thereto covenanted, among other things, that none of the proprietors for the time being should ever use as an hotel a house erected on any of the lots. The purchasers of two other lots afterwards executed the deed, and then sold their lots, the one to A., the other to B., neither of whom executed the deed, but both had notice of it; B. and his tenant were restrained by injunction from using the house built on B.'s lot as an hotel. *Whatman v. Gibson*, 9 Sim. 196; 7 L. J., N. S., Ch., 160; 2 Jur. 273.

3. According to *Tulk v. Moxhay* (2 Ph. 774), if parties purchase land with notice of a covenant concerning it, but which does not run with the land so as to bind them at law, equity will not permit them to do anything contrary to the true meaning of that covenant. *Patching v. Dubbins*, 1 Kay 1; 17 Jur. 1113; 2 W. R. 2; 23 L. J., Ch., 45. Affirmed 2 Eq. Rep. 71.

4. Where a purchaser in fee covenanted that no building whatever should at any time thereafter be erected on a certain portion, which latter was afterwards, and after one mesne conveyance, vested in the defendant, who before the conveyance to him had notice of the covenant, the Court, at the instance of the plaintiff, who had afterwards divers mesne conveyances of the other portions, restrained the defendant from continuing a building begun by him. *Mann v. Stephens*, 15 Sim. 377; 10 Jur. 660.

5. Each of the original owners of houses in a row entered into covenants with the original owner of all the land on which they stood as to what should be done in the garden attached to each house:—Held, that whether the covenants did or did not run with the land, a purchaser of one of the houses, with notice of the covenants, was bound by them in equity. *Western v. MacDermott*, 2 L. R., Ch., 72; 15 W. R. 265; 15 L. T., N. S., 641.

6. The purchaser of a plot of ground agreed that no building erected on it should be used as a public-house during twelve years and a half. The agreement did not appear on the conveyance. The purchaser's assignee built a public-house on the plot, and let it to a yearly tenant. The assignee had notice, but the tenant had not. On a bill against the assignee and his tenant, an injunction was granted to restrain the assignee from allowing the premises to be used as a public-house; the injunction to be suspended during the existing tenancy. *Carter v. Williams*, 39 L. J., Ch., 560; 9 L. R., Eq., 678; 18 W. R. 593; 23 L. T., N. S., 183.

7. A vendor entered into agreements, by deed, to sell to A., B., and C., certain land, in lots, for building purposes, reserving to himself a portion. Each deed of agreement contained covenants between the vendor and purchasers respectively, and among others that the purchasers should, within a certain time, erect dwelling-houses upon their respective lots, in a uniform row, in a certain specified position, and that no building should be erected on the piece of ground in front of each house, which was to be laid out as a garden, and that the vendor would dispose of all the lots subject to the same conditions as to building; and that in case the vendor should build upon the portion reserved by him, he would build in a line with the other houses, and would keep a similar piece of land in front for a garden. Before the contracts were completed by conveyance, the vendor sold and conveyed the reserved land to J., and the deed of conveyance recited the said sales, and contained a covenant by the vendor, that in the conveyances to A., B., and C., he would require them to enter into covenants with J. similar to their covenants in the agreements. J. also thereby covenanted with the vendor, that, if he should build on the land purchased by him, he would build within the line, and would keep the said piece of ground in front as garden. Subsequently the land purchased by A. was conveyed to him by a deed, in which A. entered into the same covenants as he had entered into in the deed of agreement. After divers mesne assignments, the land purchased by J. became vested in the defendants, with notice of the agreements and of J.'s covenants in his purchase deed, and the land of A. came in like manner to the plaintiff:—Held, that, whether the covenants run with the land or not, as the defendants had notice of them, the plaintiff might have an injunction to restrain the defendants from building in a manner contrary to the general scheme for the benefit of all the original parties. *Coles v. Sims*, 1 Kay 56; 23 L. J., Ch., 37; 2 W. R. 48. Affirmed 18 Jur. 683; 6 De G. M. & G. 1; 23 L. J., Ch., 258; 2 Eq. Rep. 951.

1. A covenant relating to but not running with land is binding on an assign with notice. *Luker v. Dennis*, 47 L. J., Ch., 174; 7 L. R., Ch. D., 227; 37 L. T., N. S., 827; 26 W. R. 167.

2. The owners of a freehold property, on a sale of a plot of land to the plaintiff, covenanted with him not to allow any house built on the adjoining land to be used for the sale of liquor. They afterwards sold another plot to a person who granted a lease to the defendant, such lease purporting to allow the defendant to carry on the trade of a vendor of wines and spirits and bottled ale. The defendant at the date of his lease knew the existence of the former covenant. The defendant having commenced to carry on the sale of wines, etc.:—Held, that an assign with notice was in the same position as a party to the covenant, and that, therefore, the Court will not require substantial damages to be shown before granting an injunction to restrain a breach. *Richards v. Revitt*, 26 W. R. 166; 7 L. R., Ch. D., 224; 37 L. T., N. S., 632; 47 L. J., Ch., 472.

An assignee of land with notice of a covenant is subject in the same measure of relief as if he had been party to the covenant, and the covenantee suing on breach of the covenant is no more bound to prove substantial damage in one case than in the other. *Ib.*

3. A demised a plot of land for a term of forty years for the erection of a hotel, with a covenant that he, his heirs, or assigns, would not, during the term, let any house, building, or land for the erection of a hotel or inn, or for the sale of ale or beer or spirits, within a quarter of a mile of the plot of land so leased. A demised another plot of land to S., who covenanted that he would not allow any building to be erected thereon to be used for the sale of beer without the written authority of A., his heirs, or assigns. R., with notice of the covenants, purchased the reversion in S.'s lot, and afterwards bought up his lease. He afterwards commenced building a hotel thereon. Upon a bill by the owner of the hotel, a perpetual injunction was granted, during the continuance of his lease, to restrain R. from using the building as a hotel, or for the sale of beer. *Jay v. Richardson*, 8 Jur., N. S., 689; 31 L. J., Ch., 398; 10 W. R. 412; 6 L. T., N. S., 177; 30 Beav. 563.

4. A sub-tenant is liable to a restrictive covenant entered into by the purchaser of the freehold for himself and his assigns, though neither the sub-tenant nor his lessor has actual notice of it, and in spite of the provision of s. 2 of the Vendor and Purchaser Act, 1874, preventing the examination of the title to the freehold. In the conveyance in 1875 to F. of part of a building estate purchased by him, F. covenanted for himself, his heirs, executors, administrators, and assigns, with the owner or owners for the time being of the remainder of the property, not to carry on the trade of retailer of wine, spirits, or beer, on the land purchased. F. leased to D., who sub-leased to J., neither D. nor J. having actual notice of the restriction. J. opened a shop for the sale of wine and beer to be consumed off the premises. Upon a motion for an injunction by T., the purchaser of another part of the building estate:—Held, that J. was liable for

breach of the covenant. *Thornewell v. Johnson*, 50 L. J., Ch., 641; 44 L. T. 768; 29 W. R. 677.

5. In 1867 the plaintiffs conveyed to a purchaser in fee simple certain hereditaments and appurtenances adjoining their railway, and by the deed of conveyance the purchaser covenanted "for himself, his heirs, executors, administrators, and assigns, that he (the said purchaser) would not erect or build any erection or buildings of any kind whatsoever within ten feet of the roadway or viaduct of the plaintiffs without their permission in writing first had and obtained." In the following year the said purchaser conveyed the said hereditaments and appurtenances to a person since dead, the testator of the defendant B., and the said testator took and accepted the said conveyance without notice or knowledge of the said covenant other than such constructive notice (if any), as he might be deemed to have had by reason of the said deed of 1867, being a title deed of the premises. In 1869 the testator rebuilt the said hereditaments, and erected on the premises a hotel, part of which stood within ten feet of the roadway or viaduct of the plaintiffs, and he demised the said hotel and premises for fifty years upon a certain rent to a woman, who assigned the lease to the second defendant F. A covenant was contained in the lease to the effect that the lessee should not make any alteration in the premises without the lessor's consent in writing, but neither the lessee nor the defendants had any notice of the covenant in the conveyance of 1867 other than such constructive notice (if any) as before mentioned in the case of the testator. In 1881 the defendant F. increased the height of that part of the erection, which was within ten feet of the plaintiffs roadway or viaduct, having previously, in consideration of the payment of a sum of money, obtained the written authority of the defendant B. for so doing. The plaintiffs had no knowledge of this erection by the defendant B., or the alteration by the defendant F., until they were both completed in 1881:—Held, upon a special case, that the plaintiffs were entitled to an injunction to both the defendants requiring them to pull down the said erections; and that the defendant F. was not entitled to be indemnified by the defendant B. *London, Chatham, & Dover Railway Co. v. Bull*, 47 L. T. 413.

6. The former owners in fee of a residential estate and adjoining lands sold part of the adjoining lands to the defendant's predecessors in title, who entered into covenants with the vendors and their assigns restricting their right to build on and use the purchased land. The same vendors afterwards sold the residential estate to the plaintiffs' predecessors in title. The conveyance contained no reference to the restrictive covenants, nor was there any contract or representation that the purchasers of the residential estate were to have the benefit of them; there was, moreover, in the plaintiffs' conveyance a covenant limiting their use of the purchased property, but such covenant was not co-extensive with the covenants above mentioned. In an action by the plaintiffs to restrain the defendants, who had purchased the land first sold as above mentioned, with notice of the first-

mentioned restrictive covenants, from building in contravention of those covenants:—Held, that, although the plaintiffs were “assigns” of the original covenantees, they were not entitled to sue upon the original covenants. *Renals v. Cowlishaw*, 9 L. R., Ch. D., 125; 38 L. T., N. S., 503; 26 W. R. 754. Affirmed 11 L. R., Ch. D., 866; 48 L. J., Ch., 830.

1. The vendors of an estate sold part of it in 1863 to C., as a site for a public-house, and entered into a covenant with him that they would not sell any other portion of it without requiring the purchaser to enter into a covenant with them “not to erect thereon, or use, or permit to be used, any building erected thereon as a tavern, public-house, or beer-shop.” C. erected a public-house on his part, which he demised to N. In 1869 other portions of the estate were sold to a company, who afterwards sold to P., his conveyance containing a covenant with his vendors in the above terms. P. erected a house on one plot and leased it to F., who obtained a retail licence for the sale of beer off the premises:—Held, that, from the date of the sale to C., the rest of the property was subject to the restrictive covenant; that F. must be taken to have had constructive notice of it; that a beer-shop was a shop where beer was sold, independently of any other circumstance; that F. had broken the covenant; and that N. was entitled to sue in respect of such breach. *Nicoll v. Fenning*, 30 W. R. 95.

2. By a deed which recited that the plaintiff company were seised in fee of certain land not required for the purposes of their railway, the company conveyed the land to G. P. in fee, and G. P. covenanted that he, his heirs, and assigns would at any time thereafter, whenever the land might be required for the railway, and whenever thereunto requested by the company on a six months' notice, reconvey on receiving the same sum as that paid by G. P. Fourteen years afterwards the defendant purchased the lands from G. P.'s heir, with notice of the above covenant. The company then gave notice to the defendant to reconvey, and on his refusing brought an action against him for specific performance:—Held, by Kay, J., that in the present case the covenant did not create any estate or interest in land, and therefore was not obnoxious to the rule against perpetuities, and that specific performance must be decreed, the covenant being binding on an alienee with notice on the principle of *Tulk v. Moshay* (2 Ph. 774). But held, by the court of appeal, that as the covenant gave to the company an executory interest in land to arise on an event which might occur after the period allowed by the rules as to remoteness, it was invalid on the ground of remoteness. The doctrine of *Tulk v. Moshay* (2 Ph. 774) only applies to restrictive covenants, and not to covenants to do acts relating to the land. *London & South-Western Railway Co. v. Gomm*, 20 L. R., Ch. D., 562; 51 L. J., Ch., 530; 46 L. T. 449; 30 W. R. 620. Reversing 45 L. T. 505.

3. A purchaser of a piece of land with a well or spring upon it covenanted with the vendor, who retained land adjoining intended to be disposed of for building sites, to erect a pump and reservoir, and to supply water from

the well to all houses built on the vendor's land:—Held, that both the benefit and the burden of the covenant ran with the land, and that the case was not within the second resolution in *Spencer's case* (5 Rep. 16a; 1 Sm. L. C. 60), but if not, a sub-purchaser with notice of the covenant was bound by it. *Cooke v. Chilcott*, 3 L. R., Ch. D., 694; 24 L. T., N. S., 207.

4. Land was granted to J. in fee subject to a rent-charge. The grantee covenanted for himself, his heirs, executors, and administrators, that he, his heirs and assigns, would pay the rent, would erect buildings on the land, and would thereafter keep them in repair. The grantor afterwards assigned the rent-charge with the benefit of all covenants to the plaintiff, and the land and the buildings which had been erected came by assignment to A., who mortgaged them, subject to the covenants, to the defendants, who afterwards entered into possession. In an action on the covenant to repair:—Held, that the defendants were not liable, that the covenant did not run with the land, that it was a collateral affirmative covenant, and did not impose a burden on the land, so that the defendants could not, as assignees with notice, be compelled to perform it. *Haywood v. Brunswick Permanent Benefit Building Society*, 8 L. R., Q. B. D., 403; 51 L. J., Q. B., 73; 45 L. T. 699; 30 W. R. 299.

Cooke v. Chilcott (3 L. R., Ch. D., 694) questioned. *Tulk v. Moshay* (2 Ph. 774) explained. *Id.*

IV. EFFECT OF ALTERATION OF CHARACTER OF PROPERTY.

5. Where land is conveyed in fee by deed of feoffment, subject to a perpetual ground-rent, and the feoffee covenants for himself, his heirs, and assigns with the feoffor, the owner of adjoining lands, his heirs, executors, administrators, and assigns, not to use the land in a particular manner, with a view to the more ample enjoyment by the feoffor of such adjoining lands, and the subsequent acts of the feoffor, or of those claiming under him, have so altered the character and condition of the adjoining lands, that, with reference to the land conveyed, the restriction in the covenant ceases to be applicable according to the intent and spirit of the contract, a court of equity will not interpose to enforce the covenant, but will leave the parties to law. Whether upon such a covenant there could be any remedy at law against the assignees of the covenantor, *quære*. *Bedford (Duke) v. British Museum (Trustees of)*, 2 Myl. & K. 525; 2 L. J., N. S., Ch., 129.

6. A building estate was laid out in lots, which were sold by the owners of the estate to different purchasers, each of whom covenanted with the vendors, and with the owners of the other lots entitled to the benefit of the covenant, not to build a shop on his land, or to use his house as a shop, or to carry on any trade therein. The purchaser of one of the lots, who occupied his house as a private residence, brought an action against the purchaser of another lot, who was using his house as a beer-shop with an “off” licence, to restrain him from breaking his covenant, and for damages.

The defendant had, to the knowledge of the plaintiff, so used his house for three years before the action was commenced. There was evidence that several other houses built on others of the lots (one of them immediately opposite the plaintiff's house) had been for some time used as shops, notwithstanding the covenant, and that many of the houses adjoining the plaintiff's house were occupied, not each by a single tenant, but each by two families at weekly rents:—Held, that the character of the property had become so changed that the original purpose—the keeping the estate as a residential property—for which the covenant had been entered into had failed, and that it would not, under the circumstances, be equitable to enforce specific performance of the covenant. The principle of *Bedford (Duke) v. British Museum (Trustees of)* (2 Myl. & K. 552) applied. And the plaintiff not having proved any substantial damage, the action was dismissed with costs. *Sayers v. Collyer*, 24 L. R., Ch. D., 180; 52 L. J., Ch., 770; 48 L. T. 939; 32 W. R. 200.

1. A., by indenture, covenanted to lay out and preserve land in an ornamental manner, according to a certain plan, subject to such alteration as should be made or approved of by him, his heirs, or assigns, and as should not destroy the general beauty of the design, and, upon selling any part thereof, to require purchasers to enter into a covenant not to erect any messuage thereon so as to lessen the value of those already erected. B. agreed to purchase and build certain messuages on a line with each other on part of the land. After B. had built and taken a conveyance of two of such messuages, the agreement as to the remainder was cancelled, and the rest of the land conveyed to A., who had sold part of it to C., who commenced building several feet in advance of the line in which B. had built:—Held, that A. had power to vary the details of the plan, and that a purchaser from B. of one of the messuages built by him was not entitled to relief by injunction restraining C. from building in such manner. *Schreiber v. Creed*, 10 Sim. 9; 8 L. J., N. S., Ch., 346; 3 Jur. 625.

V. SALE IN LOTS. RIGHTS OF PURCHASERS INTER SE.

2. Where an estate is vested in trustees, who sell plots for building subject to restrictive covenants, each purchaser has an equity against the other purchasers to compel the observance of the covenants. *Eastwood v. Lever*, 12 W. R. 195.

In a suit to enforce such an equity the trustees are necessary parties, and the remaining purchasers ought to be represented on the record. *Id.*

Each allottee or purchaser from a building society entered into restrictive covenants with the trustees to whom the estate was conveyed, and who were the conveying parties to him, and it was covenanted that these covenants were to enure for the benefit of those entitled under conveyance to be made by the trustees, and that the trustees should be deemed trustees of the covenants for the benefit of those claiming under conveyances already made by

them. Every allottee or purchaser had notice of the scheme of the society, and of the regulations, provisions, and restrictions under which alone he could build upon his lot. With this notice the plaintiff and the defendant became allottees or purchasers. The defendant soon after built a large hotel, which was completed before the bill was filed, but later he began erecting stables with a large midden, or receptacle for manure, in front of the plaintiff's lots. The bill alleged the breaches of covenants complained of, and prayed for the plaintiff the benefit of the covenants entered into by the defendant with the trustees, or their allottees or purchasers; for an injunction against building in violation of those covenants and the plan; that the buildings already so erected might be pulled down, and damages might be awarded to the plaintiff. The Vice-Chancellor of the County Palatine of Lancaster at the hearing decreed that the only proper buildings were such as had been approved by the covenantees; he directed the demolition of buildings raised after the filing of the bill, and restrained the defendant from using the stables otherwise than as general outbuildings. The defendant appealed, and it was alleged that the trustees had sanctioned deviations from the general plan, and that the plaintiff had himself not strictly observed it:—Held, that, even if the defendant was not bound by the general plan, the plaintiff had an equity against him by force of the covenants he entered into with the trustees in the conveyance to him; that a deviation sanctioned by the trustees in breach of their duty could not displace the plaintiff's equity under that covenant; and that the plaintiff must be taken to have acquiesced, inasmuch as the hotel itself was built before the bill was filed, and he must have known that the stables were an indispensable adjunct to it, and the decree directing demolition was discharged. *S. C. non.* *Eastwood v. Levers*, 33 L. J., Ch., 355; 9 L. T., N. S., 615.

3. When houses were set out in a regular plan and each purchaser of a house covenanted with the former owners of the whole not to erect any building in advance of the general line of frontage:—Held, that a purchaser of one of such houses, to whom the benefit of such covenants was assigned, was entitled to a mandatory injunction to compel the purchaser of another house to pull down a bay window built in breach of such covenant, even without showing material damage. *Manners v. Johnson*, 45 L. J., Ch., 404; 1 L. R., Ch. D., 673; 24 W. R. 481.

4. A vendor of a piece of land took from the purchaser a covenant that he would not do, or suffer to be done, on the premises, anything which should be a nuisance to the vendor or his tenants, or the occupiers or owners of the adjoining property, or the houses to be built thereon. The purchaser, immediately after the sale, put up the piece of land again for sale by auction in lots, under conditions which required each purchaser to enter into a covenant in similar terms; and each of the purchasers did enter into a covenant with his vendor that he would not do, or suffer to be done, on any of the premises, anything which should, would, or might be deemed a nuisance to the original vendor, or the

occupiers or proprietors for the time being of the adjoining property or the houses to be built thereon:—Held, that by the word "adjoining" in the last-mentioned covenant was meant the property adjoining each lot, and not merely the property adjoining the whole piece of land originally sold; and that the owner of any lot was entitled to enforce the covenant against the owner of any other lot. *Harrison v. Good*, 11 L. R., Eq., 338; 40 L. J., Ch., 294; 24 L. T., N. S., 263; 19 W. R. 346.

The owner of one of the lots having made a free gift of the same to the committee of a district national school, for the purpose of having a national school erected thereon:—Held, that the word "nuisance" in the covenant must be restricted to its technical meaning; that the establishment of a national school is not a legal nuisance; and that the establishment of such a school on one of the above lots could not be restrained by the owner of a dwelling-house built on an adjoining lot, though his property would be depreciated thereby. *Id.*

1. Where the owner of one of a number of houses purchased for the same owner for building purposes conveyed them to separate alienees in such manner that the benefit of a covenant (entered into originally with the grantor) passed to each alienee; upon a breach injurious to one only of these alienees:—Held, that the party injured might sue alone, without joining the others. *Western v. McDermott*, 2 L. R., Ch., 72; 15 W. R. 265; 15 L. T., N. S., 641; 36 L. J., Ch., 76. Affirming 1 L. R., Eq., 499; 12 Jur., N. S., 366; 35 L. J., Ch., 190.

2. Covenant not to build within — feet of H. Street:—Held, on the evidence, that the omission of the number was accidental, not intentional, and that the covenantees might have had the covenant reformed on a bill. *Child v. Douglas*, 2 Jur., N. S., 950. And see *S. C. 1 Kay* 575, 560; 2 W. R. 461, 701; 2 Jur., N. S., 360; 5 De G. M. & G. 739.

The covenant was in a conveyance by vendors who retained other land adjoining to that conveyed, and afterwards sold part of it:—Held, that the second purchaser could assert all the rights which the vendors could have asserted, and could therefore have had the covenant reformed, and that no objection to this right arose from the doctrines of maintenance or champerty. *Id.*

In a proper case the Court would interfere on behalf of the second purchaser to restrain a breach of the covenant, whether in point of legal form the second purchaser could sue at law or not, and without regard to any difficulty arising on the exact form of the conveyance to him. *Id.*

The benefit of the covenant passes to the second purchaser without special mention. *Id.*

But *quære*, whether the second purchaser is entitled to enforce the covenant where there is no reciprocity between the vendors and the covenantee, the former having entered into no covenant as to not building, and having retained land which they might deal with so as to defeat the object of the covenant. *Id.*

And *quære*, generally, what are the rights of parties *inter se* each of whom has covenanted with the landlord, but who have neither cove-

nanted with each other, nor taken any covenant from the landlord to themselves. *Id.*

In consequence of the doubts on the last two points, the second purchaser's bill to enforce observance of the covenant dismissed without costs. *Id.*

3. A vendor, about to sell his estate in lots, entered into covenants by a deed (dated in 1827) with several purchasers whereby certain provisions were made as to the mode of building upon and laying out the estate according to a plan annexed, subject to such alterations as the vendor might make "as should not destroy the general beauty of the design." In 1833 S. entered into an agreement for the purchase of several lots, by which certain stipulations were made for the building of three houses, which were consistent with the terms of the deed of 1827. He built two of the houses, and obtained a conveyance to him, in which he entered into covenants as to those two similar to those in his agreement. S. sold those houses and abandoned his contract as to the remainder of his lots, which the vendor re-sold. The sub-purchaser from S. of the two houses was:—Held, not entitled to restrain the purchaser of the re-sold lot from building inconsistently with the terms mentioned in the agreement and covenant into which S. had entered. *Schreiber v. Creed*, 10 Sim. 9; 8 L. J., N. S., Ch., 346; 3 Jur. 625.

4. The plaintiffs, the trustees of a chapel, were the owners in fee of a piece of land, and the defendant was the owner in fee of an adjoining piece of land, which together formed part of an estate that had been laid out for building under a general scheme. The conveyances of the pieces of land respectively contained a covenant that certain stipulations would be observed and performed, one of which stipulations was that "nothing is to be erected within fifteen feet of the high-road, or within ten feet from any other road, except fences, and those not more than six feet high, and no house or part of a house is to be erected at a greater distance than fifty feet from the front building line." Before the plaintiffs' chapel was erected, a house was built on the defendant's land, the front of which was fifteen feet from the high-road. Afterwards the defendant began building a shop on his land in advance of the front of his house. The plaintiffs objected on the ground of the covenant, but the defendant built his shop and brought forward the walls seven feet in advance of his house, so as to be only eight feet from the high-road. The view of the plaintiffs' chapel was obstructed by the defendant's shop. The plaintiffs claimed an injunction to restrain the defendant, and damages. It appeared, however, that the plaintiffs' chapel was in advance of the lines mentioned in the above stipulation in some trifling respects, and that they had violated the stipulation that no house, or part of a house, was to be erected at a greater distance than fifty feet from the front building line, by carrying their chapel to a greater distance than fifty feet from the high-road, and by erecting an iron building at the rear of their chapel, so as to occupy the entire space between the chapel and the extent in depth of their ground. The defendant contended that, under the circumstances, the

plaintiffs were not entitled to the relief claimed by them:—Held, that the two covenants were essentially different (the one to observe the line of frontage being of a more important, and the other, as to building in the rear, being of a less important, character), and could be treated as separate covenants; that the plaintiffs were not prevented in equity from enforcing the covenant as to the frontage line, which they themselves had substantially observed; and that the injunction claimed must be granted, and the defendant's building removed. *Chitty v. Bray*, 48 L. T. 860.

1. Upon the sale in 1863 to A., for the purposes of a public-house, of part of an estate intended to be laid out for building, the trustees of the estate covenanted with A., his heirs and assigns, that they, their heirs and assigns, would not therefore sell any portions of the estate without requiring the purchaser to enter into a covenant "not to erect thereon or use or permit to be used any building to be erected thereon as a tavern, public-house, or beer-shop." Further portions of the estate were sold in 1870 by the then trustees to G., who covenanted with the vendors not to use or permit to be used any building erected on the land and premises intended to be thereby assured as a tavern, public-house, or beer-shop. The rest of the estate was sold to other persons. In 1879 H. purchased from G. part of the land comprised in G.'s purchase of 1870, and entered into a covenant with G., in terms similar to those of the covenant in the deed of 1870. I., a yearly tenant under H. of one of the houses, having obtained an "off licence," sold under it beer which was not drunk upon the premises:—Held, that the property was bound by the restrictive covenant entered into by the vendors in 1863, and that B., an assign of A., was entitled to an injunction and damages against H. and I. in respect of the breach of covenant in selling beer under an "off licence." *Nicoll v. Fenning*, 19 L. R., Ch. D., 258; 51 L. J., Ch., 166; 45 L. T. 738; 30 W. R. 95.

VI. WAIVER AND ACQUIESCENCE.

2. Distinction between the hearing of a cause and of interlocutory applications as to the amount of acquiescence which will preclude a plaintiff from obtaining the assistance of the Court. Distinction between the effect of a single waiver of a restrictive covenant by a landlord in favour of one of several tenants, as against the others, and a prior waiver of a right under such a covenant by the tenant as against himself. *Patching v. Dubbins*, 2 W. R. 2; 1 Kay 1; 23 L. J., Ch., 45; 17 Jur. 1113; 22 L. T. 116. Affirmed on appeal, 23 L. J., Ch., 45; 2 Eq. Rep. 71.

3. A party was entitled to the benefit of a covenant not to build more than eight feet high in the garden next door to his house, and not to allow trees or buildings over that height upon land lying in view of his house. In process of time tall trees were allowed to grow up, and cottages were built upon the latter land, and he, or those through whom he claimed, never interfered:—Held, that this non-interference could not operate to prevent his enforcing the covenant to restrain a building in the garden. *Western v. Macdermot*,

15 W. R. 265; 15 L. T., N. S., 641; 2 L. R., Ch., 72; 36 L. J., Ch., 76. Affirming 1 L. R., Eq., 499; 12 Jur., N. S., 366; 35 L. J., Ch., 190.

An injunction was granted at the suit of the owner of one of the houses restraining a breach of the covenants by the owner of another house, notwithstanding that small breaches of the covenants by other owners had not been interfered with, and that he himself had committed a small breach. *Id.*

4. Acquiescence in a trivial breach of covenant does not preclude a plaintiff from relief in respect of a breach of an important character. *Richards v. Revitt*, 7 L. R., Ch. D., 224; 37 L. T., N. S., 632; 47 L. J., Ch., 472; 26 W. R. 166.

When the vendors of land have covenanted with the purchaser against the carrying on of certain trades upon other parts of the land, the purchaser is not prevented from obtaining an injunction against an assignee of other part of the land because he has not attempted to prevent previous unimportant breaches of the covenant. *Id.*

5. On a conveyance by S. to T. of land in 1845, T. covenanted not to carry on trade of a licensed victualler or beer-shop-keeper on the premises. In March 1852 T. commenced to carry on the business of a beer-shop-keeper, and in May of the same year S. gave notice to T. to discontinue such business. The business was, however, carried on, and T. applied on two occasions for a spirit licence. In 1853 T. sold the business to H. In 1854 S. filed a bill to restrain T. and H. from carrying on either of the prohibited trades:—Held, that T. having before bill filed parted with her interest, no injunction could be granted against her; and delay and acquiescence having taken place, no injunction would be granted against H. as to the trade of beer-shop-keeper. But injunction as to commencing or carrying on trade of licensed victualler granted against H. *Scarabrick v. Tunbridge*, 3 Eq. Rep. 240.

6. Acquiescence in the violation of a covenant to a certain extent:—Held, a sufficient objection to an interlocutory application for an injunction against a greater violation of it. *Child v. Douglas*, 5 De G. M. & G. 739. And see S. C. 1 Kay 560, 575; 2 W. R. 461, 701; 2 Jur., N. S., 350, 950.

Where on a motion for an injunction to restrain an alleged breach of covenant the question in dispute appeared doubtful:—Held, that the burden of proof was on the plaintiff to show that the balance of convenience was in favour of granting the injunction. *Id.*

Sale in Lots. 7. The owner of an estate covered it with houses, and sold some of them, subject to a covenant not to carry on any trade, business, or calling therein, or to otherwise use, or suffer the same to be used, to the annoyance, nuisance, or injury of any of the houses on the estate:—Held, that the carrying on of a girls' school in one of the houses was a breach of the covenant, and that the covenantee had not waived the benefit of the covenant, though he had permitted other houses, held under the like covenant, to be used as schools. *Kemp v. Sober*, 1 Sim., N. S., 517; 20 L. J., N. S., Ch., 602; 15 Jur. 458.

8. An estate was sold in lots, each lot consisting of a house and some adjacent land.

The fee was conveyed to the purchasers, who covenanted respectively with the vendors that the front or elevation of the houses should not be altered without the vendors' consent in writing, and that the premises should not be used as a public-house, beershop, temperance hotel, etc.:—Held, that the vendors had not waived their right to insist upon the observance of this covenant by forbearing for periods of six and nine months respectively from taking proceedings against two of the purchasers who sold beer upon their premises, but in such a way that the sale was not visible to the occupants of the other houses. *Mitchell v. Steward*, 1 L. R., Eq., 541; 35 L. J., Ch., 393; 14 W. R. 453.

1. Where an estate is vested in trustees, who sell plots for building subject to restrictive covenants, each purchaser has an equity against the other purchaser to compel the observance of the covenants. *Eastwood v. Lever*, 12 W. R. 195. S. C. *nom. Eastwood v. Levers*, 33 L. J., Ch., 355; 9 L. T., N. S., 615.

Such equity may be lost by acquiescence. *Ib.*

2. Where a vendor, having taken from each of several purchasers of plots of building land, formerly the same estate, a covenant to build only in a specified manner, has permitted, without interference, material breaches of the covenant to be committed by some of the purchasers, he cannot obtain an injunction to compel another purchaser to observe the same covenant; and there is no difference in the case where the covenant is not only a covenant by each purchaser with the vendor, but also a covenant by each purchaser with all the others, nor in the case where the breaches have been committed before the defendant became a purchaser, and executed the deed of covenant. *Peck v. Matthews*, 3 L. R., Eq., 515; 16 L. T., N. S., 991; 15 W. R. 689.

3. On the sale of an estate in building plots, purchasers were required to enter into a covenant with the vendors and with each other that plans of all buildings to be erected on the estate should be submitted for approval to the vendors or to a committee, and that no building should be erected the plan of which had not been approved. And it was provided, that within seven days after the submission of such plan, the approval or disapproval should be signified in writing to the party submitting the plan; and that such approval should not be withheld unless for the sake of preserving uniformity of building or other good causes or considerations. On 23rd June, 1869, a purchaser of one plot began, without submitting a plan, to erect buildings the plan of which would not have been approved had it been submitted. Remonstrances were made and notices served on him during July and August, and on 3rd September the vendors filed a bill on behalf of themselves and all other persons entitled to benefit of covenants (except the defendant) praying for mandatory injunction and damages:—Held, that the erection of a temporary hovel on another part of the estate, which had not been interfered with by the plaintiffs, was not a waiver of the covenant; and that the vendors were not bound to obtain the consent of all the parties entitled to the benefit of the covenant in order to file such a bill. *Kilbey v. Haviland*, 24 L. T., N. S., 353; 19 W. R. 698.

A mandatory injunction was, however, re-

fused, but the Court considering that he had done damage by his building, and that he had broken his covenant, ordered him to pay 10*l.* for the damages, and the costs of the suit. *Ib.*

4. Where all the purchasers of an estate were bound by restrictive covenants not to use their houses otherwise than as private residences, and the vendor had given permission to one of the purchasers to open a school in his house, this was held not to be a waiver of the covenant as to another purchaser whose house was at some distance. *German v. Chapman*, 7 L. R., Ch. D., 271; 47 L. J., Ch., 250; 37 L. T., N. S., 685; 26 W. R. 149. Reversing 25 W. R. 802; 37 L. T., N. S., 265.

5. On a sale of part of the C. estate, the purchasers entered into a covenant with the vendors, "their and each of their heirs and assigns, and also separately with the owners and owner, lessors and lessees, for the time being, or other the persons or person for the time being entitled to the receipt of the rents and profits of any part of" the C. estate, against (*inter alia*) keeping a beershop on any part of the premises sold. In an action brought by subsequent purchasers of the C. estate to restrain a breach of this covenant:—Held, on the evidence adduced, that they had lost their right to bring an action by long-continued acquiescence in breaches of the covenant both by the defendant and other similar covenantors, and consequently were not entitled either to an injunction or to any damages. *Kelsey v. Dodd*, 52 L. J., Ch., 34.

Semble, also, that they were not entitled to sue on the covenant at law, even for nominal damages. *Ib.*

6. On the sale of an estate in plots for building purposes, a deed of covenant was executed by all the purchasers whereby they covenanted with the trustees, each purchaser covenanting with regard to the plot purchased by him, to observe certain stipulations as to the number of houses to be built on the plots, the building lines, and other similar matters. The plaintiff was owner of certain of these plots, on which a house had been erected and grounds laid out. The defendant had contracted for the purchase of some adjoining plots, on which he was commencing to build more houses than were allowed by the deed of covenant, and in a position at variance with the building line therein laid down. The houses so built would overlook the plaintiff's grounds somewhat more than if built within the building line. The plaintiff claimed an injunction, and the defendant pleaded that in several other instances the original vendors, who were trustees under the deed of covenant for all the purchasers, had allowed considerable breaches of the covenants to be committed without interference, that they were therefore disentitled to enforce the covenants against the defendant, and that the plaintiff, as claiming under them, could not be in any better position. It also appeared that the plaintiff's own house was built two feet in advance of the building line:—Held, that as the breaches of covenant allowed by the trustees were committed in relation to other portions of the property not affecting the plaintiff's enjoyment of his plots, they could not be set up against him, and that the

deviation with regard to his own house was too trifling to affect his right. *Jackson v. Winniffrith*, 47 L. T. 243.

1. Land having been laid out for building, and streets projected across it, the defendant bought one plot with a right of way over the projected streets, the vendors reserving a similar privilege over the street in front of the plot sold; and the defendant covenanted with the vendors that he would not erect any building on the said plot within the distance of six feet from the intended streets. The original vendors, or their assigns, not having taken proceedings against the first purchaser, who had built upon his land in such manner that it was very doubtful whether or not he had thereby broken his covenant:—Held, that this was not such an acquiescence as would prejudice their right to restrain a breach of his covenant. *Child v. Douglas*, 1 Kay 560. And see S. C. 1 Kay 575; 2 W. R. 461, 701; 2 Jur., N. S., 350, 950; 5 De G. M. & G. 739.

2. An estate was laid out for building and sold in lots, and the purchasers of the different lots executed a deed by which they covenanted with the vendor not to erect any buildings beyond a certain line, the covenant being subject to a proviso that it should not be personally binding on any one except in respect of breaches committed during his sole or joint seisin of the lot to which it related. In 1872 the purchaser of Lot B built upon it a bakehouse beyond the line. The plaintiff about the same time bought the opposite Lot A. No complaint appeared to have been made by any one of the erection of the bakehouse until his action was commenced. In 1876 the defendant purchased the residue of a mortgage term in Lot B, and in 1877 commenced building upon that plot a wooden stable beyond the line. The plaintiff, as soon as he heard of this, wrote to complain on the 17th March 1877, at which time the stable was built up to the eaves. The defendant proceeded to complete the stable, which was finished on the day on which the plaintiff commenced an action for an injunction to restrain the defendant from allowing any buildings to continue on his land beyond the line:—Held, by Bacon, V.-Ch., that a mandatory injunction ought to be granted to compel the removal of all the erections on the defendant's plot beyond the line. *Gaskin v. Balls*, 13 L. R., Ch., 324; 28 W. R. 552.

Held, on appeal, that the injunction ought not to extend to the building which had been allowed to remain for five years without complaint, but must be confined to buildings erected since the defendant acquired his title. *Ib.*

The Judicature Act, 1873, s. 26, sub-s. 8, has not altered the principles on which the Court acts in granting injunctions. *Ib.*

VII. OTHER CASES.

3. A purchaser in fee of a piece of land cannot, by the purchase of a lease granted of the same land, avoid covenants which his vendor had taken from his tenants over a wide area, in aid of covenants which he had entered into with third parties. *Jay v. Richardson*, 8 Jur.,

N. S., 689; 31 L. J., Ch., 398; 10 W. R. 412; 6 L. T., N. S., 177; 30 Beav. 563.

4. Where property put up for sale is described merely as held by the vendor as assignee under a lease, the purchaser cannot object to complete on the ground that the lease contains a covenant not to carry on obnoxious trades. *Grosvenor v. Green*, 5 Jur., N. S., 117; 28 L. J., Ch., 173.

5. The rule that a purchaser who does not inquire into his vendor's title is affected with notice of what appears upon it, applies equally to a yearly tenant as to the purchaser of a greater interest. *Wilson v. Hart*, 1 L. R., Ch., 463; 12 Jur., N. S., 460; 35 L. J., Ch., 569; 14 W. R. 748; 14 L. T., N. S., 499. Affirming 2 Hem. & M. 551.

6. The owner of land sold a part of it and entered into an agreement with the purchaser that an adjoining plot of land "should never be hereafter sold, but left for the common benefit of both parties and their successors":—Held, that this was merely an agreement that the plot of land should be left open, in the state in which it then was, for the common advantage of both parties, and that such an agreement did not contravene any rule of law, but gave the person who might hold the vendee's land the right to enforce the obligation against the person who might hold the vendor's land. Thus the former might apply to a court of equity to order the removal of a structure that had been placed on the plot in violation of the agreement. *McLean v. McKay*, 5 L. R., P. C., 327.

7. On an agreement to sell part of a vendor's land, the vendor and purchaser entered into mutual covenants prohibiting building, except in a specified manner, on the sold and unsold parts, with a stipulation for payment of liquidated damages in case of breach of covenant:—Held, first, that the subsequent owner of the unsold part, claiming through the grantor by means of deeds, one of which referred to the deed containing the prohibitory clause, but not to that clause, was bound by the prohibition in equity. Secondly, that the circumstance of the grantor not having performed a covenant to obtain for the grantee a direct covenant from the former purchaser did not constitute a defence, it not appearing that any application had been made to the grantor for that purpose. Thirdly, that notice of a right to prevent building, and of an intention to enforce it, given before any expense was incurred, followed by a bill for an injunction, though not filed till four months afterwards, was sufficient to exclude a defence on the ground of laches, it appearing that the plaintiff could not sooner establish his right to enforce the prohibition. Fourthly, that the clause as to liquidated damages did not exclude the interference of the Court by interlocutory injunction. *Coles v. Sims*, 5 De G. M. & G. 1; 18 Jur. 683; 23 L. J., Ch., 258; 2 Eq. Rep. 951. Affirming 1 Kay 56; 23 L. J., Ch., 37; 2 W. R. 48.

8. The owners in fee of a residential estate and adjoining lands sold part of the adjoining lands to the defendant's predecessors in title, who entered into covenants with their vendors, their heirs and assigns, restricting their right to build on and use the purchased land. The same vendors afterwards sold the residential

estate to the plaintiff's predecessors in title. The conveyance contained no reference to the restrictive covenants, nor was there any contract or representation that the purchasers were to have the benefit of them:—Held, that the plaintiffs were not entitled to restrain the defendants from building in contravention of the restrictive covenants entered into by their predecessors in title. *Renals v. Cowlishaw*, 11 L. R., Ch. D., 866; 48 L. J., Ch., 830. Affirming 9 L. R., Ch. D., 125; 38 L. T., N. S., 503; 26 W. R. 754.

1. A., the owner of land which it was intended to let for building, with ornamental grounds, enters into an agreement with B. for selling to him the lots 2, 3, 4, and 5, subject to a certain condition as to the distance from the boundary of the land sold at which the houses should be built. He afterwards conveys to B. lots 2 and 3, the covenants in the conveyance being according to the terms of the agreement. Shortly after B. surrenders up the agreement to A. as to lots 4 and 5, and these lots are afterwards sold to C., who builds upon them at a less distance from the boundary than was stipulated in the original agreement between A. and B. B., in the meanwhile, had sold the house on lot 3 to D.:—Held, that the latter had no right against C. under the agreement originally entered into between A. and B. as to the mode of using the lots 2, 3, 4, and 5 when sold together. The case was also rested in some measure upon a general deed entered into by A. for the laying out and management of the property, and particularly a clause binding him to exact from the purchaser of every lot a covenant so to use his lot as not to deteriorate the value of those contiguous, and to this deed a plan was annexed. This deed was not signed by B., the plaintiff, and it was held with reference to this part of the case, that the plan was not intended to be binding in all its details, and that the provision against deterioration of value was of too vague and uncertain a nature to afford itself a ground of suit. *Schreiber v. Creed*, 10 Sim. 9; 8 L. J., N. S., Ch., 346; 3 Jur. 625.

2. In a sale by the Court the particulars of sale contained certain reservations and stipulations as to the property, and one of the conditions of sale provided that the conveyances should contain covenants by the purchasers for securing the liabilities and rights under such reservations and stipulations, the form of such covenants, in case of dispute, to be settled by the judge. A dispute having arisen between a purchaser and the vendor concerning the form of the covenant, the judge settled the covenant, adding a proviso that if the purchaser assigned his purchase, and the assignee entered into a similar covenant, the purchaser should be freed from further liability:—Held, that the vendor was entitled to an unqualified covenant, and that the proviso must be struck out. *Pollock v. Rabbits*, 21 L. R., Ch. D., 466; 31 W. R. 150.

The order of a judge settling the form of a conveyance is subject to appeal. *Id.*

XIX. Indemnity.

See also IX. ante—XV. iv. ante—XXII. i. 9 post.

3. The Court will not compel a vendor to give an indemnity unless vendor and purchaser have contracted for it. *Aylett v. Ashton*, 1 Myl. & C. 105; 5 L. J., N. S., Ch., 71.

4. Upon supersedeas by consent, a purchaser is entitled to be indemnified against judgments outstanding before the bankruptcy. *Exp. Lardour*, Mont. & Bli. 89; 2 L. J., N. S., Bky., 15.

5. Purchaser not entitled to compensation where the misdescription consists in stating that the premises sold were in the joint occupation of A. and B. as lessees, the fact being that the premises had been demised to C., and by C. assigned to A., who was, together with B., in the occupation of them at the time of sale. The purchaser could not, in this case, be compelled to accept an indemnity. *Ridgway v. Gray*, 1 Macn. & G. 109; 1 H. & Tw. 195.

6. A. seised in fee of premises subject to quit-rent, in 1793 sold a portion, then in possession of B., his attorney; and by the deed of conveyance, which recited that A. was seised of other premises, which, with those conveyed, were subject to a quit-rent, and that B. had agreed to indemnify A. and the other premises therefrom, B. covenanted to pay the quit-rent of all the premises, and indemnify A., etc.:—Held, in a suit by the assignee of the unsold lands against a volunteer claimant under B., that the sold lands were specifically bound to indemnify the unsold lands against the payment of the quit-rent. *Hatton v. Waddy*, 2 Jones 541.

Semble, the proper form of indemnity is a grant of a rent-charge in fee, equal in amount to the quit-rent, and to be issuing out of the sold lands. *Id.*

7. Estates being sold by auction in lots under conditions, one of which expressed that they were subject to the perpetual payment of 120*l.* a-year to the curate of N., but that the same and the perpetual annual payment of 20*l.* to the hospital of C. were in future to be charged upon, and paid by, the purchaser of lot 1 only, the purchaser of the other lots are entitled, not to an absolute exoneration, but to an indemnity from the purchaser of lot 1. Nature of the indemnity which they may require. *Casamajor v. Strade*, 2 Swan. 347; 1 Wils. 428. See also Jac. 630.

8. A tenant for life of a real estate, the trustees of which were empowered to sell it at his request and by his direction, entered into a contract to sell it. The estate was subject, with others, to a charge for younger children. The tenant for life died without issue, and the fee of the estate passed under his will:—Held, that the purchaser, on waiving the objection as to the charge, was entitled to a specific performance against the representatives of the vendor, but he was not entitled either to an indemnity against the charge or to compensation. *Bainbridge v. Kinnaird*, 32 Beav. 346; 9 Jur., N. S., 862; 11 W. R. 608; 8 L. T., N. S., 447.

9. A vendor of freehold property, who, on his own purchase of it, had entered into a covenant to observe the covenants entered into

with a former vendor, and which prohibited building on the land, put it up for sale, pursuant to particulars and conditions, noticing the existence of the covenant, but not stipulating that the purchaser should enter into any covenant on the subject. On a bill for specific performance, filed by the purchaser:—Held, that the plaintiff was not entitled to a conveyance, unless on the terms of giving or providing for the vendor a sufficient indemnity against any breach of the covenant on the part of the plaintiff, his heirs, appointees, or assigns. *Mozhay v. Inderwick*, 1 De G. & Sm. 708.

Held, also, that a covenant on the part of the plaintiff, his heirs, executors, administrators, appointees, and assigns, with the defendant, his heirs, executors, and administrators, to the same effect, *mutatis mutandis*, as the covenant entered into by the vendor on his own purchase, ought to be considered as a sufficient indemnity. *Ib.*

1. A. contracted to sell to B. the fee simple, clear of incumbrances. B., aware that on a former occasion an attempted sale had gone off in consequence of A.'s wife refusing to bar her dower, asked as to this, and was informed that she would join. Afterwards she refused to join:—Held, that B. was entitled to compel a specific performance, with a compensation and an indemnity against the right to dower. *Wilson v. Williams*, 3 Jur., N. S., 810.

Semble, a proper indemnity would be to retain in court a third part of the purchase-money, the dividends to be paid to A. and his assigns during the joint lives of himself and wife; and if she survived A., to B. during her life; and upon her decease, the capital so retained in court to be paid to the husband. *Ib.*

2. Vendor, having lost title deeds, agrees to give real security for title:—Held, that personal security is not sufficient, and that he must purchase real estate for that purpose. *Walker v. Barnes*, 3 Madd. 247.

XX. Costs, Expenses, and Stamps.

- I. *Costs of Investigation of and Reference as to Title*, 7298.
- II. *Costs of and Incident to Conveyance*, 7299.
- III. *Stamps*, 7300.
- IV. *Of Attested Copies*. See XVI. IV. *ante*.
- V. *Costs of Suits*. See SPECIFIC PERFORMANCE, XVI.
- VI. *On Sales by the Court*. See XXIV. IV.—XXIV. VI.—XXIV. XIII. *post*.
- VII. *On Sale of Copyholds*. See XXI. VI. *post*.

I. COSTS OF INVESTIGATION OF AND REFERENCE AS TO TITLE.

3. Costs of perpetuating testimony of will allowed to purchaser. *Mackrell v. Hunt*, cited 2 Madd. 37.

4. In the case of purchasers from the assignees of a bankrupt, the rule as to the costs of investigating the title is similar to that governing sales under decrees of courts of equity. *Re Page*, 1 Dr. & Wal. 31.

5. Where title deeds are in the hands of persons residing in the country, the vendor must bear the expense of the purchaser's solicitor sending a clerk to compare the abstract with the deeds. *Hughes v. Wynne*, 8 Sim. 85. Affirmed 1 Jur. 720.

6. Construction of a contract, that a reference of the expenses was confined to the expense of the conveyance; but the evidence of the attorney was admitted for the defendant to prove the intention of both parties, according to verbal instructions, that the plaintiff, the purchaser, should also pay the expenses of making out the defendant's title. *Ramsbottom v. Gosden*, 1 Ves. & B. 165.

7. Words construed so as to have some meaning taken rather than rejected: therefore, vendor proposing a price clear of all expenses, construed that the purchaser should bear the expense of making out the title, the law imposing on him the expense of the conveyance. *Stratford v. Bosworth*, 2 Ves. & B. 341.

8. Upon a bill praying a specific performance, "if a good title could be made," and the decree accordingly, the Master reported that such title could not be made, and the plaintiff then consented to waive all objections to title:—Held, that he might do so, but, being aware at the hearing of the objections, he must pay the costs of going on to investigate the title. *Bennett v. Fowler*, 2 Beav. 302.

9. When plaintiff neglects to make out title to purchaser, the latter will be allowed to make it out himself, and deduct expense from purchase-money. *Harding v. Middleton*, 1 Hog. 80.

10. By the same instrument, the plaintiff agreed to sell an estate to the defendant, and the defendant agreed to sell another estate to the plaintiff. The defendant being unable to make a good title to his estate, resisted the performance of his agreement to purchase the plaintiff's estate, on the ground that the agreement was intended to take effect only on the basis of a mutual exchange, and he failed in that defence (2 Myl. & K. 251). On a reference to inquire as to the plaintiff's title, the Master found that the plaintiff could make a good title; but he did not find that he could make such title before the filing of the bill, the consideration of the time at which the plaintiff's title could be made having been expressly excluded, at the hearing, from the terms of the reference:—Held, that the defendant was liable to the costs of investigating the title in the Master's office. *Croome v. Lediard*, 2 Myl. & K. 293; 3 L. J., N. S., Ch., 98.

11. Bill by a purchaser praying specific performance upon the terms of the vendor deducing a good title, at her own expense, in the ordinary way, dismissed, the Court being of opinion, upon the construction of a series of letters, and upon the fact of the abstract of title having been delivered to the purchaser in the first instance, that the vendor entered into the negotiation only upon this footing, namely, that she should deliver an abstract of title, and verify it so far as she had the means in her possession at her own expense, but that the purchaser, if upon perusal of the abstract he were satisfied with the title, should be at the expense of completing its verification. *Thomas v. Blackman*, 1 Colly. 301.

12. A purchaser, discharged by reason of bad

title, is entitled to the cost of counsel's opinion on the title, and of the preparation of the case for counsel. *Barton v. Dornes*, Fl. & K. 633; 4 Ir. Eq. R. 607.

1. The conditions of sale requiring purchaser to pay the expenses of all assignments and surrenders of terms, etc.:—Held, that the purchaser must pay the expenses of perusal and execution. *Johnson v. George*, 2 Jur. 886.

2. Title established before Master, not being clear on abstract, vendor pays costs. — *v. Collinge*, cited 3 Ves. & B. 143. n.

3. Costs to a purchaser; the vendor having established his title before the Master after contest, upon a different ground from that in the abstract delivered. *Fielder v. Higginson*, 3 Ves. & B. 142

4. Where a vendor has not furnished a complete abstract until after a general reference as to title, he will have to pay the costs of the reference, although no defect of title is discovered upon the inquiry, except such as was already known to the purchaser. *Wilson v. Williams*, 3 Jur., N. S., 810.

5. A. entered into a written contract for the sale of an estate to B. B. declined to perform the contract, on the ground of inadequacy of value. In a suit by A. against B. for a specific performance, by a decree, dated in April 1851, it was declared that A. was entitled to a specific performance of the agreement, and a reference was made to the Master to inquire whether A. could make a good title; and if so, to state when such good title was first shown, and costs were reserved. The Master found that a good title was made, and that it was first shown in April 1852:—Held, that A. was entitled to the costs of the reference to the Master. *Abbott v. Swoorder*, 22 L. J., Ch., 236.

6. A decree for specific performance of a contract to purchase with a reference as to title having been made against the purchaser:—Held, that he was bound to pay the costs of having the title investigated in chambers. *McNichol v. Kay*, 4 W. R. 801.

II. COSTS OF AND INCIDENT TO CONVEYANCE.

7. Expense of conveyance falls on the purchaser if no particular stipulation. *Bolton (Duke) v. Williams*, 2 Ves. J. 155; 4 Bro. C. C. 297.

8. Construction of a contract, that a reference of the expenses was confined to the expense of the conveyance; but the evidence of the attorney was admitted for the defendant to prove the intention of both parties, according to verbal instructions, that the plaintiff, the purchaser, should also pay the expense of making out the defendant's title. *Ramsbottom v. Goaden*, 1 Ves. & B. 165.

9. The conditions of sale requiring purchaser to pay the expenses of all assignments and surrenders of terms, etc.:—Held, that the purchaser must pay the expenses of perusal and execution. *Johnson v. George*, 2 Jur. 886.

10. A vendor agreed to surrender, or procure some person to surrender, and the costs of the surrender were to be paid by the purchaser. It was found necessary to procure a surrender

under the Trustee Act:—Held, that the costs of the proceedings ought to be paid by the vendor. *Bradley v. Muntion*, 16 Beav. 294.

11. A condition of sale, which stated that "the purchasers should have proper surrenders, conveyances, and assignments of the premises at their own expense," did not bind them to bear the expense of procuring the concurrence of all proper parties. Where, therefore, it was necessary for the heir of a trustee to be admitted on the court rolls, the fine and fees on that admission were ordered to be paid by the vendors. *Paramore v. Greenslade*, 17 Jur. 1064.

12. On the sale of an estate under an order of court, one of the conditions provided, that if the purchaser should require a conveyance of any outstanding legal estate which should not have been referred to or noticed in any of the abstracted deeds or other documents dated within the last thirty years, or any of outstanding term, all the expenses attending the getting in and conveyance of such estate should be borne by the purchaser. The estate was in 1823 conveyed to trustees for a term of 1,000 years, to secure the payment of a sum of money, the payment of which was under orders of court provided for. The purchaser of the estate required an assignment of the term from the representative of the surviving trustee, on the ground that it was not satisfied, but he refused to pay the costs of such assignment:—Held, that the purchaser was entitled to an assignment of the term, the costs of which, not having been provided for by the conditions of sale, must be borne by the vendors. *Stronge v. Hanks*, 2 Jur., N. S., 388.

13. A. and B., tenants for life in possession and remainder, with remainder to the first and other sons of B. in tail male; the first son of B., being then an infant, agreed to sell the premises to C. for a certain sum, and C. agreed to buy the same if they could obtain an Act of Parliament so to enable them, C. agreeing also to bear all the expenses incident to and consequent on his proposal to purchase, and the negotiations consequent thereon and the obtaining the Act of Parliament, etc., "and all other expenses whatsoever of A. and B., in consequence of the sale, or arising out of or in anywise relating thereto." The Act of Parliament was obtained, vesting the estate in trustees for sale, upon trust to convey according to the terms of the agreement, reciting the words thereof; and directing that the purchase-money should, in the first instance, be invested in the purchase of stock until it could be invested in the purchase of real estate, to be held upon the original trusts:—Held, that the expenses of reinvesting the purchase-money in real estates were not such expenses as C. was, under the agreement, bound to pay, as being incidental, etc., to the sale:—Held, also, that though the estate was vested in trustees for sale, yet that A. and B. were necessary parties to the conveyance, and that they should enter into covenants for title, notwithstanding the exceptions from the saving clause of the Act of Parliament, which it was held did not extend to the acts of the testator, but only to the acts of his devisees and heir-at-law, etc. *Esop. Wills*, 6 Jur. 936.

14. A. being tenant for life of an estate, with remainder to his sons successively in tail male,

with a former vendor, and which prohibited building on the land, put it up for sale, pursuant to particulars and conditions, noticing the existence of the covenant, but not stipulating that the purchaser should enter into any covenant on the subject. On a bill for specific performance, filed by the purchaser:—Held, that the plaintiff was not entitled to a conveyance, unless on the terms of giving or providing for the vendor a sufficient indemnity against any breach of the covenant on the part of the plaintiff, his heirs, appointees, or assigns. *Mozhay v. Inderwick*, 1 De G. & Sm. 708.

Held, also, that a covenant on the part of the plaintiff, his heirs, executors, administrators, appointees, and assigns, with the defendant, his heirs, executors, and administrators, to the same effect, *mutatis mutandis*, as the covenant entered into by the vendor on his own purchase, ought to be considered as a sufficient indemnity. *Ib.*

1. A. contracted to sell to B. the fee simple, clear of incumbrances. B., aware that on a former occasion an attempted sale had gone off in consequence of A.'s wife refusing to bar her dower, asked as to this, and was informed that she would join. Afterwards she refused to join:—Held, that B. was entitled to compel a specific performance, with a compensation and an indemnity against the right to dower. *Wilson v. Williams*, 3 Jur., N. S., 810.

Semble, a proper indemnity would be to retain in court a third part of the purchase-money, the dividends to be paid to A. and his assigns during the joint lives of himself and wife; and if she survived A., to B. during her life; and upon her decease, the capital so retained in court to be paid to the husband. *Ib.*

2. Vendor, having lost title deeds, agrees to give real security for title:—Held, that personal security is not sufficient, and that he must purchase real estate for that purpose. *Walker v. Barnes*, 3 Madd. 247.

XX. Costs, Expenses, and Stamps.

- I. *Costs of Investigation of and Reference as to Title*, 7298.
- II. *Costs of and Incident to Conveyance*, 7299.
- III. *Stamps*, 7300.
- IV. *Of Attested Copies*. See XVI. IV. *ante*.
- V. *Costs of Suits*. See SPECIFIC PERFORMANCE, XVI.
- VI. *On Sales by the Court*. See XXIV. IV.—XXIV. VI.—XXIV. XIII. *post*.
- VII. *On Sale of Copyholds*. See XXI. VI. *post*.

I. COSTS OF INVESTIGATION OF AND REFERENCE AS TO TITLE.

3. Costs of perpetuating testimony of will allowed to purchaser. *Mackrell v. Hunt*, cited 2 Madd. 37.

4. In the case of purchasers from the assignees of a bankrupt, the rule as to the costs of investigating the title is similar to that governing scales under decrees of courts of equity. *Re Page*, 1 Dr. & Wal. 31.

5. Where title deeds are in the hands of persons residing in the country, the vendor must bear the expense of the purchaser's solicitor sending a clerk to compare the abstract with the deeds. *Hughes v. Wynne*, 8 Sim. 85. Affirmed 1 Jur. 720.

6. Construction of a contract, that a reference of the expenses was confined to the expense of the conveyance; but the evidence of the attorney was admitted for the defendant to prove the intention of both parties, according to verbal instructions, that the plaintiff, the purchaser, should also pay the expenses of making out the defendant's title. *Ramsbottom v. Gosden*, 1 Ves. & B. 165.

7. Words construed so as to have some meaning taken rather than rejected: therefore, vendor proposing a price clear of all expenses, construed that the purchaser should bear the expense of making out the title, the law imposing on him the expense of the conveyance. *Stratford v. Bosworth*, 2 Ves. & B. 341.

8. Upon a bill praying a specific performance, "if a good title could be made," and the decree accordingly, the Master reported that such title could not be made, and the plaintiff then consented to waive all objections to title:—Held, that he might do so, but, being aware at the hearing of the objections, he must pay the costs of going on to investigate the title. *Bennett v. Fowler*, 2 Beav. 302.

9. When plaintiff neglects to make out title to purchaser, the latter will be allowed to make it out himself, and deduct expense from purchase-money. *Harding v. Middleton*, 1 Hog. 80.

10. By the same instrument, the plaintiff agreed to sell an estate to the defendant, and the defendant agreed to sell another estate to the plaintiff. The defendant being unable to make a good title to his estate, resisted the performance of his agreement to purchase the plaintiff's estate, on the ground that the agreement was intended to take effect only on the basis of a mutual exchange, and he failed in that defence (2 Myl. & K. 251). On a reference to inquire as to the plaintiff's title, the Master found that the plaintiff could make a good title; but he did not find that he could make such title before the filing of the bill, the consideration of the time at which the plaintiff's title could be made having been expressly excluded, at the hearing, from the terms of the reference:—Held, that the defendant was liable to the costs of investigating the title in the Master's office. *Croome v. Lediard*, 2 Myl. & K. 293; 3 L. J., N. S., Ch., 98.

11. Bill by a purchaser praying specific performance upon the terms of the vendor deducting a good title, at her own expense, in the ordinary way, dismissed, the Court being of opinion, upon the construction of a series of letters, and upon the fact of the abstract of title having been delivered to the purchaser in the first instance, that the vendor entered into the negotiation only upon this footing, namely, that she should deliver an abstract of title, and verify it so far as she had the means in her possession at her own expense, but that the purchaser, if upon perusal of the abstract he were satisfied with the title, should be at the expense of completing its verification. *Thomas v. Blackman*, 1 Colly. 301.

12. A purchaser, discharged by reason of bad

title, is entitled to the cost of counsel's opinion on the title, and of the preparation of the case for counsel. *Barton v. Downes*, Fl. & K. 633; 4 Ir. Eq. R. 607.

1. The conditions of sale requiring purchaser to pay the expenses of all assignments and surrenders of terms, etc.:—Held, that the purchaser must pay the expenses of perusal and execution. *Johnson v. George*, 2 Jur. 886.

2. Title established before Master, not being clear on abstract, vendor pays costs. — *v. Collinge*, cited 3 Ves. & B. 143. n.

3. Costs to a purchaser; the vendor having established his title before the Master after contest, upon a different ground from that in the abstract delivered. *Fielder v. Higginson*, 3 Ves. & B. 142

4. Where a vendor has not furnished a complete abstract until after a general reference as to title, he will have to pay the costs of the reference, although no defect of title is discovered upon the inquiry, except such as was already known to the purchaser. *Wilson v. Williams*, 3 Jur., N. S., 810.

5. A. entered into a written contract for the sale of an estate to B. B. declined to perform the contract, on the ground of inadequacy of value. In a suit by A. against B. for a specific performance, by a decree, dated in April 1851, it was declared that A. was entitled to a specific performance of the agreement, and a reference was made to the Master to inquire whether A. could make a good title; and if so, to state when such good title was first shown, and costs were reserved. The Master found that a good title was made, and that it was first shown in April 1852:—Held, that A. was entitled to the costs of the reference to the Master. *Abbott v. Swoorder*, 22 L. J., Ch., 235.

6. A decree for specific performance of a contract to purchase with a reference as to title having been made against the purchaser:—Held, that he was bound to pay the costs of having the title investigated in chambers. *McNichol v. Kay*, 4 W. R. 801.

II. COSTS OF AND INCIDENT TO CONVEYANCE.

7. Expense of conveyance falls on the purchaser if no particular stipulation. *Bolton (Duke) v. Williams*, 2 Ves. J. 155; 4 Bro. C. C. 297.

8. Construction of a contract, that a reference of the expenses was confined to the expense of the conveyance; but the evidence of the attorney was admitted for the defendant to prove the intention of both parties, according to verbal instructions, that the plaintiff, the purchaser, should also pay the expense of making out the defendant's title. *Ramsbottom v. Godden*, 1 Ves. & B. 165.

9. The conditions of sale requiring purchaser to pay the expenses of all assignments and surrenders of terms, etc.:—Held, that the purchaser must pay the expenses of perusal and execution. *Johnson v. George*, 2 Jur. 886.

10. A vendor agreed to surrender, or procure some person to surrender, and the costs of the surrender were to be paid by the purchaser. It was found necessary to procure a surrender

under the Trustee Act:—Held, that the costs of the proceedings ought to be paid by the vendor. *Bradley v. Muntion*, 16 Beav. 294.

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12. On the sale of an estate under an order of court, one of the conditions provided, that if the purchaser should require a conveyance of any outstanding legal estate which should not have been referred to or noticed in any of the abstracted deeds or other documents dated within the last thirty years, or any of outstanding term, all the expenses attending the getting in and conveyance of such estate should be borne by the purchaser. The estate was in 1823 conveyed to trustees for a term of 1,000 years, to secure the payment of a sum of money, the payment of which was under orders of court provided for. The purchaser of the estate required an assignment of the term from the representative of the surviving trustee, on the ground that it was not satisfied, but he refused to pay the costs of such assignment:—Held, that the purchaser was entitled to an assignment of the term, the costs of which, not having been provided for by the conditions of sale, must be borne by the vendors. *Stronge v. Hawkes*, 2 Jur., N. S., 388.

13. A. and B., tenants for life in possession and remainder, with remainder to the first and other sons of B. in tail male; the first son of B., being then an infant, agreed to sell the premises to C. for a certain sum, and C. agreed to buy the same if they could obtain an Act of Parliament so to enable them, C. agreeing also to bear all the expenses incident to and consequent on his proposal to purchase, and the negotiations consequent thereon and the obtaining the Act of Parliament, etc., "and all other expenses whatsoever of A. and B., in consequence of the sale, or arising out of or in anywise relating thereto." The Act of Parliament was obtained, vesting the estate in trustees for sale, upon trust to convey according to the terms of the agreement, reciting the words thereof; and directing that the purchase-money should, in the first instance, be invested in the purchase of stock until it could be invested in the purchase of real estate, to be held upon the original trusts:—Held, that the expenses of reinvesting the purchase-money in real estates were not such expenses as C. was, under the agreement, bound to pay, as being incidental, etc., to the sale:—Held, also, that though the estate was vested in trustees for sale, yet that A. and B. were necessary parties to the conveyance, and that they should enter into covenants for title, notwithstanding the exceptions from the saving clause of the Act of Parliament, which it was held did not extend to the acts of the testator, but only to the acts of his devisees and heir-at-law, etc. *Exp. Witts*, 6 Jur. 936.

14. A. being tenant for life of an estate, with remainder to his sons successively in tail male,

entered into an agreement with B., by which it was stipulated that A. should procure an Act of Parliament to enable him to sell the estate to B.; and B. should bear all the expenses incident to and consequent upon his proposal to purchase the estate, together with the expense of obtaining the Act, of preparing the abstract, and showing a title to the estate, and of and about making and completing the sale and conveyance to him, together with the expense of the agreement, and all other expenses whatsoever of A., in consequence of the sale, or arising out of or in anywise relating thereto, or to the proposal of B. A. accordingly obtained an Act for the sale of the estate to B., which directed the purchase money to be invested in lands to be settled to the same uses as the estate stood limited to:—Held, that B. was not bound to pay the expenses of the investment. *Re London Bridge Acts*, 13 Sim. 180.

1. Upon a sale by auction of real estate by an official manager of a company in the process of being wound up, it was provided by one of the conditions of sale, that the vendor should deliver to the purchaser an abstract of the documents affecting the respective shares into which the company was divided, but that he should nevertheless accept a conveyance of the entire property from the official manager, under the powers contained in the Winding-up Acts, without requiring the concurrence of any of the shareholders, or of any other person, for any purpose whatsoever: also, that if the purchaser should consider the legal state to be outstanding, and should require a conveyance thereof, he should bear the expense of obtaining such conveyance, and all other expenses incidental thereto:—Held, that, under the latter part of the condition, it was incumbent upon the purchaser, and not the official manager, to find out and specify the person in whom the legal estate was outstanding, and that then the official manager was, at the expense of the purchaser, to get such conveyance or conveyances of the legal estate as the purchaser should require, and the official manager could obtain. *Sheerness Wall or Waterworks Co. (Official Manager) v. Polson*, 29 Beav. 70; 7 Jur., N. S., 12; 30 L. J., Ch., 326; 4 L. T., N. S., 568; 9 W. R. 113; 3 De G. F. & J. 36.

III. STAMPS.

2. Contract to sell a freehold ground-rent of 20*l.*, arising from a wharf, "subject to an agreement for a lease for a term" of years. The agreement mentioned was unstamped. On a bill for specific performance by the purchaser:—Held, that the agreement was part of the subject of the contract, and that the vendor was bound to perfect it by having it properly stamped. *Smith v. Wyley*, 16 Jur. 1136.

3. A ten shilling deed stamp on a mortgage deed is insufficient, therefore a purchaser is entitled on a contract for sale with a mortgagor to require the mortgage deed, when so stamped, to be stamped before completion to the full *ad valorem* duty at the vendor's expense, notwithstanding the mortgagee may have consented to join in the conveyance. *Whiting to Loomes*, 17 L. R., Ch. D., 10; 50

L. J., Ch., 463; 44 L. T. 721; 29 W. R. 433; 14 L. R., Ch. D., 822; 49 L. J., Ch., 617; 43 L. T. 83; 28 W. R. 822.

4. A freehold land society in 1871 purchased some land in Epping Forest, which was conveyed to them in fee. They conveyed it in allotments to various members of the society, who respectively paid for their allotments. Afterwards the Epping Forest Act 1878 was passed, and it provided that the land (together with other lands) should be thrown open to the public, certain compensation, the amount of which was to be ascertained by an arbitrator, being paid by the conservators appointed by the Act to the owner of the soil of any land thrown open. With the Act were incorporated the provisions of the Lands Clauses Act 1845, with respect to the purchase-money or compensation coming to parties having limited interests, or prevented from treating, or not making title, and with respect to the conveyances of lands. After the passing of the Act the land society repurchased the allotments from the allottees, repaying them their purchase-moneys. The allottees reconveyed the plots to the trustees of the society, the reconveyances being indorsed on the original conveyances, but the reconveyances were not stamped within the proper time after execution. This arbitrator determined the amount of compensation to be paid by the conservators to the society, and the society furnished an abstract of title to the conservators. The conservators made no objection to the title, except that the reconveyances ought to be stamped, and they required the society to have them stamped at their own expense. The society declined to do this, but offered that the allottees should join with the trustees of the society in a conveyance to the conservators. The conservators would not accept this offer, but paid the compensation money into court, and, under s. 75 of the Lands Clauses Act, executed a deed-poll vesting the land in themselves in fee. The society petitioned for payment of the money to them:—Held, that it was not necessary that the reconveyances should be stamped; that the conservators ought to have been satisfied with the conveyance offered them by the society; and that the conservators must pay the costs of the petition. *Whiting to Loomes* (14 L. R., Ch. D., 822; 17 L. R., Ch. D., 10) distinguished. *Exp. Birkbeck Freehold Land Society*, 24 L. R., Ch. D., 119; 52 L. J., Ch., 777; 49 L. T. 265; 31 W. R. 716.

XXI. Sale of Copyholds.

- I. *Sale of Enfranchised Copyholds*, 7300.
- II. *Objections to Title*, 7301.
- III. *Deeds and Verification of Title*, 7302.
- IV. *Covenants for Title*, 7302.
- V. *Surrender*, 7303.
- VI. *Expenses, Fines, and Horlots*, 7303.
- VII. *Other Cases*, 7303.
- VIII. *Copyholds Sold as Freeholds*. See VI.

VI. 1 ante.

I. SALE OF ENFRANCHISED COPYHOLDS.

5. Copyholder in fee takes an enfranchisement of his copyhold in the name of a trustee,

and devises the lands to his younger son, who sells to A.; the heir-at-law of the copyhold recovers in ejectment, and A. brings his bill, and is decreed to hold and enjoy against the heir. *Dancer v. Evelt*, 1 Vern. 392. S. P. *Parker v. Turner*, *ib*.

1. It is no sufficient objection to the title of a vendor of an enfranchised copyhold, that a mortgagee to whom a surrender had been made had not been admitted before the enfranchisement, the deed of enfranchisement having conveyed to the vendor all the rights of the lord. *Minton v. Kirwood*, 1 L. R., Eq., 449; 12 Jur., N. S., 86; 35 L. J., Ch., 393; 14 W. R. 274; 13 L. T., N. S., 751. Affirmed 12 Jur., N. S., 970; 15 W. R. 116.

A copyholder surrendered to certain uses, and died before any admittance had been made in pursuance of the surrender. Subsequently the copyholds were enfranchised to a person not entitled to be admitted under that surrender, who afterwards entered into a contract for sale of the property. The purchaser refused to complete, on the ground that the legal estate had remained in the deceased surrenderor, and was outstanding in the hands of her customary heir:—Held, that the outstanding interest was not correctly described as the "legal estate," and that it was a mere shadowy right; that the objection was not sufficient to show the property to be unmarketable; and that, consequently, specific performance must be decreed. *Id*.

2. The vendor of a copyhold estate enfranchised under the 15 & 16 Vict., c. 51, is not bound to show the lord's title. *Kerr v. Parnon*, 25 Beav. 394; 4 Jur., N. S., 425; 27 L. J., Ch., 594; 6 W. R. 447; 1 L. T., N. S., 224.

After the passing of the 4 & 5 Vict., c. 35, and the 15 & 16 Vict., c. 51, but before 21 & 22 Vict., c. 94, an agreement was entered into for the sale of a copyhold estate, together with the timber, and all appurtenances to the same hereditaments belonging, as soon as the same should become freehold, under an agreement of the vendor to use his best endeavours to enfranchise; an enfranchisement was made under the second Act, reserving the minerals to the lord:—Held, that the contract had reference to the provisions in those Acts relative to minerals, and that the purchaser must complete, notwithstanding this reservation. *Id*.

Held, also, upon an enfranchisement under the 15 & 16 Vict., c. 51, and under an agreement to purchase a freehold, that it was not incumbent upon the vendor to produce the title of the lord of the manor. *Id*.

3. Land was described in a contract for sale as freehold, but it was shown by the abstract that it was formerly copyhold, and had been enfranchised. A decree was afterwards made at the suit of the vendor for specific performance, and a general inquiry directed as to title; in the course of which the purchaser for the first time objected that the minerals were reserved to the lord of the manor under the enfranchisement:—Held, that the objection was fatal to the title; but as the purchaser had taken the objection so late, he was not allowed his costs. *Upperton v. Nicholson*, 6 L. R., Ch., 436; 40 L. J., Ch., 401; 25 L. T., N. S., 4; 19 W. R. 733.

II. OBJECTIONS TO TITLE.

4. A woman seised of a copyhold executed a surrender jointly with her husband to such uses as her husband should appoint, and in default of appointment to him in fee, but no admittance was entered under the surrender. The husband then executed a conveyance of the copyholds to a purchaser, but still no admittance was entered. The plaintiff, who claimed under the purchaser, filed a bill to restrain an action of ejectment by the copyhold heir of the wife, and to compel a surrender to complete his title:—Held, that the husband of the copyholder had no power to make perfect that title which he, as a volunteer and without consideration, took imperfectly, and no person claiming under him could ask that his defective title should be made complete; and the bill was dismissed with costs. *Somerby v. Gutteridge*, 18 L. J., N. S., Ch., 9.

5. An inclosure Act, reciting that S. was entitled as lord of a manor to the soil and royalties, and as lay rector to all tithes within the manor, and that he claimed right of common on the waste in respect of the soil and royalties, directed certain allotments to be made to him in compensation for his right to the soil of the waste and to the tithes, and that the residue of the waste should be divided among S. and the other persons having right of common upon such waste, in proportion to their respective claims; and it reserved to the lord the seignory and royalties. The Act made no mention of any right of warren existing in the lord; but there was some evidence that S. had used part of the waste as a rabbit warren. The award gave an allotment to S. for his right of warren, and also three allotments, which purported to be made for his right to the soil, his right to the tithes, and his right of common, and other rights and interests in the waste respectively; which allotments were declared to be a full compensation for all his right and interest in the lands directed to be inclosed:—Held, that S.'s title of the warren allotment was not such as a purchaser could be compelled to take. *Casamajor v. Strobe*, 2 Myl. & K. 706; Coop. temp. Brough. 248. Reversing 5 Sim. 87.

6. Objection by purchaser of allotments under an Inclosure Act, that the award of the commissioners was not made, overruled, the Act containing a clause enabling a sale, and declaring the conveyance valid before the award, not supposing the possibility of the commissioners barring the allotments, the purchaser having full notice of all the circumstances. *Kingsley v. Young*, 17 Ves. 468. Affirmed 18 Ves. 207.

7. A testator devised copyholds to such uses as A. and B., or the survivors of them, his executors or administrators, should appoint, and subject thereto to the use of A. and B., their heirs and assigns for ever, upon certain trusts; and he directed his said trustees to sell the copyholds as soon as conveniently might be:—Held, that the trustees could make a good title to a purchaser without being admitted. *Glass v. Richardson*, 2 De G. M. & G. 658; 17 Jur. 926; 22 L. J., Ch., 105.

Devise of a copyhold to such uses as A. and B., or the survivor of them, or the executors or administrators of the survivor or the

trustees or trustee of the will for the time being, should by deed appoint, and subject thereto, to the use of A. and B., their heirs and assigns for ever; with a direction to sell and stand possessed of the proceeds upon certain trusts. After the death of the testator, A. and B. sold the copyhold estate in pursuance of the trusts. The lord of the manor required that A. and B., the devisees, should be admitted before the admission of the purchaser. On the bill by A. and B., the vendors, against the purchaser, to compel a specific performance of the contract, the Court held, that the copyhold tenant might direct the lord to admit into the tenancy either such person as A. should nominate, or A. himself; that it was the exercise of the right of the tenant to nominate alternatively in favour of A., or the nominee of A., and not a double exercise of his right to nominate, first, in favour of A., and then in favour of the nominee of A.; and that the purchaser was bound specifically to perform the contract. 8 C. 9 Hare 698.

1. Where copyhold is sold under commission, good title is made by bargain and sale from commissioners to the purchaser direct. *Exp. Holland*, 4 Madd. 483.

2. *Semble*, that in copyhold land, although the lord's title may be barred by adverse possession for twenty years, yet the commoner's title could not. And *quare*, what is a proper case for compensation and what for avoiding a contract. *Perkins v. Ede*, 1 W. R. 10.

3. A copyholder contracted with a railway company for the sale of his tenement, which was subject to a heriot and to quit-rents and fines. The heriot was supplied by severance of the copyhold:—Held, on the construction of the contract, that the vendor was not entitled to have the remaining part of his copyhold discharged from the heriot; and that he could not refuse to execute the conveyance on the ground that the company had not apportioned the rents and fines, but must proceed himself under the Railway Consolidation Act. *Parker v. South-Eastern Railway Co.*, 1 W. R. 316.

4. The generality and vagueness of descriptions of copyhold property on the court rolls are so well known, that a vendor is not bound to show how the description on the court roll is to be applied to the present state of the property, if he prove that the property has actually been enjoyed, and passed under that description, for upwards of sixty years. *Long v. Collier*, 4 Russ. 267.

See also Preceding Subdivision.

III. DEEDS AND VERIFICATION OF TITLE.

5. A lord of a manor selling freehold lands of the manor subject to leases for lives granted by copy of court roll must covenant to produce the court rolls up to the date of the conveyance. *Poulett (Earl) v. Hood*, 5 L. R., Eq., 115; 37 L. J., Ch., 224; 16 W. R. 323; 17 L. T., N. S., 486.

6. An equitable mortgage may be created of copyholds by the mere deposit of the copy of court roll. It is therefore not sufficient for the protection of a purchaser or mortgagee of copyholds that he should search the

court rolls for incumbrances; he ought to require the vendor or mortgagor to produce an abstract of his title and the copy of his admission to the copyhold premises; and if the latter document is not forthcoming, its non-production must be reasonably accounted for. *Whitbread v. Jordan*, 1 Y. & Coll. 303; 4 L. J., N. S., Exch. Eq., 38.

7. The presumption is, that a surrender will bar an estate tail in copyholds, until a contrary custom is shown. *Gould v. White*, 1 Kay 683.

Copyholds having been sold, subject to a condition that all statements and recitals in any of the title deeds or muniments of title should be considered as satisfactory evidence of the facts stated or recited; and in case any purchaser should not within fourteen days from the delivery of the abstract declare his dissatisfaction with the title, and point out some valid objection thereto, the same should be considered as accepted. The purchaser objected, that the first surrender on the abstract was by A., and J., his wife, which said J., it was therein stated, "had then lately been admitted there tenant in tail, according to the custom of that manor," and that there was nothing to show how the estate tail had been barred. Afterwards the purchaser required evidence that the custom of the manor warranted estates tail. The first surrender was dated in 1801, and was conditional only. In 1815 the same parties made an absolute surrender in fee, under which the possession had been enjoyed ever since:—Held, that the recital was conclusive evidence, under the conditions of sale, of the fact that J. had been admitted tenant in tail, but not that this was according to the custom of the manor, for this was not a single fact, but a deduction from a series of facts. But held, that the recital, coupled with the conditional surrender of 1801, the absolute surrender of 1815, and the subsequent possession, consistently with that title, was sufficient evidence that the custom of the manor did warrant estates tail. *Id.*

8. The lord of a manor contracted to sell part of the waste, and furnished a statutory declaration that to the best of his information and belief no copyholder or free tenant had exercised any right of common for forty years and upwards, and that he did not know or believe that any copyholder or free tenant existed, and that no quit-rents had been paid or services rendered or court baron held for forty, or, as the declarant believed, for sixty years and upwards. The means of knowledge of the declarant were not questioned; and he offered to add to his statutory declaration a statement negating the existence of and commonable rights over the waste:—Held, that the title could be forced on the purchaser. *Re Bridges and McRae's contract*, 30 W. R. 539.

IV. COVENANTS FOR TITLE.

9. A sold copyholds in fee simple to B., and covenanted to surrender, which he did the next day, and entered into the usual covenants for title. Shortly afterwards, the copyholds were again sold:—Held, that the cove-

nants for title either ran with the land for the benefit of the second purchaser, or that he was entitled to sue on them in the name of the first. *Riddell v. Riddell*, 7 Sim. 529; 5 L. J., N. S., Ch., 132.

Quere, whether covenants for the title of copyholds run with the land. *Ib.*

V. SURRENDER.

1. Upon a sale in court of copyhold, vendor coming for aid is compelled to surrender in person if it can be done conveniently. *Noel v. Weston*, 6 Madd. 50.

2. Purchaser of copyhold not obliged to accept of surrender by letter of attorney. A custom that it must be in person is not contrary to law. *Mitchel v. Neal*, 2 Ves. 679.

3. Assignees in bankruptcy must surrender copyhold to purchaser. *Drury v. Man*, 1 Atk. 95.

4. Copyholder contracts, for valuable consideration, to sell to his son, and dies before actual surrender; the son held entitled to performance, and to compel the widow to surrender free bench. *Hinton v. Hinton*, 2 Ves. 631; Ambl. 277.

5. A testator devised his copyhold estate to his wife for life, with remainder to his two sons as tenants in common in fee; the eldest son and customary heir was, by an arrangement between himself, his mother, and brother, admitted to the copyhold in fee, and executed by deed a declaration of trust to the uses of his father's will. The brothers became bankrupts, and their assignees sold their reversion to the plaintiff:—Held, that the plaintiff, though, as against the assignees, a purchaser of a legal reversion, was not, as against the tenant for life, entitled to compel such a surrender as would give him the legal reversion. *White v. Stook*, 6 Madd. 327.

6. It is no sufficient objection to the title of a vendor of an enfranchised copyhold, that a mortgagee to whom a surrender had been made had not been admitted before the enfranchisement, the deed of enfranchisement having conveyed to the vendor all the rights of the lord. *Minton v. Kirwood*, 1 L. R., Eq., 449; 12 Jur., N. S., 86; 35 L. J., Ch., 393; 14 W. R. 274; 13 L. T., N. S., 751. Affirmed 12 Jur., N. S., 970; 15 W. R. 116.

Semble, the non-admittance of a surrenderee leaves in the surrenderor an interest which exists only for the benefit of the lord, and does not leave any beneficial interest in the surrenderor or his heir. *Ib.*

7. Injunction to restrain the vendor of copyhold premises, after delivery of possession and receipt of part of the purchase-money, from surrendering them to persons other than the purchasers. *Spiller v. Spiller*, 3 Swan. 556.

VI. EXPENSES, FINES, AND HERIOTS.

8. A copyholder contracted with a railway company for the sale of his tenement, which was subject to a heriot and to quit-rent and fines. The heriot was supplied by severance of the copyhold:—Held, on the construction of the contract, that the vendor was not en-

titled to have the remaining part of his copyhold discharged from the heriot; and that he could not refuse to execute the conveyance on the ground that the company had not apportioned the rents and fines, but must proceed himself under the Railway Consolidation Act. *Parker v. South-Eastern Railway Co.*, 1 W. R. 316.

9. Copyholds ordered to be sold by the Court were put up for sale in lots, and purchased by different purchasers. After some delay in complying with the conditions of sale, other purchasers were, by order, substituted, and ultimately all the lots were purchased by the same parties. After the sale, and before the completion of the conveyance by surrender, the tenant on the court rolls, who was the surviving trustee, died, and thereupon it became necessary for his heir to be admitted, and a fine and fees paid:—Held, that as there had been no improper delay or neglect on the part of either the trustee or purchasers, the fine and fees must be paid out of the fund belonging to the *cestuis que trustent*. *Paramore v. Grenslade*, 17 Jur. 1064; 1 Sm. & Giff. 541; 23 L. J., Ch., 34.

A condition of sale, which stated that "the purchasers should have proper surrenders, conveyances, and assignments of the premises at their own expense, did not bind them to bear the expense of procuring the concurrence of all proper parties. Where, therefore, it was necessary for the heir of a trustee to be admitted on the court rolls, the fine and fees on that admission were ordered to be paid by the vendors. *Ib.*

10. The purchaser of a copyhold estate (devised, subject to payment of debts, in trust for sale, and sold during the infancy of the heir, under the usual decree), is not entitled to have a portion of the purchase-money retained in court, as a provision for defraying the expense of the fine, which would become payable on the death of the heir before a conveyance. *Morris v. Clarkson*, 3 Swan. 558.

11. A vendor of a manor is entitled to the fines paid for the admission of any new tenants in the room of the tenants described in the particulars of sale who may happen to die after the contract, but before the day fixed for the completion of the purchase, although the fines are not in fact paid till after that day. *Cuddon v. Tite*, 1 Giff. 395.

12. A manor was sold under the decree of the Court as part of the real estate of the testator, and an order was made on the 13th March that the purchaser should, on or before the 17th May, pay his purchase-money into court, and be let into possession of the profits from Lady-day; several deaths and admissions took place prior to Lady-day, but the fines due thereon had not been paid or assessed until after that time, no court having been holden; these fines belong to the vendors, and not to the purchaser. *Garrick v. Camden (Earl)*, 2 Cox 221.

See also IX. ix. *ante*.

VII. OTHER CASES.

13. Bill to have execution of articles for the sale of some copyhold lands to plaintiff, on

payment of 538*l.* to defendant B., a guinea being paid in part, and to compel the lord of the manor to admit plaintiff in fee, according to the agreement, which was decreed; but there being no tender of a surrender to the lord, and consequently no refusal, he was to have his costs. *Sayle v. Reeves*, Gilb. Eq. Rep. 188.

1. Parol agreement for the sale of copyhold lands, carried into execution. *Borrett v. Gomeserra*, Bunb. 94.

2. A contract for the purchase of copyhold land at a certain price, and the timber upon it at a specified valuation, enforced as one entire contract, although the vendor could not show any custom in the manor, or license from the lord, enabling the tenants of the manor, or himself, or his assigns, to fell the timber. *Crosse v. Keene*, 9 Hare 469; 16 Jur. 142; 21 L. J., Ch., 892.

3. Tenant for life of a copyhold sold his estate, and surrendered it that the lord might admit A., the purchaser; the copyholder in reversion entered and recovered at law; A. was relieved in equity. *Anon.*, 2 Freem. 118.

4. Lord of manor (his tenants refusing to renew) makes a lease of the premises to his daughter for ninety-nine years, and afterwards sells the manor to J. S., who has notice of the lease, but has security that the daughter, when at age, should surrender; daughter decreed to have the benefit of the lease. *Jennings v. Sellock*, 1 Vern. 467.

5. A. agrees with B., lord of the manor, to purchase a copyhold for two lives, such as A. shall name. A. pays 200*l.*, part of the purchase-money, and was to pay the rest in three months; a court is held; three months pass; B. died suddenly, and the manor came to one who was not bound by the contract. The executor of B. to refund 200*l.* *Ambry v. Keen*, 1 Vern. 472.

6. A. purchases copyhold estate, and takes the surrender to himself and his wife and daughter, and their heirs: the husband and wife (as one person) take a moiety by entireties, and the daughter the other moiety: the husband mortgages it and dies: void for the whole, and no relief in equity. *Back v. Androm*, 2 Vern. 120; Pre. Ch. 1.

6. *Condition as to Receipt of Rent being Evidence of Performance of Covenants*, 7309.
7. *Proof of Performance of Covenants. Ope Contract*, 7310.
8. *Notice of Covenants*, 7310.
9. *Indemnity by Vendor*, 7311.
10. *Covenant for Indemnity by Purchaser*, 7311.
11. *Other Cases*, 7312.
12. *Sale of by Executors or Administrators and Right to Indemnity. See EXECUTOR AND ADMINISTRATOR, XV..*

1. Production of Title and Waiver.

7. On a suit for specific performance by vendor against purchaser of leasehold property under an agreement, general as to title, the Master cannot report a good title in vendor, unless he sets forth a good title in his lessor; bill therefore dismissed, but without costs. *Purvis v. Rayer*, 9 Price 488.

8. If the vendor of a leasehold interest means to sell, without producing his lessor's title, he ought to declare it. *Ogilvie v. Foljambe*, 3 Meriv. 53.

9. On a bill by vendor for specific performance of an agreement to take a lease for twenty-one years, at rack-rent, the Master having reported in favour of the title shown by the abstract, and an exception being taken to the report, the question was, whether, where the agreement is silent, the vendor of a leasehold interest is not bound to produce the title of his lessor; and the exception was allowed. *Fildes v. Hooker*, 2 Meriv. 424.

Objection to title between vendor and purchaser on the ground of non-production of lessor's title, overruled in the case of a bishop's lease. *S. C.* 2 Meriv. 430.

10. Exceptions to Master's report in favour of title of vendor of bishop's lease, on ground of non-production of bishop's title, overruled. *Fane v. Spencer*, 2 Madd. 438.

11. A contract for sale of the lessee's interest in a lease does not exonerate the vendor from the necessity of proving the lessor's title to grant the lease. *Fennelly v. Anderson*, 1 Ir. Ch. R. 706.

12. An agreement to sell the interest of A. B. in the lands of Whiteacre does not absolve A. B., the vendor, from the necessity of proving his lessor's title. Nor is there any waiver of that necessity by the mere fact of the vendee having taken possession of the lands before production of the lessor's title. *Wright v. Griffith*, 1 Ir. Ch. R. 695.

Where an agreement for sale of a leasehold is silent as to the production of the lessor's title, parol testimony is admissible in proof of facts and circumstances constituting a waiver by the vendee of production of the lessor's title. *Id.*

Semble, that if such a waiver be proved, the Court will declare it to be established, although the bill contains no prayer to that effect. *Id.*

13. Whether without express stipulation a person under a contract with a lessee for years to purchase the term, can insist upon a production of the lessor's title, and whether the

XXII. Sale of Leaseholds.

- I. *Sale of Leases*, 7304.
- II. *Sale of Under-Leases*, 7312.
- III. *Leaseholds sold as Freeholds or Under-Leases as Leases*. See VI. VI. 2 and 3 ante.
- IV. *Grant of Original Leases*. See LANDLORD AND TENANT.

I SALE OF LEASES.

1. *Production of Title and Waiver*, 7304.
2. *Special Conditions as to Title*, 7306.
3. *Notice of Title*, 7308.
4. *Objections. In General and Doubtful Title*, 7308.
5. *Objections for Non-performance of Covenants*, 7309.

lessee can compel such production, *quære*. The lessee's bill for a specific performance dismissed; his interest described as forty years, the residue of a term free from incumbrances, being a few years only of an old term, and a reversionary term from another lessor, and old incumbrances not shown to be discharged. *White v. Foljambe*, 11 Ves. 337.

1. Contract for sale of an existing and a reversionary lease not specifically performed without a production of the titles of the lessors. The objection not waived by a premature conditional approbation of the title, by the purchaser's counsel; but the expense incurred in making out the title before this objection was taken, repaid. *Deverell v. Bolton (Lord)*, 18 Ves. 505.

Approbation of counsel not a waiver of all reasonable objections to the title. *Id.* 514.

2. A party who had contracted for the purchase of the benefit of an agreement for a lease, and who before the lease was granted entered into possession and paid part of the purchase-money, the remainder being left a charge on the property, and who after the lease had been granted assigned his interest in it as a security for money lent; on a bill being filed against him by the lessee for specific performance and payment of the residue of the purchase-money, or otherwise that the property might be sold:—Held, to have waived all objections on the score of title. *Haydon v. Bell*, 1 Beav. 337; 2 Jur. 1008.

3. In a suit for specific performance of an agreement to accept a lease, the Court, considering the defendant (the intended lessee), by his conduct, to have waived all objections to the vendor's title, decreed a specific performance of the agreement, and referred it to the Master to settle the lease. In settling the lease, it became necessary, for identifying the premises, to produce before the Master the original lease under which the plaintiff was entitled to the property, and from which lease it appeared that the property in question was held, with other property, at one entire rent, and under some special covenants, no provision with respect to which was made in the agreement between the plaintiff and the defendant. On hearing, for further directions, these facts being brought before the Court in the shape of exceptions to the report, it was held, that though the defendant had, by his conduct, waived his right to the production of the lessor's title, yet, as in the course of the proceeding it had become necessary to produce that title, and that production showed that a sufficient lease could not be made to the defendant according to the agreement, the Court would not enforce a specific performance, and the bill was dismissed, but without costs. The form of the decree in this case was followed in *Simpson v. Sadd* (4 De G. M. & G. 665), *Warren v. Richardson*, Younger 1.

4. It is not so universally the custom to call for the lessor's title as for that of the vendor of a fee simple, and therefore smaller circumstances will satisfy the Court that the right to call for the lessor's title was waived. *Simpson v. Sadd*, 3 W. R. 118; 1 Jur., N. S., 457; 3 Eq. Rep. 263; 4 De G. M. & G. 665; 24 L. J., Ch., 562. Affirming 2 Eq. Rep. 798; 2 W. R. 578.

An agreement for the sale of leaseholds

fixed the date for purchaser entering into possession, but contained no stipulation as to title. Purchaser got possession before the day fixed, and exercised acts of ownership; after which (four months from entry) he claimed to investigate the title, having previously asked vendor to delay in preparing the underlease or assignment for the purpose of including an intended partner:—Held, that vendor was entitled to specific performance of agreement, without showing the lessor's title. *Semble*, where the time fixed for taking possession is antecedent to that for delivering abstract of title, the ordinary rule, that taking possession without investigating the title is a waiver of the right to do so, does not apply, for then the terms of the contract would be inconsistent. S. C. 2 W. R. 578.

5. Memorandum of agreement signed by both parties for sale and purchase of fixtures, etc., in a leasehold house, and for purchaser to take an assignment of the vendor's interest in the premises:—Held, to be a contract on the part of the purchaser to take an assignment of the lease of the premises. The purchaser requested the vendor to prepare the assignment by indorsement *totidem verbis* with that to himself (the vendor):—Held, that the purchaser could not afterwards require the production of the original lessor's title. *Smith v. Capron*, 19 L. J., N. S., Ch., 322; 7 Hare 185; 14 Jur. 686.

6. An agreement by the vendors, to let to the vendors for the term of sixty-one years the premises then occupied by the vendors as held under A. B., does not absolve the vendors from the duty of proving the title of their lessor, A. B. And on its appearing that A. B. was himself only a lessee for three lives with a covenant for perpetual renewal:—Held, that the fact of other premises (besides those proposed to be let by the vendors) being comprised in the lease to A. B. was a fatal objection to the title. *Leatham v. Allen*, 1 Ir. Ch. R. 683.

Where there is an agreement by a vendor, having a derivative estate in lands, to let them for a term of years, and such an agreement, if carried into execution, would operate, not as a lease, but as an assignment of the vendor's estate, *quære*, whether specific performance of the agreement will be decreed against the vendee. *Id.*

7. *Semble*, that where the purchaser, after transmission to him of the original lease, prepares a draft assignment, and makes various objections as to repairs and other matters, but does not require production of the landlord's title, he will be considered to have waived its production. *Semble*, that a decree for specific performance should not declare that the agreement ought to be performed, if a good title can be made. *Clive v. Beaumont*, 1 De G. & Sm. 397.

8. Upon the sale of a leasehold for lives, expressed to have been granted by a corporation in consideration of the surrender of a prior lease, the title to the surrendered lease must be shown. *Hodgkinson v. Cooper*, 9 Beav. 304; 15 L. J., N. S., Ch., 160; 10 Jur. 39.

9. If a lessee for a term of years underlet for a less term, and the under-lessee sell by auction the lesser term, describing it as a lease, and one of the conditions of sale is

that the lessor's title shall not be inquired into, the vendor's title being good, *quære*, whether the purchaser can refuse to complete, because there is a term imposed between the vendor's interest and the freehold. *Darlington v. Hamilton*, 1 Kay 550; 23 L. J., Ch., 1000; 2 Eq. Rep. 906.

But in such a case, where the property was included in the original lease, together with other hereditaments, subject to general covenants, and a power of re-entry for breach of any of them, and the purchaser had discovered these facts *aliunde*:—Held, that he was entitled to refuse to perform his contract, notwithstanding that the original lease contained provisions for the apportionment of the rent, and of the power of re-entry. *Ib.*

It is a formidable objection to the title of a vendor of leasehold property, that he has underlet it by a lease which does not contain similar covenants to those by which he is bound to his own lessor; for example, covenants to build, or to paint at certain periods; for the vendor may thus have put it out of his power, during the under-lease, to perform covenants for the breach of which the original lessor can re-enter. *Ib.*

1. When the plaintiff and defendant claim leaseholds under the same instrument, and the defendant purchases the plaintiff's share, he cannot object that the lessor's title is not shown. *Phipps v. Child*, 3 Drew. 709.

A defendant admitting by his answer that at the date of the contract the plaintiff was entitled, cannot at the hearing object that no abstract was delivered, and no title shown. *Ib.*

2. Although under ordinary circumstances, upon the sale of leaseholds, the production of the last receipt for ground rent, without proof of the title of the person giving the receipt, is sufficient, yet where such title is *bonâ fide* in question, the Court will not compel specific performance without proof of the reversioner's title. The usual inquiry in chambers as to title having been waived by consent, the cause was ordered to stand over to enable the vendors to establish the title of the reversioner, or to obtain the consent to the sale of the various claimants. *Pegler v. White*, 10 Jur., N. S., 330; 33 L. J., Ch., 569; 12 W. R. 455; 10 L. T., N. S., 84.

2. Special Conditions as to Title.

3. The subject of sale was described in the conditions "as a leasehold ground-rent of 23l.," reserved by a mesne lease in 1812, for ninety-eight years wanting seven days, and assigned apart from the reversion by an indenture of 1817, and one of the conditions was, that no title prior to the assignment, or the title of any ground or mesne landlord, was to be produced. From a recital in the deed of 1817, it appeared that the land out of which the rent issued had been demised, with other lands, to the original lessee at a rent of 10l., and subject to certain covenants and conditions:—Held, that the purchaser might take an objection on this ground, the conditions of sale not excluding such an objection with sufficient clearness. *Taylor v. Martindale*, 1 Y. & Coll. C. C. 658.

4. The Court will not make it a condition of sale of an interest under a lease that a purchaser shall not be at liberty to object to the title of the lessor to make the lease. But it will direct that a purchaser shall not require the plaintiff to show that the lessor had such power, leaving the purchaser at liberty to object *aliunde*. *Willes v. Latham*, Sen. & Sc. 441.

5. A condition of sale, that the purchaser shall not be at liberty to investigate the right of the lessor in a lease for lives renewable for ever, which was decreed to be sold, to grant the same, will not be granted. But the Court will refer it to the remembrancer to settle a condition of sale, that the purchaser shall not require the production of the title of the lessor by the vendors. *Lahey v. Bell*, 6 Ir. Eq. R. 122.

A vendor will only be relieved from the liability of verifying the abstract of title by proper evidence, by stipulations expressed in plain, clear, and unambiguous language. *Ib.*

6. Under a contract to make out a good title to a lease for lives renewable for ever, a vendor must show who are the lives in existence at the time of the contract. *Anderson v. Higgins*, 1 J. & L. 718.

7. A condition, on the sale of leasehold property, that the title of the lessor would not be shown, and should not be inquired into:—Held, to be binding, and the purchaser compelled to perform his contract, although in the investigation before the Master a serious defect in the lessor's title was discovered. *Hume v. Bentley*, 16 Jur. 1109; 21 L. J., Ch., 760.

Upon a sale by auction of leasehold premises, one of the conditions was as follows, "The lessors' title will not be shown, and shall not be inquired into." In a suit to enforce specific performance by the vendor against the purchaser, the latter objected, that the lessors' title appeared by Acts of Parliament produced by the purchaser, which showed that the lessors had no power to lease the premises:—Held, that the condition provided that the title should not be shown, and also precluded inquiry for every purpose, and specific performance was decreed. In a suit by the owner of leasehold premises against a purchaser to enforce the specific performance of a contract to purchase, it appeared that the original lessee had, in 1835, covenanted with the lessors, in or before 1836, to build two houses on the property, worth 400l., to the satisfaction of the lessors' surveyor. The lessee, instead of so doing, built, with the sanction of the lessors' surveyor, five houses, worth, in the aggregate, more than 400l., but no two being worth that sum. The lessors thenoforth received the rents yearly accruing due on the premises:—Held, though the covenant had not been performed *modo et formâ*, yet that it had been substantially performed, and the Court decreed specific performance. S. C. 5 De G. & Sm. 520.

8. On the sale of leasehold premises, one of the conditions stated that the premises "were mortgaged by the late Mr. H. to Messrs. H. and M., the trustees of his wife's marriage settlement, to secure part of the trust funds; and the lease of the 26th December 1816 was granted to them, subject to such redemption

as the said Mr. H. was entitled to under the said mortgage. Upon the death of Mr. H., Mrs. H., his widow, executrix, and universal legatee, became beneficially entitled to both the mortgage-money and the premises; and the vendors, her executors, are also the legal personal representatives of Mr. H. They will, within seven days from the day of sale, deliver to the purchasers an abstract of the said lease and the wills of Mr. and Mrs. H.; but they are not to be called upon to deduce the lessor's or any earlier title, nor shall the subsistence of the lease be questioned, and the purchaser shall be satisfied with an assignment from them of the beneficial interest".—Held, that the purchaser was, under this condition, entitled to an assignment of the legal estate which was outstanding in H. and M., and not merely to the assignment of such beneficial interest as the vendors had vested in them. *Smith v. Ellis*, 14 Jur. 682.

1. Two houses, held under one lease, were sold separately to A. and B. The lease was produced, and inspected at the sale by the purchasers' solicitors. The conditions of sale provided for the apportionment of the rent between the two purchasers, but did not notice covenants to insure, etc., and a proviso for re-entry on non-performance contained in the lease.—Held, that though A. might be evicted by the default of B., still he was, under the circumstances, bound to complete. *Paterson v. Long*, 6 Beav. 590; 13 L. J., N. S., Ch., 1; 7 Jur. 1049.

Observations on special conditions of sale. *Id.*

2. A vendor stipulated that he would show title under an agreement for a lease. There was no agreement signed by the lessor and lessee, but a draft or paper, signed only by the lessee, and which document came out of the lessee's possession, was produced. He (the lessee and vendor) alleged that he had taken possession under this agreement.—Held, that this was not sufficient. The purchaser could not be compelled to take an equitable title under the agreement, coupled with possession, but was entitled to strict evidence that such an agreement had been entered into. *Houghton v. Bankart*, 5 L. T., N. S., 307.

3. Particulars of a sale by auction described the subject as a plot of ground held for a term of one hundred and eleven years from the 23rd April 1853, subject to the annual rent of 5*l.* One of the conditions of sale was, that the vendor should deliver to the purchaser, or his agent, an abstract of title, and deduce a good title to the premises sold, down from the 23rd April 1853 to the time of the sale; nor should the title of the lessor be questioned, nor the vendor be bound to go behind the same; that compared copies of registry searches against the vendor's lessor should be handed to the purchaser, as also of judgments from June 1845 to June 1853; and also a compared copy of his abstract of title, as also common searches by vendor, from the date of his lease to the time of sale in the registry and judgment offices, and not further or otherwise. The plot of ground was part of two properties, held under two distinct leases, made in 1845 to the vendor's lessor, by which leases rents of 3*l.* and 9*l.* were respectively reserved. The interest sold was under a lease

made to the vendor, of portions of both properties, on the 25th July 1853, subject to a rent of 5*l.*:—Held, first, that the title was bad. *Geohagan v. Connolly*, 8 Ir. Ch. R. 598.

Held, secondly, that the condition of sale was so ambiguous and uncertain as not to preclude the purchaser from objecting to the title. *Id.*

Held, thirdly, that there had been a suppression of facts in the particulars of sale, which amounted to misrepresentation, and disentitled the vendor to a decree for specific performance. *Id.*

4. A condition provided that the purchaser shall not be at liberty to require any evidence of the title of lessors in said lease, or any of of them; or object by reason of incumbrances, if any, affecting the title of such lessors; nor require the production of any title deeds connected with the premises prior to, or of previous date to, the lease, but shall admit that the lease has been duly executed and acknowledged by all the parties thereto, and be satisfied with same being handed over to them, and the title deduced therefrom to the owners.—Held, that this condition did not preclude the purchaser rejecting the title on the ground of objections to the lessor's title. *Musgrave v. M'Cullagh*, 14 Ir. Ch. R. 496.

Lessee for lives renewable for ever granted to L., his heirs and assigns, at a rent. L.'s estate did not answer the description of a lease for ever. *Id.*

5. Leasehold hereditaments were agreed to be sold, and the vendor stipulated that he would produce a good and marketable title, commencing from the freeholder, but that no title should be called for prior to the lease granted D. S. to the vendor. The lease having been granted pursuant to a prior contract, which contract had been mortgaged, the purchaser refused to complete, and the vendor filed a claim for specific performance.—Held, that the words of the contract were ambiguous, and that the purchaser was entitled to construe them most favourably to himself, and therefore that if the vendor insisted on specific performance the disputed stipulation must be construed as if the words "but no title shall be called for prior to the lease granted by D. S. to the vendor" were omitted. *Rhodes v. Ibbetson*, 23 L. J., Ch., 459; 4 De G. M. & G. 787; 2 Eq. Rep. 76.

6. Where an under-lessee described his property in the particulars and conditions of sale as held under a lease, and stipulated that the purchaser should not require proof of his, the vendor's, title.—Held, upon a suit for specific performance, that the purchaser having discovered, *alivunde*, a material objection to the vendor's title (*vis.*, that the estate in question was included with other property in a former lease, under which there was a possibility of the vendor's being ousted at some time or other on account of some breach of covenant in respect of such other property), he could not be compelled to complete his purchase. It has never been decided that, if a person, having a clear title as lessee for eighty years, makes another lease for sixty years, and the under-lessee sells his under-lease by auction, describing it as a lease, and subject to a condition of sale that the vendor's title is not to be inquired into (such title being, in

fact, perfectly good, but not a freehold), this alone would be a reason for resisting specific performance. *Darlington v. Hamilton*, 1 Kay 550; 2 Eq. Rep. 906; 23 L. J., Ch., 1000.

Conditions as to Performance of Covenant to Insure.] 1. Leasehold property was sold, subject to a condition that possession under the lease should be deemed conclusive evidence of the due performance or sufficient waiver of any breach of the covenants in the lease up to the completion of the sale. A covenant to keep the premises insured was broken on two occasions, one before and one subsequently to the sale:—Held, that the condition precluded any objection on the ground of the former breach of covenant, but not of the latter, and that the purchaser was not bound to take the title. *Howell v. Kightley*, 21 Beav. 381; 2 Jur., N. S., 455; 25 L. J., Ch., 868.

Quare, even as to a breach before the contract, whether the purchaser could have been compelled to complete if the lessor had, on being applied to, threatened eviction. *Id.*

3. Notice of Title.

2. Purchaser of a lease, though not considered a purchaser for valuable consideration without notice, to the extent of not being bound to know from whom the lessor derived his title, is not to take notice of all the circumstances under which it is derived. Therefore, understood to have notice, that the lessors were trustees for a charity, not that the lease was bad, that depending on circumstances *dehors*. *Att.-Gen. v. Backhouse*, 17 Ves. 293.

3. A party claiming title under a lease or any other instrument is presumed to know the title under which he takes and the circumstances connected with it, unless he can show the contrary. *Butler v. Portarlington (Earl)*, 1 Dr. & War. 20; 1 Con. & L. 1; 4 Ir. Eq. R. 1.

4. The rule, that a purchaser is bound to inquire into the title of his vendor, and is affected with notice with that which appears upon the title if he does not so inquire, applies to the case of a lessee who neglects to inquire into his lessor's title. *Fielden v. Slater*, 17 W. R. 485; 20 L. T., N. S., 112; 7 L. R., Eq., 523; 38 L. J., Ch., 379.

5. The doctrine of purchase for value without notice, does not apply to a purchase of a leasehold interest without notice of the lessor's title, if it turns out that the lessor had no power to grant the lease. *Robson v. Flight*, 10 Jur., N. S., 1228.

6. Notice of a lease is not notice that the reversion remained vested in the lessor until his death. *Prigler v. White*, 12 W. R. 455; 10 Jur., N. S., 300; 33 L. J., Ch., 569; 10 L. T., N. S., 84.

4. Objections. In General and Doubtful Title.

7. An under-lessee of premises bequeathed them to P. his lessor (whom he also appointed executor), in trust for L.; P. afterwards executed a deed, purporting to be an assignment

of them to L., and by his will bequeathed the premises to his executors on certain trusts; on his death his executors demised the premises to L. for the then residue of the term. On a bill for specific performance:—Held, that L. could make no title, the legal estate being merged in the bequest to P., and the assignment by him, therefore, inoperative; and the demise by the executor being a breach of trust. *Law v. Urrwin*, 16 Sim. 377; 12 Jur. 1012.

8. An estate, described as a freehold estate for three lives, with covenant for perpetual renewal, was sold under a decree. In the original lease, bearing date the 21st July 1777, there was not any express covenant for perpetual renewal; but the *habendum* was to the lessee, his heirs and assigns, "for and during the natural lives of J. and C., or the longest liver of them, or whatever life or lives should for ever thereafter be nominated or appointed, added or inserted on the back of said indenture, or a label affixed thereto, yielding and paying unto R. L., the lessor, his heirs and assigns, the yearly rent of" etc. In 1836 the son and devisee of the original lessor executed to the assignee of the original lessee a renewal for three lives, in which the original lease of the 21st July 1777 was recited as containing a covenant for perpetual renewal, and the renewal was expressly made "in pursuance and performance of said covenants;" it did not contain any covenant for renewal, but the *habendum* was similar to that in the original lease, with the exception that the word "and" was used instead of "or." The Master having reported that the title was not such as the purchaser could be compelled to take, the report was excepted to:—Held, that the report should be confirmed, and the exception to it overruled, with costs. *Sheppard v. Doolan*, 4 Ir. Eq. R. 654; Fl. & K. 598.

But, on appeal, the Lord Chancellor seemed to be of opinion that the *habendum* amounted to a covenant for perpetual renewal, and at all events that the purchaser's conduct disentitled him to take advantage of the rule as to doubtful titles. Ultimately, the purchaser accepted the title, being allowed his costs. S. C. 3 Dr. & War. 1; 5 Ir. Eq. R. 6.

9. On a sale, in lots, of premises, the particulars of which state them to be held under one lease, receiving rent, and that the purchaser of one lot is to be exclusively subject to the rent, the other purchasers cannot object to the title, on the ground of a clause of re-entry on non-payment, contained in the lease. *Walter v. Maunde*, 1 Jac. & Walk. 181.

Landlord contracting to sell part of the demised estate, with an apportionment for a specific amount of part of the rent reserved for the whole estate, can make a good title to it without the consent of the tenant. *Id.*

10. Leasehold property was underlet by the lessee to A., for twenty-one years from 1861, and was in 1864 again underlet by the lessee to B. for twenty-one years, but A. never attorned to B., and subsequently surrendered his interest to the lessee:—Held, as against a purchaser of the original lease subject only to B.'s interest, that the surrender was valid, and a good title shown. *Edwards v. Wickwar*, 1 L. R., Eq., 403; 12 Jur., N. S., 158; 35 L. J., Ch., 309; 14 W. R. 863.

1. On an agreement to purchase a leasehold interest, the purchasers, who had previously bought the reversion, subject to the vendor's lease, from the lessor, the freeholder, investigated and accepted the vendor's title, and prepared and engrossed the surrender. They subsequently delayed completion upon the discovery of an ancient lease which they alleged to be still outstanding, and to override the lessor's title. Specific performance decreed, and reference as to title refused. *Corbett v. Commissioners of Her Majesty's Works and Public Buildings*, 16 W. R. 889; 18 L. T., N. S., 548.

2. S., being in the occupation of a public-house, contracted with W. to sell to him the residue of the lease, of which twelve and a half years at least were unexpired. W., the day after signing the contract, by which he agreed to take possession on the 15th April 1878, paid a sum as a deposit to S.'s agent. The abstract of title showed that S.'s lessors had a right of option to determine the lease at the end of five years, and W. at once rescinded the contract, and required the return of the deposit money. S. refused to repay the money, and W. issued a writ in his action on the 10th April to recover it.—Held, that W.'s objection to the title was valid; that he was not bound to wait till the 15th April before issuing the writ; and that he was entitled to repayment of the deposit money with interest. *Weston v. Savage*, 10 L. R., Ch. D., 736; 48 L. J., Ch., 229; 27 W. R. 654.

5. Objections for Non-performance of Covenants.

3. On granting a building lease for ninety-two and three-quarter years, the lessee covenanted that he would, within the first five years of the term, build thirty-four additional houses, of the dimensions therein mentioned, and keep the same in repair, and at the end or other sooner determination of the term, deliver up the same, so repaired, to the lessor or his assigns. Some only of the thirty-four houses were built; but the lessor, notwithstanding, received the rent, payable under the lease, for forty-six years afterwards.—Held, on a sale of the property by public auction, by the assignees in bankruptcy of the lessee, that, although there had been a waiver by the lessor of the covenant to build, still the covenant to deliver up the houses, at the end or sooner determination of the term, continued in force, and was a valid objection to the title; and that the purchaser could not be required to accept compensation or indemnity; the circumstance that the purchaser could at any time rid himself of all liability, in respect of the breach of the covenant, by assigning the premises to a pauper, was considered no reason for compelling the purchaser to accept the title. *Nouaille v. Flight*, 7 Beav. 521; 13 L. J., N. S., Ch., 414; 8 Jur. 838.

4. A lessee of land covenanted to build thereon two houses, with the approbation and under the inspection of the lessor's surveyor, and to expend in such building 400*l.* With the surveyor's approbation he built five houses on the land, no two of which were worth so much as 400*l.*, though all together were worth much more.—Held, that the

covenant was substantially performed, and that there was no objection, on the ground of the deviation from its terms, under the circumstances, to the lessor's title. *Hume v. Bentley*, 16 Jur. 1109; 21 L. J., Ch., 761.

Covenant to Insure.] 5. The vendors of an interest in a leasehold house, subject to a covenant to insure it against fire, contracted for the sale of the house to a purchaser within a given time. The contract was not completed by the specified time. There was no default on the part of the purchaser, but the vendors did not keep up the insurance after the time at which the contract should have been completed.—Held, that the purchaser ought to be discharged from his contract. *Palmer v. Goren*, 25 L. J., Ch., 841.

6. Leasehold property was sold by auction on the 8th June 1858, with a condition for completion on the 20th June following. The title was accepted by the purchaser on the 16th July, but owing to disputes as to the value of the fixtures, the meeting for completion did not take place till the 20th August. The purchaser then discovered that the vendors had renewed the insurance, which expired on the 24th June, for one month only, so that the property became uninsured on the 24th July, and thereupon became forfeited to the lessors. On the 7th September the purchaser absolutely repudiated the contract. The vendors subsequently renewed the insurance, and obtained a waiver of the forfeiture from the lessors, and the purchaser refusing to complete, they filed a bill for specific performance.—Held, that, although the vendors were not bound to renew the insurance, yet having done so in so unusual a manner, the Court would not decree specific performance, and the bill was dismissed, but without costs. *Domson v. Solomon*, 1 Dr. & Sm. 1; 29 L. J., Ch., 129.

Held, also, that the insurance ought to have been continued at the expense of the purchaser, and that it was not the duty of the vendors to inform the purchaser of the expiration of the insurance. 8 C. 6 Jur., N. S., 33.

See also 2 supra.

6. Condition as to Receipt of Rent being Evidence of Performance of Covenants.

7. By the conditions of sale relating to the leaseholds, it was stipulated that the production of the last receipt should be conclusive evidence that all the covenants had been performed.—Held, that the production of such a receipt prevented the purchaser from taking the objection that the lease had been forfeited by reason of the dilapidated state of the premises. *Bull v. Hutchens*, 32 Beav. 615.

8. A leasehold public-house was sold subject to a condition that the production of the last receipt for rent paid should be taken as conclusive evidence of the due performance of the lessee's covenants or the waiver of any breaches up to the time of completion, whether the lessor should be cognizant of such breaches or not. The lease contained a covenant to use the premises for the business of a public-house only, and not to permit any other trade to be

carried on on any part of the premises without the lessor's written consent. The particulars on which the contract of purchase was indorsed showed that parts of the premises were underlet to persons who carried on other trades there. From the answers to objections to title, it appeared that the lessors had received rent with knowledge of the underlettings, and the last receipt for rent was produced. Specific performance of the contract having been decreed, and a reference as to title directed by an order which was not appealed from:—Held, that whether the breach of covenant was or was not a continuing breach such as to render the purchaser liable to be ejected after the completion of the purchase, and whether this would or would not have furnished a valid reason for not decreeing specific performance, the vendor had made a good title in accordance with the contract which the purchaser was bound to accept, the decree for specific performance having been made and not appealed from. *Lamrie v. Lees*, 7 L. R., App. Cas., 19; 51 L. J., Ch., 209; 46 L. T. 210; 80 W. R. 185. Affirming 14 L. R., Ch. D., 249; 49 L. J., Ch., 636; 42 L. T. 485; 28 W. R. 779.

Whether the decision in *Walrond v. Hawkins* (10 L. R., C. P., 342) is applicable to a case where the covenant is simply not to permit the property to be used in a particular way, *quære*. *Ib.*

7. Proof of Performance of Covenants. Open Contract.

1. Upon an open contract for the sale of a lease of a house the vendor, in answer to a requisition by the purchaser as to the performance of repairing covenants in the lease, produced a receipt for rent down to a year previously, but could not produce the last receipt, the lessor having refused to receive his rent, on the ground of alleged breaches of covenant. The lessor had commenced an action of ejectment on the same ground against the vendor, but the action had been stayed on account of the plaintiff having failed to comply with an order for delivery of particulars of claim. The vendor deposed that to the best of his knowledge and belief the whole of the covenants in the lease had been duly performed, and proved the execution of various specific repairs, and the purchaser, though he had had an opportunity given him of inspecting the premises, offered no evidence to show that anything was wanting to complete the performance of the covenants:—Held, that, notwithstanding the failure to produce the receipt for rent, there was such *prima facie* evidence of the performance of the covenants as to constitute a sufficient answer to the requisition in that behalf. *Ringer to Thompson*, 51 L. J., Ch., 42; 45 L. T. 580.

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2. A person contracting to purchase leasehold property, is held to contract with notice of the clauses of the lease. *Walter v. Maunde*, 1 Jac. & Walk. 181.

3. A purchaser of a leasehold sold under a decree is bound by notice of all clauses and

covenants in the lease, whether unusual or not, without their being specially mentioned in the rental or conditions. *Vaughan v. Magill*, 12 Ir. Eq. R. 207. Affirming *id.* 200.

An annuity being mentioned in the rental to be charged on the premises sold, is sufficient notice of the legal estate being outstanding to secure it in the usual way; and the principle equally applies where the interest sold is a renewable leasehold, and the annuity deed contains a *toties quoties* covenant, though the effect is, that the purchaser cannot acquire the reversion of the tenancies on the lands. *Ib.*

4. During a treaty for an assignment of a lease, the plaintiff produced the lease to the defendant, and the defendant looked at the lease and the indorsement by which the original lessee had assigned the lease to the plaintiff, and in which it was stated that the assignment was made with the licence of the lessor. The defendant afterwards requested the plaintiff to cause the proposed assignment to be indorsed on the lease *totidem verbis* with the assignment thereon to himself. The defendant denied he had seen the covenant against assignment without licence; but held to have had notice of it. *Smith v. Capron*, 7 Hare 189; 19 L. J., N. S., Ch., 322; 14 Jur. 686.

5. *Quære*, whether the doctrine, that a purchaser of leaseholds, or of freeholds subject to a lease, has notice of the covenants in the lease, can be extended to fix him with notice of collateral facts stated in such covenant. If such facts disclose a defect in the vendor's title, the Court will not compel the purchaser to perform his contract, whether he had notice or not. *Darlington v. Hamilton*, 1 Kay 550; 23 L. J., Ch., 1000; 2 Eq. Rep. 906.

6. Upon the sale of leasehold property, it is the duty of the purchaser to inquire into the contracts and stipulations of the original lease; therefore, where leasehold property about to be sold was described in the particulars of sale as being held at a ground-rent of 86*l.* per annum, and it appeared from the lease that the ground-rent was 80*l.*, and one-third of the improved yearly rent or value, and there were other stringent covenants in the lease, not noticed in the particulars, such as that no fine should be taken for an under-lease or assignment, except with the consent of the reversioner, etc.:—Held, nevertheless, that the purchaser must be held to his contract. *Pope v. Garland*, 4 Y. & Coll. 394; 10 L. J., N. S., Exch. Eq., 13.

7. The purchaser of property has notice of the interests of a tenant in possession, and the purchaser of leaseholds has notice of what it is he purports to buy, and that he must be bound by all the covenants in the lease; but one who contracts for a lease from a party, with knowledge that he holds under a leasehold title, has notice of ordinary but not of unusual covenants in the original lease. *Wilbraham v. Livezey*, 18 Beav. 206.

Covenants in restraint of trade in a trading locality are not considered usual covenants. *Ib.*

The defendant agreed with the plaintiff to take a house in the Strand to be used for the business of printing. Nothing was said as to covenants. The plaintiff was a lessee under a lease containing covenants against

"obnoxious trades," and the defendant was told that the premises were leasehold. A reference as to title was directed, having regard to the covenants in the lease, and the purposes for which the premises were taken. *Id.*

1. A purchaser of leasehold property is bound to inform himself of the contents of the lease, and cannot avoid specific performance, on the ground that it contains an unusual covenant, which was not mentioned in the particulars or at the sale. *Grosvenor v. Green*, 5 Jur., N. S., 117; 28 L. J., Ch., 173.

2. Particulars of sale described the thing to be sold as an improved ground-rent, amply secured, and stated the property to be held under a sub-lease of the full term of the ground lease. The conditions of sale provided that no objection should be taken by reason of the sub-lease being in excess of the superior lease, and offered previous inspection of the leases, and provided that the purchaser should be held to have notice of the leases, and their effect, whether he inspected or not:—Held, that the particulars disclosing the facts, and the conditions referring to the facts, the purchaser was bound, though the particulars and conditions did not particularly state the legal effect; particularly having regard to the circumstance that inspection was offered. *Smith v. Watts*, 4 Drew. 331; 28 L. J., Ch., 220.

3. The original conveyance in fee of land contained a covenant by the purchaser, for himself, his heirs, executors, and administrators, with the vendors, their heirs and assigns, that no building to be erected on the premises should be used for the sale of ale, beer, wine, or spirits, or any other intoxicating liquor. A house was built on the land, and a tenant from year to year, holding under a purchaser of the fee, but not having actual notice of the covenant, opened a beer-shop on the premises:—Held, that it was the duty of the tenant to have inquired into the title of his lessor, and as he had not made out a case which relieved him from such obligation, an injunction was granted. *Wilson v. Hart*, 1 L. R., Ch., 463; 35 L. J., Ch., 569; 14 W. R. 748.

The rule, that a purchaser is bound to inquire into the title of his vendor, applies equally to a tenant from year to year in relation to the title of his lessor. *Id.*

4. A purchaser or lessee having notice of a deed forming part of the chain of title of his vendor or lessor, has constructive notice of the contents of such deed, and is not protected from the consequences of not looking at the deed, even by the most express representation on the part of the vendor or lessor that it contains no restrictive covenants, nor anything in any way affecting the title. The rule that a lessee has constructive notice of his lessor's title has not been altered by s. 2, sub-s. 1 of the Vendor and Purchaser Act 1874, but a lessee is now in the same position with regard to notice as if he had, before the Act, stipulated not to inquire into his lessor's title. *Wilson v. Hart* (1 L. R., Ch., 463) observed upon. *Patman v. Harland*, 17 L. R., Ch. D., 363; 50 L. J., Ch., 642; 44 L. T. 728; 29 W. R. 707.

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applies to the case of the lessee who neglects to inquire into his lessor's title. *Frieden v. Slater*, 17 W. R. 485; 20 L. T., N. S., 112; 7 L. R., Eq., 523; 38 L. J., Ch., 379.

[What are Usual Covenants.] See LANDLORD AND TENANT.

9. Indemnity by Vendor.

6. Lessee subject to covenants cannot compel specific performance of agreement to purchase the premises of him, though he offers to indemnify purchaser against performance of covenants. *Fildes v. Hooker*, 3 Madd. 193.

7. A., lessee of iron works, etc., subject to payment of rent and performance of covenants, assigns to B., as a security for sums advanced, and to be advanced, reserving to himself a mere equity of redemption. A. becomes bankrupt, and his assigns agree to convey to B. the equity of redemption in the demised premises. The assignees have no right to enforce against B. a specific performance of this agreement, by accepting an assignment with a covenant for indemnity against payment of the rent and performance of the covenants reserved by the original lease. *Wilkins v. Fry*, 1 Meriv. 244; 2 Rose 371.

8. A court of equity will not decree the specific performance of a contract for the purchase of a lease, where, from pending and threatened litigation, it is impossible to ascertain to whom the ground-rent is payable, and the purchaser must be involved in immediate litigation. *Pegler v. White*, 23 Beav. 403.

The vendors under an agreement for sale of leaseholds produced the last receipt for the ground-rent, signed by agents; but it did not clearly appear on whose behalf it was so signed. On inquiry the title to the reversion was found to be uncertain:—Held, that the Court would not compel the purchaser to accept the title, although the vendors offered to indemnify him against six years' ground-rent. As the usual inquiry in chambers as to title had been waived by consent, the cause was ordered to stand over to give the plaintiff an opportunity of making a good title by procuring the consent of all the claimants of the reversion. S. C. 3 N. R. 557.

10. Covenant for Indemnity by Purchaser.

9. Under a contract for assignment of a term, whether from the original lessee or a mesne assignee, the purchaser must covenant for indemnity against payment of rent and performance of the covenants, though he cannot have a covenant for title from the assignor, as being an executor, and also by express stipulation. *Staines v. Morris*, 1 Ves. & B. 8.

10. Under the usual condition on sales by auction of leaseholds, that the largest purchaser shall take an assignment of the lease and execute under-leases to the other purchasers, he is bound to covenant to indemnify the other purchasers against any breach of covenants contained in the original lease relating to any part of the property. *Brown v. Paull*, 2 Jur., N. S., 317.

carried on on any part of the premises without the lessor's written consent. The particulars on which the contract of purchase was indorsed showed that parts of the premises were underlet to persons who carried on other trades there. From the answers to objections to title, it appeared that the lessors had received rent with knowledge of the underlettings, and the last receipt for rent was produced. Specific performance of the contract having been decreed, and a reference as to title directed by an order which was not appealed from:—Held, that whether the breach of covenant was or was not a continuing breach such as to render the purchaser liable to be ejected after the completion of the purchase, and whether this would or would not have furnished a valid reason for not decreeing specific performance, the vendor had made a good title in accordance with the contract which the purchaser was bound to accept, the decree for specific performance having been made and not appealed from. *Lavrie v. Lees*, 7 L. R., App. Cas., 19; 51 L. J., Ch., 209; 46 L. T. 210; 50 W. R. 185. Affirming 14 L. R., Ch. D., 249; 49 L. J., Ch., 636; 42 L. T. 485; 28 W. R. 779.

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1. A purchaser of leasehold property is bound to inform himself of the contents of the lease, and cannot avoid specific performance, on the ground that it contains an unusual covenant, which was not mentioned in the particulars or at the sale. *Grosvenor v. Green*, 5 Jur., N. S., 117; 28 L. J., Ch., 173.

2. Particulars of sale described the thing to be sold as an improved ground-rent, amply secured, and stated the property to be held under a sub-lease of the full term of the ground lease. The conditions of sale provided that no objection should be taken by reason of the sub-lease being in excess of the superior lease, and offered previous inspection of the leases, and provided that the purchaser should be held to have notice of the leases, and their effect, whether he inspected or not:—Held, that the particulars disclosing the facts, and the conditions referring to the facts, the purchaser was bound, though the particulars and conditions did not particularly state the legal effect; particularly having regard to the circumstance that inspection was offered. *Smith v. Watts*, 4 Drew. 331; 28 L. J., Ch., 220.

3. The original conveyance in fee of land contained a covenant by the purchaser, for himself, his heirs, executors, and administrators, with the vendors, their heirs and assigns, that no building to be erected on the premises should be used for the sale of ale, beer, wine, or spirits, or any other intoxicating liquor. A house was built on the land, and a tenant from year to year, holding under a purchaser of the fee, but not having actual notice of the covenant, opened a beershop on the premises:—Held, that it was the duty of the tenant to have inquired into the title of his lessor, and as he had not made out a case which relieved him from such obligation, an injunction was granted. *Wilson v. Hart*, 1 L. R., Ch., 463; 35 L. J., Ch., 569; 14 W. R. 748.

The rule, that a purchaser is bound to inquire into the title of his vendor, applies equally to a tenant from year to year in relation to the title of his lessor. *Ib.*

4. A purchaser or lessee having notice of a deed forming part of the chain of title of his vendor or lessor, has constructive notice of the contents of such deed, and is not protected from the consequences of not looking at the deed, even by the most express representation on the part of the vendor or lessor that it contains no restrictive covenants, nor anything in any way affecting the title. The rule that a lessee has constructive notice of his lessor's title has not been altered by s. 2, sub-s. 1 of the Vendor and Purchaser Act 1874, but a lessee is now in the same position with regard to notice as if he had, before the Act, stipulated not to inquire into his lessor's title. *Wilson v. Hart* (1 L. R., Ch., 463) observed upon. *Patman v. Harland*, 17 L. R., Ch. D., 353; 50 L. J., Ch., 642; 44 L. T. 728; 29 W. R. 707.

5. The rule, that a purchaser is bound to inquire into the title of his vendor, and is affected with notice with that which appears upon the title if he does not so inquire,

applies to the case of the lessee who neglects to inquire into his lessor's title. *Fielden v. Slater*, 17 W. R. 485; 20 L. T., N. S., 112; 7 L. R., Eq., 523; 38 L. J., Ch., 379.

What are Usual Covenants.] See LANDLORD AND TENANT.

9. Indemnity by Vendor.

6. Lessee subject to covenants cannot compel specific performance of agreement to purchase the premises of him, though he offers to indemnify purchaser against performance of covenants. *Fildes v. Hooker*, 3 Madd. 193.

7. A., lessee of iron works, etc., subject to payment of rent and performance of covenants, assigns to B., as a security for sums advanced, and to be advanced, reserving to himself a mere equity of redemption. A. becomes bankrupt, and his assigns agree to convey to B. the equity of redemption in the demised premises. The assignees have no right to enforce against B. a specific performance of this agreement, by accepting an assignment with a covenant for indemnity against payment of the rent and performance of the covenants reserved by the original lease. *Wilkins v. Fry*, 1 Meriv. 244; 2 Rose 371.

8. A court of equity will not decree the specific performance of a contract for the purchase of a lease, where, from pending and threatened litigation, it is impossible to ascertain to whom the ground-rent is payable, and the purchaser must be involved in immediate litigation. *Pegler v. White*, 23 Beav. 403.

The vendors under an agreement for sale of leaseholds produced the last receipt for the ground-rent, signed by agents; but it did not clearly appear on whose behalf it was so signed. On inquiry the title to the reversion was found to be uncertain:—Held, that the Court would not compel the purchaser to accept the title, although the vendors offered to indemnify him against six years' ground-rent. As the usual inquiry in chambers as to title had been waived by consent, the cause was ordered to stand over to give the plaintiff an opportunity of making a good title by procuring the consent of all the claimants of the reversion. S. C. 3 N. R. 557.

10. Covenant for Indemnity by Purchaser.

9. Under a contract for assignment of a term, whether from the original lessee or a mesne assignee, the purchaser must covenant for indemnity against payment of rent and performance of the covenants, though he cannot have a covenant for title from the assignor, as being an executor, and also by express stipulation. *Staines v. Morris*, 1 Ves. & B. 8.

10. Under the usual condition on sales by auction of leaseholds, that the largest purchaser shall take an assignment of the lease and execute under-leases to the other purchasers, he is bound to covenant to indemnify the other purchasers against any breach of covenants contained in the original lease relating to any part of the property. *Brown v. Paull*, 2 Jur., N. S., 317.

1. An owner of leasehold premises covenanted to assign them to trustees, or as they should direct, upon trust to sell, and apply the proceeds for the benefit of his creditors. Upon a sale by the trustees:—Held, that the owner was entitled to a covenant of the purchaser for payment of the rent and performance of the covenants during the continuance of the lease. *Morley v. Clavering*, 29 Beav. 84; 7 Jur. N. S., 904.

The draft assignment having been settled in chambers, and signed by the vendor, a time and place were appointed for the purchaser to attend and pay the balance of the purchase-money on delivery of the assignment executed by the vendor. *Id.*

11. Other Cases.

2. Leaseholds were sold under the Court, described as "a bonded sugar refinery," and the lease was referred to, which contained no such restriction. The abstract showed a prior agreement for the lease of the premises, to be used "for refining sugar in bond." The purchaser accepted the title, paid his purchase-money into court, and was let into possession. The lessors afterwards instituted a suit to rectify the lease, by introducing the restriction. The Court refused to compel the final completion of the purchase, or part with the purchase-money, until the result of the suit was known. *Bentley v. Craven*, 17 Beav. 204.

3. A slight and immaterial misdescription of the term in the agreement for the sale of a lease will not relieve a purchaser from the obligation of completing his purchase. *Jennings v. Brunt*, 19 L. T., N. S., 705.

4. Conditions of sale of leasehold property provided that the vendors should pay all outgoings up to the half-quarter day, when the purchase was to be completed:—Held, that under the term "outgoings," the half-quarter's rent was payable by the vendors. *Laves v. Gibson*, 35 L. J., Ch., 148.

5. A person agreeing to purchase the right and interest of another, under a contract for a lease, with full notice of the nature of it, cannot object to the payment of the consideration, either on the ground that such contract is not binding on the other party to it, or for want of title. *Baxter v. Conolly*, 1 Jac. & Walk. 576.

6. A party who takes an assignment of a lease from the agent of the lessor, with notice of the assignor's character as agent, has the same liability of sustaining the lease cast upon him that the agent has, and if the lease cannot be upheld by the agent neither can it be supported by the purchaser from the agent. *Molony v. Kernan*, 2 Dr. & War. 31.

7. The vendor of leaseholds held under an ecclesiastical corporation, previously to his contract for sale, was in treaty with the lessors for a renewal of the lease, and continued such treaty after the contract:—Held, that this did not throw upon him the obligation of procuring such renewal for the benefit of the purchaser. *Monro v. Taylor*, 3 Macn. & G. 713; 21 L. J., N. S., Ch., 525. Affirming 8 Hare 51.

8. After a purchase, the tenant holds of the purchaser on the same terms as he previously held of the vendor, and the holding continues until the tenancy has been regularly deter-

mined, either by the landlord or tenant. *Greenwood v. Bairton*, 5 L. J., N. S., Ch., 179.

9. To a suit for specific performance, by the purchaser against the vendor of a leasehold interest, it is not a defence that the lease contains a covenant against alienation without the consent of the landlord, and that it does not appear that the consent of the landlord has been obtained. *Leitch v. Simpson*, 5 Ir. R., Eq., 613.

10. "Occupation under a lease" means occupation of all that passed under the lease, whether in actual enjoyment and use or not, and whether known to exist at the time of the lease or not; and therefore a cellar under certain demised premises was held to be in the "occupation of the lessee under the lease," although the tenant of the neighbouring tenement was in the actual use of such cellar. *Whittington v. Corder*, 16 Jur. 1034.

11. Agreement for the sale of a lease, "with possession on the 1st December, the rent to commence at Christmas." Possession was not given until the 31st January, through the default of the vendor:—Held, that the purchaser was entitled to compensation, and an inquiry was directed. *Gedye v. Montross (Duke)*, 26 Beav. 45.

12. Premises held under a demise, containing a proviso, that lessees shall not assign without the license of landlord in writing, are sold under a decree to a purchaser, who pays his purchase-money into court, and is let into possession; the landlord having refused to concur in the assignment, the representatives of the lessee filed a bill against him, alleging that his conduct with respect to the sale had been such as to deprive him in equity of any right to act on the legal construction of the covenant and proviso against assignment, and praying that he might be decreed to give his license in writing for the transfer of the interest. The purchasers are necessary parties to such a bill. *Maule v. Beaufort (Duke)*, 1 Russ. 349.

II. SALE OF UNDER-LEASES.

1. *Objections to Title*, 7312.

2. *Notice of Covenants in Original Lease*, 7313.

1. Objections to Title.

13. Upon a contract for a sale of the sub-lease, the objection to the title, arising from the possibility of a future breach of the covenant by the representative of the original lessee, may be cured, either by an insurance, in the name of that representative, for the whole residue of the term created by the sub-lease, or by making that representative join in a covenant, that the purchaser shall be at liberty to insure in his name, and to deduct the annual premiums out of the rent. *Montresor v. Williams*, 1 L. J., Ch., 151.

14. Where upon the sale of a leasehold ground-rent by the mesne lessee, a part of the term assigned (seven days) being reserved, and by the conditions, no title prior to the assignment or title of any ground or mesne landlord was to be produced, and, by recital in the original lease, it appeared that the

property out of which the rent issued had been originally demised with other premises at a rent, subject to the covenants, etc., in the original demise:—Held, that a good title could not be made to the ground-rent in question, as upon failure of payment of the original rent it might become subject to forfeiture or diminution. Where conditions are so obscurely worded as to mislead a purchaser, *semble*, the Court would discharge him from his purchase, on the assignment of exceptions to the title, without putting him to the necessity of a motion to be so discharged. *Taylor v. Martindale*, 1 Y. & Coll. C. C. 658.

1. On the purchase of an under-lease it is not a valid objection to the title, that the under-lease may become forfeited by the non-performance of the covenants in the original lease. *Hayford v. Criddle*, 22 Beav. 477.

2. Where the original lease contains covenants, the breach of any one of which would incur a forfeiture, and an under-lease is made of a portion of the property containing no similar covenant on the part of the under-lessee, and the latter sells his under-lease, describing it as a lease, but that the lessor's title shall not be inquired into, the Court will not compel a purchaser who has discovered the true state of the title *abundè* to complete, notwithstanding in the original lease the rents and right of re-entry are apportioned. *Darlington v. Hamilton*, 2 Eq. Rep. 906; 1 Kay 550; 23 L. J., Ch., 1000.

Under-lessee of a term describing it as a lease, and selling subject to a condition that the lessee's title shall not be inquired into, but is nevertheless good, and it turns out that the title is of leasehold only, and not freehold:—*Quære*, whether such a misdescription as would entitle a purchaser to resist a specific performance. *Ib.*

Covenant to repair and amend, with power of entry to inspect the state of the premises, does not include a covenant to paint. *Ib.*

Under-lease Sold as a Lease.] See VI. VI. 3 *ante*.

Non-performance of Covenant to Insure.]

3. A covenant by the lessee to insure the demised premises in the names of himself and the lessor, although not performed literally by an insurance in the name of the lessor only, is yet so far substantially performed for the benefit of the lessor, and he could not recover for a breach of the covenant, the stipulation for the insurance in the name of the lessee being for the exclusive benefit of the latter, and which he is at liberty to dispense with:—Held, therefore, that the circumstance that the original lessee could not be found, and that no insurance could be effected in his name, was not an objection to the title of an under-lessee. *Havens v. Middleton*, 10 Hare 641; 47 Jur. 271; 22 L. J., Ch., 746.

2. Notice of Covenants in Original Lease.

4. It is the duty of a person contracting for an under-lease to inform himself of the covenants contained in the original lease, and if he enters and takes possession of the property,

he will be bound by those covenants. Where the original lease contained unusual covenants, and the defendant entered into an agreement with the plaintiff for an under-lease, and took possession of the premises, no reference to covenants being made in the agreement, but the defendant's solicitor having had an opportunity of inspecting the original lease, it was held that the defendant was bound to accept a lease with the unusual covenants contained in the original lease. *Cosser v. Collinge*, 3 Myl. & K. 283; 1 L. J., N. S., Ch., 130.

5. A party who enters into an agreement for an under-lease, without inquiring into the covenants of the original lease, has constructive notice of all usual covenants in the original lease. *Quære*, whether he has such notice of unusual covenants. But where a party entered into an agreement with a lessee for an under-lease, and informed him of the nature of the business which he meant to carry on in the premises, and the lessee did not apprise him that there was a covenant in the original lease prohibiting such business, the silence of the lessee was equivalent to representation that there was no such prohibiting covenant. *Flight v. Barton*, 9 Myl. & K. 282.

XXIII. Options and Pre-emptions.

I. *Who may Exercise*, 7313.

II. *Time for and Delay*, 7314.

III. *Other Cases*, 7315.

IV. *Bequest of*. See WILL.

V. *Conversion by*. See CONVERSION, I. II. 2.

VI. *In Case of Superfluous Lands taken under Compulsory Powers*. See LANDS CLAUSES ACT, XIV.

VII. *Conditional Sale or Mortgage*. See MORTGAGE, I. II.

I. WHO MAY EXERCISE.

6. Equity will not, after a sale, enforce a covenant for pre-emption against mortgagor in favour of mortgagee. *Orby v. Trigg*, 9 Mod. 2.

7. B. and C., being the sole proprietors of a newspaper, by indenture divide the concern into a certain number of shares, and confirm certain rights of pre-emption, according to fixed rates of price, and in a certain order, on each other mutually, and on all future holders of shares. Having all along continued to be, and still being, the sole proprietors, they afterwards assign certain shares, with their appurtenances, and all their right, title, and interest in these shares to A.; and various new conditions, with respect to A.'s interest, are introduced into the deeds of assignment, but nothing is said as to the right of pre-emption:—Held, that A. is entitled to the rights of pre-emption annexed by the first-mentioned indenture to his shares. *Stewart v. Stuart*, 1 L. J., Ch., 61.

8. Certain lands were demised for three lives, renewable for ever, subject to a condition of pre-emption, by the lessor, his heirs, or assigns, in case the tenant, his heirs, or assigns, should dispose thereof; and if such preference

should not be given, then the lease to cease. The lessor assigned his interest, and the assignee purchased a portion of the tenant's interest:—Held, that the condition could not be taken advantage of by the assignee of the reversion; and the lands having been sold under a decree without such preference having been given, an exception to the title on that ground was overruled. *Sparrow v. Cooper*, Hay. & J. 404.

1. A lease of land contained a covenant by the lessor with the lessee, his executors, administrators, and assigns, that if the lessee, his executors, administrators, or assigns, should at any time thereafter be desirous of purchasing the fee simple of the demised land, and should give notice in writing to the lessor, his heirs and assigns, then the lessor, his heirs or assigns, would accept 1,200*l.* for the purchase of the fee simple, and on receipt thereof would convey the fee simple to the lessee, his heirs or assigns, or as he or they should direct. The lessee died intestate, and nearly twenty years after his death, his heir, who was also administrator of his personal estate, called on the devisee of the lessor to convey the fee simple to him in accordance with the covenant, and a conveyance was executed accordingly. The heir afterwards contracted to sell part of the property thus conveyed to him:—Held, that the option to purchase was attached to the lease and passed with it; that it consequently passed as part of the lessee's personal estate to the administrator, and that the administrator could not make a good title to the purchaser, unless the next-of-kin of the lessee would concur in the sale. *Re Adams and Kensington Vestry*, 24 L. R., Ch. D., 199; 52 L. J., Ch., 758; 48 L. T. 958; 32 W. R. 120. Affirmed 27 L. R., Ch. D., 394; 54 L. J., Ch., 87; 51 L. T. 382; 32 W. R. 883.

II. TIME FOR AND DELAY.

2. A right of pre-emption held limited to the life of the owner of the property. *Stocker v. Dean*, 16 Beav. 161.

Semble, that a right of pre-emption "at all times thereafter cannot be enforced after the death of the owner of the property. *Ib.*

3. A lessor covenanted with the lessee that if he should be desirous, at the expiration of the term, of purchasing the fee of the hereditaments, and should give unto or leave at the last known or most usual place of abode of the lessor six calendar months' notice in writing of such his desire, and should pay unto the lessor 2,000*l.*, and also all arrears of rent, the lessor would, at the expense of the lessee, convey the premises, free from incumbrances. The expense of preparing an abstract of the title of the lessor, and charges incidental thereto, and of any copies of deeds, and the charges of the solicitor of the lessor for perusing and procuring the execution of the conveyance, were to be borne and paid by the lessee. The lessee, by the deed, accepted and approved the title of the lessor:—Held, that the payment of purchase-money was a precedent condition to the delivery of the abstract of title, and that as the lessee had not performed the condition, the contract

was not binding on the lessor. *Weston v. Collins*, 11 Jur., N. S., 190; 13 W. R. 510; 34 L. J., Ch., 345; 5 N. R. 345.

4. A tenant was to have a purchasing clause, at any time within nine years, by giving three months' notice. He gave the notice at the end of four years, and delays occurring, the three months elapsed. Afterwards the landlord threatened hostile measures to compel a completion, but subsequently gave notice that unless the purchase should be completed within six weeks, he should treat the notice as void, and the right of purchasing as forfeited. The purchase was not completed within the six weeks:—Held, first, that though a conditional right to purchase must be strictly complied with, yet time was not, in this case, of the essence of the contract; secondly, that if it had been, it was waived by the landlord's insisting on the contract after the expiration of the three months; thirdly, that time was not made of the essence of the contract by the notice; and, fourthly, that six weeks was not, under the circumstances, a reasonable time. *Pegg v. Wisden*, 16 Beav. 239; 16 Jur. 1105; 1 W. R. 43.

5. Articles of agreement for a lease contained a proviso, that if at any time within a certain period the lessees should desire to purchase the fee simple, and should give three months' notice of such their desire, and should, "at the expiration of such notice, pay unto him, the lessor, 210*l.* in respect of such plot, etc., then the lessor shall and will convey the freehold to the lessee." Notice to purchase was given in due course, but the three months after the notice having been allowed to elapse without the money being paid, the lessor refused to carry out the agreement for sale. Upon a bill by the lessee for specific performance:—Held, that "at the expiration" meant the precise day on which the notice expired; that until the condition of paying the money was performed, the relation of vendor and purchaser did not arise; that time was of the essence of the contract, and that the money not being paid at the fixed time, the lessee lost his right to purchase, and the Court refused specific performance and dismissed the bill, with costs. *Ranelagh (Lord) v. Melton*, 2 Dr. & Sm. 278; 10 Jur., N. S., 1141; 13 W. R. 150; 34 L. J., Ch., 227; 11 L. T., N. S., 409; 5 N. R. 101.

6. By a clause at the end of a lease, the lessees on notice given on or before a fixed date had the option of purchasing the fee simple of the premises comprised in the lease, together with certain machinery thereon. The term was under the lease determined absolutely by an event which happened, viz., by a fire which partly destroyed the premises demised, and which occurred before the exercise of the option:—Held, that the option to purchase was independent of the duration of the term. *Edwards v. West*, 26 W. R. 507; 38 L. T., N. S., 481; 7 L. R., Ch. D., 858; 47 L. J., Ch., 463.

7. A person entitled to leasehold premises for a long term of years agreed to underlet them to a tenant for three years, and, whenever called upon to do so by the tenant, to grant him a lease for three years, seven years, or the remainder of the term that he had it in his power to grant, such lease to contain all

the usual covenants for protecting the interests of the grantor. The three years expired without the option being exercised. The tenant, however, continued in possession until he became bankrupt, and his interest in the premises was sold by his assignee to a purchaser, who entered into possession and filed a bill for specific performance of the agreement:—Held, first, that the option might be exercised at any time during the tenancy. *Buckland v. Papillon*, 36 L. J., Ch., 81; 2 L. R., Ch., 67; 12 Jur., N. S., 992; 15 W. R. 92; 15 L. T., N. S., 378. Affirming 1 L. R., Eq., 477; 12 W. R. 380; 13 L. T., N. S., 736.

Held, secondly, that the bankrupt had such an interest in lands as passed to his assignee either under 12 & 13 Vict., c. 106, s. 142, or under s. 145. *Ib.*

Held, thirdly, that such interest was not prevented from so passing by the absence of the word "assigns" in the agreement. *Ib.*

1. M. became tenant to A. of leasehold property for ten years from December 1861, "M. to have the option at any time during the term to purchase the premises for 3,500*l.*, and upon payment to A. the term of ten years and the rent shall thereupon cease, and M. shall thereupon be entitled to an assignment." M. entered into possession, and afterwards A. made a mortgage to G. In July 1867 M. gave written notice to A. and to G. that he elected to purchase. A draft assignment was prepared, which could not be settled, since neither A nor G. would assent to the purchase-money being paid to the other of them. A correspondence took place, which ended in March 1868. G. having given notice to M. to pay his rent to him, M. made to him various irregular payments, for the most of which receipts were given expressing them to be on account of rent, and this went on after the end of the term of the ten years. In November 1872 A. became bankrupt. On the 1st May 1873 the solicitor of his trustee called on M., and stated that the trustee was going to sell, and wished to give him the refusal. M. desired time to consider, and did not say that he had already agreed to purchase. On the next day the solicitor discussed the matter with the trustee's solicitor, but did not set up any claim as having purchased. On the 13th May, however, he wrote to the trustee's solicitor insisting on M.'s right under the agreement of 1861 and the notice of July 1867, and the trustee disputing this right, M. filed a bill for specific performance:—Held, that the option in the agreement of 1861 and the notice of July 1867 made a binding contract, although the purchase-money was not paid within the term. *Mills v. Haywood*, 6 L. R., Ch. D., 196.

Held, that M.'s right to specific performance was lost by the delay from March 1868 to May 1873, which was not excused by his having been in possession; for that possession, in order to have that effect, must be a possession under the contract, and such that the vendor must know, or be taken to know, that the purchaser claims to be in possession under the contract; and in this case the plaintiff did not, from March 1868 to May 1873, claim possession under the contract, nor did it appear that the vendors recognize him, as claiming possession under it. *Ib.*

III. OTHER CASES.

2. A person who contracts to sell an agreement for a lease must, in the absence of anything to show a contrary intention at the time of the contract, show that the agreement is valid. A contract was entered into for the sale of an agreement for a lease. The agreement was at that time voidable at the will of a third person, as also subsequently, when the purchaser, on discovering that to be the case, repudiated the contract. The third person had not avoided the agreement, but offered to renew it conditionally on the vendor's doing a certain thing:—Held, that the purchaser was entitled to repudiate the contract, and was not obliged to wait and see whether the condition would be performed. *Brewer v. Broadwood*, 22 L. R., Ch. D., 105; 47 L. T. 508; 31 W. R. 115; 52 L. J., Ch., 136.

3. A yearly tenant with the option of purchasing, having filed his bill for a specific performance against the landlord, the latter, after notice to quit, brought an action of ejectment against him, whereupon the tenant applied for an injunction to restrain the action, which the Court only granted upon the terms of the tenant continuing to pay the rent without prejudice. *Pyke v. Northwood*, 1 Beav. 152.

4. The defendant agreed, in consideration of the plaintiff erecting a house and premises upon a plot of ground belonging to the defendant, to grant a lease of the same when completed, according to the terms of the agreement; and the plaintiff agreed to insure the house and premises in the County Fire Office in the joint names of the plaintiff and the defendant; provided that if the plaintiff should not fully perform his agreement, then that the agreement by the defendant for executing a lease should be void, and the defendant should have power to re-enter; and the defendant further agreed that the plaintiff should, within two years from the date of the agreement, have the option to purchase for a stipulated sum. The plaintiff erected the house and premises in accordance with the terms of agreement, but insured them in the Royal Exchange Insurance Office, and in his own name only. The plaintiff within the time limited signified his intention to purchase. The defendant refused to sell on the ground of the breach of covenant, and commenced an ejectment against the plaintiff. Upon a bill filed by the plaintiff:—Held, that the contract to sell was a distinct and separate part of the agreement; and a decree was made restraining the ejectment, and for the specific performance of the agreement for purchase. *Green v. Low*, 2 Jur., N. S., 848.

5. A lease for twenty-one years contained a proviso, that if the lessees should be desirous of purchasing the fee, and should give to the lessor, his heirs or assigns, notice of such desire, they should be entitled to become the purchasers of the premises at the price named, and the lessor, his appointees, heirs, or assigns would, on payment of the purchase-money, do all acts for conveying the premises to the use of the purchasers. The lessor died, having devised all his real estate to trustees, who disclaimed, and leaving an infant heir. The lessees having served on the infant and his guardian notice of their election to purchase:

—Held, that such notice was effectually served, and constituted a valid and binding contract, which the Court would not refuse to carry out on the ground that the infant could not give a discharge for the purchase-money. *Woods v. Hyde*, 31 L. J., Ch., 295.

1. An agreement was entered into between two water companies, by which Company A. should take over the works, provide for a mortgage debt, and pay interest upon the shares of Company B. This agreement was sanctioned by Act of Parliament, and the transaction was carried into effect by a deed of January 1857, which provided that if company A. (or their intended assignees, the corporation or local board of health), being desirous of becoming the absolute and unrestricted owners of the works of Company B., subject only to the mortgage debt, should, "on or before any 25th December, after having given to Company B. six months' previous notice of their desire to avail themselves of the option thereby given, pay unto the Company B." 46,246l., the amount of their share capital, the party so paying should become absolutely entitled to the works. In June 1870 the corporation, who had acquired the interest of Company A., gave notice to Company B. of their intention to pay this sum on the 25th December following, but they were unable from want of funds to carry out the purchase. In June 1871 they again gave notice that they would pay the money on the 25th December 1871.—Held, that the corporation, by giving the first notice and failing to act upon it, had not lost the right given to them by the deed of January 1857, of purchasing after six months' notice, on or before any 25th day of December. *Ward v. Wolverhampton Waterworks Co.*, 13 L. R., Eq., 243; 41 L. J., Ch., 308.

2. By an agreement between the plaintiff and the defendant, the latter agreed with the former to grant him a lease for a term of ninety-nine years, subject to a yearly rent and certain covenants to be inserted in the lease. The agreement contained an option on the part of the plaintiff to purchase the premises within three years. The plaintiff having elected to purchase, the defendant refused to produce his title to the premises.—Held, that the right of the plaintiff was that of an ordinary purchaser, who was entitled to have a good title produced, in the absence of any condition to the contrary, and that the onus was upon the defendant to show that that right had been waived. *Welshman v. Spinks*, 5 L. T., N. S., 385.

3. B. leased lands to H., giving him an option to purchase the fee, having previously devised the land so leased. After B.'s decease, H. desired to exercise the option, for which purpose a suit was necessary.—Held, that the decree must be without costs. *Hall v. Bushill*, 14 W. R. 495; 14 L. T., N. S., 246.

4. Where a vendor is entitled to repurchase on payment of a sum of money by a given day, and such sum of money can only be ascertained by accounts to be rendered by the purchaser in possession, such purchaser cannot, by rendering such account so late as to preclude the possibility of a settlement within the time, deprive the vendor of his right to repurchase. *Ponsford v. Hackney*, 9 W. R. 510.

A contract provided for repurchase by the plaintiff from the defendant of hereditaments, upon payment to him of a stipulated sum within a certain time, but deducting the net proceeds of all sales, if any, which should have been previously made by him, including all moneys laid out in repairs or improvements of the property. The right to purchase was in no case to be exercised after the time fixed. Several proceedings were had between the parties on the footing of the contract, but the defendant never furnished to the plaintiff any proper account of the property. A bill was accordingly filed to obtain the benefit of the contract, for an account, an injunction, and a receiver. The defendant demurred to the bill.—Held, that the terms of the contract threw on him the obligation of rendering an account to the plaintiff, and that the demurrer must be overruled. S. C. 2 Giff. 604; 7 Jur., N. S., 938. Affirmed 7 Jur., N. S., 929; 5 L. T., N. S., 226.

5. Under a will which empowered the trustees thereby appointed to grant building leases for ninety-nine years at increasing rentals, and ordinary leases for twenty-one years at the best rents which could be obtained, and provided that a lease granted under either power might contain an option of purchase by the lessee, the trustees demised to C. a piece of freehold and a piece of leasehold land for thirty-five years, at a nominal rent as to both for the first quarter, and afterwards, as to the freehold at an increasing rent, and as to the leasehold at a fixed rent. The lessee did not covenant to build, but only to repair all buildings erected or to be erected on the land, and to insure; and the lease gave him an option of purchase as to any part of the premises during the first twenty-one years. In exercise of this option, C. purchased the leasehold portion of the land, which was accordingly assigned to him. Doubts having afterwards arisen as to the validity of the lease, a notice was indorsed upon it, pursuant to 12 & 13 Vict., c. 26, and signed by C. and the trustees of the will, declaring that the lease should be considered in equity as a contract to grant a valid lease under the power to grant ordinary leases. Upon the sale by C. of the leasehold land purchased by him, objection was taken to the title on the ground that the lease, not being a building lease, and being granted for more than twenty-one years, was an invalid exercise of the power.—Held, that, inasmuch as the lease did not contain any covenant to build, it was invalid as a building lease; that the defect could not be remedied under 12 & 13 Vict., c. 26, by turning that which was a lease of one kind into a contract for a lease of another kind; and that, even if that could be done, the lease would still be invalid in consequence of the rent reserved in respect of the freehold portion being an increasing rent, which was not in accordance with the power to grant leases other than building leases. *Hallett to Martin*, 52 L. J., Ch., 804; 48 L. T. 894.

Held, also, that the lease being bad, the option of purchase was ineffectual and could not be exercised. *Id.*

XXIV. Sales by the Court.

See also Preceding Divisions.

- I. *Order for Sale*, 7317.
- II. *Mode and Conduct of Sale*, 7317.
- III. *Who may Purchase and Leave to Bid*, 7319.
- IV. *Opening Biddings and Order for Re-Sale*, 7320.
- V. *Purchase Money and Deposit*, 7327.
- VI. *Setting Aside and Discharge of Purchaser*, 7333.
- VII. *Substitution of Purchaser*, 7340.
- VIII. *Report or Certificate*, 7341.
- IX. *Rents Loss and Deterioration*, 7342.
- X. *Enforcing Completion*, 7344.
- XI. *Conveyance*, 7344.
- XII. *Deeds and Other Documents*, 7345.
- XIII. *Taking Possession*, 7345.
- XIV. *Costs and Expenses*, 7346.
- XV. *Sale Subject to Incumbrances*.
See also v. 6 (c) and (d) *supra*—VI. 3 *supra*—XI. 3 *supra*.
- XVI. *In Administration Suits*. See EXECUTOR AND ADMINISTRATOR, XXIII.
- XVII. *In Bankruptcy*. See BANKRUPTCY, XVII. xlii.—XXVII. iv.
- XVIII. *At Suit of Judgment Creditors*. See JUDGMENT, X. i.
- XIX. *In Mortgage Suits*. See MORTGAGE, XV.
- XX. *In Partnership Suits*. See PARTNERSHIP, IX. iv.
- XXI. *Under Particular Statutes*. See PARTITION, VI.—SETTLED ESTATES ACTS, VI.

I. ORDER FOR SALE.

1. Hearing for further directions. Decree for a sale pronounced. *Simpson v. O'Sullivan*, Dr. 89.
2. By the decree, the plaintiff's demand was declared a charge upon the lands, and liberty was given to all parties to apply as occasion might require. The Court, subsequently, on motion, directed a sale. *Watson v. Pm*, Dr. 90.
3. Real estate ordered to be sold pending inquiries before the Master. *Martin v. Hadlow*, 1 W. R. 101.
4. Court refused to make an order under Act of Parliament for sale of estate upon opinion of conveyancer merely approving the conveyance, without reference to the Master. *Exp. Newcastle (Duke)*, 6 Ves. 454.
5. The decree being for sale of a term, the Court, on the application of the inheritor, superadded a direction to the Master at the same time to sell the fee, taking care not to prejudice the plaintiff, but not requiring his consent. If the decree is inrolled, such a collateral order being for the benefit of one party, and without prejudice to any, may be appended without affecting the inrolment. *Sheppard v. Murdoch*, 1 Moll. 130.
6. The Master will not be ordered to sell an estate until a statement of title is made out and lodged in his office. How to proceed when defendant refuses to give statement of his title. *Roberts v. Roberts*, 1 Hog. 124.
7. Though the Court will not, in general, give a decree for a sale of an equitable estate

in lands; yet if the plaintiff is not entitled to call for a conveyance of the legal estate, it will make such decree. *Tremble v. Simpson*, 6 Ir. Eq. R. 98.

8. Two of four co-heiresses-at-law residing out of the jurisdiction, sale of the inheritance decreed in their absence, at the suit of judgment creditor of ancestor. The heir-at-law being absent from the jurisdiction, sale of real estate may be effectuated under the decree of the Court, the particular of sale stating the fact, and the purchaser buying with notice. It is a principle not to foreclose an absent mortgagor; but there is not, in the case of absent heir, any principle by which the Court is precluded from selling a deceased debtor's real estate. *Leahy v. Dancer*, 3 Moll. 108.

9. In an action to enforce a charge on real estate, the plaintiff is, under ordinary circumstances, entitled to an order for sale before the trial on showing a case upon which such an order would be made at the trial. A creditor in respect of a debt secured upon the real estate of a company in liquidation brought an action for an account and sale. Upon an interlocutory application, under s. 55 of the Chancery Procedure Act 1852, 15 & 16 Vict., c. 86, the Court ordered an immediate sale, without waiting until the hearing of the action. *Davis v. Ashwin, Re Brynmawr Coal and Iron Co.*, 26 W. R. 139; 47 L. J., Ch., 70.

II. MODE AND CONDUCT OF SALE.

- I. *Mode and Place of Sale*, 7317.
- II. *Sale by Private Contract*, 7318.
- III. *Conduct of Sale*, 7318.
- IV. *Reserved Biddings*, 7319.
- V. *Conditions*, 7319.

1. Mode and Place of Sale.

10. The Masters are personally to superintend sales under decrees, and a sale had in the Master's office, before his clerk, but in his absence, will be set aside for irregularity. *Ellis v. Molloy*, 2 Hog. 255.

11. Auctioneer in the country appointed to conduct the sale under a decree, to avoid the expense of sending the Master's clerk. *Thompson v. Hodgson*, 2 Y. & Coll. 311; 6 L. J., N. S., Exch. Eq., 80.

12. Sales ought to be ordered to be made at chambers, not by parties with the approbation of the judge at chambers. *Nash v. Worcester Improvement Commissioners*, 19 Jur. 973.

13. Shares in joint-stock and other companies, directed to be sold, should be sold out of court. *Cobden v. Maynard*, 1 N. R. 354.

14. Premises held under distinct leases ordered to be sold in one lot upon the speculative probability, arising from the nature of the property, that a higher price would be obtained by that mode of sale, than if they were put in distinct lots. *Cook v. Collingridge*, 3 Russ. 520.

15. If lands be leased by the inheritor after a decree to account has been pronounced against him, they will be set up in the first instance subject to the lease; and if they do not produce sufficient to pay the incumbrances, decreed with costs, they will then be set up

discharged of the lease. *Barrett v. Bermingham*, Sau. & Sc. 678.

1. Property was put up for sale by auction under the order of the Court, and it was knocked down as unsold, there being no bid up to the reserved price. Before the auctioneer had left the desk, C. agreed to purchase the property at the reserved bidding, and signed the contract and paid the deposit:—Held, that he was estopped from disputing the sale as not being a sale by auction, and that he could not repudiate his purchase. *Else v. Barnard*, 6 Jur., N. S., 621; 29 L. J., Ch., 729; 28 Beav. 228.

2. The Court has jurisdiction to direct an estate to be sold by auction by the chief clerk, without the employment of an auctioneer. And this jurisdiction will be exercised, if all parties interested are before the Court, and concur in desiring the sale so to be made. *Pemberton v. Barnes*, 41 L. J., Ch., 209; 13 L. R., Eq., 349; 26 L. T., N. S., 389.

3. The Court of Appeal, though it may be of opinion that a sale of real estate forming part of an estate being administered by the Court would more conveniently take place in the district registry where the administration action was commenced, will not interfere with an order of the judge of the Court directing the sale to take place in his own chambers, that being a matter for the discretion of the judge. *Macdonald v. Foster*, 37 L. T., N. S., 296; 6 L. R., Ch. D., 193; 25 W. R. 687.

2. Sale by Private Contract.

4. Where sale before Master is directed to take place by decree, a contract for private sale by trustee will not be enforced. *Raymond v. Webb*, Loft. 66.

5. Suits were compromised with the sanction of the Court (infants being interested), and it was agreed that the estate should be sold by auction, for the purpose of division, and that A. should have the conduct of the sale. At the auction, the property could not be sold, and it was afterwards sold by private contract at the reserve bidding:—Held, that this was a valid sale, and the purchaser was decreed specifically to perform his contract. *Bousfield v. Hodges*, 33 Beav. 90.

6. A property ordered by the Court to be sold by auction was bought in. After which, and before the auctioneer had left the rostrum, A. signed a contract to purchase it, at the reserved price, which was divulged contrary to the express instructions given to the auctioneer:—Held, that there was a valid binding contract. *Else v. Barnard*, 28 Beav. 228; 6 Jur., N. S., 621; 29 L. J., Ch., 729.

7. Although in pursuance of an order of Court directing a sale of real estate by public auction, an attempt has been made to sell by public auction and has failed, the property cannot be sold otherwise than by public auction until a proper order for the purpose has been obtained, and any prevailing practice at chambers to the contrary is irregular. *Berry v. Gibbons*, *Ex p. Lee*, 15 L. R., Eq., 150; 42 L. J., Ch., 231.

When the Court has made an order for the sale of property by public auction, and the sale has proved to be abortive, the parties

cannot make a valid contract for sale of the property under the order by private tender without the personal sanction of the judge who made the order; it is not sufficient for them to have obtained the sanction of the chief clerk. *Ib.*

3. Conduct of Sale.

8. Where a plaintiff obtains liberty to bid, the management of the sale will be taken from his solicitor. *Drought v. Jones*, Fl. & K. 316; *Ennis v. Casey*, *id.* 319. n.

9. In a sale under a decree, the solicitor of the plaintiffs having the management of the sale is to be considered, as between the vendors and the purchaser, to be the agent of all the parties to the suit. *Dalby v. Pullen*, 1 Russ. & M. 296; 8 L. J., Ch., 74.

10. Under a decree, directing the sale of an estate, but not directing by whom the sale shall be conducted, the Master is not bound to give the conduct of the sale to the plaintiff, but may in his discretion, if he considers it more beneficial to the estate, give the conduct of the sale to other parties. *Dixon v. Fyner*, 7 Hare 331; 19 L. J., N. S., Ch., 402; 14 Jur. 217.

Grounds on which the conduct of a sale, under the decree of the Court, may properly be given to parties other than the plaintiff. *Ib.*

11. The plaintiff in a cause held entitled to the conduct of the sale of partnership property, although, according to the contract, if performed without suit, he might not have been entitled to interfere in the sale. *Dale v. Hamilton*, 10 Hare (App.) vii.

12. Where a sale is made by the Court, and the purchasers pay their money into court, the plaintiffs are entitled to the conduct of the sale: but where a sale, directed by decree, is made out of court, the trustee or executor is the proper person to conduct it. *Cobden v. Maynard*, 1 N. R. 354.

13. After the estate had been sold by auction under a decree of Court, the purchaser's title is not to be attacked merely on the ground that the holder of the decree had not complied with all the statutory formalities for the conduct of such sale; as, for example, the want of due notice of sale; and the burden of proof of such compliance is not on the purchaser. *Singh v. Singh*, 9 L. T., N. S., 129.

In selling by auction under a decree of the Court, if a person bids for others, and his bidding is refused on account of his not giving a deposit or any satisfactory references, the sale cannot be afterwards impugned, on the ground that the estate was sold under its value. *Ib.*

14. Ordinarily, the conduct of a sale directed by the Court is committed to the plaintiff; but when it appears for the benefit of the parties, it will be given to a defendant. This right does not, however, depend on the extent of the interest of the parties in the property. *Knott v. Cottle*, 27 Beav. 33.

When a sale is directed, every party to the suit having the title deeds is bound to facilitate the sale. *Ib.*

15. When a sale has been decreed in one of two concurrent suits, the fact of the party to whom has been given the conduct of the

cause being an entire stranger to the family and to the property is a sufficient reason for taking away from him the conduct of the sale, and giving it to the trustee and testamentary guardian of the infants. *Re Garmeson, Garmeson v. Sharrod*, 21 W. R. 98.

1. When a sale has been directed by the Court, and the conduct of it given to one party, no other party has a right to interfere in any way in the sale without the leave of the Court. Thus, where the Court directed a sale and gave the conduct of it to an independent solicitor, both plaintiff and defendant having liberty to bid, the plaintiff was restrained by injunction from issuing and circulating advertisements that the sale was about to take place. *Dean v. Wilson*, 10 L. R., Ch. D., 136; 48 L. J., Ch., 148; 27 W. R. 377.

4. Reserved Biddings.

2. A direction for a reserved bidding ought not to be inserted in a decree for sale, but ought to be the subject of a separate order. *Brooker v. Collier*, 3 Russ. 369.

3. At a sale by order of the Court, a reserved bidding allowed to be made one of the conditions, the Master to fix the amount, and to use his discretion in communicating it to the parties or their solicitors. *Jervoise v. Clarke*, 1 Jac. & Walk. 889.

4. An estate being directed to be sold by a decree, the conditions of sale fixed a reserved bidding, under which the auctioneer announced a sum, and there being two bidders and an uncertainty as to who had the bid, the estate was bought in at another sum. Upon a petition by a person claiming to be the purchaser that he might be declared the highest bidder, or for a re-sale:—Held, that the auctioneer had no right to fix more than one reserved bidding, nor could a bidder claim a re-sale if the parties interested did not desire it. *Notley v. Salmon*, 1 W. R. 240.

5. Although in sales directed by the Court it is usual to fix the reserved price at the amount at which the estate has been valued, an exception will be made where a mortgagee, who, being also a trustee, is incapable of bidding, is desirous of having it fixed at an amount sufficient to cover his debt. *Tennant v. Trenchard*, 41 L. J., Ch., 779; 20 W. R. 785.

A trustee, who had a charge on the estate of greater amount than its value, as fixed by the *cestui que trust* for the reserved bidding, was allowed to fix the reserved bidding at the amount of his charge, he having, on a previous occasion, been refused leave to bid at the instance of the *cestui que trust*. *Id.*

As a general rule, when a party applies for a sale and not foreclosure, the reserved bidding will be fixed at the amount of the value of the estate, the person applying for the sale being able, on giving up the conduct of the sale, to protect himself by bidding. *Id.*

See also 2 *supra*—III. III. 3 *ante*.

5. Conditions.

6. The Court in proper cases will refer it to the remembrancer to settle conditions of sale.

Bennett v. Beamish, Jon. & C. 178. And see *Cooke v. Campbell*, *id.* 183. n.; *Mackay v. Orr*, *Barrington v. Blake*, *id.* 184. n.; *Johnson v. Auchinleck*, *id.* 185. n.

7. Where there was a decree for the sale of the whole lands, a reference to settle conditions of a sale of a moiety was refused, on the ground that where a good title can be made only as to a moiety, the Court cannot on motion direct that moiety only to be sold, when such a decree for the sale of the whole has been made; the proper course being to set down the cause for further directions. The Court will not set up lands for sale knowing the title to be bad. *Piers v. Piers*, Sau. & Sc. 414. Affirmed 1 Dr. & Wal. 265.

8. The Court will not set up a title, knowing it to be bad; therefore, when the Court is apprised of a defect of such a nature, that if of any importance it must render the title not merely defective, but absolutely bad, though the Court may not deem it important, it will not, by a condition of sale, preclude objection to such a defect. *Bennett v. Wheeler*, 1 Ir. Eq. R. 18.

9. The Court will not make it a condition of sale of an interest under a lease, that a purchaser shall not be at liberty to object to the title of the lessor to make the lease; but it will direct that a purchaser shall not require the plaintiff to show that the lessor had such power, leaving the purchaser at liberty to object *alimunde*. *Willes v. Latham*, Sau. & Sc. 441.

10. Where an estate was set up for sale in two lots and one of them was sold, but no bidder appearing for the other the sale was adjourned as to it, the Court approved of the following condition of sale to the remaining lot: that the purchaser should not require original searches for judgments against any person against whom such searches had been already made at the instance of the purchaser of the lot already sold, but should be satisfied with compared and certified copies of such searches. *Fitzgerald v. Lane*, 2 Ir. Eq. R. 447.

11. On a sale in court, the Court refused, on an adjourned summons, to alter the conditions under which the property had been sold, so as to substitute the word "grantees" for the word "grantors," although the Court thought that probably there had been a clerical error; and though the effect of the change would be to make the language in unison with that in ordinary use in such cases. Observations on conditions of sale of leaseholds as to the position of the purchaser of the largest lot. *Brown v. Paull*, 2 Jur., N. S., 317.

Form of and Construction of Particular Conditions.] See VI. *ante*.—XI. IV. *ante*.

III. WHO MAY PURCHASE AND LEAVE TO BID.

12. A testator's estate was directed to be sold by an order of the Court. The executor applied for leave to bid, alleging that such bidding would be for the benefit of the estate; but the Court refused to grant the application. *Geldard v. Randall*, 9 Jur. 1085.

1. Sales under a decree in trust as to part for the receiver to set aside after confirmation. *Aiken v. Bond*, Fl. & K. 196; 3 Ir. Eq. R. 365.

2. Whether the defendant who has not the carriage of the decree may bid at the sale in the Master's office, without an order permitting him so to do, *quære*. *Munns v. Ferris*, 11 Ir. Eq. R. 253.

3. Where lands decreed to be sold for payment of the plaintiff's demand were of insufficient value, and no *bond fide* bidders could be procured, the Court permitted the plaintiff to bid without taking from him the carriage of the decree. *Spaight v. Patterson*, 9 Ir. Eq. R. 149.

4. If the plaintiff, or a person standing in the situation of a plaintiff, purchases under the decree, the transaction is to be examined with the utmost strictness; and if the decree be reversed for ever, the sale cannot be upheld. *Talbot v. Minnett*, 6 Ir. Eq. R. 83.

5. It is irregular for a party in the cause to bid at the sale of lands set up under the decree, without having previously obtained the permission of the Court so to do. And the Court will not, in such case, on a certificate of his being the highest bidder, declare him the purchaser, unless special circumstances are shown to excuse this irregularity. *Byrne v. Lafferty*, 8 Ir. Eq. R. 47.

6. Where the defendant had bid for property sold under a decree without leave of the Court, the Court refused to enforce its rule in the same manner as it does against assignees in bankruptcy, who have the conduct of the sale; and a motion by another defendant that the estate might be again put up for sale, and that he might be held to his biddings, unless a higher sum was offered, and that he should pay the expenses of re-sale, refused, but without costs. *Elworthy v. Billing*, 10 Sim. 98; 10 L. J., N. S., Ch., 176. And see *Wilson v. Greenwood*, 10 Sim. 101. n.

7. Residuary legatee, tenant for life, or reversioner, may become the purchaser of an estate sold in the Master's office. *Williams v. Attenborough*, T. & R. 76.

8. A party to a suit, who was also a solicitor and had the conduct of sale decreed by the Court, purchased at the sale under a feigned name. The Court, after the purchase had been confirmed, ordered the estate to be again offered for sale at the price at which the party had purchased it, and if there should be no higher bidder the party to be held to his purchase. *Sidney v. Ranger*, 12 Sm. 118.

9. The Court, when it has directed the sale of a trust estate, will not, in opposition to the declared wishes of adult *cestuis que trustent*, and prior to any attempt to sell, grant leave to the trustee to bid, notwithstanding that, besides being trustee, he is entitled to a charge on the estate, and that the sale has in fact been ordered with a view to the payment of such charge. *Tennant v. Trenchard*, 38 L. J., Ch., 661.

10. A term of two hundred years, of which only nine months remained unexpired, was vested in trustees, upon trust to sell. It was not known who was entitled to the reversion expectant on the determination of the term. Upon a bill by one of the *cestuis que trustent*, the Court declared a sale, giving all the *cestuis*

quo trustent liberty to bid, and directing advertisements to be issued for the representatives of the original lessor, who were to be at liberty to come in under the suit. *Edmunds v. Foley (Lord)*, 7 Jur., N. S., 1268; 30 L. J., Ch., 887; 9 W. R. 859.

11. The rule that, at the sale in a suit by an order of the Court, parties to the suit and their solicitors cannot become purchasers, will not be extended so as to embrace the case of a purchase by a person who, being the solicitor in another suit for persons interested in the proceeds of such sale, has obtained an order to attend the proceedings in the first suit on their behalf, and whose name, without his consent or knowledge, has been placed in the particulars of sale, as that of a person from whom copies and information could be obtained. *Guest v. Smythe*, 5 L. R., Ch., 551; 39 L. J., Ch., 536; 22 L. T. 563; 18 W. R. 742.

But if the purchaser's position had been brought within any of the well-established rules of equity, the Court would not have been precluded from opening the sale by reason of the 30 & 31 Vict., c. 48, s. 7. *Id.*

12. C. was the solicitor of an executor, the defendant in a creditor's administration action. A life interest, part of the estate, was put up for sale by the Court, and C. obtained leave to bid. The interest was sold, after an abortive auction, to C. by private contract:—Held, that the sale could not be set aside by reason of non-disclosure by C. of circumstances affecting the value of the life interest. *Boswell v. Coaks*, 23 L. R., Ch. D., 302; 52 L. J., Ch., 465; 48 L. T. 929; 31 W. R. 540.

Practice on Application. 13. Application that a party in the suit may bid at the sale must be on notice. *Clarke v. Dobbin*, 8 Ir. Eq. R. 111.

III. OPENING BIDDINGS AND ORDER FOR RE-SALE.

1. *General Principles*, 7320.
2. *Who may Apply. In General*, 7321.
3. *Application by Persons Present at Sale*, 7321.
4. *Where Sale in Lots*, 7321.
5. *On Sale by Private Contract or Sealed Tender*, 7322.
6. *After Report of Purchase made or Certificate Signed*, 7323.
7. *After Confirmation of Report*, 7323.
8. *What Advances Sufficient*, 7324.
9. *Deposit on Opening Biddings*, 7324.
10. *Under the Sales of Land by Auction Act 1867 (30 & 31 Vict., c. 48)*, 7325.
11. *Costs of Applicant*, 7326.
12. *Costs of First Purchaser*, 7326.
13. *Order for Re-sale*, 7326.
14. *Other Cases*, 7327.

1. General Principles.

14. Biddings are opened for the benefit of the suitor and estate, not of the purchaser, as where he was too late, and the over-bidding is small. *Anon.*, 1 Ves. J. 453.

15. The Court has always discretion to open

biddings, resting wholly on circumstances of the case. *Ryder v. Gower*, 6 Bro. P. C. 306.

1. Where applications to open biddings are frivolous or litigious, and grounded only on application of the owner, and especially where value of estate is but little more than will satisfy incumbrances, Court is well justified in refusing such applications. *Baillie v. Chaigneau*, 6 Bro. P. C. 313.

2. In opening biddings, this Court does not tie itself down to any precise rule as to the amount of the sum to be advanced, but looks substantially to that which is for the benefit of the parties, and to the circumstances of the particular case before it. *Power v. Power*, 3 Ir. Eq. R. 511.

2. Who may Apply. In General.

3. *Quere*, whether any party, except the plaintiff, in a creditor's suit can apply to open the biddings, or to set aside a sale made by order of the Court in that suit. *Price v. North*, 2 Y. & Coll. 620; 7 L. J., N. S., Exch. Eq., 9.

4. Biddings opened on advance of 5l. per cent. on 7,300l., on application of a mortgagee, but he was not allowed to conduct the sale. *Domville v. Berrington*, 2 Y. & Coll. 723; 7 L. J., N. S., Exch. Eq., 68.

5. One party having moved to open biddings, although he has not drawn up the order, nor paid his deposit, another person cannot open biddings without notice to the first. *Gibbons v. Howell*, 4 Madd. 52.

3. Application by Persons Present at Sale.

6. Biddings opened by a person who was present at the sales. *Rigby v. M'Namara*, 6 Ves. 117. *S. P. Tait (Lord) v. Northwick*, 5 Ves. 655.

7. Biddings opened on the application of a person who was present at the sale, though the advance offered was less than 5 per cent. on the price. *Lefroy v. Lefroy*, 2 Russ. 606.

8. Biddings for an estate allowed to be opened by a person who had attended the former sale by an agent, he offering an advance of 500l. in 8,950l., the best bidding reported. *Pearson v. Collett*, M'Clel. 82; 13 Price 213.

9. A person present at the sale allowed to open biddings, but a larger advance expected from him. *Tyndale v. Warre*, Jac. 525.

10. There is no general rule that a party present at the sale shall not open biddings; each case must depend on its own circumstances. A party who neglects to bid, in consequence of the auctioneer declaring that a person may open the bidding, if he comes within eight days after the report, cannot allege surprise as a ground for opening the biddings, if he does not come within that time. *Thornhill v. Thornhill*, 2 Jac. & Walk. 347.

11. Person present at sale not allowed to open biddings. *Sed quere*. *M'Culloch v. Cotbath*, 3 Madd. 314.

12. Biddings opened, under the circumstances of the case, on an advance of 20l. on 165l., upon the application of a person who had bid at the former sale. Whether the biddings

will be opened or not is a question to be determined by the particular circumstances of each case. *Mayne v. Macartney*, 2 Ir. Eq. R. 324.

13. Biddings were opened at the instance of a party to the cause, who had had liberty given to bid at the former sale, and who was aware of the amount of the reserved bidding, on an advance of 150l. on 1,650l. *Logan v. Dowbinson*, 7 L. J., N. S., Ch., 130.

14. An advance of 300l. on 6,700l. is not sufficient to open biddings, though the fund was deficient. *Semble*, that when the applicant has been present at the former sale, a larger advance would be expected from him. *Graham v. Gledstanes*, 1 Jones 436.

15. Where an estate had been sold under the Court for 5,050l., the sale was opened upon an advance of 300l., and on the application of a person who had bid at the sale. *Biggs v. Rowe*, San. & Sc. 152.

16. Biddings opened on an advance of 250l. upon a sum of 8,500l., by a person who was present and had bid at the former sale. *Gorman v. Browne*, San. & Sc. 154. n.

17. Biddings opened on an advance of 400l. upon a sum of 6,200l. by a person who bid at the former sale. *Langford v. Carroll*, San. & Sc. 155. n.

18. The rule is not universal, that biddings shall not be opened in favour of parties present at the sale. *Williams v. Attenborough*, T. & R. 76; 1 L. J., Ch., 138.

19. The biddings having been opened upon an advance of 150l. on 2,500l., the Court refused the application of the first purchaser to open the second biddings upon an advance of 150l., it appearing that he had been present at and had bid at the second sale. *Jackson v. Granard (Lord)*, 3 Ir. Eq. R. 513.

4. Where Sale in Lots.

20. Where a person is reported purchaser of several lots before the Master, if the biddings are opened as to one, he shall have an option to open them as to all, *semble*. *Boye v. Blackwell*, 3 Anstr. 657.

21. Where two lots are purchased together, biddings cannot be opened as to one lot only, unless the first purchaser choose to keep the one remaining lot alone. *Eap. Tilsley*, 4 Madd. 227. n.

22. Where several lots have been purchased by the same person, and the biddings are opened as to some of them, which were first purchased, the purchaser will be allowed option of opening biddings as to remainder. *Price v. Price*, 1 Sim. & S. 386; 1 L. J., Ch., 184.

23. In a similar case, upon an affidavit of the purchaser that he had bid for the lot in consequence of having been declared the best bidder for the prior lot, the bidding was opened. *Fielder v. Fielder*, cited 1 Sim. & S. 386.

24. A motion to open biddings for several lots, purchased by different purchasers, on an advance of a certain sum for each lot, is irregular. *Goodall v. Pickford*, 6 Sim. 379; 3 L. J., N. S., Ch., 23.

25. An estate was put up to sale in four lots, and the timber on each lot was to be paid for by the purchaser, according to a valuation

which had been made. A. purchased lot 1; the other lots were not sold. B. opened the biddings, and, on the re-sale, purchased lots 1 and 2 for 2,140*l.*, and lot 3 at 380*l.* The Court refused to open the biddings for lots 1 and 2 on the application of A., unless he would advance 10*l.* per cent. on the price of the timber as well as the land, and would take lot 3 (in case B. should retire from it) at the price it had been sold for, in case it should not fetch the same price at the re-sale. *Bates v. Bonnor*, 6 Sim. 380.

5. On Sale by Private Contract or Sealed Tender.

1. The rule under which the Court permits a stranger to intervene for the purpose of opening biddings on a sale by auction before the Master, has no application to a sale before him by private contract. *Millican v. Vanderplank*, 11 Hare 136; 17 Jur. 986.

When the Master has in the presence of the parties approved of a sale by contract, whether under a special reference or under the 4th General Order of the 16th July 1851, no stranger can intervene to prevent the confirmation of the report; nor will the sale be disturbed by the Court on the mere ground that a larger price has been offered subsequently, and before such confirmation, unless there be some error or miscarriage in the proceedings, or the contract price be grossly inadequate. *Id.*

When there are grounds upon which the Court would refuse to confirm a sale by private contract approved by the Master, the fact that the purchaser has after the approval of his contract, and before the confirmation of the report, entered upon the property, and expended money thereon, or incurred liabilities with respect to it, will not afford any reason for supporting the sale, for such acts before the confirmation of the report are done at the purchaser's own risk or in his own wrong; but where all the parties interested in the estate have approved of or acquiesced in the contract, and concurred in and encouraged such acts of the purchaser, they may then constitute reasons for not disturbing the sale. *Id.*

An offer of 15,000*l.* for an estate ordered to be sold by the Master was discussed before him in the presence of the parties to the cause (one of whom had been for some years in the occupation of the estate, and was virtually the owner subject to the charges on it), and was with their assent approved of. B. signed the contract for his purchase, which was thereby agreed to be completed on the 25th March. After that date C. offered 1,000*l.* more. The Master's report had never been confirmed, but the purchaser had, with the knowledge of some of the parties interested, laid out money in improvement of the estate, and had entered into contracts for tenants, etc. The evidence proved that 15,000*l.* was a fair value, and it appeared that during the discussion of B.'s offer the Master had a letter before him to the effect that C. would be willing to give more than the market price. The Court refused to disturb the purchase by B. Under ordinary circumstances, if a purchaser does

any act of ownership before the Master's report is confirmed, he must do so at his own risk. S. C. 1 W. R. 364; 1 Eq. Rep. 429.

Semble, the Court will not disturb a sale by private contract before the Master, unless the parties to the cause made objections to the sale before the purchaser entered into the contract, or unless there has been such a miscarriage in the sale, or it has been at such an undervalue that the Court would not allow such a contract for sale to be completed in case it had been entered into by trustees. *Id.*

An estate was, by the direction of the Court, advertised for sale by sealed tender, the form of tender expressing that the contract was subject to the approbation of the Court, and to certain conditions of sale: the condition of sale stated that the certificate of sale would in due course be signed and filed, and become binding, without any further notice or expense to the purchaser:—Held, that the Court had the same power of ordering a re-sale, on an advance of price, as in the case of a sale by auction. *Id.*

2. An estate was directed to be sold by the Court of Chancery by sealed tenders, and was advertised to be sold by private contract, subject to conditions of sale, and to the contract receiving the consent of the V.-Ch. By the third condition of sale it was stated, that on a certain day "the certificate of sale would be settled, and in due course he signed and filed, and become binding, without further notice or expense to the purchaser." On the opening of the tenders the chief clerk declared the offer of A. to be the highest, and certified him to be the purchaser. The certificate was signed by the chief clerk, approved by the judge, and duly filed. On the same day that the approval was signed by the judge a summons was taken out by H., to show cause why there should not be a re-sale on an advanced offer by him; and the V.-Ch. made the order, and that upon such re-sale B. should be the purchaser in case there were no higher biddings:—Held, that this was a case to which the ordinary rules of a sale by auction under the direction of the Court would attach, and that on the intervention of B. offering a higher price, the Court had the power to order a re-sale. *Barlow v. Osborne*, 6 H. L. Ca. 556; 4 Jur., N. S., 367; 27 L. J., Ch., 308; 6 W. R. 315. Affirming S. C. *sub. nom. Osborne v. Foreman*, 8 De G. M. & G. 122; 2 Jur., N. S., 361; 25 L. J., Ch., 340; 4 W. R. 396.

The case of *Millican v. Vanderplank* (11 Hare 136) distinguished. *Id.*

Suggestion that the practice of the Court of Chancery in respect to opening biddings should be amended by a general order. *Id.*

A sale of an estate upon sealed tenders must be treated as a sale by auction, and the biddings may be opened on application to the judge, within eight days after the certificate of the chief clerk, approved by the judge, has been filed. *Id.*

The word "party" in the 49th Order of 16th October 1852 must be taken to mean person. *Id.*

3. Where, after an unsuccessful sale by auction, the chief clerk arranged that, in lieu of a second auction, sealed tenders might be sent in:—Held, that this was a sale within the rules as to opening biddings, and the

biddings opened accordingly on the offer of a large advance. *Waterhouse v. Wilkinson*, 1 Hem. & M. 636; 12 W. R. 336; 9 L. T., N. S., 799.

Where, after an ineffectual attempt to sell by auction, it was agreed that sealed tenders for the purchase of the estate should be sent in to the Chief Clerk, stating the highest sum to be given for the estate:—Held, that the biddings might be opened at the instance of a person who had not made the highest offer. *S. C.* 3 N. R. 869.

6. After Report of Purchase made or Certificate Signed.

1. No order will be made to open biddings until the report of the purchase has been made. *Lovegrove v. Cooper*, 9 Hare 279.

2. After the expiration of eight days from the filing of the certificate of a sale under a decree, the Court refused to open the biddings on a mere advance of price, though considerable. *Ware v. Watson*, 7 De G. M. & G. 739; 4 W. R. 233; 25 L. J., Ch., 199; 2 Jur., N. S., 129. Reversing 4 W. R. 36; 1 Jur., N. S., 1083.

After the expiration of eight days from the filing of the certificate of sale, the biddings will not be opened except under very special circumstances; and the offer of an advanced bidding will not be considered in itself sufficient for that purpose. *Ib.*

In calculating the eight days, the vacations are not excluded. *Ib.*

3. In a sale under decree of the Court the Vice-Chancellor had signed the certificate approving the purchase of a lot. On a motion to open the biddings, made within eight days after the signing of the certificate, with a substantial advance and an offer to pay the costs of the former purchase:—Held, that the biddings might be opened, the signing of the certificate by the Vice-Chancellor being only equivalent to the order *nisi* confirming the Master's report, and the 34th section of the Act 15 & 16 Vict., c. 80, and the 51st Order of 16th October 1852, allowing eight days within which the signature and filing of the certificate might be discharged. *Bridger v. Penfold*, 1 Kay & J. 28; 8 Eq. Rep. 141.

4. Before the certificate is signed approving of a purchaser at a sale under direction of the Court, the biddings will be opened in favour of a bidder who makes a substantial advance in the price; but after eight days have expired, and the certificate is signed, the Court will not disturb the first purchase, unless in an extraordinary case. *Re Jones*, 1 Giff. 284; 29 L. J., Ch., 139; 5 Jur., N. S., 1243; 1 L. T., N. S., 186.

7. After Confirmation of Report.

5. Increase of price offered is not alone a reason to open biddings after the report confirmed. *Boyer v. Blackwell*, 3 Anstr. 656.

6. Biddings opened after confirmation of the report on circumstances, as where the owner of the estate who joined in the motion was in prison at the time of the confirmation, and a fourth of the original price was offered

in advance; but a deposit of the whole advance was required. *Watton v. Birch*, 2 Ves. J. 51; 4 Bro. C. C. 172.

7. The bidding on a lot sold in this court may be opened upon a proper offer, even a second time, if the Master's report has not been confirmed, but shall not be opened at all after confirmation. *Scott v. Nesbit*, 3 Bro. C. C. 475.

8. Biddings opened after confirmation of the Master's report, upon considerable advance, there having been a mistake made in a particular of the estate left with Master, and one of the parties who confirmed the report having been steward of the family, and knowing more than he communicated. *Gomer (Countess) v. Gomer (Lord)*, 2 Eden 340.

9. When the eight days are passed and the sale confirmed, the purchaser's title is complete, and the sale cannot be opened; but until then, upon an advance of 5 per cent., making a deposit of it, and paying the former purchaser's costs, Court will always open the sale. *Aubrey v. Denny*, 2 Moll. 508.

10. Purchaser who has confirmed his report *nisi* cannot, after notice to open biddings, confirm absolutely. *Vansittart v. Collier*, 2 Sim. & S. 608.

11. General rule not to open biddings, after confirmation of the report, upon negligence, surprise, the circumstances of the estate, etc., without something unconscientious on the part of the purchaser. No rule fixing the advance on opening biddings at 10 per cent.; more or less will be required according to circumstances. *White v. Wilson*, 14 Ves. 151.

12. Biddings will not be opened after confirmation of the report, unless fraud is shown in purchaser, or fraudulent negligence in agent, etc., or other special circumstances. *Mortice v. Durham (Bishop)*, 11 Ves. 57.

13. After a sale regularly confirmed, the Court cannot open the bidding, merely on the suggestion of there being persons ready to bid in advance, without first setting aside the order confirming the sale, and that order ought not to be set aside but on the grounds of fraud. *Fergus (Executors of) v. Gore*, 1 Sch. & Lef. 350.

14. Biddings opened after confirmation of a sale, under a decree, the plaintiff in the cause being the purchaser. It will always be a question with reference to the particular circumstances of each case, whether the jurisdiction of the Court in opening sales ought to be exercised or not. *O'Connor v. Richards*, 8au. & Sc. 246.

15. After confirmation of the sale, the biddings will not be opened upon a mere advance of price. *Vincent v. Thwaites*, 5 Ir. Eq. R. 526.

16. A party to a suit, who was also a solicitor and had the conduct of a sale decreed by the Court, purchased at the sale under a feigned name. The Court, after the purchase had been confirmed, ordered the estate to be again offered for sale at the price at which the party had purchased it, and, if there should be no higher bidder, the party to be held to his purchase. *Sidny v. Ranger*, 12 Sim. 118.

17. In bankruptcy, application to open biddings when deed executed, and purchaser put into possession, too late. *Exp. Partington*, 1 Ball & B. 209.

8. What Advances Sufficient.

1. Bidding opened on advance of 50*l.* on 380*l.*, and paying the expenses; 10 per cent. not sufficient on a small sum. *Upton v. Ferrers* (Lord), 4 Ves. 700.

2. Biddings opened after the report, confirmed simply upon an advance of 61*l.* on 305*l.*; 35*l.* not sufficient. *Chetham v. Grugeon*, 5 Ves. 86.

3. Biddings opened on advance of 200*l.* upon 3,200*l.*, but 100*l.* was held too little. *Anon.*, 5 Ves. 148.

4. The rule that an advance of 10 per cent. entitles party to open biddings, not to prevail in future. *Andrews v. Emmerson*, 7 Ves. 420.

5. Biddings opened on advancing 100*l.* on 800*l.*, and 200*l.* on 1,200*l.* *Anon.*, 2 Ves. & J. 487.

6. The biddings were opened on an advance of 500*l.* upon 13,500*l.* under the circumstances. *Cockrane v. Cockrane*, 2 Russ. & M. 684.

7. Biddings not opened whatever the rate per cent. of the advance offered, unless the total of the advance amounts to 40*l.* at least. *Leland v. Griffith*, 2 Moll. 510.

8. Bidding not opened, even in creditor's suit, upon an advance of 350*l.*, being less than 10 per cent. *Garstone v. Edwards*, 1 Sim. & S. 20.

Upon advance of 500*l.*, though less than 10 per cent., Court will act. *Ib.*

9. Biddings not opened under advance less than 40*l.* *Brookfield v. Bradley*, 1 Sim. & S. 23.

Two lots ordered to be re-sold in one, where advance on smaller lot under 40*l.* *Ib.*

10. Biddings not opened, unless advance of 40*l.* is offered. *Farlow v. Weildon*, 4 Madd. 460.

11. In a creditor's suit, bidding opened on an advance of 500*l.* upon 10,000*l.*, paying the advance into court, and the expenses of the discharged purchaser. *Brooks v. Smith*, 3 Ves. & B. 144.

12. The Court opened the biddings upon an advance of 75*l.* on 1,650*l.* There is no fixed rule in Ireland for the *quantum* of advance; therefore, the Court will always open the biddings where it is for the benefit of the estate to do so. *Digby v. Broune*, 1 Ir. Eq. R. 277.

13. Biddings opened on an advance of 1,000*l.* upon a sum of 33,000*l.* *McClintock v. Know*, Sau. & Sc. 155. n.

14. Biddings opened on an advance of 300*l.* upon a sum of 5,500*l.* *Moloney v. Bernard*, Sau. & Sc. 156. n.

15. Biddings opened on a sale of mortgaged premises on an advance of 190*l.* to 310*l.* *Exp. Hutchinson, Re Hunt*, 2 Mont. & A. 727.

16. Biddings opened on an advance of 300*l.* on 5,030*l.* *Lawrence v. Halliday*, 6 Sim. 296.

17. The Court refused to open the biddings on an advance of 20*l.*, the property having been sold for 430*l.* *Gardiner v. Blessinton*, 10 Ir. Eq. R. 220.

18. The Court declined to open biddings upon an advance under 10 per cent. *Holroyd v. Wyatt*, 2 Colly. 537.

19. Biddings opened on an advance of 60*l.* on 430*l.* *Bourn v. Bourn*, 13 Sim. 189.

20. Biddings were ordered to be opened on an advance of 80*l.* on 775*l.* *Cannel v. Hardie*, 3 Y. & Coll. 677.

21. The rules which regulate the practice of opening biddings upon a sale of landed estate, do not apply when a colliery is the subject of sale. *Williams v. Attenborough*, T. & R. 70; 1 L. J., Ch., 138.

Upon an offer to give 10,000*l.* for a colliery sold for 8,850*l.*, a motion to open the biddings refused. *Ib.*

22. Where part of an estate had been sold in four lots, at sums amounting together to 710*l.*, the biddings were ordered to be opened, and the lots re-sold in one lot, an advance being offered of 160*l.* on the whole amount of 710*l.* *Ward v. Cooke*, 9 Sim. 87; 7 L. J., N. S., Ch., 150.

23. The biddings allowed to be opened, as to an estate sold in eight lots for different sums, amounting to 300*l.*, on an advance of 120*l.* *Humphreys v. Robinson*, 11 L. J., N. S., Ch., 399.

24. A lot at a sale under the Court having been sold for 730*l.*, and an advance of 80*l.* having been offered, the biddings were opened on the usual terms, although the application was opposed. *Terson v. Hamkins*, 18 Jur. 721.

25. A mortgagee of West India estates sold under a fiat, had obtained an order to bid, and was the only bidder for them; they were sold subject to other large incumbrances, the particulars of which were not well ascertained. On a petition to open the biddings, offering more than twice the amount at which the equity of redemption had been knocked down, and payment of the former bidder's costs:—Held, a proper case for such an order, upon terms similar to those adopted in Chancery. *Exp. Lee*, 1 De G. 628; 12 Jur. 995; 18 L. J., Bk., 6.

Quære, whether the practice in Chancery generally, as to opening biddings, ought to be adopted in bankruptcy. *Ib.*

26. Where A. attended a sale by auction under the direction of the Court, and bid 2,580*l.* for an estate, which was ultimately knocked down to B. for 2,600*l.*, and the eight days had not elapsed, the Court, on the motion of A., opened the biddings to enable him to give 200*l.* more than B. had bid for the property. *Re Jones*, 5 Jur., N. S., 1243; 1 L. T., N. S., 186; 1 Giff. 284; 2 L. J., Ch., 139.

27. Order made opening the biddings upon an undertaking to abide by the order of the Court as to the expenses of the re-sale, where the advance was only 9*l.* more than the probable expenses of such re-sale. *Bridger v. Penfold*, 1 Kay & J. 28; 3 Eq. Rep. 141.

9. Deposit on Opening Biddings.

28. The Court refused to enlarge the time for payment of the deposit by a party applying to open biddings, after the day which had been fixed for such payment; or to make a second order for opening the biddings, on the application of the same party who had failed in paying the deposit under the first order, although the report of the sale had not been confirmed absolutely. *Colebrook v. Clarke*, 9 L. J., N. S., Ch., 130.

29. There is no invariable rule as to the sum to be paid into court on obtaining an order opening biddings made at a sale directed by the Court; but where a sum of 27,000*l.* was

the last bidding made at a sale, a sum of 3,400*l.* was ordered to be paid into court by the applicant on his obtaining an order to open the bidding. *Manners v. Furze*, 17 L. J., N. S., Ch., 485.

1. Motion, that, on sale of an estate under an order of the Court, the Master might be at liberty to take a deposit on the purchase money to be paid into the hands of the Master's chief clerk, by him to be paid into the bank in the name of the accountant-general, to the credit of the cause, refused. But the Court, on the applicant's solicitor appearing by counsel, and undertaking to pay what he might receive according to the order of the Court, and the applicant himself undertaking to be bound by any order the Court might make in respect of any moneys his solicitor might receive, gave liberty to the Master to fix a deposit, and to direct the purchaser to pay the same to such solicitor, such solicitor to pay the same into court on or before a time appointed by the present order. *Lyon v. Colvill*, 6 Jur. 680.

2. There is no settled rule in Ireland to regulate the sum which a person must lodge to obtain an order to open a sale. *Ford v. Head*, 1 Hog. 93.

3. Where biddings have been re-opened, and party opening them does not become the purchaser, he cannot have his deposit re-paid, till report of re-sale is confirmed. *Rea v. Hilton*, M'Clel. 595.

4. On opening biddings, 10 per cent. to be deposited. *Anon.*, 3 Madd. 494.

5. Upon opening biddings, the Court refused to dispense with deposit, or order a trifling one to be taken upon particular circumstances. *Anon.*, 6 Ves. 513.

6. Where a person who has made a deposit, upon being declared the highest bidder at a sale under a decree, is outbid at a subsequent setting up of the lands to sale, he is entitled to have his deposit back immediately; but for his interests and costs he must wait until the same shall have been completed. *Archdall v. Montgomery*, Vern. & Scriv. 302.

7. A deposit made on opening a bidding having been laid out in the public funds, this deposit is considered as part of the purchase money paid, and therefore the depositor is not entitled to the dividends accruing between the time of the deposit and the completion of the purchase; but only interest on the deposit at 4 per cent. *D'Oyley v. Powis (Countess)*, 1 Cox 206; 2 Bro. C. C. 33.

8. The deposit made upon opening a bidding is considered as part of the purchase money paid, although, in the event of the depositor not being reported the best bidder, it must be returned to him; and therefore, where the deposit is laid out in the public funds, which rise between the time of the deposit and the purchase being completed, the estate will have the benefit of the rise. *Ambrose v. Ambrose*, 1 Cox 194.

9. Purchaser who has applied to open the biddings, and upon a re-sale was outbid, allowed, under the special circumstances, interest on his deposit, as well as the costs of the re-sale and of his application to the Court. *Filder v. Bellingham*, 1 Colly. 526; 9 Jur. 8.

10. Interest must be paid by the new purchaser to the old one on the deposit made by him. *Banks v. Banks*, 1 W. R. 95, 511.

When biddings are opened, the purchaser is entitled to interest on his deposit at 4 per cent. S. C. 16 Beav. 380.

A party opening biddings must deposit the amount of his advance, but he is not required, in the first instance, to pay into court the amount of the original deposit. Upon his neglect to make the required payment, the order to open biddings will be discharged with costs, to be paid by him. *Id.*

10. Under the Sales of Land by Auction Act 1867 (30 & 31 Vict., c. 48).

11. In an administration suit an estate was ordered to be sold by auction, but the reserved price not having been reached the sale by auction became inoperative. A subsequent offer to purchase subject to the approval of the Court within ten days was carried in before the chief clerk, who approved of the offer and ordered the contract to be carried out, whereupon the deposit was paid and the abstract delivered. Before the order had been passed and entered, a much higher price was offered. Upon summons to vary the chief clerk's certificate by setting aside the sale and directing the offer for a larger amount to be accepted:—Held, that the certificate of the chief clerk, although not passed and entered, was tantamount to a confirmation of the contract, and that the principle of the Act 30 & 31 Vict., c. 48, s. 7, by which the old practice of opening biddings on a sale by auction was discontinued, except upon the ground of fraud or improper conduct, applied equally to a sale by private contract entered into under the sanction of the Court, and that such a contract could not be discharged, where no unfairness existed. The chief clerk's certificate was therefore confirmed. *Re Bartlett, Newman v. Hook*, 16 L. R., Ch. D., 561; 50 L. J., Ch., 205; 44 L. T. 17; 29 W. R. 279.

12. Neglect on the part of an auctioneer to ascertain the reserved price before the commencement of a sale is not such "improper conduct in the management of the sale" as will authorize the Court to open the bidding. *Brown v. Oakshott*, 38 L. J., Ch., 717.

13. In order to entitle parties to open the biddings after a sale by auction under the Court since the passing of the Sales of Land by Auction Act 1867, there must be either fraud or such misconduct as borders on fraud. *Delves v. Delves*, 20 L. R., Eq., 77; 23 W. R. 499.

On a sale under a decree in an administration suit, a trustee of the testator's will joined with the auctioneer in fixing 3,000*l.* as the reserved price of a lot; and this was the fair market value of the lot. The trustee was the agent of the person who was the only bidder, and purchased at the reserved price. Before the sale the trustee told his employer that he ought to buy the property, and that 3,000*l.* was a fair price; but he did not tell him that this was the reserved price. After the sale an adjoining proprietor offered 4,000*l.*:—Held, that the Court was not warranted in opening the biddings. *Id.*

14. The rule that, at a sale in a suit by an order of the Court, parties to the suit and their solicitors cannot become purchasers, will not be extended so as to embrace the case of

a purchase by a person who, being the solicitor in another suit for persons interested in the proceeds of such sale, has obtained an order to attend the proceedings in the first suit on their behalf, and whose name, without his consent or knowledge, has been placed in the particulars of sale, as that of a person from whom copies and information could be obtained. *Guest v. Smythe*, 39 L. J., Ch., 536; 5 L. R., Ch., 551; 18 W. R. 742; 22 L. T., N. S., 563.

But if the purchaser's position had been brought within any of the well-established rules of equity, the Court would not have been precluded from opening the sale by reason of the 30 & 31 Vict., c. 48, s. 7. *Id.*

Employment of Puffer.] See III. III. 3 ante.

11. Costs of Applicant.

1. A re-sale on opening biddings producing considerable increase of price is no ground for giving party his costs of opening biddings. *Trefusis v. Clinton*, 1 Ves. & B. 361.

2. Person opening biddings, though not purchaser, is in no case entitled to costs. *Rigby v. McNamara*, 6 Ves. 466.

3. A person who opened biddings, but was not the purchaser, the estates upon the re-sale going considerably higher, cannot on that ground have his costs. *Mawlesfield (Earl) v. Blake*, 8 Ves. 214.

4. Person who opened biddings, but was not the purchaser, allowed his costs on the special circumstances, having opened them, not on his own account, but for the benefit of the family. *Owen v. Foulks*, 9 Ves. 348.

5. A person who opened biddings, not being the purchaser, allowed his expenses on the circumstances against the general rule, having interposed at the instance and for the benefit of the family. *West v. Vincent*, 12 Ves. 6.

6. A relation of the parties entitled to the residue of the estate, if any, obtained an order for opening biddings, but did not become the purchaser of the property on the re-sale. The property was sold at an advance beyond the first price added to the deposits. In the special circumstances of the case the Court allowed the person who opened the biddings his costs. *Chapman v. Fowler*, 3 Hare 577; 13 L. J., N. S., Ch., 464; 8 Jur. 613.

7. A person who opened a sale with the assent of the parties, for the purpose of preventing a sacrifice of the property, but was not the purchaser, being outbid, allowed the costs of opening the sale on the ground of having benefited the estate. *Cuffe v. Young*, 9 Ir. Eq. R. 475.

8. A purchaser, at whose application, made on behalf of certain of the parties interested in the subject matter of the suit, the biddings were opened, by which means a considerable advance of price was obtained, and himself outbid, was, under the circumstances, allowed his costs and charges, and interest on his deposit. *Filder v. Bellingham*, 9 Jur. 8. *S. P. Gravenor v. Miles*, 9 Jur. 838.

12. Costs of First Purchaser.

9. Bidding opened on terms of paying the former bidder all costs, charges, and expenses,

to be settled by the Master. *Watts v. Martin*, 2 Bro. C. C. 113.

10. A person coming in to open biddings must pay the costs of the former purchaser, and is not entitled to any reimbursement in the event of his being outbid. *Chester v. Gorges*, 2 Moll. 505.

11. In sales judicial on opening biddings, as to costs of former purchaser. See *Farlow v. Weildon*, 4 Madd. 460.

12. A person who opens a sale under the decree of the Court, undertaking to pay the former purchaser his costs and interest, will not be released from his undertaking, though the estate be sold to another person at a greater advance of price. *O'Beirne v. Macmahon*, 2 Jones 589.

13. On opening biddings, the Court in the reference of costs of the purchaser will not give a particular direction for the specific expense. *Anon.*, 2 Ves. J. 286.

14. Biddings were opened upon an advanced price on payment by the applicant of the costs properly incurred of the purchaser:—Held, that the costs of perusing the abstract and of the examination of the title, prior to the first purchase being confirmed, ought not to be allowed on taxation. *Raymond v. Lakeman*, 34 Beav. 584.

A company, who employed standing solicitors at a fixed salary, became the purchaser under the Court. The biddings were opened on payment by the applicant of the costs of the company:—Held, that the applicant was not, on the taxation, entitled to the benefit of the private arrangement between the company and their solicitors. *Id.*

13. Order for Re-sale.

15. An order for re-sale, made in consequence of purchaser's default in payment of his money, ought not to discharge him from his purchase, the re-sale being the realisation of a lien, leaving it to the purchaser to make up the deficiency, if any. *Harding v. Harding*, 4 Myl. & C. 514; 9 L. J., N. S., Ch., 124; 3 Jur. 1164. And see *Saunders v. Gray*, and *Tanner v. Radford*, 4 Myl. & C. 515. n.

16. A re-sale of property, sold under a decree, ordered, in case the purchaser did not pay his money into court within a given time; and the purchaser ordered, in that case, to make good the deficiency, and to pay the costs of all the proceedings. *Gray v. Gray*, 1 Beav. 199.

17. A purchaser under the Court of reversionary interest having made default in completing, a re-sale was ordered, and the purchaser was to make good any deficiency. Before such re-sale, it was discovered that the reversionary interest had previously fallen into possession; the Court gave the purchaser four days to complete his purchase. *Robertson v. Shelton*, 13 Beav. 91; 19 L. J., N. S., Ch., 561.

18. Nine lots ordered to be resold in one, where the advance offered on such lot was not sufficient to authorise the opening of the biddings for them separately. *Humphries v. Roberts*, 6 Jur. 680.

19. If, at a sale by auction under the order of the Court, a purchaser sell his purchase for an additional sum beyond his purchase money, the Court will order the property to be re-sold;

and *semble*, that if upon such re-sale the property does not produce the improved price agreed to be given by the sub-purchaser, he will be responsible to the Court for the difference. *Holroyd v. Wyatt*, 2 Colly. 327.

1. The Master having, on reference, found against the title:—Held, that there must be an order for discharging the purchaser before the Court will give effect to re-sale. *Williams v. Wace*, C. P. C. 42.

2. Upon the purchase of several lots by the same party, the Court, although it allowed the biddings to be opened, refused to order the re-sale in one lot. *Ward v. Cooke*, 9 Sim. 87; 7 L. J., N. S., Ch., 150.

3. Where, upon a re-sale, the former purchaser has been over-bid, the Court will not pay him his own fourth until after the deposit by the new purchaser. *Anon.*, Hay. & J. 719.

4. A purchased for B, but without authority, an estate sold under a decree; B died, without adopting the purchase; the order *nisi* was nevertheless obtained. The Court refused to order B's executor to pay the purchase money, and, on the heir declining the purchase, discharged the order *nisi*, and directed a re-sale. *Lord v. Lord*, 1 Sim. 503.

If the executors of a purchaser under a decree refuse to pay the purchase money, they cannot be compelled to pay it, unless a suit be instituted by the heir. *Ib.*

5. Estate sold before the Master for payment of debts, and A. reported the best bidder. Before the report was confirmed, it was discovered that A. was insane at the time of the bidding. It was moved on behalf of all the parties in the cause, that B., the next best bidder, might be reported the purchaser at the sum bidden by him, and B. consented; but the Court thought this was irregular, and directed the estate to be re-sold generally. *Blackbeard v. Lindigren*, 1 Cox 205.

6. An estate being directed to be sold by a decree, the conditions of sale fixed a reserved bidding, under which the auctioneer announced a sum, and there being two bidders and an uncertainty as to who had bid, the estate was bought in at another sum. Upon a petition by a person claiming to be the purchaser, that he might be declared the highest bidder, or for a re-sale:—Held, that the auctioneer had no right to fix more than one reserved bidding, nor could a bidder claim a re-sale if the parties interested did not desire it. *Notley v. Salmon*, 1 W. R. 240.

14. Other Cases.

7. On opening the biddings in the case of property held for lives, the Court imposed the condition that the party opening should be bound by his offer, if no better bidding could be enforced. *Walond v. Walond*, 8 Beav. 352; 9 Jur. 479.

8. The person who opens the biddings is discharged, if he is outbid at the re-sale. *Williams v. Attenborough*, T. & R. 70; 1 L. J., Ch., 138.

9. Person opening biddings setting up sham bidders, who are reported best bidders, ordered himself to be best bidder at price he opened biddings. *Molesworth v. Optie*, 2 Eden 289.

10. Consent of owner of property sold under

decree is necessary to a motion to vacate a bidding. *Rees v. Briekdale*, 8 Price 630.

11. Biddings opened upon a second application by the same person, the purchaser not appearing upon notice. *Preston v. Barker*, 16 Ves. 140.

12. A purchaser under the Court died before the confirmation of the report:—Held, that it was not necessary to serve his heir with notice of an application to open the biddings. *Templer v. Sweet*, 8 Beav. 464; 14 L. J., N. S., Ch., 424.

13. An estate was sold in the country subject to a life annuity equal to the rent. After sale, but before the purchaser was declared by the Master, the annuity determined. The Court opened the sale on an advance. *O'Hara v. Chains*, 8 Ir. Eq. R. 365.

14. In order to set aside a sale under a decree, there must be an affidavit of a greater sum having been offered. *Keogh v. Wood*, Vern. & Scriv. 118.

15. Where, on an advanced offer being made, after a sale by order of the Court, the property was again put up for sale, and there was no bidding:—Held, that the biddings might be opened again, although an order had been made that the person at whose instance they had been opened before should be allowed to be the purchaser in case there should be no bidding higher than his offer. *Erwings v. Waite*, 1 L. R., Eq., 440; 12 Jur., N. S., 117; 13 L. T., N. S., 664.

16. On a sale under the Court, two persons agreed not to bid against each other, but that one should bid up to 1,500*l.*, and divide the lot between them. They bought it for 650*l.*:—Held, that this agreement furnished no ground for opening the biddings or annulling the sale. *Re Carew*, 26 Beav. 187; 38 L. J., Ch., 218.

V. PURCHASE MONEY AND DEPOSIT.

See also XIV. *ante*.

1. *Duty of Auctioneer*, 7327.
2. *Forfeiture of Deposit*, 7328.
3. *Payment into Court and Promissory Note (Ireland)*, 7328.
4. *Leave to Pay in*, 7329.
5. *Order to Pay in*, 7330.
6. *Payment out of Court*, 7331.

1. Duty of Auctioneer.

17. It is the duty of an auctioneer who is nominated to conduct a sale by the Court, to pay any money received by him into court, at all events as between himself and the Court. After certificate, the ordinary course of business is for the solicitors to receive the money from the auctioneer, and themselves pay it into court. *Biggs v. Bree*, 51 L. J., Ch., 263; 46 L. T. 8; 30 W. R. 278. Affirming 51 L. J., Ch., 64; 45 L. T. 648; 30 W. R. 132.

The practice of the solicitors having the conduct of a sale to pay the deposits into court for the auctioneers is within the ordinary business of a solicitor. An auctioneer sent the deposits received on a sale to the solicitors of the plaintiff, who had the conduct of the sale, to be paid into court. This deposit was received by one of the members of the firm,

and misappropriated. On the question whether the auctioneer should not have himself paid this deposit into court, and whether he was not therefore liable to pay it over again:—Held, that the receipt and payment into court of the auctioneer's deposit was within the ordinary business of the solicitors to the party having the conduct of the sale, and that the innocent members of the firm were therefore liable for the defalcation of their partner. *Ib.*

2. Forfeiture of Deposit.

1. At a sale under a decree by the Court, the conditions provided that, in case of non-payment of the purchase money or other default, there should be a re-sale, and the deficiency, if any, to be made good by the purchaser, but containing no stipulation as to the return or forfeiture of the deposit. The purchaser paid the deposit, and afterwards became bankrupt, and the assignees having declined to complete:—Held, that the deposit was forfeited. *Depree v. Beadborough*, 4 Giff. 479; 33 L. J., Ch., 134; 9 Jur., N. S., 1317; 12 W. R. 191; 9 L. T., N. S., 532; 3 N. R. 187.

The Court refused to make any order "without prejudice" to the right of the vendors against B. or his assignees, in the event of the re-sale being made at a less price than the original sum. *Ib.*

Semble, that where the purchaser makes default, no express stipulation is necessary to entitle the vendor to the deposit. *Ib.*

2. A solicitor who attends a sale and bids for his client, is responsible for the payment of the deposit, and will be attached if it is not paid. A purchaser who refuses to pay the remaining three-fourths of the purchase money on the title being declared good, will be ordered to do so on a certain day, or to forfeit his deposit. *Hobhouse v. Hamilton*, 1 Hog. 401.

3. Where a purchaser, having lodged the one-fourth of his purchase money, refused to lodge the three-fourths unless the abstract of title was first delivered to him, and no report of good title had been obtained; upon motion by the plaintiff that the lands should be re-sold and the one-fourth forfeited:—Held, first, that the purchaser was not entitled to the abstract. Held further, that no report of good title having been had, the one-fourth could not be forfeited. *Warren v. Bateman*, Fl. & K. 189.

Semble, if a report of good title had been had, the proper motion would have been that the lands should have been re-sold, the one-fourth to remain as a security to indemnify the estate from all loss and costs attending the re-sale. *Ib.*

3. Payment into Court and Promissory Note (Ireland).

(a) *In General*, 7328.

(b) *Interest*, 7329.

(a) *In General*.

4. The purchaser who has lodged his purchase money under an order, is entitled, in

case the sale does not proceed, to have it back without incurring any risk of fall of the funds, with interest at 6 per cent. The vendor investing it in the funds runs the risk of a fall, whether he does it by order of the Court or not. If the investment is at the purchaser's instance, he may, if the sale goes off, be entitled to the stock in specie. *Kirwan v. Blake*, 2 Moll. 506.

The bidding at a sale under the Court binds the purchaser, but the Court may receive an outbidding, until the conditional order to confirm the sale is made absolute. The conditional order to confirm the sale cannot be obtained until the bidder has deposited one-fourth of the purchase money. The conditional order to confirm the sale cannot be made absolute till the remaining three-fourths of the purchase money have been paid. Should the title turn out bad, the purchaser will be paid back his purchase money with interest at 6 per cent. But should the purchaser prefer it, he may have the purchase money invested at his own risk expressly. A purchaser who pays in his purchase money is entitled to the rents from the gale day previous to the lodgment of the three-fourths, if the purchase be completed within the current gale from the bidding. *S. C.* 1 Hog. 151.

5. The purchaser of a reversionary interest under the decree of the Court, is bound to pay interest at the rate of 3l. 10s. per cent. on the three-fourths of his purchase money, from the date of the report of good title, he not having been guilty of any laches up to that period, to the date of the lodgment. *Hutchinson v. Cathcart*, Jon. & C. 260; 1 Ir. Eq. R. 452.

The rule is the same if the property be in its nature reversionary, though there be a small present profit arising from it. *Ib.*

Upon obtaining the report of good title it is the duty of the purchaser to bring in the remainder of his purchase money; and if he is afterwards discharged on account of defect of title, he will be entitled to interest thereupon: he is therefore properly chargeable with interest from that time. *Ib.*

6. A purchaser under the decree of this Court is not entitled to have his objections to the title disposed of before he brings in the whole of the purchase money, and has the sale absolutely confirmed. If, after lodging one-fourth of the purchase money, he delays to complete his purchase, the party having the carriage of the decree may obtain an order that he do bring in the remaining three-fourths within a limited time, or, in default of his so doing, that his one-fourth be forfeited, and that there be a re-sale. It is no objection to the application for such order that there has not been any report upon, or reference as to, the title. *Newman v. Fitzgerald*, 6 Ir. Eq. R. 258.

7. Where a creditor to the estate is declared the purchaser at a sum less than his demand, he must lodge his promissory note in lieu of the purchase money, in order that the sidebar rule to confirm the sale may be entered. *Edwards v. Bachas*, 8 Ir. Eq. R. 585.

8. Where lands decreed to be sold, subject to a charge, application on consent to lodge the sum in court refused. *Anon.*, 8 Ir. Eq. R. 514.

9. The Court refused to allow a purchaser to

lodge his promissory note in lieu of the three-fourths of his purchase money, upon the allegation that there would be a large surplus, and the inheritor consenting, notice not having been given to all the creditors. *Gardiner v. Blesington*, 11 Ir. Eq. R. 357.

1. A motion to invest the one-fourth of the purchase money in $3\frac{1}{4}$ per cent. stock, must be upon notice. *Lee v. Poole*, 2 Ir. Eq. R. 419.

2. In the Exchequer the three-fourths of the purchase money cannot be paid in until the sale is confirmed. *Secus* in Chancery. *Vincent v. Thwaites*, 2 Ir. Eq. R. 427.

3. Where a purchaser, having lodged the one-fourth of his purchase money, refused to lodge the three-fourths unless the abstracts of title were first delivered to him, and no report of good title had been obtained, upon motion by the plaintiff that the lands should be re-sold, and that the one-fourth should be forfeited:—Held, that the purchaser was not entitled to the abstract that no report of good title having been had, the one-fourth could not be forfeited. *Warren v. Bateman*, Fl. & K. 189.

Semble, if a report of good title had been had, the proper motion would have been, that the lands should be re-sold, the one-fourth to remain as a security to indemnify the estate from all loss and costs attending the re-sale. *Id.*

(b) Interest.

4. Where a purchaser moves on consent to lodge a promissory note in part payment of his purchase money, the consent and note should both specify the rate of interest payable on the note. *O'Connor v. Richards*, Sau. & Sc. 160.

5. Where a promissory note, payable with interest generally, has been lodged in court, in part payment of purchase money, it will be regarded as a contract between the parties out of court, and the word *interest* signifies legal interest, and not the court rate of interest. *Gibbons v. Berry*, Sau. & Sc. 158.

6. A purchaser's promissory note directed to bear interest at 6 per cent. where there were charges upon the estate at that rate of interest, although 5 per cent. was the rate of interest agreed upon. *Ferguson v. Eyre*, Sau. & Sc. 160. n.

7. Promissory note lodged by purchaser, for purchase money will bear 6 per cent. interest. *Anon.*, 8 Ir. Eq. R. 158.

8. When a purchaser lodges his promissory note for his deposit of one-fourth of his purchase money, he must pay interest on the amount when he completes his purchase. The purchaser's deposit of one-fourth of his purchase money does not bear interest for him until the remaining three-fourths are lodged. *Hill v. Kirwan*, 1 Hog. 357.

9. The deposit of one-fourth of the purchase money does not bear interest for the purchaser, till the remaining three-fourths are lodged. *Kirwan v. Blake*, 1 Hog. 151.

10. The purchaser who has lodged his purchase money under an order, is entitled, in case the sale does not proceed, to have it back without incurring any risk of fall of the funds, with interest at 6 per cent. The vendor in-

vesting it in the funds runs the risk of a fall, whether he does it by order of the Court or not. If the investment is at the purchaser's instance, he may, if the sale goes off, be entitled to the stock in specie. *Kirwan v. Blake*, 2 Moll. 506.

11. The purchaser lodged his promissory note for 1,500*l.*, the amount of the purchase money, but was afterwards allowed 281*l.* 2*s.* 4*d.* compensation for a rent-charge to which the estate was found to be liable:—Held, he was chargeable for interest on his note for the difference only. *Wilson v. Poe*, 8 Ir. Eq. R. 139.

12. A purchaser discharged on a report of bad title is entitled in this court to interest on the one-fourth of the purchase money lodged from the date of the lodgment. *Gower v. Hill*, Hay. & J. 127.

13. A purchaser who has been discharged from his purchase on report of bad title, is entitled to interest on his one-fourth of the purchase money from the date of its lodgment up to the lodgment of the residue. *Lincham v. Cotter*, 8 Ir. Eq. R. 104.

14. A purchaser from the assignees of a bankrupt is entitled to receive interest upon his deposit, whether the purchase be proceeded with or not. *Re Page*, 1 Dr. & Wal. 31.

4. Leave to Pay in.

(a) *In General*, 7329.

(b) *Without Prejudice*, 7330.

(a) *In General*.

15. Order directing timber to be sold before Master and purchase money to be paid by instalments. Purchaser desirous of paying purchase money immediately on allowance of discount, the same ordered on consent of defendant. *Sitwell v. Sitwell*, 4 Madd. 183.

16. A purchaser having bought, under a decree of the Court, property described as *tithe free*, raised a question on the title, which remained to be decided in the cause, whether the *tithe* passed under the will of the testator, and applied in the cause for leave to pay the whole of his purchase money into court, and that he might thereupon be let into possession of the purchased property, without prejudice to any application he might thereafter make for compensation, in case a title could not ultimately be made to the *tithe*s. The Court, considering that as a claim to compensation only was asked to be reserved to the purchaser, made an order accordingly. *Man v. Ricketts*, 5 De G. & Sm. 116.

17. Where the Master's report of the purchase was confirmed absolute, and the purchaser was ready with his money, but the abstract not fully delivered, the Lord Chancellor allowed it to be paid into the bank, to the credit of the cause, and invested, and the accumulating dividend to be invested in like manner; and the accountant-general was to declare the trust thereof, subject to the further order of the Court, without prejudice to any question as to the rents, etc., and interest on the purchase money; the fund not to be transferred

without notice to the purchaser. *Hindle v. Dakins*, C. P. C. 381.

1. Where two purchase one lot jointly, one party will not be permitted to pay into court his moiety of the purchase money. *Darkin v. Marye*, 1 Anstr. 22.

(b) *Without Prejudice.*

2. Purchaser, under circumstances, allowed to pay his purchase money into court, and to be let into possession and receipt of the rents and profits, without prejudice to any subsequent objection which he might make to the title. *Marfell v. Rudge*, 2 Y. & Coll. 566; 2 Jur. 78.

3. A purchaser under the Court will not be allowed to take possession, "without prejudice to objections to the title," even upon payment of his purchase money into court. *Hutton v. Mansell*, 2 Beav. 260.

4. Purchase money may be paid into court without prejudice to acceptance of title, but purchaser will not be let into possession. *Morris v. Bull*, 17 L. J., N. S., Ch., 9; 12 Jur. 4.

5. A purchaser under the decree of the Court is never let into possession till he has approved the title. *Williams v. Shaw*, 3 Russ. 178; 3 L. J., Ch., 157.

6. Applications of purchasers to pay purchase money into court, and to be let into possession, without prejudice to objections to the title, are always refused. *Rutter v. Marriott*, 10 Beav. 33.

7. A purchaser having bought under a decree of the Court property described as tithe free, raised a question on the title, which remained to be decided in the cause, whether the tithe passed under the will of the testator, and applied in the cause for leave to pay the whole of his purchase money into court, and that he might thereupon be let into possession of the purchased property, without prejudice to any application he might thereafter make for compensation, in case a title could not ultimately be made to the tithes. The Court, considering that a claim to compensation only was asked to be reserved to the purchaser, made an order accordingly. *Man v. Ricketts*, 5 De G. & Sm. 116.

8. In this case the purchaser, finding that the vendor had failed to deliver an abstract, set apart his purchase money, and gave notice to the vendor:—Held, that the purchaser did this in his own wrong, the conduct of the vendor having rendered it unnecessary for him to pay the purchase money until a good title was shown. *De Visme v. De Visme*, 1 Macn. & G. 336; 1 H. & Tw. 408; 19 L. J., N. S., Ch., 52; 13 Jur. 1037. Reversing 18 L. J., N. S., Ch., 159; 13 Jur. 205.

It is the rule of the Court, on a special case being made out, to receive from the purchaser his purchase money, without compelling him to accept the title. *Id.*

9. Notwithstanding the general rule, the Court may, under special circumstances, permit a purchaser to pay his purchase money into court before he has accepted the title; but in such cases express provision must be made against his taking possession, until he shall have accepted the title. *Dempsey v. Dempsey*, 1 De G. & Sm. 691.

10. Property was sold under a decree, subject to conditions, one of which was that the purchase money was to be paid into court on or before the 30th November, or that interest should be paid from that time at 5l. per cent. The abstract was not delivered till October 18th, and the deeds were in the hands of mortgagees, who declined producing them without payment. On the purchaser's application on the 15th December, the Court allowed him to pay in the principal and interest up to that day, without prejudice to any question and without acceptance of title. *Rutley v. Gill*, 3 De G. & Sm. 640.

11. Held, that a purchaser under a decree could not be permitted to pay his purchase money into court, without accepting the title, although all parties consent, and although the conditions provide that, if from any cause whatever the money shall not be paid by a particular day, the purchaser making default shall pay interest from that day. *Denning v. Henderson*, 1 De G. & Sm. 689; 16 L. J., N. S., Ch., 178; 11 Jur. 687.

5. Order to Pay in.

(a) *In General*, 7330.

(b) *Order. How Obtained*, 7331.

(c) *Deduction of Income Tax*. See XIV. VIII. 5 ante.

(a) *In General.*

12. In sales under a decree, it is irregular to pay the purchase money to the party; it ought to be paid into court. *Bennett v. Hamill*, 2 Sch. & Lef. 581.

13. Motion against purchasers in the Master's office, to pay in their purchase money, refused: the estate sold being copyhold limited for life, and then in remainder, and the remainderman being abroad, he not having surrendered. *Noel v. Weston*, Coop. 138.

14. Upon a sale under the Court, an order upon the purchaser to pay his purchase money into court cannot be obtained until the title has been accepted, or the Master's report obtained in its favour; and such an order, obtained before such acceptance or report upon affidavit of service of the notice of motion, was discharged with costs. Applications of purchasers to pay purchase money into court, and to be let into possession, without prejudice to objections to the title, are always refused. *Rutter v. Marriott*, 10 Beav. 33.

15. Where property was sold under an order of the Court, in which the plaintiff was interested to the extent of one-eighth part, and three of the defendants, who were interested in the other shares, and were in possession of the property, became the purchasers of part of the property, they were required to pay the whole amount of their purchase money into court; and that notwithstanding there were incumbrances upon the property, and the purchasers claimed to be entitled to allowances for improvements. *Bulmer v. Allison*, 15 L. J., N. S., Ch., 11. Affirming 8 Jur. 440.

16. A mortgage debt and securities were voluntarily assigned by W. to two trustees in strict settlement, but the trustees did not

execute the deed, and they refused to act in the matter of the trusts. W., under a power contained in the settlement, appointed two other parties to be trustees, but the deed contained no assignment to them. One of the new trustees executed the deed, but the other did not, nor did he act in the trusts, except by signing a written consent to a sale of the property. Afterwards mortgagees instituted a suit, and obtained a decree for sale, but the executrix of W., the two new trustees, and the *cestuis que trustent* were not parties to the suit. The solicitor of the executrix and one of the trustees attended the proceedings in chambers, and counsel subsequently appeared for them in court, and the trustee, in writing, consented to a sale. B. was certified to be the purchaser of the estate, but he objected to pay the purchase money into court, on the ground that the *cestuis que trustent* were not sufficiently represented. The Court overruled the objection, and directed a conveyance to the purchaser by the trustees, it not being necessary that the *cestuis que trustent* should be parties to the conveyance. *Watters v. Jones*, 6 Jur., N. S., 530.

1. When the purchaser of property under an administration decree declined to complete his purchase upon the ground of non-concurrence in a previous sale of one of two persons' interest in the purchase money:—Held, that he must nevertheless bring the purchase money into court, the objection being one of conveyance and not of title. *Matson v. Deanes*, 4 De G. J. & S. 345.

(b) *Order. How Obtained.*

2. The usual order for the payment of purchase money into court (of property sold under the decree of the Court, where there is no question as to title), is an order to be obtained at chambers. *Davenport v. Davenport*, 1 W. R. 4, 12; 9 Hare (App.) i.; 22 L. J., Ch., 11; 16 Jur. 988.

6. Payment out of Court.

- (a) *Where Conveyance not Executed*, 7331.
- (b) *Rights of Purchaser after Conveyance Executed*, 7332.
- (c) *To Incumbrancers*, 7332.
- (d) *Of Surplus after Discharge of Incumbrances*, 7332.
- (e) *Retainer of Part*, 7333.
- (f) *Liability to see to Application of Purchase Money*, 7333.
- (g) *Practice on*, 7333.

(a) *Where Conveyance not Executed.*

3. The Court will not, under any circumstances, suffer money paid in by a purchaser of an estate sold under its order to be paid out to a mortgagee, until a proper conveyance shall have been executed to purchaser. *Rees v. Adam*, 9 Price 660.

4. In a suit for payment of creditors, the real estates of testator were ordered to be sold; A., being reported the purchaser of one

of the estates for 14,480*l.*, entered in possession and accepted the title, and proper conveyances were executed; on application by the creditors to have the purchase money paid out, the purchaser stated, that the tenants of the estate had been served with a writ of right at the suit of a person who claimed the whole estate under an adverse title; but the Court thought, that the purchaser, having accepted the title, etc., could not prevent the money being paid out of court, and ordered it accordingly. *Thomas v. Powell*, 2 Cox 394.

5. An estate was sold to a party to a suit, for payment of the testator's debts, and which, by the disclaimer of a trustee, was vested in the heir *pur autre vie*, with legal remainder to the children of A. (who was living) as tenants in common. The purchase money was in court. The case appeared not to be within the 1 Will. 4, c. 47, so that no effective conveyance could be made until the death of A.:—Held, that the purchase money ought not to be distributed. *Heming v. Archer*, 9 Beav. 366; 10 Jur. 169.

6. Where an estate has been sold under the direction of the Court, and the purchasers have paid the money into court, no part of the purchase money will be ordered without the consent of the purchasers to be paid, even in the discharge of incumbrances affecting the estate, till conveyances to them have been executed, although the delay in executing the conveyances should have arisen from their own negligence. *Beven v. Beven*, 1 L. J., Ch., 159.

7. Whilst conditional orders for attachments are depending against plaintiff and defendant for not executing the deeds of conveyance to the purchaser, the creditors who came in under the decree cannot be paid out of the purchase money, though the purchaser has gone into possession, but the Court will give them leave to proceed on their security. *Ormsby v. Nicholson*, Vern. & Scriv. 115.

8. The plaintiff can draw out the purchase money only when he has delivered the deed executed by all necessary parties, or in their default by the Master, under an order for that purpose, to the purchaser, and an injunction with it to put him into possession. Therefore, Court refused this motion. *Farrell v. Irwin*, 2 Moll. 511. And see *Massey v. Massey*, *id.* 511.

9. A purchaser under a decree, who has gone into possession, cannot prevent the purchase money being paid out, by alleging that the landlord claims title to the premises because of a forfeiture, and threatens to bring an ejectment for them; the Court having previously overruled an exception, taken by the purchaser to the report of good title, founded upon that defect in the title. *Sparrow v. Cooper*, 1 Jones 72.

10. The Court having ordered certain small leaseholds to be sold and the proceeds distributed, together with a fund in court, among numerous parties, upon the certificate of the chief clerk, in order to save expense, directed the purchasers to be served with a summons to show cause at chambers why the proceeds should not be distributed pursuant to the order; and no cause having been shown, the proceeds were distributed by the chief clerk. *Thorp v. Owen*, 2 Sm. & G. (App.) i.

(b) *Rights of Purchaser after Conveyance Executed.*

1. Where a sale takes place under a decree and the purchase money is paid into court, and the purchaser discovering an incumbrance does not prosecute a requisition made in consequence, but executes the conveyance, he can stand in no better position than an ordinary purchaser, and cannot interfere with the distribution of the proceeds. Where certain defendants are dismissed with costs, and register the order dismissing them, they can claim no lien on the fund. *Miller v. Pridden*, 5 W. R. 171; 26 L. J., Ch., 183; 3 Jur., N. S., 78.

(c) *To Incumbrancers.*

2. A. having a lien on the testator's estate, established his debt under the decree, but his claim for interest was disallowed by the Master, whose report stood confirmed. The estate was sold, subject to A.'s lien; and A., having refused to accept from the purchaser his principal without interest, was not allowed to participate as a creditor in the purchase money. *Hempstead v. Hempstead*, 4 Beav. 423.

3. A judgment creditor not deprived of his lien on the estate in the hands of a purchaser under a decree, by not proving his debt before the Master, in pursuance of advertisements for that purpose, his legal right to enforce payment of the judgment not being in the least affected by the decree. *Barrett v. Blake*, 2 Ball & B. 354.

The only inconvenience to a judgment creditor not proving before the Master under a decree, is, that he loses the benefit of having his debt discharged out of the produce of the sale under the decree. *Id.* 357.

4. Where lands are sold under a decree, the purchaser is entitled to have all judgments paid out of the purchase money satisfied on record; but where a judgment creditor went in and filed a charge under a decree to which the plaintiff filed a discharge, and the Master's report did not find anything due on foot of the judgment, the purchaser, notwithstanding the death of the judgment creditor, was not entitled to have the judgment satisfied, nor lands released, as the filing of the charge made the creditor a quasi party. *Fitzgerald v. Lane*, 3 Ir. Eq. R. 339.

Where a judgment creditor comes in under a consent order, after the final decree, and the Master finds against the judgment as being barred by the Statute of Limitations, the Master's report must be made up and confirmed; otherwise, the purchaser under the decree will be entitled to have the judgment satisfied, or a release executed. *Id.*

5. Parties to the suit, and all persons coming in under the decree, will be enjoined from disturbing the purchaser. If fifty judgment creditors come in, and only a few can be paid, others are restrained. Where there is original jurisdiction (as in carrying a trust into execution), if the old judgment creditors will not come in, they are restrained from proceeding against those lands in future. *Stackpoole v. Curtis*, 2 Moll. 504.

6. Where a deficient fund is produced by a title under a decree, and judgment creditors

having a lien upon the legal estate paise to the reported incumbrances, refuse to prove under the decree, or to release lands; if the purchaser, who relies on those judgments as objections to the title, will not consent to be discharged, the proper course is to apply for a reference as to title. *Barrett v. Birmingham*, Sau. & Sc. 419.

7. Prior judgment creditor, who neglected to come in and prove before final decree for a sale, directed to obtain a report, and then apply to extend the sale to cover his demand; a motion to amend the minutes being refused. Purchaser under the decree, after such a motion, could not plead want of notice, and, although he had the legal estate, would, it appears, be liable, if, having notice of such prior judgment creditor, he allowed the purchase money to be applied to subsequent incumbrances, contrary to the order of priority of charge. *Leake v. Moore*, 2 Moll. 127.

8. A judgment creditor, having obtained a decree for a sale in the Court of Chancery, the lands having been sold under a prior decree in the Exchequer, was allowed to file a charge under the decree to account in the Exchequer, on foot of his demand, as decreed in Chancery, and the remembrancer and registrar were directed to amend the report and final decree by inserting his demand, if it should be proved. *Pidgeon v. D'Alton*, Jon. & C. 276.

9. Though the purchaser objects that there are several outstanding judgments not proved in the cause, this Court will, at the instance of the party having the carriage of the decree, refer it to the Master to ascertain the sums due under the decree, and to allocate the purchase money without prejudice to the purchasers, insisting that the said purchase money shall not be paid out until a clear title shall have been made, and under peril of the costs of reference in default of such title. *Greene v. Elliott*, 1 Ir. Eq. R. 207.

(d) *Of Surplus after Discharge of Incumbrances.*

10. The surplus fund, after payment of the sums decreed, will not be paid to the defendant, unless it appears that he has not specifically pledged it. According to the mode of executing decrees for sales in the Master's office, the defendant is allowed to select the parts of his estate to be first sold. Lord Eldon's decision, that there must be a reference to the Master to inquire whether the parties interested in funds to be invested in land had in any manner incumbered their interests before the money can be paid to them, has always been followed in this country. *St. Antonio v. Adderly*, 2 Hog. 6.

11. Surplus arising from sale of real estate under a decree for payment of all incumbrances (notice to creditors to come in being given by advertisement), after payment of all charges proved thereunder paid out to the inheritor; Master of the Rolls holding that the surplus fund retaining the character of land is subject to the lien of creditors subsequent to the report, and being in *custodiâ legis*, that the

Court will be active for the protection of the person who can show the right without reference to the parties in the case, and, therefore, directed a further advertisement for all persons having charges, judgments, or incumbrances, affecting the lands which produced the residue. Order varied on appeal, Lord Chancellor being clear, that the Court has no jurisdiction to go out of the record in favour of creditors, but inclining to sustain the order for the protection of the purchaser; but it appearing that, according to the practice, in respect of sales under decrees, *bonâ fide* purchaser is never liable to answer subsequent creditors, made the order to pay out the surplus upon an affidavit that no specific lien had been given upon the money without advertisement. *St. Antonio v. Adderley*, 2 Moll. 117.

(e) *Retainer of Part.*

1. The purchaser of a copyhold estate, devised, subject to payment of debts, in trust for sale, and sold, during the infancy of the heir, under the usual decree, is not entitled to have a portion of the purchase money retained in Court, as a provision for defraying the expense of the fine, which would become payable on the death of the heir before a conveyance. *Morris v. Clarkson*, 3 Swan. 558.

(f) *Liability to see to Application of Purchase Money.*

2. Purchaser or mortgagee under a decree, for sale or mortgage, and payment of creditors, answerable for the application of the money, if not paid into court. So, also, if the debts are specified in a schedule, etc., by the will. *Lloyd v. Baldwin*, 1 Ves. 173.

3. A purchaser, under a decree, is not affected by irregularities and defects in the decree by which the application of the money may not have been properly secured. *Curtis v. Price*, 12 Ves. 89.

4. A purchaser of lands sold under a decree is not bound to see to the application of the purchase money. *Blake v. Blake*, 5 Ir. Eq. R. 596.

5. Purchaser, under a decree, bound to see directions of decree observed. *Colclough v. Sterum*, 3 Bligh 181.

(g) *Practice on.*

6. The purchase money of an estate sold under decree in a suit paid into court to the credit of the cause, becomes the fund of all parties to the suit:—Held, therefore, that they were properly served with a petition respecting such purchase money. *De Visme v. De Visme*, 1 Maon. & G. 336; 1 H. & Tw. 408; 19 L. J., N. S., Ch., 52; 13 Jur. 1037. Reversing 18 L. J., N. S., Ch., 159; 13 Jur. 205.

VI. SETTING ASIDE AND DISCHARGE OF PURCHASER.

1. *In General*, 7333.
2. *For Defects of Title. In General*, 7334.
3. *Objections. Outstanding Incumbrances and Judgments*, 7336.

4. *For Errors and Irregularities*, 7338.
5. *Delay*, 7339.
6. *Right to Interest and Costs*, 7339.
7. *Practice on Application*, 7340.
8. *For Misleading Particulars and Conditions*. See VI. ante.

1. *In General.*

7. Principles on which Court acts in suits to impeach purchases made under a decree. *Thornhill v. Glover*, 3 Dr. & War. 196.

8. A sale under a decree in a creditors' suit, subject to certain specified defects, deteriorating the value of the estates, but which the creditor had no means of getting rid of by any suit, not set aside. *Fisher v. Barry*, Beat. 139.

9. Under a decree directing the sale of an estate, which, as against T., one of the defendants, was only a decree *nisi*, and before the decree was made absolute, the estate was sold, and A. was reported the purchaser: afterwards, on the application of A., an order was made by the Vice-Chancellor, discharging him from the purchase on the ground that the decree was not absolute as against T.; the plaintiff immediately gave notice of a motion before the Lord Chancellor to discharge that order, and that motion having stood over a considerable time, the decree was made absolute as against T., before it was heard:—Held, that the purchaser was entitled to be discharged at the time when the application was made, and that he, having been once discharged by an order which was right at the time when it was pronounced, the contract could not be revived by the proceedings subsequently taken by the vendor to make the decree perfect. *Coster v. Turner*, 1 Russ. & M. 311; 8 L. J., Ch., 98.

10. A motion by a person, who, in consequence of a direction to his agent to bid one pound more than any other bidder, had been declared tenant at a very high rent, to be discharged from his bidding, was refused with costs. *Mahon v. Hammond*, Sau. & Sc. 689.

11. A solvent person, who had directed his agent to bid 1*l.* more than any other person at the letting under the Court, will not be discharged from his bidding, although it may be much above the real value. An option was given to the applicant to have the lands set up again, without discharging him from his bidding, and subject to his making compensation for any difference between the two lettings. *Coote v. Coote*, Sau. & Sc. 623; 2 Ir. Eq. R. 159.

Semble, if the applicant could have shown that the person who bid against him was employed merely to raise the rent, or had any ill will against him, or was in collusion with any of the parties, his application to be discharged might have been granted. *Ib.*

After inquiry by the solicitor of the inheritor, who was a minor, the rent was reduced, by consent, from 26*l.* to 20*l.* per annum. *Ib.*

12. A purchaser of two lots, as to one of which the biddings were opened, released from his bidding for the other lot, upon his undertaking to pay the costs of the re-sale. *Gregg v. Glover*, 1 Ir. Eq. R. 211.

1. Purchaser before a Master submitting to forfeit his deposit, not bound to proceed in the purchase. *Savile v. Savile*, 1 P. W. 745. But see *id.* 747.

2. The Court refused to discharge the solicitor in the cause from a purchase before the Master, with the view of preventing a sale at under-value. *Neilthorpe v. Pennymann*, 14 Ves. 517.

3. Where the vendor had no title to a small portion of the land contracted for, but such defect was not discovered till after the contract, the Court refused, with costs, a motion by the purchaser to be discharged from his contract, without giving the vendor an opportunity of acquiring a title to the portion. *Chamberlain v. Lee*, 10 Sim. 444.

4. When difficulties arise to delay the completion of a sale had under a decree, and during the interval of making out the title ordinary dilapidation takes place, that is a case for compensation; but if a destruction of ornamental timber, that is a ground for the purchaser to apply to be discharged. *Magennis v. Fallon*, 2 Moll. 585.

5. An estate having been sold, in which the petitioners were interested, it was represented to them that a good title could not be made; and they were induced to give a brief to counsel to consent to the purchaser being discharged; they subsequently discovered circumstances which led them to conclude they had been deceived, and that, in fact, a good title could be made, and thereupon petitioned the Court that the order might be discharged. The Court discharged the order, giving the purchaser his costs, and referring it to the Master to inquire whether a good title could be made. The solicitor for the petitioner to have the conduct of the inquiry. *Butter v. O'maney*, 1 Taml. 344.

6. Purchaser discharged on motion upon affidavit of imprisonment for debt and insolvency. *Hodder v. Ruffin*, 1 Ves. & B. 544.

7. Where a property was set up for sale, by an auctioneer in the country, first in lots, then part of it in batches of some lots together, then the whole together, the auctioneer, having stated that he would receive biddings, and that the Master would declare the purchaser, a person, who was the highest bidder for a batch of some lots, and afterwards for the whole, was held to his bidding for the lots, though he was misled by the mode of selling, and intended to bid for the whole. *O'Grady v. Boady*, 11 Ir. Eq. R. 400.

8. An estate having been sold under a decree for payment of incumbrances, part of the purchase money was applied in payment of interest accrued due during the possession of a tenant for life. There had been an agreement respecting the sale with the tenant for life, and he also obtained a lease of part of the property. On a bill filed by the next remainderman in tail, the Court refused to set aside the sale, but referred it to the Master to inquire if the sale was at an under-value, and if so, that the purchaser's representatives should pay the difference into court, and that the tenant for life should pay into court so much of the produce of the sale as the Master should find had been applied in discharge of interest accrued during the possession of the tenant for life. *Townsend v. Warren*, 6 Ir. Eq. R. 620; 1 J. & L. 221. n.

2. For Defects of Title. In General.

9. After the purchaser of an estate, sold under a decree, had approved of the title, a deed was discovered, which showed that the plaintiffs could not make a title to more than a moiety of the estate. The Court discharged the purchaser from his purchase. *Ward v. Trathen*, 14 Sim. 82; 8 Jur. 303.

10. The purchaser under a decree having objected to the title for want of parties to the suit, an application on behalf of the plaintiff that the purchaser might be discharged from his purchase, refused. *Conyers v. Crosbie*, 7 Ir. Eq. R. 401.

11. Where a Master had reported that a good title could not be made to certain lots which had been sold under a decree in the cause, a purchaser of other lots, which were held under the same title, but who had not obtained any order of reference of the title as to those lots, was discharged, upon motion, from his purchase, and his costs and expenses ordered to be paid out of the funds in court, without any reference as to the title; and that, although some of the parties to the suit were infants. *Lewis v. Lewis*, 9 L. J., N. S., Ch., 176.

12. A purchaser of real estate at a sale in the Court of Bankruptcy will not be discharged from his purchase on objections to title, where the abstract of title posted in the Court contains express notice of the defects objected to:—Held, also, that where title cannot be made out to small portions of the estate the purchaser will not be discharged, but will be entitled to compensation *pro tanto* only, unless he can show that the deficient portion was essential to the proper enjoyment of the whole, or that it constituted his main object in entering into the contract. *Exp. Gethin, Re Smith, Ll. & G. temp. Plunk.* 429.

Difference in practice between sales in bankruptcy and sales under decrees of courts of equity. *Id.*

13. A purchaser of lands, sold under the decree, and described in the rental as held under a lease that would expire on the 1st of June then next, discharged from his purchase, it subsequently appearing that the tenant of part of the lands was entitled, under an equitable article, to a reversionary lease for four lives. *Linsahan v. Cotter*, 7 Ir. Eq. R. 176.

14. Under a decree for sale, made in a suit for the administration of a testator's assets, A. became, in 1813, the purchaser of certain lots, and, after a long resistance to the title, was, in 1824, compelled to pay the purchase money into court, and was let into possession two years afterwards; and before the conveyances were executed, having discovered, by means of the information of third parties, a circumstance which constituted a material defect in the title, and which, there was reason to believe, had been long before known to the solicitor of the plaintiff, he obtained a reference back to the Master; the Master reported against the title; to the report exceptions were taken, and before the exceptions came on to be heard the vendors had cured the defect:—Held, that the purchaser had a right to be discharged from his contract, and that a further reference of title ought not to be directed. *Dalby v. Pullen*, 1 Russ. & M. 296; 8 L. J., Ch., 74; 8 Sim. 29.

1. M. purchases leaseholds at an auction under a decree in a suit in which a receiver has been appointed, and it is provided by the conditions that the receipt of rent up to the time fixed for completing the purchases shall be conclusive evidence of the fulfilment of the covenants by the lessee. There being no one to assign the lease by reason of the non-appointment of trustees, the vendors let a policy against fire drop (which is covenanted by the lease to be kept up) by non-payment of the premiums from the time fixed to complete the purchase. On motion by the purchaser to be discharged, order made, on the ground that up to the time of actual completion a vendor must preserve the title unimpeachable. *Palmer v. Goren*, 4 W. R. 688.

2. The plaintiff having obtained an order for sale in the suit, put up a lot described as being in the occupation of C., at a yearly rent of 42l. It appeared that C. was holding as tenant under another party, hostilely to the vendor. The Court discharged the purchaser, and directed the plaintiff to pay his costs, and refused to give time to the vendor to recover the premises by ejectment. *Lauchlan v. Reynolds*, 2 Eq. Rep. 713.

3. Purchaser under decree of two-sevenths of estate in one lot is not obliged to take one-seventh to which only title can be made. *Roffey v. Shalloross*, 4 Madd. 227.

4. In general, objection, on the part of a purchaser of two lots, to the completion of his agreement, on the ground that the title to one is bad, is not such as ought to be discussed upon motion. *Casamajor v. Strode*, Coop. temp. Brough. 510.

5. The doctrine of compensation ought not to be extended. Jurisdiction has been exercised in giving compensation founded on the minuteness of the object compared with the estate sold, and not upon any jurisdiction to find and adjust pecuniary equivalents, where essential parts of the contract cannot be performed. The Master's certificate of the sale and the printed rental are analogous to the minute of the contract on a private sale. The purchaser of several denominations in one lot will be discharged on motion, if the Master reports that a good title cannot be made to one of the denominations. *Prendergast v. Byre*, 2 Hog. 81.

6. Defendants in a cause, where there has been a sale under a decree, ought to be served with the petition of a purchaser to be discharged from his purchase. In September 1848 a purchaser bought under a decree, and by his requisitions on the title required a receipt to be given by a trustee having power to give receipts, but who was by mistake stated in the pleadings to have disclaimed, and was not a party to the cause. Afterwards the purchaser required that the trustee should be brought before the Court by supplemental bill. In the course of the discussion on these subjects, it was objected by the purchaser that an additional *cestui que trust* ought to have been brought before the Court. The plaintiff acceded to this, and promised that the defects complained of should be supplied and remedied by a proper supplemental suit, and petition of re-hearing, in which (as all parties were amicable) a decree might be obtained in three weeks.

This took place in March 1849. The purchaser, in answer to the proposal, declined waiting any longer, and demanded back his deposit and costs. He then presented a petition to be discharged from his purchase, but before the petition came on to be heard the defects in the suit had been supplied:—Held, not a case for discharging the purchaser. *Sherwood v. Beveridge*, 3 De G. & Sm. 425; 13 Jur. 1042.

7. A purchaser, under a decree, will be compelled to take a title which depends on adverse possession, under the Statute of Limitations, although the fact of such adverse possession is evidenced merely by affidavit in the Master's office, and was not at issue in the suit. *Scott v. Nison*, 2 Con. & L. 185; 3 Dr. & War. 388; 6 Ir. Eq. R. 8.

Held, that it was no objection to the title, that the facts constituting adverse possession were proved by affidavit, and in the absence of the heir. *Id.*

8. When the purchaser of an interest sold under a decree of the Court, acquires by that means a knowledge of a defect in the title to that interest, and afterwards buys up the estate of the person interested in taking advantage of that defect, the Court will not allow him to rely on the doctrine that a purchaser is not obliged to take a doubtful title, in support of an objection to the title founded on that defect. *Sheppard v. Doolan*, 5 Ir. Eq. R. 6; 3 Dr. & War. 1. And see S. C. Fl. & K. 598; 4 Ir. Eq. R. 654.

Quære, whether, if the objections were valid, the Court will allow him to rely on it. *Id.*

9. Lands were set up as held under a clear and indefeasible title in fee-simple, and it appeared that they had been conveyed forty years before, reserving a right to cut turf and quarry limestone to tenants of another estate, although the right had never been since exercised, and there were no turf bogs worked or quarries open on the estate; but it did not appear that there might not be turf, and there was no proof that there was not limestone:—Held, a good objection to the title, and the purchaser discharged. The rental at the sale contained an obscure statement, leaving it doubtful whether a tenant held for lives named in 1804 or 1843; it proved to be the latter, and the purchaser swore he had been misled:—Held, a sufficient ground for discharging the purchaser. *Martin v. Cotter*, 9 Ir. Eq. R. 351; 3 J. & L. 496. Affirming 9 Ir. Eq. R. 44.

10. A purchaser under a decree of leaseholds presented a petition to be discharged from his purchase, on the ground that a share in the property had been bequeathed upon trusts, and that the bequest appeared, by inference from the pleadings, to have been assented to; but that some of the *cestuis que trustent* were infants, and were not before the Court. The assent was disputed:—Held, that the purchaser was not entitled at once to be discharged, but only to a reference to the Master as to title. *Whitfield v. Loqueutre*, 3 De G. & Sm. 464.

11. If an account to be taken in a suit to be instituted is necessary to complete the title to lands sold under a decree, the purchaser, if he desires it, must be discharged. He cannot be held until a subsidiary cause is brought, however speedily, to a determination; but where the party had instituted such a suit,

yielding to the suggestion of the Court, it was:—Held, that he was not shut out by his acquiescence from showing on appeal that it was unnecessary;—conforming to the opinion of the Court, not binding the party complying with it not to controvert it. *Magenis v. Fallon*, 2 Moll. 561.

1. A purchaser was discharged from his purchase on the ground of misrepresentation, the lands having been set up to be sold as held under written agreements for leases, and it appearing upon inquiry subsequent to the sale that the agreements were merely parol. *Bessonnet v. Robins*, Sau. & Sc. 142.

2. A purchaser bought the lease of certain premises under the decree of the Court, and entered into possession and paid the purchase money into court. Afterwards the lessors instituted a suit against the original lessee for the purpose of altering the lease in a material particular:—Held, that the Court would not compel the purchaser to complete the purchase until that suit was decided, although he had notice at the time of accepting the title that there were grounds for the lessor's claim. *Bentley v. Craven*, 1 W. R. 362, 401.

3. Trustees of copyholds vested in them by a private Act of Parliament take a surrender from the tenants for life, and sell under a decree subject to certain leases, and petition for payment of the purchase money into court. The purchaser objects that they had not the legal estate, having only taken a surrender from tenants for life, and the Court had therefore no jurisdiction. The leases also were void, and therefore the sale was at an undervalue:—Held, that the Act vesting the property in the trustees overrules the surrender, that the Court therefore had jurisdiction, and no one could object to the sale but the purchaser, who would gain by it. But as it was a fair question, the costs must come out of the estate. *Dixon v. Wilkinson*, 1 W. R. 513; 1 Eq. Rep. 566; 22 L. J., Ch., 981.

4. Conditions of sale, settled by the Court in 1871, provided that a conveyance on a sale made by B. in 1838 should be the root of title; that no objection or requisition should be made with respect to earlier title, and that recitals in deeds twenty years old should be conclusive evidence of the instruments recited. That conveyance purported to recite the will, but stopped short of the final gift over, thus showing a good title to the fee in B.:—Held, that a purchaser under the Court was not precluded from showing that B.'s title under the will was defective, and that he was entitled to be freed from his contract, and to get all his costs. *Elae v. Elae*, 13 L. R., Eq., 196; 41 L. J., Ch., 213; 25 L. T. 927; 20 W. R. 286.

5. Upon a sale under the order of the Court, the purchaser will not be compelled to accept an equitable title without the legal estate being got in, except, perhaps, in a case where a dry legal estate is outstanding in an infant. *Freeland v. Pearson*, 7 L. R., Eq., 246.

6. A purchaser cannot take an objection that the Court has miscarried in exercising its jurisdiction. *Waters v. Waters*, 15 W. R. 191; 15 L. T., N. S., 406; 36 L. J., Ch., 195.

Construction of Special Conditions. In General.] See VI. ante—XI. IV. ante.

3. Objections. Outstanding Incumbrances and Judgments.

7. A purchaser cannot be compelled to accept a title without having judgments against the person in whom the legal estate is vested satisfied. *Semble*, even where a purchaser can get a clear legal estate, he will not be compelled to accept the title without having judgments entered after the execution of a deed, conveying such legal estate, satisfied; he having notice of such judgments. *Piers v. Piers*, Sau. & Sc. 379. Affirmed Dr. & Wal. 265.

A purchaser under a decree will not be held to his purchase except all parties having judgments, etc., appearing on record against the vendor, whether prior or subsequent to the claim, for the raising of which the bill was filed, are brought before the Court so as to bind their rights. *Id.*

8. To make title under a decree for a sale of lands in a judgment creditor's suit, every incumbrancer whose demand is, prior to the last incumbrance, provided for by the decree, must be satisfied or be brought before the Court. *Ponsonby v. Ponsonby*, 2 Hog. 201.

This rule has now, by *Piers v. Piers* (Sau. & Sc. 379, and 1 Dr. & Wal. 264) been extended to every judgment creditor puisne to those provided for by the statute. *Id.*

9. When it is ascertained that there are prior judgment creditors who will not come in and prove their demands under a decree, they ought to be made parties to the suit by supplemental bill, that their rights may be bound by the decree for a sale. It is not the practice in Ireland to make subsequent judgment creditors parties to a bill for a sale. *Johas v. French*, 1 Hog. 450.

10. Where a deficient fund has been produced by a sale under a decree, and judgment creditors having a lien on the legal estate, puisne to the reported incumbrances, refuse to prove under the decree, or to release the lands; if the purchaser who relies on those judgments as objections to the title will not consent to be discharged, the proper course is to apply for a reference as to title. *Barrett v. Birmingham*, Sau. & Sc. 419.

11. There was a decree of the Court for the sale of a testator's estate for payment of his simple contract creditors. Lot 4 was sold, and the purchaser objected to the title, that there were unsatisfied judgments against the heir-at-law of the testator, upon whom lot 4 had descended:—Held, that this was a good objection, the judgment creditors of the heir-at-law not being parties to the suit, and although this Court might, upon the application of the purchaser, restrain the judgment creditors from extending their elegit. *Parkinson v. Piper*, 8 Jur. 1111.

12. The purchaser under a decree in a creditor's suit objected to the title, on the ground that there were certain outstanding judgments confessed by the defendant before the filing of the bill, which afterwards, pending the cause, were revived and re-docketed under Moore's Act, and that they were not bound by the decree. The Master overruled the objection, being of opinion that the judgments in *sci. fa.* were to be considered as new and original judgments, that the first were gone,

and that the others, having been obtained *pendente lite*, did not affect the title to be conveyed to the purchaser. Upon exceptions to the report of good title:—Held, that they should be allowed, that the judgments in *sci. fa.* were not to be considered as creating new rights, but merely as revivals of rights under the original judgments, and that the purchaser's objection to the title should therefore be allowed. *Newman v. Fitzgerald*, 6 Ir. Eq. R. 260.

1. Purchaser under decree, with notice of judgments intervening between incumbrances ordered to be paid, is bound by them, unless persons in whom they are vested are parties to cause, or come in and prove under decree. *Steele v. Phillips*, 1 Hog. 49.

2. Lands were subject by a settlement to 1,800*l.*, secured by a term of one hundred, and by subsequent will to 4,200*l.*, secured by another term of ninety-nine, years, as portions for younger children, of whom the plaintiff and A. were two. By the will the lands were devised, subject to the two terms, after prior limitations, to A. for life, remainder to his first and other sons in tail. A. being in possession, a bill was filed to raise the two sums, to which a minor tenant in tail, born afterwards, was made a party by supplemental bill. The Master reported interest accrued on the two charges during the possession of A. The final decree confirmed the report, and declared the sums reported charges on the terms of one hundred years and ninety-nine years, and, in default of payment thereof, directed the Master to sell the several lands and premises comprised in the respective terms of one hundred years and ninety-nine years for payment of the respective demands decreed charges thereon. The lands were set up and sold for the residue of the two terms:—Held, on exceptions to the Master's report of good title, that as the minor tenant in tail was a party in the cause, the decree was not erroneous, though it directed a sale for the payment of interest accrued during the possession of A., nor because it omitted to set off the interest which ought to have been paid by A. against his share of the portion, and a sum which was reported to A. charged on other lands directed to be sold by the decree. But the Court directed the Master to allocate to the minor, out of the sum so reported to A., the amount of interest which he was liable to pay:—Held, also, that although the two charges affected the terms separately, and were not distinguished in the report or decree, as it was clearly for the benefit of the minor that the terms should be sold together, the title was not objectionable on that ground:—Held, also, that as the minor's estate was pious to the terms, the omission to give him a day to show cause would not affect the purchaser. *Edgeworth v. Edgeworth*, 12 Ir. Eq. R. 81.

3. A. devised his estate at H. to his second son, who survived him and afterwards died intestate, whereupon the estate descended to N., his elder brother. Pending a suit instituted by A.'s creditors, judgments were entered up against N., which remained unsatisfied when the estate at H., together with the testator's other estates, were sold under the decree in the suit for payment of his debts:—Held, that N.'s judgment creditors were necessary parties

to the conveyance of the estate at H., and, as they could not be compelled to join in the conveyance, because they were not parties to the suit, that a good title could not be made to the estate. *Craddock v. Piper*, 14 Sim. 310.

4. Upon a loan of money, the borrower conveyed lands to the lenders and their heirs, upon trust to sell and repay themselves, and to pay the surplus and convey the unsold lands to the borrower. The lands having been sold under a decree in a suit to carry the trust into execution:—Held, that a good title might be made to the purchaser without the concurrence of the creditors of the borrower by judgment confessed after the execution of the trust deed. *Alexander v. Crosby*, 1 J. & L. 666; 7 Ir. Eq. R. 445.

5. Lands held under a lease for lives renewable for ever were, by marriage settlement, conveyed to trustees to the use of G. L., the husband, for life, remainder (subject to jointure and portions for younger children) to the first and other sons of the marriage in *quasi* tail. After the death of G. L., the younger children filed a bill to raise their portions. In 1838 there was a final decree for a sale, under which, in 1843, the lands were sold. In 1842 a renewal of the lease was executed to the defendant, the *quasi* tenant in tail, against whom, pending the suit, several judgments had been obtained, of which no notice had been taken. The purchaser objected to the title because of those judgments:—Held, on exception to the Master's report of good title, that the renewal of 1842 ought to have been to the trustees of the settlement, that its having been to the defendant made him a mere trustee of the legal estate upon the trusts of the settlement, and that the judgments in question did not constitute a valid objection to the title. *Loake v. Loake*, 5 Ir. Eq. R. 361.

6. A good title cannot be made to property sold under a decree of the Court as against judgment creditors who are not parties to the suit, although they are served with notice of the decree under the 15 & 16 Vict., c. 86; but if they afterwards come in under the decree, they will be bound. *Knight v. Pocock*, 4 Jur., N. S., 197; 27 L. J., Ch., 297.

7. A. agreed to sell land to B., who accepted the title, paid part of his purchase money, and was let into possession, but took no conveyance. A. subsequently obtained a decree against B. for sale of the property, and payment of the balance of purchase money out of the proceeds:—Held, that a purchaser under the decree could not be compelled to complete without the concurrence of the registered judgment creditors of B., whose judgments were prior to the decree, and who were not parties to the suit. *Grey Coat Hospital v. Westminster Improvement Commissioners*, 1 De G. & J. 531; 3 Jur., N. S., 1188; 26 L. J., Ch., 848; 5 W. R. 855.

8. A purchaser, after contracting for certain mines for a specified sum, to be paid partly by instalments, made default in payment, and under a suit by the vendor for specific performance, the property was directed to be resold. This was done, and the original vendor re-purchased the property. Judgment creditors claiming under judgments prior in date to the decree for sale, and one of them refusing to disclaim or release the premises, a

bill was filed against them, praying that that suit might be taken as supplemental to the former, and that "the estate and premises directed to be sold might be declared freed and absolutely discharged from all rights, interests, claims, and demands of the defendants thereon or thereto." Decreed as prayed, with costs against the refusing defendant. *Moscrop v. Sandeman*, 9 L. T., N. S., 352.

4. For Errors and Irregularities.

1. It is no objection on the part of a purchaser of land sold by a Master, that more land is sold than is necessary for the purpose of the testator's will. *Lutwyche v. Winford*, 2 Bro. C. C. 248.

2. An estate being sold before a Master, where the purposes of the decree did not require it, the sale shall be set aside, although the reports of the several purchasers were confirmed; but the purchasers must be fully reimbursed all their expenses out of pocket. *Prideaux v. Prideaux*, 1 Cox 34. And see S. C. 1 Bro. C. C. 287, where stated to have been reversed.

3. Purchaser of estates sold under a decree discharged, on motion, from his purchase, upon error in the decree being shown, though the parties are proceeding to rectify it. Whether he is entitled to his costs, *quære*. *Lechmere v. Brasier*, 2 Jac. & Walk. 287.

4. Where property is sold under a decree, and there is jurisdiction to sell, mere irregularities and errors in the proceedings will not invalidate the sale, or prevent a good title from being made under the decree. *Calvert v. Godfrey*, 6 Beav. 97; 12 L. J., N. S., Ch., 305.

5. A purchaser under a decree shall not be affected by error in the decree, *e.g.*, in its not having given a day to an infant defendant to show cause, or in decreeing a sale of lands to satisfy judgment debts, without an account of the personal estate. *Bennett v. Hamill*, 2 Sch. & Lef. 566.

A purchaser has a right to presume that the Court has taken the steps necessary to investigate the rights of the parties, and that on that investigation it has properly decreed a sale; but he ought to see that all proper parties to be bound are before the Court, and that he does not take a title which can be impeached *aliunde*. *Ib.*

6. A purchase under a decree, not impeachable when made, cannot become so from any irregularities in the subsequent conduct of the cause or errors in dealing with the purchase money. *Boven v. Evans*, 2 H. L. Ca. 257.

A bill was filed by a remainderman to set aside a sale made under the decree of the Court in a creditor's suit, for errors in the proceedings and fraud in the sale, the purchaser, G. E. B., having unwarily lent himself to acts whereby the estate was sold for payment of interest, properly payable by tenant for life. The tenant for life had been allowed to remain in receipt of the rents, and all interest on the incumbrances paid off by G. E. B. was permitted to remain in arrear with his consent, G. E. B. being allowed compound interest, and the entire amount

of interest was allowed in the purchase money. The tenant for life died in 1837, and the bill was filed by the remainderman in 1843 to set aside the sale:—Held, that although the sale was the result of a pre-arrangement, and the suit was irregular in the above respects, yet, as in the opinion of the Court it was not fraudulent, and the purchaser intended no fraud, and the purchase was made at full value, the sale could not be set aside, especially after so long a time. S. C. 6 Ir. Eq. R. 569; 1 J. & L. 178. Affirmed 2 H. L. Ca. 257. And see *Thomson v. Warren*, 2 H. L. Ca. 221. n.

Held, also, that as the purchaser had lent himself to the transaction, whereby the arrear of interest was thrown on the inheritance, he should be made responsible for that amount, and an account accordingly was directed. S. C. Ir. Eq. R. 569.

The sale of the lands of B. took place in a similar manner, in a suit behind the back of the Court, but no conveyance of them was ever executed, and no final settlement of the accounts on foot of this purchase was ever made:—Held, that the sale of those lands, being still *in fieri*, should be set aside; and an account directed on foot of the sums paid towards the purchase, and of the rents received. *Ib.*

On the 15th December 1795, G. E. B. (the purchaser), on the marriage of his brother, granted a rent charge of 300*l.* a year for one thousand years out of the lands of K., which was settled on the issue of the marriage. The Court dismissed the bill with costs against the parties claiming under this settlement, but refused to give them any relief. *Ib.*

Principles on which the Court acts as to what shall, and what shall not, impeach a sale under a decree. *Ib.*

7. A decree for sale of lands did not direct them to be sold, subject to dower which one of the defendants had recovered at law, but the remembrancer himself set them up to sale so subject:—Held, sale not therefore irregular. *Eyre v. Lynch*, Hay. & J. 505.

Held, also, that remembrancer has a right to ascertain if a bidding be *bonâ fide*; and if he thinks it not so, to refuse to accept it. *Ib.*

8. A purchaser under a decree is not to be relieved from his purchase merely because there are irregularities in the decree, where there is no want of jurisdiction or parties. *Baker v. Sowter*, 10 Beav. 343; 16 L. J., N. S., Ch., 333.

Real estate was devised to and vested in trustees in trust for certain persons, amongst whom were an infant and person not *in esse*. In a suit for carrying the trusts into execution, the debts and legacies were paid out of the personal estate before any provision was made for payment of the costs of the suit. While there was personal estate remaining, and before the facts had been so ascertained as to make a sale of the real estate proper, a decree was made for the sale of the real estate for payment of the costs:—Held, that although the decree was not such as would have been pronounced on due consideration, and would have been varied upon re-hearing, yet a purchaser under it was not entitled to be discharged from his purchase on the ground of

irregularity, there being no want of justification or parties. *Ib.*

1. A bidder at a sale under the decree of the Court, who is not a party to the cause, or interested in the estate which is the subject of the sale, has no right to apply to the Court to set aside a sale to another bidder, on the ground of irregularity, in that the latter, although reported the purchaser, was not in fact the highest bidder. Whether he may apply to be declared the purchaser in the place of the bidder reported to be the best purchaser, *quære*. *Hughes v. Lipscombe*, 6 Hare 142. See also *Bass v. Wellsted*, 12 Jur. 347.

2. A party, the highest bidder for a batch of some lots, and afterwards for the whole, was held to his bidding for the lots, though misled by the mode of selling. *O'Grady v. Brady*, 11 Ir. Eq. R. 400.

3. Lands in strict settlement, with power to grant leases, being subject to prior incumbrances, are, by decree in a suit instituted by incumbrancers, directed to be sold subject to charges prior to deed of settlement. Pending the suit, the tenant for life, under settlement, grants leases not authorised by the power, and raises money upon annuities for his life, which he charges upon the lands, and they are sold subject to those charges:—Held (reversing decree of Court below), on suit by remainderman in tail, that the sale, subject to charges not warranted by decree, is void. *Colclough v. Sterum*, 3 Bligh 181.

4. The purchaser of the estate of an insolvent debtor from his assignees, at a sale by auction, will not be affected by constructive notice of circumstances of negligence on the part of the assignees in conducting the sale, such circumstances being entirely collateral to any question of title. *Borell v. Dann*, 2 Hare 440.

A sale of the estate of an insolvent debtor, made *bonâ fide* at a public auction, is not, after conveyance to the purchaser, necessarily voidable in equity, only because the purchaser, after the sale, but before the conveyance, had notice of circumstances attending the conduct of the sale by the assignees amounting to negligence on their part. *Ib.*

5. Delay.

5. The Court is forbearing towards a party selling under a decree, and will not let off the purchaser unless the delay is grievous. *Magennis v. Fallon*, 2 Moll. 584.

6. An estate was sold in September 1848 under a decree of the Court. The purchaser objected, within time limited by the conditions, that the suit was defective as to parties. Counsel's opinion was communicated to plaintiff's solicitor on the 8th February 1849, and on the 22nd March the purchaser's solicitor was informed that steps were being taken to cure the defect, and it was hoped it would be done in three weeks. Four days after, the purchaser's solicitor claimed a return of the deposit, and the purchaser presented a petition, praying to be relieved from his purchase. On the 27th March the supplemental bill was filed. The Court refused to discharge the purchaser. *Sherwood v. Beveridge*, 13 Jur. 1042.

7. A sale under a decree, all necessary parties being before the Court, not set aside after a lapse of time, though the surplus of the purchase money was directed to be paid to the tenant for life, there being no surplus, and the sale appearing to be properly conducted. *Lightburn v. Swift*, 2 Ball & B. 207.

8. Where lands have been purchased under a decree in a creditors' suit, the Court, on the application of a creditor, who had for four years acquiesced in the purchase, and who was not supported in his objections by the other creditors, refused to set aside the purchase on the ground of misdescription of the land in the particulars of sale. *Price v. North*, 2 Y. & Coll. 620; 7 L. J., N. S., Exch. Eq., 9.

6. Right to Interest and Costs.

9. Whenever a purchaser is discharged, he must also get interest and his costs. *Pleasants v. Roberts*, 2 Moll. 507.

10. A purchaser discharged on a report of bad title is entitled in this court to interest on the one-fourth of the purchase money lodged from the date of the lodgment. *Gover v. Hill*, Hay & J. 127.

11. A purchaser under a decree, to whom a good title could not be made, discharged from his purchase, with his costs, charges, and expenses, including the costs of his petition to be discharged. *Calvert v. Godfrey*, 6 Beav. 97; 12 L. J., N. S., Ch., 305.

12. A purchaser under the decree of the Court was discharged upon a report of bad title, and it was ordered that his deposit be paid back to him, without prejudice to his applying for the interest thereon, and his costs, when there should be a fund in court. He died before either the costs were taxed, or a fund for their payment was realised:—Held, that on a fund being afterwards realised, his personal representative was entitled to be paid thereout the interest and costs. *Mackay v. Orr*, 3 Ir. Eq. R. 499.

13. A purchaser under a decree having accepted the title and paid his purchase money into court, discovered that a will had been mis-stated in the abstract in such a manner as to conceal an important defect in the title. Upon the petition before conveyance, he was discharged from his purchase, and his purchase money was ordered to be re-paid, but as his solicitor had neglected to examine the original will, although the abstract showed that it was of a very peculiar nature, and although reminded of the necessity of doing so by the counsel who advised upon the abstract:—Held, that he was not entitled to interest, and that he must pay the costs of all parties except the person who had the conduct of the sale. *McCulloch v. Gregory*, 1 Kay & J. 286; 24 L. J., Ch., 246; 3 W. R. 231; 3 Eq. Rep. 495.

A purchaser is not conclusively bound by the acceptance of the title by his counsel, but if he pays his purchase money into court he is bound. This rule, however, does not apply to a case where the counsel is misled by the abstract of title. *Ib.*

14. A sale in chambers under a decree in a partition suit having been declared invalid on the ground that the sale took place before the certificate in answer to the inquiries directed

by the decree was made:—Held, that the vendors could not avail themselves of a condition enabling them, if unwilling, or unable for any reasonable cause to remove or comply with any objection or requisition by a purchaser, to rescind on repayment of the deposit without interest and without costs on either side; and that the discharged purchaser was entitled to the stock arising from his deposit, which had been paid into court and invested, with the dividends thereon, or the actual amount of deposit and the produce, with costs, charges, and expenses. *Powell v. Powell*, 19 L. R., Eq., 422; 44 L. J., Ch., 311; 32 L. T. 148; 23 W. R. 482.

See also as to Costs XIII. infra.
See also III. 11 and 12 supra.

7. Practice on Application.

1. Rule as to serving purchaser on an application to set aside a sale made by assignees. *Exp. Shepley, Re Wright*, Mont. 353.

2. Defendants in a cause where there has been a sale under a decree ought to be served with the petition of a purchaser to be discharged from his purchase. *Sherwood v. Beveridge*, 3 De G. & Sm. 425; 13 Jur. 1042.

3. In general, objection, on the part of a purchaser of two lots, to the completion of his agreement, on the ground that the title to one is bad, is not such as ought to be discussed upon motion. *Casamajor v. Strode*, Coop. temp. Brough. 510.

4. A purchaser at a sale before the Master cannot move to be discharged from his purchase until the report has been confirmed, the report being the only evidence that the Court can receive as to the purchase having been made. *M'Culloch v. Gregory*, 2 W. R. 575; 2 Eq. Rep. 1088; 23 L. J., Ch., 636.

5. Where conditions of sale are so obscurely worded that, when taken in connection with the particulars of sale, they are likely to mislead an ordinary purchaser as to the nature of the property offered for sale, *semble*, that the Court will discharge the purchaser from his bargain on the argument of exceptions to the title, without putting him to the necessity of moving to be discharged from the purchase. *Taylor v. Martindale*, 1 Y. & Coll. C. C. 658.

VII. SUBSTITUTION OF PURCHASER.

1. *Of New Purchaser*, 7340.
2. *Of Sub-purchaser*, 7340.

1. Of New Purchaser.

6. One purchaser substituted for another upon motion with consent. *Matthews v. Stubbs*, 2 Bro. C. C. 391.

7. Upon a motion to substitute one purchaser for another, there must be an affidavit that no money has been paid for the substitution. *Vincent v. Going*, Fl. & K. 428.

8. Court will not discharge purchaser, and substitute another in his place, even upon paying in the money, without affidavit that there is no under-bargain. *Rigby v. M'Nam-*

ara, 6 Ves. 515. S. P. *Vale v. Davenport*, 6 Ves. 615.

9. The Court will not set up lands for sale knowing the title to be bad; but, *semble*, if the owners and the creditors interested in the produce do not object, it will allow a party to apply to stand in the place of a purchaser discharged in consequence of bad title. *Piers v. Piers*, Sau. & Sc. 414. Affirmed 1 Dru. & Wal. 265.

10. Where the purchaser has been discharged upon a report of bad title, it is the right of the inheritor to have the estate again set up to be sold; and, therefore, the Court will not, against his desire, substitute in the place of the discharged purchaser a person who offers to take the estate at the same price, and not object to the title. *O'Connor v. Bernard*, 3 Ir. Eq. R. 496.

11. A farm was put up for sale under the direction of the Court by particulars accompanied by a plan, and was described as "a compact small farm containing 41A. 3R. 35P., divided as follows." Among the parcels was "490a, Bottlesey Green, containing 7A. 1R. 27P.," opposite to which, in the column showing the amounts which made up the 41A. 3R. 35P., was entered 4A. 0R. 38P. The conditions provided that any error, misstatement, or omission in the particulars should not annul the sale, nor should any compensation be allowed except such (if any) as the judge in chambers should direct. G. bought the property in his own name, and was certified as purchaser. He in fact bought as agent for B., who was the owner of immediately adjoining property. On investigating the title it turned out that the vendors were only entitled to four undivided sevenths of 490a, which was a narrow close containing 7A. 1R. 27P., having a long frontage to a highroad, and at one end adjoined B.'s property. B. alleged that it was of great importance to the enjoyment of his property that he should have the whole of 490a, and G., by his directions, refused to complete. The vendors then entered into an arrangement with the owner of the other three-sevenths to give them up, receiving an equivalent out of another part of the farm having a frontage to another road:—Held, by the Master of the Rolls, that, as B. had not been substituted as purchaser, G. must be treated as the real purchaser, and could not take any objection depending on the circumstances of B.'s property, and that, as the arrangement would give the purchaser all he contracted to buy, he must complete without compensation:—But held, on appeal, that G., having only purchased as agent for B., could take any objection which B. had been the nominal as well as the real purchaser, could have taken. *Re Arnold, Arnold v. Arnold*, 14 L. R., Ch. D., 270; 42 L. T. 705; 28 W. R. 635.

2. Of Sub-purchaser.

12. Where a purchaser of a bankrupt's estate re-sells it before a conveyance is executed to him by the assignees, the Court will, at his instance, order the assignees to convey the estate direct to the second purchaser if no imputation is thrown on the fairness of the first sale, notwithstanding the estate has been

re-sold at a profit. *Exp. Anderdon*, 1 Dea. 585; 3 Mont. & A. 698.

1. A purchaser under a decree agreed to sell the lots he had purchased to A., and died, his heir being abroad. Ordered that A. should be substituted for him as the purchaser, and should be at liberty to pay the purchase money into court, and be let into possession. *Pearce v. Pearce*, 7 Sim. 138.

2. A purchaser in this court having re-sold with a profit before his purchase was confirmed, the person to whom he has sold it is to be considered as a substituted purchaser, and must pay the additional purchase money into court for the benefit of the parties to the suit. *Hodder v. Ruffin*, Tam. 341.

3. The Court will not grant an application by a sub-purchaser to be substituted as the purchaser of an estate sold by auction under an order of the Court where neither the original purchaser nor the vendor consents to the application. *Re Goodwin*, 32 L. J., Ch., 70; 1 N. R. 46.

At a sale by auction, under an order of the Court, H. was declared the best bidder and purchaser, at 3,095*l*. Before the purchase had been certified by the chief clerk, L. and H. entered into an agreement for the purchase and sale of the property at an advanced price of 500*l*., both of them being in ignorance of the rule of the Court in reference to sub-contracts before confirmation of certificate by the chief clerk. L. subsequently applied by summons (which was opposed by H.) to be substituted as purchaser, but the application was refused; and the Court, upon H. undertaking to bid 3,595*l*., and to pay 500*l*. into court, ordered a re-sale of the property. *S. C. nom. Re Goodwin, Exp. Legard*, 8 Jur., N. S., 1170; 11 W. R. 54.

VIII. REPORT OR CERTIFICATE.

1. *Purchase Completed by*, 7341.
2. *Practice on Confirmation*, 7341.
3. *Inquiries other than Matters of Title*, 7342.

1. Purchase Completed by.

4. A purchase before the Master is not complete before confirmation of the report; therefore a loss by a fire after the report, but before confirmation, falls upon the vendor, and the circumstance that the sale had been delayed by the purchaser having opened the biddings was not attended to. *Exp. Minor*, 11 Ves. 559.

5. Purchaser under decree considered only as owner from time he pays the purchase money, and not from confirmation of report by which he is declared the best bidder, he having taken objections to title. *Mackrell v. Hunt*, cited 2 Madd. 34.

6. Sale of an annuity before the Master takes effect from the confirmation of the report; and the sale being on the 11th August, and the report confirmed in Michaelmas term, interest was given upon the purchase money from the first day on which the report could have been confirmed, viz., the first seal before the term. *Twigg v. Field*, 13 Ves. 517.

7. The Court will not recognise a party as a

purchaser at a sale made under a decree until the Master has made his report. *M^cCulloch v. Gregory*, 2 Eq. Rep. 1088; 2 W. R. 575; 23 L. J., Ch., 636.

An affidavit of payment of the deposit money is not the proper evidence of such purchase. *Id.*

The only proper evidence of a purchase under decree and payment of deposit is the Master's report, which must be confirmed before a purchaser can apply to the Court to be discharged from his contract. *S. C.* 23 L. J., Ch., 656.

8. Lands having been sold under a decree, W. became the purchaser, and his purchase was approved, and the certificate of approval signed by the Vice-Chancellor. More than eight days after signature of the certificate, but before any conveyance to W., he entered into a contract to sell to M. at an advanced price:—Held, that eight days having elapsed since signature of the certificate, W. was so far the absolute owner of the estate that he might sell at an advanced price for his own profit. *Demell v. Tuffnell*, 1 Kay & J. 324.

9. After the expiration of eight days from the filing of the chief clerk's certificate upon the sale of an estate, the Court will not entertain an application to discharge or vary the certificate without special circumstances; and negotiations pending between the plaintiff and a third party for a re-sale of the estate were not considered sufficient for that purpose. *Hewell v. Kightley*, 4 W. R. 477; 25 L. J., Ch., 341; 2 Jur., N. S., 455.

10. At a sale of an estate by auction under the direction of the Court, E., having previously been informed of the value of the timber, purchased lot 2, and agreed to take the timber at the price named by the auctioneer. The chief clerk confirmed the sale and filed his certificate. It was subsequently discovered that the value of the timber on a portion of the lot had been, by the mistake of the auctioneer, omitted:—Held, that the purchaser was entitled to hold the property without submitting to a valuation of the timber. *Griffiths v. Jones*, 15 L. R., Eq., 279; 42 L. J., Ch., 468; 21 W. R. 470.

See also IX. infra.

2. Practice on Confirmation.

11. It is irregular to confirm the Master's report, approving of a contract for sale of an estate being carried into effect, by a petition of course, with the consent of the clerks in court of all parties. Such a report ought to be confirmed by a special petition, stating all the facts. *Bailey v. Todd*, 1 Beav. 95.

12. A plaintiff may obtain the order absolute to confirm a sale under the Court though the order *nisi* has been obtained by the purchaser; but the application was in this case refused, on the ground of there having been great laches on the part of the plaintiff. *Lidbetter v. Smith*, 5 Beav. 377.

13. In a creditor's suit an application to confirm absolute the Master's report of last purchaser, made by consent before the expiration of the time limited by the order *nisi* refused. *Vernon v. Thellusson*, 10 Beav. 462.

14. One notice of motion to confirm the Master's report of best purchaser, and to pay

the purchase money into court, is irregular. *Duffield v. Elwes*, 13 Beav. 85.

1. Where a sale is had in the country under the 139th Order, the bidders are not entitled to have notice of the confirmation of it by the Master. *O'Grady v. Brady*, 11 Ir. Eq. R. 400.

2. A purchaser of lands sold under the decree of the Court, pursuant to a rental, which stated that they were demised for a term therein mentioned, is entitled to confirmation if it should appear that they are demised for a longer term; but he may, by his acts, waive his title thereto. *Horner v. Williams*, Jon. & C. 274.

3. Inquiries other than Matters of Title.

3. This Court will not refer it to the chief remembrancer to report generally what proceedings should be taken as to certain lands. *Cottingham v. Whyte*, Hay. & J. 411.

4. Motion by purchaser under the Court for a reference to inquire whether it would benefit the parties that the contract should be rescinded, on the ground that the executor had stated he was unable to comply with the conditions:—Held, irregular. *Stubbs v. Sargon*, 4 Beav. 90.

Order held irregular, first on the ground of its having been made and passed without due notice to the other parties to the cause; and secondly, as not specifying the evidence on which it was grounded. *Id.*

An executor, who was under an obligation to deliver a book to a purchaser under the Court, made an affidavit that it was lost:—Held, that the purchaser was not bound by that affidavit, but was entitled to an inquiry before the Master. *Id.*

IX. RENTS LOSS AND DETERIORATION.

1. *Casualties and Outgoings*, 7342.

2. *On Sale of Life Interests or Reversions*, 7342.

3. *Rents and Profits*, 7343.

1. Casualties and Outgoings.

5. The purchaser, under a decree, must bear any loss which accrued after the sale was confirmed, and before he entered into possession, if it would have fallen on him had he been in possession; but the funds in the cause must make good to him any loss occasioned by the misconduct or mismanagement of the parties or the receiver. *D'Espard v. Head*, 1 Hog. 486.

6. A purchaser from the Court is in equity the owner from the order confirming the report, and any deterioration of the property arising from accident or by fire, without the default of the vendor, falls upon the purchaser. *Robertson v. Skelton*, 12 Beav. 260; 19 L. J., N. S., Ch., 140; 14 Jur. 323.

If, between the contract and conveyance, a loss arises by accident, which brings with it legal obligation, which must be immediately satisfied, the expense incurred by the vendors is payable by the purchaser. *Id.*

After the confirmation of the report, a part of the premises fell down and damaged the

neighbouring property, the owner of which threatened to bring an action, and the remainder was ruinous and dangerous to the public. The vendor having reinstated and repaired the premises, the Court held, that the purchaser was bound to indemnify him, and, on petition, ordered a reference to ascertain the expenses properly incurred. *Id.*

7. When difficulties arise to delay the completion of a sale had under a decree, and during the interval of making out the title ordinary dilapidation takes place, that is a case for compensation; but if a destruction of ornamental timber, that is a ground for the purchaser to apply to be discharged. *Magennis v. Fallon*, 2 Moll. 585.

8. A purchaser of an estate sold under a decree of the Court of Chancery, who confirmed his sale on the 29th April, but whose purchase deed was not executed until the December following, is liable for the tithe composition which accrued due in November, the lands being in the occupation of tenants from year to year. *Stewart v. Alexander*, 2 Jones 530.

A person who has been declared the purchaser on a sale under the Court of Chancery has, in the contemplation of a court of equity, after the confirmation of the report, an estate in the lands. *Id.* 535.

A purchaser of an estate buys it subsequent to the outgoings incident to it. *Id.*

9. A purchaser of real estate upon a sale by the Court was kept out of possession for a year through the opposition of the plaintiff in the cause, who was himself in occupation of the estate; and was ultimately let into possession by virtue of a writ of assistance issued by the Court:—Held, that the purchaser was entitled to have paid to him out of the purchase money in court sums in respect of the following items: first, the costs of obtaining the orders under which he succeeded in getting possession; secondly, an occupation rent for the time during which he was kept out of possession; thirdly, compensation for deterioration of the property during the same period; and fourthly, arrears of tithes which he had been compelled to pay. *Thomas v. Buxton*, 8 L. R., Eq., 120; 38 L. J., Ch., 709.

2. On Sale of Life Interests or Reversions.

10. Where a life interest was sold under a decree, and the tenant for life died subsequently to the lodgment of the one-fourth of the purchase money, but prior to confirmation of sale:—Held, contract not complete till sale confirmed by order of Court, and purchaser not bound to complete. *Vincent v. Going*, 3 Dr. & War. 75. n. Reversing Fl. & K. 250; 3 Ir. Eq. R. 480.

11. The purchaser of an estate *pur autre vie*, sold under a decree of the Court of Chancery:—Held, not entitled to be discharged from his purchase in a case in which the sole *cestui que vie* died subsequently to the bidding, and before the Master's report could have been confirmed, according to the practice of the Court. *Vesey v. Elwood*, 3 Dr. & War. 74; 2 Con. & L. 47. Affirming Fl. & K. 668; 5 Ir. Eq. R. 184.

In sales under the Court, the title of the purchaser has relation back to the time of the bidding, as in other sales it has to the date of the contract. *Id.*

Semble, the case of the purchase of a fee-simple estate is distinguishable from that of a life estate with respect to compensation for casualties. *Id.*

1. A reversion expectant on an estate for life is decreed to be sold. B. is confirmed the best purchaser, and the order made absolute 1st January 1724. On the — day of January 1726 B. is ordered to bring his money into the bank, the life drops; if the life had dropped the next day after the report of B.'s being the best purchaser made absolute, the purchase must have stood; and as from that time the life was wearing, so from that time the purchaser ought to pay interest. *Exp. Manning*, 2 P. W. 410.

2. A purchaser under the Court of a reversionary interest having made default in completing, a re-sale was ordered, and the purchaser was to make good any deficiency. Before such re-sale it was discovered that the reversionary interest had previously fallen into possession. The Court gave the purchaser four days to complete his purchase. *Robertson v. Skelton*, 13 Beav. 91; 19 L. J., N. S., Ch., 561.

3. Rents and Profits.

3. A purchaser under a decree, having lodged the whole of his purchase money, is entitled to the rents from the preceding gale day. *Gowan v. Tighe*, Ll. & G. temp. Plunk. 168.

4. A purchaser under a decree is entitled to the rents from the gale day preceding the lodging the three-fourths of the purchase money without reference to the order confirming the sale absolutely. *Prendergast v. Eyre*, Ll. & G. temp. Plunk. 180.

5. Rents received by receiver after the gale day next succeeding the lodgment of three-fourths of the purchase money by a purchaser of lands under a decree are applicable first to the payment of solvent arrears, and then to rent due to purchaser, whether or not he has gone into possession or purchase deed has been executed. *Lee v. Moorhead* (2 Moll. 509) and *Hargrave v. Holland* (5 Ir. Eq. R. 169) overruled. *Doorley v. Power*, 11 Ir. Eq. R. 577.

6. Purchaser under decree is entitled to rents of lands purchased from the gale day next preceding the payment of purchase money into the bank, and to have all outgoings of the estate cleared off up to that time. *Montgomery v. Coslett*, 2 Jones 174.

7. The Court does not insure to a purchaser of lands sold under its decree the rents which accrued due between the lodgment of the purchase money in court and the execution of the injunction to put him into possession, except in cases where they are in the hands of its own receiver. An application to have the rents paid out of the purchase money refused with costs. *Nunn v. Mahon*, 2 Jones 181.

8. Where the lands were sold under a decree of the 30th April 1840, one-fourth of

the purchase money deposited, a conditional order to confirm the sale, and subsequently the remaining three-fourths lodged in bank to the credit of the cause, all upon the following day, and the order to confirm the sale made absolute on the 12th May:—Held, that the purchaser was not entitled to the rents from the 1st November, the gale day next preceding the day of sale. *Vincent v. Thwaites*, 2 Ir. Eq. R. 426.

9. Where before a purchaser under decree was put into possession rents to which he was entitled became due, and payments were made by the tenants to the receiver in the cause:—Held, that the payments made after the rents to which the purchaser was entitled had become payable should be applied in payment of those rents, and not of the arrears of rent previously due. *Hargrave v. Holland*, 5 Ir. Eq. R. 169.

10. Where the gale days were the 1st May and 1st November, and the purchaser lodged one-fourth of the purchase money on the 28th April, and the remaining three-fourths on the 1st May, though the sale was not confirmed until afterwards:—Held, that the purchaser was entitled to the rents due on the 1st May, when the remaining three-fourths of the purchase money were lodged. *Scott v. Rothe*, 1 Ir. Eq. R. 105.

11. Where a reference had been directed to inquire whether an offer for the purchase of leaseholds was beneficial and ought to be accepted, and the Master reported in favour of the purchase:—Held, that the purchasers were entitled to the rents from the date of the order of reference. *Cheetham v. Surterant*, 3 De G. & Sm. 468.

12. Purchaser under a decree, having paid in his entire purchase money, was not entitled to compensation out of the fund, for the difference between the amount of rent received by the receiver, in the interim before possession given, and the amount which ought to have been received according to the rental, which was erroneous, it appearing that he was aware, when he purchased, of the discrepancy between the rental and the true rent payable: otherwise, if rents had been lost, and the claim had been for compensation for loss accrued after he paid his purchase money, and before he could get possession. *Campbell v. Hay*, 2 Moll. 102.

13. Loss or deficiency of rents arising while vendor was in default, by not completing the conveyance, the purchaser not having taken possession or changed the receiver, ordered to be made good out of the purchase money in court. *Blennerhassett v. M^r Namara*, 1 Moll. 81.

14. A manor was sold under the decree of the Court, as part of the real estate of the testator, and an order was made on the 13th March that the purchaser should, on or before the 17th May, pay his purchase money into court, and be let into possession of the profits from Lady day; several deaths and admissions had taken place prior to Lady day, but the fines due thereon had not been paid or assessed until after that time, no Court having been holden; these fines belong to the vendors, and not to purchaser. *Garriock v. Camden (Earl)*, 2 Cox 231.

15. The purchaser of a life interest in stock sold before a Master, is entitled to a dividend

becoming due on the day following the sale. *Anson v. Tongood*, 1 Jac. & Walk. 637.

1. The rule that a purchaser shall have possession as from the quarter day preceding the sale, does not apply to a colliery, which is an article of trade, the profits accruing daily. The proper period is the month or week in which the period takes place according to the usual course of taking the account. *Wren v. Kirton*, 8 Ves. 502.

X. ENFORCING COMPLETION.

2. One reported the highest bidder compelled to complete his purchase. *Cunningham v. Williams*, 2 Anstr. 344.

3. A person who bids in trust for another at a letting in the Master's office, will be attached if the bidding is not completed. *Re Studderts*, 1 Hog. 320.

4. Motion that a person reported best purchaser should complete his purchase by a certain day, refused, the report not being absolutely confirmed. *Anon.*, 2 Ves. J. 335.

5. A purchaser cannot be attached for not completing his purchase, until the Master has reported that a good title can be made out. *Dick v. Barrett*, 1 Hog. 351.

6. An application for an attachment against a party for not executing the purchase deed pursuant to the decree, should be on notice, and the order will be absolute in the first instance. *Brennan v. Carroll*, 7 Ir. Eq. R. 196.

7. Not having been served with a copy of a decree for a sale is a good cause against an attachment, for not executing the conveyance to a purchaser. *Keogh v. Wood*, Vern. & Scriv. 118.

8. Purchaser of bankrupt's mortgaged estate sold before the commissioners under the General Order, upon petition in the bankruptcy, ordered to complete his purchase. *Exp. Gould*, 1 G. & J. 231.

9. Upon a sale of a bankrupt's mortgaged property made under the General Order, the Court of Review has jurisdiction to enforce a specific performance of the contract by the purchaser. *Exp. Sibbitham*, 3 Dea. & Ch. 818; 1 Mont. & A. 655; 3 L. J., N. S., Bky., 122.

10. A person who bids in trust for another at a letting in the Master's office, will be attached if the bidding is not completed. *Re Studderts*, 1 Hog. 320.

XI. CONVEYANCE.

1. *In General*, 7344.

2. *Order to Convey*, 7344.

3. *Parties (Incumbrancers)*, 7344.

4. *Release by Equitable Incumbrances*, 7345.

5. *Other Parties to*, 7345.

6. *Conveyancing Counsel*. See PRACTICE (CONVEYANCING COUNSEL).

1. In General.

11. Conveyances made under a decree are to be settled by the like rule as men of judgment among conveyances would direct. *Lloyd v. Griffith*, 3 Atk. 279.

12. The decree for a sale does not direct the remembrancer to settle the draft of the deed of conveyance to the purchaser, and a special application for that purpose is necessary. *Hogg v. Waldron*, 6 Ir. Eq. R. 218.

13. Upon a sale of lands under a decree in a cause where judgment creditors, prior to the plaintiff, had not been made parties to the original suit, and a supplemental bill had been filed, making them parties, but no decree had been obtained in the supplemental suit, the remembrancer ordered to execute the deed of sale, upon the consent of the parties in the supplemental suit. *O'Kelly v. Bodkin*, 7 Ir. Eq. R. 338.

14. Where copyhold is under commission, good title is made by bargain and sale from commissioners direct to purchaser. *Exp. Holland*, 4 Madd. 483.

15. Upon sale in court of copyhold, vendor coming for aid is compelled to surrender in person if conveniently it can be done. *Noel v. Weston*, 6 Madd. 50.

16. Practice as to conveyances on sales in Master's office. *Smith v. Gibbons*, 1 W. R. 74.

17. In a sale by the Court, one of the conditions was that, in case of dispute, the form of the covenants was to be settled by the judge. On disputes arising, the judge settled the covenants:—Held, that the order of a judge settling the form of a conveyance is subject to appeal. *Pollock v. Rabbits*, 21 L. R., Ch. D., 466; 47 L. T. 637; 31 W. R. 150.

2. Order to Convey.

18. A peremptory order on the wife to execute a conveyance of estate not settled to her separate use, refused. *Jordan v. Jones*, 2 Ph. 170.

19. When an estate has been sold under a decree, and all proper parties have been ordered to join in the conveyance to be settled by the Master, if a party to the suit whom the Master considers a proper party to the conveyance refuses to convey, the right course for the purchaser to take is, to move, against that party, that he be ordered to convey; and not to move, against the plaintiffs, that they be ordered to procure him to convey. *Stimwell v. Mellersh*, 4 Myl. & C. 581; 10 Sim. 367; 9 L. J., N. S., Ch. 39; 4 Jur. 175.

3. Parties (Incumbrancers).

20. A., being entitled under a settlement to £5,000. secured upon an estate of his father's, and payable at his father's death, assigned it to B. as a security for money lent, with a power to B. to sell the same, and "give effectual discharges to the purchaser," and afterwards borrowed money of other persons upon the security of the same sum. The estate being afterwards sold under his father's will:—Held, that B. was not competent, under the above clause, to give a discharge for the whole sum, but that the other incumbrancers must be parties to the conveyance; the Court observing, that the clause above stated had reference not to a sale of the estate, but to a sale of the charge. *Brasier v. Hudson*, 9 Sim. 1.

1. A defendant, who is an incumbrancer on an estate sold under the decree of the Court, and who has concurred in settling conditions of sale, describing such estate as being to be sold free from incumbrances, will be ordered to concur in carrying the sale into effect, and to execute the conveyance of the estate to the purchaser, free from his incumbrance. *Tomlin v. Hatfield*, 9 L. J., N. S., Ch., 119.

See also v. 6 (o) supra.

4. Release by Equitable Incumbrancers.

2. A purchaser under a decree for a sale for the payment of equitable incumbrances, has not a right to have the estate released therefrom, the effect of the decree being to extinguish them as to the estate sold. He must have a conveyance of the legal estate discharged of all incumbrances, legal and equitable, but he is not entitled to any other evidence of the exoneration of the estate from equitable incumbrances extinguished by the decree, than such as the decree itself, and the proceedings under it, afford him. *Webber v. Jones*, 6 Ir. Eq. R. 142.

3. A purchaser under the decree of a court of equity, obtaining a conveyance of the legal estate, is not entitled to have, at the expense of the funds in the cause, a release from equitable incumbrancers, who were parties to and paid under the decree. *Keatings v. Keatings*, 6 Ir. Eq. R. 43.

Upon the sale of an estate, if there be an outstanding trust term, the vendor must (if so required) have such term surrendered at his own expense; or, if the terms be so circumstanced, that, although the trusts have been fulfilled, it has never been assigned to attend the inheritance, the vendor must, if required, have it so assigned at his own expense; but if the term have been already assigned to attend, and the purchaser requires it to be further assigned to a trustee nominated by himself, such further assignment must be at the purchaser's expense. *Id.*

The lands of B. and D. being subject to a jointure secured thereon by a trust term, by condition of sale it was stipulated that, without prejudice to the rights of the jointress, the lands of B. should be sold as if exclusively liable to the jointure, and D. as if exonerated therefrom; and that, to this end, the purchaser of D. should have from the purchaser of B. a deed of indemnity: the costs of the preparation of such deed must be borne by the vendor, the condition being silent on the subject. *Id.*

5. Other Parties to.

4. Purchasers under a decree which is impeached for fraud and error are not necessary parties, if there is a proper undertaking to abide by the sale. *Creed v. Creed*, 2 Hog. 215.

A trustee named in a will, who has refused the trust, is not a necessary party. *Id.*

5. E. K., being entitled for life to the income of a fund, and trustee of it with K., allows K. to sell out 1,000*l.* on his giving a promissory note and deposit of deeds of freeholds. K. is bankrupt, and under an order of a commissioner the freeholds are sold, and the conditions

provide that the order in bankruptcy shall be conclusive: on objection that *cestuis que trustent* were necessary parties:—Held, that they were not, the deposit and the memorandum being a personal indemnity only by one trustee to another. *Groom v. Booth*, 1 W. R. 423.

XII. DEEDS AND OTHER DOCUMENTS

6. The Court will not order the bargain and sale from the commissioners to the assignees to be given by them to the purchaser, upon his allegation merely that the bankrupt had no other freehold property than what was conveyed to the purchaser under the commission. *Exp. Pocock, Re Chapman*, 1 Dea. & Ch. 104; 1 L. J., N. S., Bky., 18.

7. A purchaser relied on the memorial of a deed as creating an objection to the title, and succeeded on an exception founded on it:—Held, that he could not afterwards object that the deed itself was not produced, although there was no condition of sale to dispense with its production. *Stewart v. Conyngham (Marquis)*, 1 Ir. Ch. R. 534.

8. A purchaser entitled to title deeds having paid his purchase money into court, the Court will not order the money to be divided, and the deeds to remain in the hands of the Master, until the completion of the sale of another lot. *Hobson v. Neale*, Taml. 446.

9. A plaintiff who has not established his title has a right to the production of documents in the defendant's custody, by which he alleges that his title will be established. *Moons v. Bernales*, 1 L. J., Ch., 185.

10. The Court will not entertain an application that further searches should be furnished to a purchaser, being an application to be made to the Master in Chancery. *Lalor v. Drew*, 7 Ir. Eq. R. 202.

11. In Ireland a plaintiff who has obtained a decree for a sale, and cannot procure the title deeds, must make out a statement of title from searches in the registrar's office and elsewhere, or the Court will not allow the lands to be sold. *Hamilton v. Royse*, 1 Hog. 236.

12. In Ireland a purchaser under a decree is not entitled to the opinion of counsel on the title procured under the Order of the 17th June 1805. *Foster v. Foster*, 1 Hog. 224.

13. The purchaser of lands sold under the decree of the Court is not entitled, before the title has been accepted by him, to see the opinion of counsel on the statement of title given pursuant to the 138th General Order. *Stack v. Baxter*, 10 Ir. Eq. R. 102.

14. The purchaser of lands sold under a decree:—Held, to be entitled to a map and survey of them, prepared during the progress of and for the purposes of the cause. *Jepson v. Minton*, Fl. & K. 95.

15. A purchaser under the Court, not being able to obtain an account book delivered over to him, to which he was entitled under his contract, brought an action of trover against some parties to the cause. He was restrained by injunction. *Stubbs v. Sargon*, 4 Beav. 90.

XIII. TAKING POSSESSION.

16. A purchaser under a decree, who takes possession without the order of the Court, by

an arrangement with the solicitor in the suit, accepts the title. *Wilden v. Andrews*, 4 L. J., Ch., 208.

1. Purchaser under a decree of the Court is not entitled, upon an affidavit that he has had his money lying ready some time, to be let into possession of estate, and receipt of rents for all such time so passed. *Barker v. Harper*, Coop. 32.

2. An injunction may be obtained, on motion to restrain purchaser under decree not party to cause, who has not paid his purchase money, from committing waste on property purchased. *Casamajor v. Strobe*, 1 Sim. & S. 381.

Injunction.] 3. The Master in the cause having executed the deed of conveyance for the principal defendant, does not preclude his giving the usual certificate to enable the purchaser to obtain an injunction to be put into possession. *Lamlor v. Drew*, 7 Ir. Eq. R. 637.

4. Where, after lands had been sold, and the purchase deed approved by the Master's counsel, though not signed, the purchaser was put into possession by injunction, in consequence of the defendant having entered on the lands and committed waste. *Gray v. Stanford*, 8 Ir. Eq. R. 678.

5. A purchaser under the decree having, under colour of the injunction to put him into possession, dispossessed persons who claimed adversely to the title of the parties in the cause, it was ordered that a writ of restitution do issue to restore them to the possession, and it was referred to the officer to ascertain the amount of damages sustained by them in consequence of the ouster; and the purchaser was ordered to pay such damages with full costs, the applicants undertaking not to bring an action. *Anderson v. Barry*, 2 Jones 631.

See also v. 4 (b) *supra*.

XIV. COSTS AND EXPENSES.

1. *On Discharge of Purchaser*, 7346.
2. *Of Investigation of Title*, 7346.
3. *Of Conveyance*, 7347.
4. *Of Payment into or out of Court*, 7348.
5. *Fees of Court*, 7348.
6. *Other Cases*, 7348.
7. *On opening Biddings*. See III. 11 and 12 *supra*.

1. On Discharge of Purchaser.

6. Under a decree for a sale of lands, a trustee for the inheritor was declared the purchaser. There was a report of bad title:—Held, that the trustee was entitled to his costs out of the fund in court, it appearing that the inheritor was ignorant of his own title, and never had the means of knowing it, and that he had acted *bonâ fide*. *Kirby v. O'Shee*, 1 Jones 164.

7. A purchaser under decree is entitled to his costs when Master reports against title, though no fund in court. *Smith v. Nelson*, 2 Sim. & S. 557; 4 L. J., Ch., 175.

8. Where there has been great delay, and there is little hope of perfecting the title within a reasonable time, the Court will dismiss a purchaser with costs. *Fraser v. Wood*, 8 Beav. 339; 14 L. J., N. S., Ch., 270.

9. Costs to which a purchaser under the Court is entitled, on its being found that a good title cannot be made. *Perkins v. Ede*, 16 Beav. 268.

10. The costs of an unsuccessful application by a purchaser under a decree to be relieved from his purchase, on the ground of defective title, must be paid by the applicant. *Osborn v. Osborn*, 18 W. R. 421.

11. Where, upon a sale under the Court, the title turned out to be bad:—Held, that the purchaser, on being discharged, was not entitled to his costs as against a party to whom the conduct of the sale had been committed by the Court. But his rights as against any fund which might come into court were reserved. *Mullins v. Hussey*, 35 Beav. 301.

See also VI. 6 *supra*.

See also Next Subdivision.

2. Of Investigation of Title.

12. Where an estate has been sold under a decree, and the Master reports against the title, the purchaser is entitled to be paid out of the fund in the cause his costs of and consequent upon his becoming purchaser, and of investigating the title. *Att.-Gen. v. Newark (Corporation)*, 8 Sim. 71.

13. If the Master reports against the title to an estate purchased under a decree, the purchaser will be paid the costs of the reference out of the funds in the cause. *Reynolds v. Blake*, 2 Sim. & S. 117. S. C. *nom. Anon.*, 3 L. J., Ch., 83.

14. A purchaser under decree is entitled to his costs where Master reports against title, though no fund in court. *Smith v. Nelson*, 2 Sim. & S. 557; 4 L. J., Ch., 175.

15. Where an estate was sold under a decree of the Court, and one of the conditions of sale was, that the purchaser pay the purchase money into court on a given day, at his own expense, it was:—Held, that the purchaser was entitled to the costs of a reference as to the title reported good by the Master. *Camden v. Benson*, 1 Keen 671.

16. The purchaser at a sale in the Master's office has a right to bind the seller to the title shown in the abstract first furnished; but if that title is not sufficient, the purchaser has a right to have a further abstract, and the purchaser gets his costs up to the time when the proper abstract is furnished. *Goffe v. Mitchell*, 2 Moll. 508.

17. Purchaser under decree is entitled to his costs of investigating the title when there has been a substantial variance from the abstract first brought into the Master's office; otherwise the uniform practice of this Court, when the title proves good, on a reference of title upon a sale under a decree, is to make the purchaser abide his own costs. Where, therefore, further documents were produced establishing a new case in answer to objections taken, but the original abstract was not varied from in substance, costs were refused. *Leland v. Griffith*, 2 Moll. 150.

18. Where a sale had been directed under a decree, but there was no reference to the Master as to the title, and no available fund in court:—Held, that the purchaser was

entitled to be reimbursed by the plaintiff the costs of investigating the title and confirming the purchase. *Berry v. Johnson*, 2 Y. & Coll. 564; 1 Jur. 474.

1. If solicitor of inheritor is employed by creditor to make out title to purchase, he will be paid his costs out of fund in court. *Thompson v. Cooke*, 1 Hog. 28.

2. A purchaser under a decree, who succeeds on exceptions to the Master's report approving the title, cannot then have the costs of the reference on title; but must obtain the report in his favour, and then present a petition to be discharged from his purchase and to have his costs. *Hyde v. Hyde*, 3 L. J., Ch., 130.

3. A discharged purchaser is not entitled, as against a bidder opening the sale, to the costs of investigating the title, where he has proceeded to do so before the order to confirm was made absolute. *Digby v. Browne*, 1 Ir. Eq. R. 377.

4. In sales under decree, as in private sales, the plaintiff or vendor is not bound to furnish to the purchaser a fee for counsel, with the abstract of title, unless by special condition. If the purchaser require the opinion of counsel, he must take it at his own expense, but he will have only a qualified property in the opinion until the sale is complete. *Alexander v. Crosbie*, 2 Ir. Eq. R. 141.

5. When, in consequence of a defect in the title to lands sold under a decree, the purchaser is discharged, he is entitled to the full amount of his purchase money, interest, and taxed costs, without deduction; therefore, where the interest and costs are to be paid out of a fund consisting of rents of the lands, the discharged purchaser is entitled to an order, including the amount of the usher's poundage, payable in respect of the sum which he is entitled to receive out of the fund. *Johnson v. Reardon*, 3 Ir. Eq. R. 200.

6. A purchaser, who having lodged one-fourth only of his purchase money, was discharged upon a report of bad title:—Held, entitled to the costs incurred by him in investigating the title, but not to interest on the one-fourth. *Feely v. Kilkenny*, Fl. & K. 456.

7. A purchaser discharged upon a re-sale under an order opening the biddings, is not entitled against the plaintiff, or his solicitor, to the costs which he may have incurred in investigating the title, there not having been any reference to the Master to report as to good title. *Sullivan v. Bayly*, Fl. & K. 460.

8. A purchaser under the decree of the Court took several objections to the title, in some of which he failed, and succeeded in others:—Held, that he was entitled to the costs properly and necessarily incurred by him in investigating the title, after deducting thereout the costs occasioned by the objections in which he failed. *Brown v. Lynch*, 4 Ir. Eq. R. 59.

9. A purchaser under decree is not entitled to require, at the cost of the estate, a further opinion of counsel in favour of the title, besides that which he gets with the abstract under Lord Redesdale's rule. But he may, if he pleases, take a further opinion; and, if afterwards discharged from the purchase by reason of defects of title discovered by such further opinion, he will be entitled to be re-paid the reasonable costs incurred in obtaining it.

Barton v. Downes (Lord), 4 Ir. Eq. R. 607; Fl. & K. 633.

10. Where property sold under a decree is bought by a defendant in the suit, he is entitled to his costs of a reference to the Master as to title. *Holland v. King*, 1 W. R. 80.

11. Where a purchase under a decree goes off on account of defects in the title, a defendant having the conduct of the cause will not be ordered personally to pay the purchaser's costs of investigating the title, though there are no funds in court, and the plaintiff is insolvent. *Mullins v. Hussey*, 1 L. R., Eq., 488; 35 L. J., Ch., 348.

3. Of Conveyance.

12. Where, under a decree for sale of an estate in a creditors' suit, containing a direction that the Master should settle the conveyances if the parties differ, an application is made to the Master respecting the conveyance, the purchaser must pay the costs of his attendances before the Master, unless he makes out a special case for exemption from them. *Hodgson v. Sham*, 16 L. J., N. S., Ch., 56; 11 Jur. 95.

13. When, in consequence of the defendants' refusal to execute the conveyance to the purchaser under the decree, it becomes necessary to apply, that the Master may execute in their names, the estate is not to bear the costs of such application, but the defendants, whose improper refusal made it necessary. *Clarke v. De Burgh*, 2 Ir. Eq. R. 19.

14. A plaintiff having charged A. B., who was named a party defendant, to be out of the jurisdiction, but omitted to pray process against him on his coming within the jurisdiction:—Held, nevertheless, entitled to the costs of a supplemental suit, instituted for the purpose of compelling him to join as a conveying party in the deed to the purchaser under the decree. *Oldham v. Wilkins*, 1 Dr. & Wal. 717.

15. Under a decree in a creditors' suit, the real estates of a debtor who had died intestate, leaving an infant his heir, were ordered to be sold. The estates were accordingly sold by auction in lots. Under the conditions of sale was this note:—"N.B.—This sale is made by an order of the Court of Chancery, etc., and the property being vested in an infant, the purchaser will have no covenants for title." A. purchased one of the lots:—Held, that the costs attending the settling of the deed of conveyance from the infant to A., by the Master, by reason of the infancy of the heir, ought to be borne by the intestate's estate, and not by A. *Brown v. Lake*, 15 L. J., N. S., Ch., 34.

16. Where the real estates of an intestate were sold under a decree in an administration, and the heir-at-law was a feme covert, who declined acknowledging the conveyance to the purchaser, *semble*, that the heir was a trustee within 1 Will. 4, c. 60. *Billing v. Webb*, 1 De G. & Sm. 716; 12 Jur. 427.

In such a case, where the costs of the suit exceeded the funds in the cause, the Court directed the costs of the purchasers, occasioned by the refusal of the married woman to make the acknowledgment, to be first taxed and

an arrangement with the solicitor in the suit, accepts the title. *Wilden v. Andrews*, 4 L. J., Ch., 208.

1. Purchaser under a decree of the Court is not entitled, upon an affidavit that he has had his money lying ready some time, to be let into possession of estate, and receipt of rents for all such time so passed. *Barker v. Harper*, Coop. 32.

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4. Where, after lands had been sold, and the purchase deed approved by the Master's counsel, though not signed, the purchaser was put into possession by injunction, in consequence of the defendant having entered on the lands and committed waste. *Gray v. Stanford*, 8 Ir. Eq. R. 678.

5. A purchaser under the decree having, under colour of the injunction to put him into possession, dispossessed persons who claimed adversely to the title of the parties in the cause, it was ordered that a writ of restitution do issue to restore them to the possession, and it was referred to the officer to ascertain the amount of damages sustained by them in consequence of the ouster; and the purchaser was ordered to pay such damages with full costs, the applicants undertaking not to bring an action. *Anderson v. Barry*, 2 Jones 631.

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6. Under a decree for a sale of lands, a trustee for the inheritor was declared the purchaser. There was a report of bad title:—Held, that the trustee was entitled to his costs out of the fund in court, it appearing that the inheritor was ignorant of his own title, and never had the means of knowing it, and that he had acted *bonâ fide*. *Kirby v. O'Shee*, 1 Jones 164.

7. A purchaser under decree is entitled to his costs when Master reports against title, though no fund in court. *Smith v. Nelson*, 2 Sim. & S. 557; 4 L. J., Ch., 175.

8. Where there has been great delay, and there is little hope of perfecting the title within a reasonable time, the Court will dismiss a purchaser with costs. *Fraser v. Wood*, 8 Beav. 539; 14 L. J., N. S., Ch., 270.

9. Costs to which a purchaser under the Court is entitled, on its being found that a good title cannot be made. *Perkins v. Ede*, 16 Beav. 268.

10. The costs of an unsuccessful application by a purchaser under a decree to be relieved from his purchase, on the ground of defective title, must be paid by the applicant. *Osborn v. Osborn*, 18 W. R. 421.

11. Where, upon a sale under the Court, the title turned out to be bad:—Held, that the purchaser, on being discharged, was not entitled to his costs as against a party to whom the conduct of the sale had been committed by the Court. But his rights as against any fund which might come into court were reserved. *Mullins v. Hussey*, 35 Beav. 301.

See also VI. 6 *supra*.

See also Next Subdivision.

2. Of Investigation of Title.

12. Where an estate has been sold under a decree, and the Master reports against the title, the purchaser is entitled to be paid out of the fund in the cause his costs of and consequent upon his becoming purchaser, and of investigating the title. *Att.-Gen. v. Newark (Corporation)*, 8 Sim. 71.

13. If the Master reports against the title to an estate purchased under a decree, the purchaser will be paid the costs of the reference out of the funds in the cause. *Reynolds v. Blake*, 2 Sim. & S. 117. S. C. *nom. Anon.*, 3 L. J., Ch., 83.

14. A purchaser under decree is entitled to his costs where Master reports against title, though no fund in court. *Smith v. Nelson*, 2 Sim. & S. 557; 4 L. J., Ch., 175.

15. Where an estate was sold under a decree of the Court, and one of the conditions of sale was, that the purchaser pay the purchase money into court on a given day, at his own expense, it was:—Held, that the purchaser was entitled to the costs of a reference as to the title reported good by the Master. *Camden v. Benson*, 1 Keen 671.

16. The purchaser at a sale in the Master's office has a right to bind the seller to the title shown in the abstract first furnished; but if that title is not sufficient, the purchaser has a right to have a further abstract, and the purchaser gets his costs up to the time when the proper abstract is furnished. *Goffe v. Mitchell*, 2 Moll. 508.

17. Purchaser under decree is entitled to his costs of investigating the title when there has been a substantial variance from the abstract first brought into the Master's office; otherwise the uniform practice of this Court, when the title proves good, on a reference of title upon a sale under a decree, is to make the purchaser abide his own costs. Where, therefore, further documents were produced establishing a new case in answer to objections taken, but the original abstract was not varied from in substance, costs were refused. *Leland v. Griffith*, 2 Moll. 150.

18. Where a sale had been directed under a decree, but there was no reference to the Master as to the title, and no available fund in court:—Held, that the purchaser was

entitled to be reimbursed by the plaintiff the costs of investigating the title and confirming the purchase. *Berry v. Johnson*, 2 Y. & Coll. 564; 1 Jur. 474.

1. If solicitor of inheritor is employed by creditor to make out title to purchase, he will be paid his costs out of fund in court. *Thompson v. Cooke*, 1 Hog. 28.

2. A purchaser under a decree, who succeeds on exceptions to the Master's report approving the title, cannot then have the costs of the reference on title; but must obtain the report in his favour, and then present a petition to be discharged from his purchase and to have his costs. *Hyde v. Hyde*, 3 L. J., Ch., 130.

3. A discharged purchaser is not entitled, as against a bidder opening the sale, to the costs of investigating the title, where he has proceeded to do so before the order to confirm was made absolute. *Digby v. Bromme*, 1 Ir. Eq. R. 377.

4. In sales under decree, as in private sales, the plaintiff or vendor is not bound to furnish to the purchaser a fee for counsel, with the abstract of title, unless by special condition. If the purchaser require the opinion of counsel, he must take it at his own expense, but he will have only a qualified property in the opinion until the sale is complete. *Alexander v. Crossbie*, 2 Ir. Eq. R. 141.

5. When, in consequence of a defect in the title to lands sold under a decree, the purchaser is discharged, he is entitled to the full amount of his purchase money, interest, and taxed costs, without deduction; therefore, where the interest and costs are to be paid out of a fund consisting of rents of the lands, the discharged purchaser is entitled to an order, including the amount of the usher's poundage, payable in respect of the sum which he is entitled to receive out of the fund. *Johnson v. Reardon*, 3 Ir. Eq. R. 200.

6. A purchaser, who having lodged one-fourth only of his purchase money, was discharged upon a report of bad title:—Held, entitled to the costs incurred by him in investigating the title, but not to interest on the one-fourth. *Feely v. Kilkenny*, Fl. & K. 456.

7. A purchaser discharged upon a re-sale under an order opening the biddings, is not entitled against the plaintiff, or his solicitor, to the costs which he may have incurred in investigating the title, there not having been any reference to the Master to report as to good title. *Sullivan v. Bayly*, Fl. & K. 460.

8. A purchaser under the decree of the Court took several objections to the title, in some of which he failed, and succeeded in others:—Held, that he was entitled to the costs properly and necessarily incurred by him in investigating the title, after deducting thereout the costs occasioned by the objections in which he failed. *Brown v. Lynch*, 4 Ir. Eq. R. 59.

9. A purchaser under decree is not entitled to require, at the cost of the estate, a further opinion of counsel in favour of the title, besides that which he gets with the abstract under Lord Redesdale's rule. But he may, if he pleases, take a further opinion; and, if afterwards discharged from the purchase by reason of defects of title discovered by such further opinion, he will be entitled to be re-paid the reasonable costs incurred in obtaining it.

Barton v. Downes (Lord), 4 Ir. Eq. R. 607; Fl. & K. 633.

10. Where property sold under a decree is bought by a defendant in the suit, he is entitled to his costs of a reference to the Master as to title. *Holland v. King*, 1 W. R. 80.

11. Where a purchase under a decree goes off on account of defects in the title, a defendant having the conduct of the cause will not be ordered personally to pay the purchaser's costs of investigating the title, though there are no funds in court, and the plaintiff is insolvent. *Mullins v. Hussey*, 1 L. R., Eq., 488; 35 L. J., Ch., 348.

3. Of Conveyance.

12. Where, under a decree for sale of an estate in a creditors' suit, containing a direction that the Master should settle the conveyances if the parties differ, an application is made to the Master respecting the conveyance, the purchaser must pay the costs of his attendances before the Master, unless he makes out a special case for exemption from them. *Hodgson v. Shaw*, 16 L. J., N. S., Ch., 56; 11 Jur. 95.

13. When, in consequence of the defendants' refusal to execute the conveyance to the purchaser under the decree, it becomes necessary to apply, that the Master may execute in their names, the estate is not to bear the costs of such application, but the defendants, whose improper refusal made it necessary. *Clarke v. De Burgh*, 2 Ir. Eq. R. 19.

14. A plaintiff having charged A. B., who was named a party defendant, to be out of the jurisdiction, but omitted to pray process against him on his coming within the jurisdiction:—Held, nevertheless, entitled to the costs of a supplemental suit, instituted for the purpose of compelling him to join as a conveying party in the deed to the purchaser under the decree. *Oldham v. Wilkins*, 1 Dr. & Wal. 717.

15. Under a decree in a creditors' suit, the real estates of a debtor who had died intestate, leaving an infant his heir, were ordered to be sold. The estates were accordingly sold by auction in lots. Under the conditions of sale was this note:—"N.B.—This sale is made by an order of the Court of Chancery, etc., and the property being vested in an infant, the purchaser will have no covenants for title." A. purchased one of the lots:—Held, that the costs attending the settling of the deed of conveyance from the infant to A., by the Master, by reason of the infancy of the heir, ought to be borne by the intestate's estate, and not by A. *Brown v. Lake*, 15 L. J., N. S., Ch., 34.

16. Where the real estates of an intestate were sold under a decree in an administration, and the heir-at-law was a feme covert, who declined acknowledging the conveyance to the purchaser, *semble*, that the heir was a trustee within 1 Will. 4, c. 60. *Billing v. Webb*, 1 De G. & Sm. 716; 12 Jur. 427.

In such a case, where the costs of the suit exceeded the funds in the cause, the Court directed the costs of the purchasers, occasioned by the refusal of the married woman to make the acknowledgment, to be first taxed and

paid, and, subject thereto, that the costs of plaintiffs and defendants should be taxed and paid ratably. *Id.*

1. A purchaser under the decree of a court of equity, obtaining a conveyance of the legal estate, is not entitled to have, at the expense of the funds in the cause, a release from equitable incumbrancers, who were parties to be paid under the decree. *Keatinge v. Keatinge*, 6 Ir. Eq. R. 43.

Upon the sale of an estate, if there be an outstanding trust term, the vendor must (if so required) have such term surrendered at his own expense; or, if the term be so circumstanced, that, although the trusts have been fulfilled, it has never been assigned to attend the inheritance, the vendor must, if required, have it so assigned at his own expense; but if the term have been already assigned to attend, and the purchaser requires it to be further assigned to a trustee nominated by himself, such further assignment must be at the purchaser's expense. *Id.*

The lands of B. and D. being subject to a jointure secured thereon by a trust term, by condition of sale it was stipulated that, without prejudice to the rights of the jointress, the lands of B. should be sold as if exclusively liable to the jointure, and D. as if exonerated therefrom; and that, to this end, the purchaser of D. should have from the purchaser of B. a deed of indemnity: the costs of the preparation of such deed must be borne by the vendor, the condition being silent on the subject. *Id.*

2. The costs of covenants to produce title deeds which cannot be delivered up fall, by the practice of conveyancers, on vendors; yet where, by the conditions of sale of property, in lots, under an order of the Court, provision was made for the largest purchaser to have the deeds, and to covenant to produce them, or give copies thereof to the purchasers of smaller lots, without reference to the manner in which the costs were to be paid, each purchaser, and not the estate, was ordered to bear his own costs of such covenants. *Strong v. Strong*, 4 Jur., N. S., 943; 6 W. R. 455.

4. Of Payment into or out of Court.

3. Where the purchaser has been the cause of delay in the completion of the title, he will be ordered to pay the costs of the motion for payment by him into court of the purchase money; but, on the reference, he will not be restricted to the objections taken by him to the title previously to the date of the notice to pay the purchase money into court. *Flomer v. Hartopp*, 12 L. J., N. S., Ch., 39.

4. A purchaser under a decree, one of the conditions of sale being the payment of the money into court by a certain day:—Held, liable to pay the costs of the order for that purpose. *Camden v. Benson*, 1 Keen 671.

5. Where, on the same motion by which the purchaser asks to pay his purchase money into court and be let into possession, it is also asked that one purchaser may be substituted for another upon the affidavit of no underhand bargain, no additional costs are incurred by the parties to the cause, and costs are not ordered to be paid by the purchasers. *Chris-*

tian v. Chambers, 4 Hare 307; 14 L. J., N. S., Ch., 340; 9 Jur. 393.

6. In a sale under the Court, after a purchaser has obtained his conveyance the costs of his appearance on a petition for payment out of court of the fund will not be allowed. His right course is, not to appear, but to inform the petitioners that he has no claim on the fund. *Barton v. Latour*, 18 Beav. 526.

7. Although purchasers were informed, in a notice of a petition for the payment of their purchase moneys out of court, that they would not be required to appear, and that if they appeared their costs would be objected to, yet the Court held that they were entitled to appear, and to be paid the costs of such appearance. *Strong v. Strong*, 4 Jur., N. S., 943; 6 W. R. 445.

5. Fees of Court.

8. Upon a sale by the Master in lots, the proper fee to be paid according to the schedule annexed to the Orders in Chancery issued under the 3 & 4 Will., 4, c. 94, is 5*l.* where the whole produce of the sale does not exceed 2,000*l.*, and 5*s.* on every 100*l.* beyond that sum, without regard to the number of lots or purchasers. *Re Allen's Charities*, 2 Myl. & K. 627.

6. Other Cases.

9. Purchaser of lands under decree, who has obtained an absolute order to confirm the sale, and has paid in his entire purchase money, is not liable to deduction for receiver's fees upon the rents collected in the interim, before he could get into possession. That expense falls upon the vendor; but the circumstance that the purchaser, by taking an assignment of the plaintiff's interest, assumed the duty of making title, makes a distinction. *Dutgean v. Nangle*, 2 Moll. 96.

10. A purchaser who allows the receiver to continue in possession until the title is declared good, is bound to pay receiver's fees, as he might have gone into possession himself on an undertaking to account if the title turned out defective. *Brown v. Dondall*, 2 Hog. 198.

11. A party who obtained possession of estates by a conveyance from a tenant for life and equitable incumbrancer, decreed the estates as his own; part were sold in a suit to administer his estates. In a subsequent suit by a party claiming the estates as devisee of the former owner, the purchaser was directed to pay his own costs. *Incorporated Society for Protestant Schools v. Richards*, 1 Dr. & War. 258; 1 Con. & L. 58; 4 Ir. Eq. R. 177.

12. A purchaser, under the Court, who had not obtained his conveyance, paid his money into court, subject to a stop-order:—Held, that he was entitled to his costs of appearance on further consideration, he having been served with notice. *Noble v. Stow*, 30 Beav. 272.

13. A purchaser under a decree has no lien for his costs on the funds in court, arising out of the sales of other property, so as to prevent any distribution of the fund until the report

of the title being bad has been confirmed. *M' Cann v. O'Farrell*, 1 Hog. 137.

Taxation.] 1. Charges of a sale to be taxed under the head of just allowances, not of costs. *Crump v. Baker*, 18 Ves. 285.

2. Costs, charges, and expenses of, and incidental to, the sale of the real estates of the testator, in the cause, were by the decree ordered to be taxed and paid. On making out these costs, charges, and expenses, it appeared that \$404. had been paid for surveying and selling the estates, upon which the fee of taxation of 36 per cent. attached. In order to avoid this fee, a motion was made, all parties consenting, to vary the order by only directing taxing master to add to the amount of the taxed costs of the plaintiffs any sums which he should find to have been properly paid by them to any surveyor or other person, as his charge for valuing or otherwise, in reference to the sales. The Court varied the order accordingly. *Bellas v. Harmer*, 3 De G. & Sm. 454.

XV. SALE SUBJECT TO INCUMBRANCES.

See also v. 6 (c) and (d) *supra*—VI. 3
supra—XI. 3 *supra*.

3. Purchaser under decree bound to see directions of decree observed. *Colclough v. Sterum*, 3 Bligh, 181.

Lands in strict settlement, with power to grant leases, being subject to prior incumbrances, are by decree in a suit instituted by incumbrancers directed to be sold, subject to charges prior to deed of settlement. Pending suit, tenant for life under settlement grants leases not authorised by power, and raises money upon annuities for his life, which he charges upon the lands, and they are sold subject to those charges:—Held (reversing decree in court below, on suit by remainderman in tail), that the sale, subject to charges not warranted by decree, is void. *Id.*

4. Two of four co-heiresses-at-law residing out of the jurisdiction, sale of the inheritance decreed in their absence, at the suit of judgment creditor of ancestor. The heir-at-law being absent from the jurisdiction, sale of real estate may be effectuated under the decree of the Court, the particular of sale stating the fact, and the purchaser buying with notice. *Leahy v. Dancer*, 3 Moll. 108.

5. Where lands are decreed to be sold subject to an annuity, it is conclusive evidence that the annuity is prior to the claims of all persons claiming under the decree; and a report, on a reference to ascertain priorities, finding that the arrears of the annuity are posterior to some of those claims, is erroneous, and will be varied accordingly. *Sparrow v. Cooper*, 1 Jones 72.

6. The decree directing a sale of a competent part of the lands, and the claim of dower subject to which the sale was to be had, overriding the whole lands, Lord Chancellor observing that he did not know an instance:—Held, that on consent of all parties he had jurisdiction on a petition in that cause in which the sale was decreed to direct a commission to set out dower, a sale discharged of

dower being clearly for the benefit of the inheritor, without requiring a bill to be filed for the purpose. *Chambers v. Davenport*, 1 Moll. 490.

7. A decree for the sale of an incumbered estate does not, of itself, alter the rights of parties. *Wild or Lee v. Lockhart*, 10 Beav. 320; 16 L. J., N. S., Ch., 519.

8. Confirmed purchaser under a decree having paid in his entire purchase money, which was invested in stock, on the motion of the parties in the cause, on the question whether he was entitled to the option of money or stock for an aliquot part of his purchase money, the amount of an incumbrance, which there was no authority to receive until infants entitled become adult:—Held, entitled to elect either his money with interest, or the stock bought with it; Lord Chancellor expressing at the same time his opinion against the eligibility of the rule permitting the payment of the entire purchase money before the title is made out. *Scott v. Rothe*, 2 Moll. 548.

XXV. Adverse Rights of Third Parties and Purchaser with or without Notice.

- I. *Purchaser without Notice. General Rights of*, 7349.
- II. *Protection by acquiring Legal Estate or Outstanding Interests*, 7354.
- III. *Sub-purchaser without Notice*, 7355.
- IV. *Sale of Estate to Two Different Purchasers*, 7356.
- V. *Actual Payment of Consideration Necessary*, 7356.
- VI. *Discovery by*, 7357.
- VII. *Pleading*, 7358.
- VIII. *Purchaser with Notice. In General*, 7360.
- IX. *What Amounts to Notice in Particular Cases*. See NOTICE.
- X. *Effect of Registration*. See REGISTRATION.
- XI. *Purchaser with Notice of Breach of Trust*. See TRUSTS, XXIV. VI.
- XII. *Assignment of Choses in Action*. See EQUITABLE ASSIGNMENT.
- XIII. *Tacking of Mortgages and Priorities of Incumbrancers Generally*. See JUDGMENT—LIS PENDENS—MORTGAGE.
- XIV. *Assignee with Notice of Restrictive Covenants*. See XVIII. III. *ante*.
- XV. *Effect of Fraud and Misrepresentation*. See FRAUD—FRAUDULENT CONVEYANCES.

I. PURCHASER WITHOUT NOTICE. GENERAL RIGHTS OF.

9. Plea of purchase for valuable consideration without notice of plaintiffs' title is good as a plea in bar, and protects defendant from answering to title set up by plaintiff. *Fitzgerald v. Fauconberge*, Fitz. 207; 2 Madd. Ch. Pr. 321.

He who would entitle himself to protection of equity as a purchaser, must claim under actual conveyance, but need not have the legal estate. *S. C. Fitzg.* 207, 213.

He that is purchaser in law, as by taking estate in right of wife by his marriage, is not a purchaser in notion of equity. *Id.* 212.

1. Whoever has the best right to call for the legal title, can avail himself of the plea of purchase for valuable consideration without notice. *Medlicott v. O'Donnell*, 1 Ball & B. 171.

2. A purchaser without notice shall not be hurt in equity, not only where he has got a prior legal title, but where he has a better right to call for the legal estate than another, who has got an incumbrance prior to his title. *Wilkes v. Bodington*, 2 Vern. 599.

3. Title of purchaser for valuable consideration is a good ground of defence, but not for relief. *Patterson v. Slaughter*, Amb. 293.

4. Purchase for a valuable consideration *bonâ fide* paid:—Held, a good defence, though the consideration was much less than the real value. *Bullock v. Sadlier*, Amb. 764.

5. Purchase for valuable consideration without notice, is not available as a defence against a plaintiff who relies upon a legal title. *Collins v. Archer*, 1 Russ. & M. 284.

6. *Semble*, that a purchase for a valuable consideration, without notice, is available as a defence against a plaintiff who relies on a legal title. *Payne v. Compton*, 2 Y. & Coll. 457.

7. A purchase for a valuable consideration, without notice, is a defence as well against a legal as an equitable title. *Joyce v. De Moleyns*, 2 J. & L. 374; 8 Ir. Eq. R. 215.

8. The defence of being a purchaser for valuable consideration without notice is available in equity against a legal as well as against an equitable title, and also as against a charity. *Att.-Gen. v. Wilkins*, 17 Beav. 285; 17 Jur. 885; 22 L. J., Ch., 830.

In the year 1641 a legal rent charge was granted to trustees for charitable purposes. The trustees had not been filled up, and it was not known in whom the legal estate was now vested. The rent charge had been nevertheless paid to the charity by the successive owners of the land until 1832, when the land was sold to the defendant, who never made any payment in respect of the rent charge:—Held, in an information and bill on behalf of the charity, that the purchase for valuable consideration without notice was a good defence, although the plaintiffs claimed under a legal title. *S. C.* 1 W. R. 472; 1 Eq. Rep. 574.

9. The defence of purchase for valuable consideration, without notice, is available when the subject matter purchased is an equitable estate. *Ernest v. Virian*, 33 L. J., Ch., 513; 12 W. R. 295; 9 L. T., N. S., 785.

10. A court of equity does not restrict the protection it will afford a purchaser for valuable consideration without notice, to a case in which he has got the legal estate. *Colyer v. Finch*, 5 H. L. C. 905. And see 2 Eq. Rep. 117; 2 W. R. 655.

11. The Court will protect a purchaser for valuable consideration without notice, even though his estate may be merely equitable. *Hunter v. Walters*, 24 L. T., N. S., 276; 11

L. R., Eq., 292. Affirmed 7 L. R., Ch., 75; 41 L. J., Ch., 175; 25 L. T. 765; 20 W. R. 418.

12. The defence of a defendant, that he is a purchaser for value without notice, is only available where the plaintiff is seeking to take something away from the defendant which he already has. *Barnard v. Hunter*, 2 Jur., N. S., 1213.

The plea of a purchaser for value without notice is not available to the mortgagee of an assignment of a chose in action as against the assignor, even though the assignor seeks to enforce a personal equity against his assignee. *Cockell v. Taylor* (15 Beav. 105; 21 L. J., Ch., 545) observed upon. *S. C.* 5 W. R. 92; 2 Jur., N. S., 1213.

13. The purchaser of a chose in action (whether with or without notice) cannot be in a better position than the person from whom he purchased. *Brandon v. Brandon*, 2 Jur., N. S., 981; 25 L. J., Ch., 896; 7 De G. M. & G. 365.

A purchaser (even for valuable consideration without notice) of a share of a fund in court cannot be in a better position than his vendor. *S. C.* 5 W. R. 1.

14. A purchaser cannot plead no notice if he abstain from calling for information to which he is entitled by law. *Parker v. Whyte*, 2 N. R. 157; 11 W. R. 683; 8 L. T., N. S., 446; 1 Hem. & M. 167; 32 L. J., Ch., 520.

15. The rule with respect to the consequence of a purchaser abstaining from making inquiries does not depend exclusively on a fraudulent motive for such abstinence. *Jones v. Williams*, 24 Beav. 47; 3 Jur., N. S., 1066.

When the circumstances of a case put a purchaser on inquiry, a false answer or a reasonable answer given to any inquiry may dispense with the necessity of further inquiry; but where no inquiry has been made, it is impossible to conclude that a false answer would have been given if an inquiry had been made, or such as would have precluded the necessity of any further inquiry. *Id.*

16. Purchase for valuable consideration without notice, may be a good defence, although the legal estate is outstanding in a mortgagee. *Penny v. Watts*, 2 De G. & Sm. 501.

17. A man who purchases without notice of a prior incumbrance or prior right, shall not have his title impeached in equity, nor shall he be compelled to discover any writings which may weaken his title, neither shall any advantage be taken from him which may defend him at law. *Harding v. Hardrett*, Rep. temp. Finch. 9; *Heyman v. Gornelton*, *id.* 34; *Snelling v. Squibb*, 2 Ch. Ca. 47; *Wilkes v. Bodington*, 2 Vern. 599; *Stephens v. Gaulle*, *id.* 701. He must plead himself a purchaser, without notice. *Bodmin v. Vandenbendy*, 1 Vern. 179.

18. Equity will not relieve the assignees of a bankrupt against a purchaser of the bankrupt's lands without notice of the Act of Bankruptcy. *Chandos v. Brownlow*, 2 Ridgw. P. C. 425.

19. Purchase for valuable consideration without notice of any incumbrance, is a good plea. *Anon.*, 3 Salk. 85.

20. Plea of purchase for valuable consideration, not good to a bill for dower. *Williams v. Lambe*, 3 Bro. C. C. 264.

21. If the persons claiming under the breach of trust have notice of it, then they are subject to the same trust; so, if the conveyance be

voluntary, or without a valuable consideration; but if for a valuable consideration, and without notice, the purchaser will hold the land discharged, and the trustees must buy and settle other land to the same uses. *Mansell v. Mansell*, 2 P. W. 681.

1. Defendant, stating by answer a purchase for valuable consideration without notice, shall not be compelled to answer farther. *Jerrard v. Saunders*, 2 Ves. J. 454.

This Court will not take the least step against a purchaser for valuable consideration without notice, not even to perpetuate testimony against him. *Id.* 458.

2. Devisee shall not examine witnesses *in perpetuum rei memoriam*, to prove a will against a purchaser without notice, till the will has been established by a verdict at law. *Bochinall v. Arnold*, 1 Vern. 354.

3. The rule that a purchaser for valuable consideration without notice, is protected by the legal estate, extends not only to cases where his title is impeached by reason of some secret act done by the vendor, or those under whom he claims, but to cases also where his title is impeached by reason of the falsehood of a fact of title asserted by the vendor or those under whom he claims, provided such asserted title is clothed with possession, and the falsehood of the alleged fact could not have been discovered by reasonable diligence. *Jones v. Pomes*, 3 Myl. & K. 581; 3 L. J., N. S., Ch., 210.

4. *Quare*, whether purchaser for valuable consideration, under a decree fraudulently obtained, though ignorant of fraud, can protect himself, when fraud appears on face of proceedings. *Gore v. Staapole*, 1 Dow 30.

5. Lease of lands in Ireland, made after the lessor's estate has been put under sequestration for contempt of Court of Exchequer in that kingdom, was held good, the lessee having no notice of sequestration. *Vicars v. Colelough*, 5 Bro. P. C. 31.

6. Purchaser of an equitable title to a rent charge, claiming against some purchasers of the land for a valuable consideration without notice, must try his title at law in the name of his vendors. *Whitfield v. Fausset*, 1 Ves. 387.

7. Legal interest prevails against a prior equitable interest. *Wilson v. Stafford*, Amb. 181.

8. Bill by purchaser without notice of mortgage and assignment for delivery up of deeds, and conveyance of legal estate, upheld. *Bennett v. Harrison*, 7 Jur. 436.

9. One seised of an estate, subject to several equitable incumbrances, sells it to a purchaser, and conveys the legal estate to him free from incumbrances, except some of the equitable incumbrances, which were later in date to the others; the purchaser, having no notice of the other incumbrances, was held a trustee for the excepted creditors only, and they were preferred to the other creditors. *Ingram v. Pelham*, Amb. 153.

10. Plea of valuable consideration without notice is no protection against adverse claim, of which purchaser might have had notice by using due diligence. *Jackson v. Rome*, 2 Sim. & S. 472; 4 L. J., Ch., 118.

11. Plea of purchase for valuable consideration without notice:—Held, good. *Gordon v. England (Bank of)*, 8 Jur. 1132.

12. Purchasers for valuable consideration not bound by private Act of Parliament. *Pomfret (Earl) v. Windsor (Lord)*, 2 Ves. 480.

13. A party claiming to be a purchaser for a valuable consideration without notice, under a marriage contract, must show that he had no notice at the time of the settlement; proof that he had no notice at the time of the articles is not sufficient. *Davies v. Thomas*, 2 Y. & Coll. 234; 7 L. J., N. S., Exch. Eq., 21.

14. An owner of a leasehold house mortgaged to first and second and third mortgagees. He then sold it, subject to the first two incumbrances only, to a purchaser who paid for it by a cheque of his trading firm, and took the assignment; but, owing to misgivings, he countermanded payment of the cheque, and then, for the first time, received notice of the existence of the third mortgage. Being, however, threatened with summons in bankruptcy, he withdrew his countermand and the cheque was paid:—Held, that he was not a purchaser for value without notice, but was bound to redeem the third incumbrance. *Tildesley v. Lodge*, 3 Sm. & G. 543; 3 Jur., N. S., 1000.

Held, also, that as D. had unsuccessfully contested C's equitable right against him, he must pay the costs occasioned by his disputing C's title. *Id.*

15. The doctrine, that no relief whatever will be given against a *bona fide* purchaser without notice, requires qualification, as the Court will make a declaration of priority adversely to a claim of a defendant who is a purchaser without notice of an equitable interest. *Stackhouse v. Jersey (Countess)*, 1 John. & H. 721.

Accordingly, where a plaintiff was interested in a moiety of a fund invested on mortgage in the name of a trustee, who fraudulently deposited the mortgage deed with the defendant to secure a debt of his own, the defendant having no notice of the plaintiff's interest, the Court declared that the plaintiff was entitled, in priority to the defendant, to one moiety of the fund; and, the money having been paid into court, an order for payment to the plaintiff was made accordingly. *Id.*

16. There is no general rule that a court of equity will never assist a plaintiff against a defendant who is a purchaser without notice; and an incumbrancer for value of an equitable interest may successfully file a bill against a subsequent incumbrancer for value to have a priority declared and enforced. *Phillips v. Phillips*, 4 De G. F. & J. 208; 8 Jur., N. S., 145; 31 L. J., Ch., 321. Affirming 3 Giff. 200; 7 Jur., N. S., 1094; 5 L. T., N. S., 108.

17. A *cestui que trust* of an annuity, secured by a term in an estate, filed a bill against the trustee of the term and the purchaser for value of the estate, praying that the trusts of the term might be administered. The purchaser, who was in possession of the estate, had no notice of the term, or of any interest of the *cestui que trust* in the estate, and denied the existence of any term in the trustee:—Held, that until the trustee had established his right to the term at law, the *cestui que trust* could have no such relief as prayed in equity. *Clemow v. Geach*, 19 W. B. 53.

18. The plaintiff, previous to his marriage with A's daughter, wrote to A, inquiring what fortune his daughter was entitled to. A,

in his reply, stated that certain houses were entailed on his daughter after his decease. A. died, leaving his daughter his only child, and having devised all his real estates to his wife. It was then discovered that A. was tenant in tail male of the houses, with reversion to himself in fee. In January 1816 the plaintiff and his wife filed a bill against A.'s widow (who was in possession of the houses) to have the houses conveyed to the plaintiff's wife, conformably to the representation in the letter, and for a receiver, and an injunction to stay proceedings at law. An injunction was granted, and the widow having put in her answer, the injunction was, in January 1818, continued. The plaintiff did not take any further proceedings till May 1820. In April 1818 the widow mortgaged the houses for 500 years to H.; and in May 1819 she sold an annuity to M., and secured it by a conveyance of the houses to trustees in fee; and in May 1819 she sold and conveyed the houses, subject to the mortgage and annuity, to W. in fee. H., W., and M. had none of them then any notice of the suit or of the plaintiff's claim. In January 1820, at which time M. had notice, the houses were purchased by M., and conveyed to him by H. and W. In May 1820 the bill was amended. The widow having gone abroad without answering the amended bill, a decree was taken *pro confesso* against her in November 1822. In December following the plaintiff had notice of the conveyance to M.; and in March 1831 filed a bill against M., stating the proceedings in the original suit, and praying that M. might be decreed to convey the houses to the plaintiff's wife, and for a receiver. M. by his answer relied partly on the want of notice in H. and W., and in himself when he purchased the annuity, but the Court, on motion, granted a receiver. *Landon v. Morris*, 5 Sim. 257; 2 L. J., N. S., Ch., 35.

1. A trader directed his trustees and executors, with all convenient speed, to convert into money his residuary estate, but he provided that three (or in case of any substantial reason, seven) years might be allowed for withdrawing his capital from the business in which he was a partner. Parties beneficially interested under the will filed their bill against the surviving partners and the legal personal representatives, insisting that the administratrix had improperly allowed the testator's capital to remain in the business beyond the prescribed period, and asking to have a share in the profits made while the capital remained in the business. The defendants pleaded, that before the testator's death, the partners made a valuation, when the share of the testator appeared to be 63,000*l.*; that a year after his death, it was agreed between the surviving partners and the administratrix, that the new firm "should take to" the whole stock, on payment to her of 63,000*l.*, and should become purchasers of the testator's share at that sum; that they gave her a bond for 40,000*l.*, and placed the residue at her disposal, which was drawn out from time to time at her pleasure. It appeared that the capital had not been finally withdrawn till 1845. By the plea they insisted, that they had thus become purchasers of the share for valuable consideration, and without notice of the trusts of the will.—Held, that this was a valid defence to the claim to par-

ticipate in the profits. *Chambers v. Howell*, 11 Beav. 6; 12 Jur. 905.

2. Where A., the heir of lessee, having a right to perpetual renewal, had entered into an agreement with B. respecting the independent lease of lands, held under renewable lease by ancestors of B., which independent lease B. had obtained from landlord by fraud and circumvention:—Held, that heir of A., and purchasers for valuable consideration claiming under him, were entitled in equity to benefit of agreement between B. and A., and that heir of landlord was entitled to benefit of agreement, so far as B. took an interest. *Butler v. Mulvihill*, 1 Bligh. 137.

3. Real estate belonged to three partners; one retired and conveyed his share to the two others, "subject to all charges and mortgages affecting the same," and the two made an equitable mortgage to the defendant. There were three charges on the property, but the defendant knew of two only, and made no inquiry as to there being more:—Held, that having notice of the terms of the conveyance to the surviving parties, the defendant was bound to inquire whether there were any other charges, and not having done so, that he could not, as against the third equitable charge, insist on being purchaser for valuable consideration without notice. *Jones v. Williams*, 24 Beav. 47; 3 Jur., N. S., 1066.

4. A purchaser of a lease, under a condition not to inquire into the lessor's title, cannot protect himself against a suit to set aside a lease as being invalid in equity on the ground that he is a purchaser for value without notice. *Robson v. Flight*, 11 Jur., N. S., 147; 34 L. J., Ch., 226; 13 W. R. 893; 11 L. T., N. S., 725. Affirming 10 Jur., N. S., 1228; 13 W. R. 195; 4 De G. J. & S. 608.

5. Where purchaser has given a full value for estate, mistake of some party to conveyance of their claim thereto under a marriage settlement shall not turn to the prejudice of the purchaser without notice. *Malden v. Menill*, 2 Atk. 8.

6. A purchaser of real estate, upon signing the contract, assigned and delivered a negotiable bond as a deposit to T., who (though never admitted) alleged himself to be a solicitor, and the solicitor for the vendor. T. transferred the bond to the defendant, as a security for his own debt. The vendor of the real estate was a fictitious person, and the contract a fraud. The purchaser filed a bill to get back the bond from the defendant:—Held, that the deposit did not make T. a trustee for the plaintiff; and that the defendant, being a purchaser for value without notice, could not be restrained from dealing with the bond. *Ashwin v. Burton*, 9 Jur., N. S., 819; 32 L. J., Ch., 196; 7 L. T., N. S., 589; 11 W. R. 103.

7. Voluntary settlement of personal property, in trust for such one or more of his children as the settlor shall appoint. Appointment to one child exclusively, upon a secret understanding that the child shall re-assign a part of the fund to or in favour of a stranger. This appointment is a fraud upon the settlement, and void, not only to the extent of the sum assigned back, but *in toto*. Bill, by purchaser for valuable consideration, without notice, under this appointment, dismissed as

against the person entitled under the settlement, in default of appointment; such person having also the legal estate in the fund which was the subject of the appointment. *Daubeny v. Cockburn*, 1 Meriv. 626.

Payment of a valuable consideration by person, not having the legal estate, and not being an object of the power, cannot set up an invalid appointment in favour of such purchaser. *Id.* 638.

Secus, where the power is unlimited as to its objects, and the appointment is only impeachable on the ground of its being voluntary. *Id.*

1. When a person seised in trust for himself and another in common in fee retains the entire rents, the debt arising in favour of the co-tenant will not be charged on the trustee's beneficial interest as against a purchaser without notice from him. *British Mutual Investment Co. v. Smart*, 10 L. R., Ch., 567; 44 L. J., Ch., 695; 32 L. T. 849; 23 W. R. 800.

2. Trustees of a marriage settlement, where by a mortgage debt was settled substantially for the benefit of A., cannot set up the defence of purchasers for valuable consideration without notice, independently of A., when the mortgage is attempted to be set aside on the ground of fraud. *Spaight v. Cowne, Edwards v. Spaight*, 1 N. R. 550.

3. One seised of an estate, subject to several equitable incumbrances, sells it to a purchaser, and conveys the legal estate to him free from incumbrances, except some of the equitable incumbrances, which were later in date to the others; the purchaser having no notice of the other incumbrances, was held a trustee for the excepted creditors only, and they were preferred to other creditors. *Ingram v. Pelham*, Amb. 153.

4. A purchaser gives the vendor's bankers, in whose hands the title deeds of the estates are, an undertaking to give them his acceptance at a specified time, for a certain sum then due to them from the vendor, after the period specified; but before he has given his acceptance, he has notices of incumbrances on the estate:—Held, that as against the incumbrancer, he is not a purchaser for a valuable consideration without notice. *Reid v. Tait*, 1 L. J., Ch., 6.

5. In January 1848 A. demised an estate to his sisters by way of mortgage to secure a debt. The sisters allowed A. to retain the title deeds in order to enable him to give a first mortgage to secure another debt due by him to B. and C., for which he was being sued. In April 1848 A. covenanted with B. and C. to execute a mortgage of the estate as a security for the debt due to them; and the title deeds were at the same time deposited by A. with his own solicitor, by way of security, until the mortgage should be prepared, but no legal mortgage was ever executed by A. to B. and C. In 1850 A. made a legal mortgage of the estate to D., who had no notice of the incumbrances of 1848, and the title deeds were delivered to D. The mortgage by A. to his sisters was executed by him for his own purposes only, and it was intended to be used by him against the claimants on the estate, if any occasion for so doing should arise:—Held, that as D. acquired the legal estate without notice of the prior incumbrances,

he became entitled to priority over B. and C. *Lloyd v. Atwood, Atwood v. Lloyd*, 5 Jur., N. S., 1322; 3 De G. & J. 614; 29 L. J., Ch., 97.

6. The defendant, who was in possession of a piece of land, under an agreement for sale, upon which he had built a granary, allowed his sons, who were partners, to have the occupation of the land and premises. The sons erected other buildings of considerable value upon the land, and supplied the father with goods for the amount of the cost of the granary erected by him. The sons afterwards applied to bankers, for a loan upon the security of the land and premises, and having obtained surreptitious possession of the agreement for the sale of the land to the father, without his knowledge, deposited the agreement with the bankers, alleging that the father had given up to them all his interest in the land, and would execute a conveyance to the bankers when required. The father had previously to this transaction become surety for the sons to another bank, and was called upon to pay a large debt in respect of this surety. The father alleged that he had never given the land to the sons, and had never intended to do so until he was released from his liability as surety. The bankers filed a bill to establish, as against the father, a charge on the land for the advances to the sons:—Held, that the sons had an equitable charge upon the land, as against the father, for the amount paid by them to the father, and for their own expenditure on the land; that although the deposit was made under false representations, and did not bind the father, yet that the bankers were purchasers for value without notice, and were entitled to a charge on the land to the full extent of the lien of the sons; and that although the father, in respect of his suretyship, had a right to set-off against his sons, yet it could not be enforced against the bankers, whose right accrued without notice of any claim of the father. *Unity Joint Stock Banking Association v. King*, 4 Jur., N. S., 470; 27 L. J., Ch., 585.

7. In 1873 D., in order to carry out a fraudulent scheme, obtained a transfer to himself of mortgages of freehold property, and after various dealings with it the legal estate was, in September 1875, conveyed by a mortgagee to H. in trust for M., and in March 1876 by H. to M. M. was alleged to have been an accomplice of and trustee for D. In August 1874, in pursuance of this scheme, T., claiming to be entitled to this property under a fictitious lease for ninety-eight years, purporting to have been granted to him in March 1870 by a merely fictitious freeholder (an agent and accomplice of D.), demised the property by way of mortgage to A. In November 1874, M., claiming to be entitled to the same property under a fictitious lease for ninety-nine years, also dated March 1870, and purporting to be granted to him by T., demised the property by way of mortgage to B., the mortgage deed being executed by M. only. In January 1877 M. (to whom the legal estate had been conveyed in March 1876) deposited the genuine title deeds of the property with C., upon a memorandum charging his estate and interest in the lands comprised in the deeds and a statutory declaration of title; and further advances were made to

M. and D., who came forward and stated that M. was merely a trustee for him of the property. In 1878 D., M., and T. were convicted and sentenced to penal servitude for forgery and fraud in connection with this property, and C., as equitable mortgagee, entered into possession. In an action by A. to settle the priorities of himself, B. and C. as incumbrancers on the property:—Held, that as purchaser for value without notice by deposit of the genuine title deeds, C., though subsequent in date, was entitled in priority over A. and B. *Keate v. Phillips*, 18 L. R., Ch. D., 560; 50 L. J., Ch., 664; 44 L. T. 731; 29 W. R. 710.

II. PROTECTION BY ACQUIRING LEGAL ESTATE OR OUTSTANDING INTERESTS.

1. Where the purchaser, for valuable consideration, claimed under a party who had obtained possession under a forged will, which no reasonable diligence could have discovered:—Held, that the legal estate acquired from a trustee of a satisfied mortgage protected him as a purchaser for valuable consideration without notice; the protection is to be extended, not merely to cases in which the title of such purchaser is impeached by reason of a secret act done, but also to cases in which it is impeached by reason of the falsehood of a fact of title asserted by the vendor, or those under whom he claims, when such asserted title is clothed with possession, and the falsehood of the fact asserted could not have been detected by reasonable diligence. *Jones v. Pomes*, 3 Myl. & K. 581.

2. Title deeds were deposited as a security for money; the defendant, a creditor of the mortgagor, fearing his immediate insolvency, took a conveyance of the same premises, without notice of the incumbrance; this was held good. *Plumb v. Fluit*, 2 Anstr. 432.

3. Purchaser for valuable consideration without notice shall not be impeached, especially when a settlement has been since made in his favour. *Rocheport v. Nugent*, 5 Bro. P. C. 351.

4. A purchaser or mortgagee shall not protect himself by taking a conveyance from a trustee after notice of the trust, for, by taking such conveyance, he becomes the trustee himself. *Saunders v. Dehew*, 2 Vern. 271.

5. S. executed mortgages to B. upon estates in Ireland. The deed contained covenants that the lands conveyed were free from incumbrances, and for further assurance. Before the deeds were registered it was discovered that a portion of the land was subject to a mortgage to E. B. thereupon applied to S., who, by means of assigning certain shares, which afterwards turned out to be fictitious, and a forged promissory note, procured a release from E. of the land so subject to the mortgage. B., in ignorance of the fraud, then registered his deeds. The Court in Ireland held that B. was a purchaser for value of the release as having been procured by S. in pursuance of the covenants in the mortgage deed, and that B., being ignorant of the fraud of S., was entitled to retain the advantage which the release had given him. On appeal the decision was reversed. *Eyre v. Burmester*, 10 W. R. 587.

E. was the equitable owner of the estate, and could at any time, by bill in equity, have set aside the fraudulent release, and his equitable title ought to be preferred to the claim of B. *Ib.*

6. Grants in reversion obtained by an agent and trustee from his employers and *cestuis que trustent* by fraud and misrepresentation, afterwards assigned, for valuable consideration, to a purchaser having notice of the facts and nature of the title, set aside. A conveyance taken after the grants, the fiduciary relations still existing, and the grantor ignorant of his rights, is a continuation of the fraud, and not a confirmation. *Dunbar v. Tredennick*, 2 Ball & B. 304.

7. A purchaser for valuable consideration, without notice, getting in the legal estate from a trustee, takes it subject to all those trusts upon which the trustee held it, and appearing upon the face of the instrument under which the trustee takes. *Carter v. Carter*, 3 Kay & J. 618; 4 Jur., N. S., 63; 27 L. J., Ch., 75.

8. A., who was entitled to a sum of money secured by a trust term in reversion after a life estate, went to Australia, and remained there many years; during which time B., representing him to be dead, obtained administration to his estate and effects, and a suit having been instituted in relation to the fund secured by the trust term, it was found by the report, and confirmed by a final decree, that he was dead. B. afterwards sold the charge to a purchaser for value, who took an assignment of the term from the trustee to a trustee for himself; and A. having come back on the death of the tenant for life, and filed a bill to set aside the sale of the charge:—Held, that, although the administration taken out by B. gave him no title to assign the charge, yet that the Court would not interfere to take away from a purchaser for value without notice the benefit of the legal estate which he had obtained by the assignment of the term. *Monckton v. Braddell*, 6 Ir. R., Eq., 352.

9. A person who has *bona fide* paid money without notice of any other title, may afterwards, even *pendente lite*, get a legal title if he can, and may hold it, though during the interval between the payment and the getting in of the legal title he may have had notice of some prior dealing inconsistent with the good faith of the dealing with himself. *Blackwood v. London Chartered Bank of Australia*, 5 L. R., P. C., 92; 43 L. J., P. C., 25; 22 W. R. 419; 30 L. T., N. S., 45.

10. A purchaser for valuable consideration without notice of any prior equity, having accidentally acquired the legal estate under a deed of which he had no notice at the time of the purchase, is not affected without notice of anything contained in such deed. *Pilcher v. Rawlins*, *Joyce v. Rawlins*, 41 L. J., Ch., 485; 7 L. R., Ch., 259; 20 W. R. 281; 25 L. T., N. S., 921. Reversing 11 L. R., Eq., 53; 19 W. R. 217.

Such a purchaser's plea of a purchase for valuable consideration without notice is an absolute, unqualified, unanswerable defence, and an unanswerable plea to the jurisdiction of the Court. *Ib.*

The defence of the purchase for value without notice may be sustained, although

the defendant, in order to make out his title to the legal estate, must rely on an instrument which discloses the title of the plaintiff, the defendant, not having had notice of such instrument at the time of the purchase. *Id.*

B., a trustee, advanced trust money to A. in 1861, on a legal mortgage of land belonging to A. in fee, the mortgage deed reciting the trust. By collusion with B., A., in 1866, obtained the title deeds, and also a conveyance of the legal estate, and then, suppressing the mortgage and re-conveyance, conveyed as under his original title the legal estate to C. by way of mortgage. In a suit by B.'s *cestui que trust*:—Held, that C. was entitled to rely on the legal estate acquired through the suppressed re-conveyance, and was not affected with notice of any equities which, if he had seen that deed, he might have discovered upon inquiry. *Id.*

1. Two trustees, one of whom was a solicitor, advanced money on mortgage. The mortgagor, with concurrence of the solicitor trustee, sold part of the mortgaged property without disclosing the mortgage. Regular conveyances in fee to the purchasers were executed by the mortgagor, containing a recital that he was seised or otherwise well and sufficiently entitled in fee-simple. The solicitor trustee received the purchase money, and retained it. Eleven years afterwards both trustees executed a re-conveyance of the property so sold, the other trustee believing, on the representation of the solicitor trustee, that the property was then about to be sold by the mortgagor. Soon afterwards the solicitor trustee absconded, and the other trustee then filed a bill against the mortgagor and the purchasers, praying for foreclosure against them:—Held, that though the purchasers were purchasers for valuable consideration without notice, they could not avail themselves of any legal estate acquired by means of the re-conveyance, which, having been obtained by fraud, must be cancelled; and that they had purchased only the equity of redemption. *Heath v. Crealock*, 10 L. R., Ch., 22; 44 L. J., Ch., 157; 31 L. T., N. S., 650.

Held, that under the form of conveyance adopted, neither the plaintiff nor the mortgagor was estopped from denying that the legal estate had passed by the conveyance to the purchasers. *Id.*

Held, that a decree must be made against the purchasers, but for foreclosure and not for sale. *Id.*

Held, also, that the purchaser could not be ordered to deliver up the title deeds in their possession, the rule being that from a purchaser for value without notice the Court takes nothing away which he has honestly acquired. *Id.*

2. A subsequent purchaser protected by getting in an old satisfied statute. *Stanton v. Sadler*, 2 Vern. 30.

3. Assignee of a statute purchases the estate, having notice of a second statute. How far he shall make use of the first statute to protect his purchase. *Huntingdon v. Greenville*, 1 Vern. 49.

Conusee of a statute, having extended the land, assigns it to J. and dies. One that had a second statute gets administration, and acknowledges satisfaction on the first statute. Equity will relieve against this practice, and

put the assignee in the same plight as if the statute was still in force. *Id.* 51.

See also MORTGAGE, VII. III.—TERMS, I. 3.

III. SUB-PURCHASER WITHOUT NOTICE.

4. A. sells to B., who has notice of an incumbrance on the estate; B. sells to C., who has no notice; and he to D., who has notice; whether this revives the first notice to B. *Harrison v. Forth*, Pre. Ch. 51.

5. A purchaser with notice himself from a person who bought without notice, may shelter himself under the first purchase. *Lowther v. Carlton*, 2 Atk. 242; Ca. temp. Talb. 186.

6. One purchases, having notice of a settlement, whereby the vendor was but tenant for life, remainder to his first son in tail, and afterwards sells to one who had no notice; tenant for life dies leaving a son. Decreed, the last purchaser shall hold the land, but the first shall account for the purchase money, which he received with interest from the death of the tenant for life. *Ferrars v. Cherry*, 2 Vern. 383.

The settlement is made after marriage, in pursuance of articles before the marriage; but the articles are not taken notice of in the settlement. The purchaser, however, having notice of the settlement, it was incumbent on him to inquire whether it was voluntary, or made in pursuance of an agreement before marriage. *Id.*

7. A purchaser for a valuable consideration, with notice of voluntary settlement from a person who bought without notice, shall shelter himself under the first purchase, but he cannot defend himself in equity upon articles only. *Brandlyn v. Ord*, 1 Atk. 571; 1 West 512.

8. A person affected by notice, has the benefit of the want of notice by intermediate parties. *McQueen v. Farquhar*, 11 Ves. 478.

9. A. articles to sell lands to B. for 15,000*l.*, the whole to be paid in money, or so much land returned as would make up what he paid short of 15,000*l.* A. conveys part of the lands to B., and by persuasion values that part at an undervalue; and then B. sells this part to C., and afterwards would have returned so much of the lands as would make up the 15,000*l.* Articles set aside as unreasonable, but the sale to C. to stand. *Whorwood v. Simpson*, 2 Vern. 186.

10. One affected with notice conveys to another without notice; the assignee having legal estate shall not be affected with the notice to assignor, and so *vice versa*. *Mertins v. Jolliffe*, Amb. 313.

11. Assignee of a mortgage from persons not having notice of mortgagor's being only tenant for life:—Held, not bound to discover whether he himself had notice. *Sweet v. Southcote*, 2 Bro. C. C. 67; Dick. 670.

12. The plaintiffs sought to set aside a conveyance made by their ancestor, as they alleged while a lunatic, under undue influence, and for an inadequate consideration. The defendant, who claimed under a derivative title from the purchaser, insisted that he was a purchaser for valuable consideration without notice. No notice, actual or constructive,

having been proved, the Court refused to interfere, and dismissed the bill with costs. *Greenlade v. Darré*, 20 Beav. 284; 1 Jur., N. S., 294; 24 L. J., Ch., 490.

1. A purchaser for value, without notice, from one who claimed under a conveyance obtained by fraud from the rightful owner, cannot defend himself as against such rightful owner, where the person who so claimed was not in possession as apparent owner at the time of the sale to the purchaser for value. *Ogilvie v. Jeaffreson*, 29 L. J., Ch., 905; 8 W. R. 745.

2. The only exception, and the well-known exception, to the rule which protects a purchaser with notice taking from a purchaser without notice, is that which prevents a trustee buying back trust property which he has sold, or a fraudulent man who has acquired property by fraud saying he sold it to a *bonâ fide* purchaser, without notice, and he got it back again. There are cases to show that a person shall not take advantage of his own wrong. *Semble. Barrow's case*, 14 L. R., Ch. D., 445; 49 L. J., Ch., 498; 42 L. T. 891.

3. A vendor of land situate in a register county, part of whose purchase money remains unpaid, is under no obligation to obtain for the unpaid amount any written security which can be registered, but is entitled to rely simply on his equitable lien, which he can enforce against sub-purchasers who have notice of it, actual or constructive; and such a vendor will not, by registering the conveyance to his purchaser, if he retains the deed in his possession lose his lien as against sub-purchasers from the original purchaser. *Kettlemell v. Watson*, 21 L. R., Ch. D., 685; 51 L. J., Ch., 281; 46 L. T. 83; 30 W. R. 402.

Land belonging to the trustees of a charity situate in the suburbs of Leeds, in the West Riding of Yorkshire, was sold by the trustees, with the sanction of the charity commissioners, to some estate agents who occupied a good position in Leeds. They bought the land with the intention of reselling it in small lots for building purposes. A receipt for the whole purchase money, signed by the vendors, was indorsed on the conveyance, but only part of it was in fact paid. The vendors retained the deed in their possession, but, at the request of the purchasers, the vendors' solicitors registered a memorandum of it in the West Riding registry. The vendors took no written security for their unpaid purchase money, but relied only on their equitable lien. The purchasers sold the land again in lots, some of which were very small. None of the sub-purchasers had actual notice of the lien of the original vendors:—Held, that the original vendors were entitled to enforce their lien against such of the sub-purchasers as had constructive notice of it. *Ib.*

IV. SALE OF ESTATE TO TWO DIFFERENT PURCHASERS.

4. A. agrees verbally to sell an estate to B., he afterwards agrees in writing to sell it to C.; and then conveys it to B., in pursuance of the first contract, B. having notice of the second. *Semble. C.* cannot call on B. for a conveyance. *Darson v. Ellis*, 1 Jac. & Walk. 524.

5. If a vendor contract with two different

persons for the sale to each of them of the same estate, the Court will *primâ facie* enforce the contract which was first made; and if the party with whom the second contract was made should, after notice of the first contract, procure a conveyance of the legal estate in pursuance of the second contract, the Court will, in a suit for specific performance by the first purchaser, against the vendor and the second purchaser, decree the latter to convey the estate to the plaintiff. *Potter v. Sanders*, 6 Hare 1.

6. A. and B. having entered into a verbal treaty for the purchase of certain premises belonging to A., and not being able to agree as to the amount of purchase money, A. addressed a letter to C., a third person, stating that he would take a certain sum from B. for the premises, reserving a small portion of the same for his sister, if C. approved of it. B. subsequently lodged the sum named by A. with C., of which lodgment C. made a memorandum on A.'s letter, with a remark that it was "a great price." During the period of this negotiation between A. and B., A. entered into a contract with D. for the sale of the same premises, and although notice of the agreement between A. and B. was given to D., actually conveyed the premises to D.:—Held, that D. having had notice of the agreement between A. and B., the conveyance to him must be considered as fraudulent, and should be delivered up to be cancelled, and that the conduct of A. having been very fraudulent, the costs of B. should in the first place be paid out of the funds lodged by her in the hands of C. *Field v. Boland*, 1 Dr. & Wal. 37.

7. A parol agreement for the purchase and possession delivered, decreed to be performed against a subsequent purchaser with notice, who had a conveyance, and had paid his money. *Butcher v. Stapely*, 1 Vern. 363.

8. W., after completing a contract to buy premises, told M. that he had done so. M. was afterwards informed by the vendor that the treaty with W. was off. M. did not make any further inquiry, but bought and took an assignment of the premises himself:—Held, that he must be held to have had notice of W.'s contract. *Waldron v. Jacob*, 5 Ir. B., Eq., 131.

V. ACTUAL PAYMENT OF CONSIDERATION NECESSARY.

9. Where a defendant, by his answer, insists that he is a purchaser for valuable consideration, and without notice, proof of payment of the purchase money is an essential part of the defence. *Molony v. Kernan*, 2 Dr. & War. 81.

10. The plea must be of a purchase for valuable consideration without notice, upon money actually paid; otherwise, it is disallowed. *Harrison v. Southcote*, 1 Atk. 538.

11. On plea of purchase for valuable consideration, the consideration must be actually paid; if, in fact, it is only secured to be paid, the plea will be overruled. *Hardingham v. Nicholls*, 3 Atk. 304.

12. Purchase for a valuable consideration *bonâ fide* paid:—Held, a good defence, though the consideration was much less than the real value. *Bullock v. Sadler*, Amb. 764.

VI. DISCOVERY BY.

1. A man who purchases without notice of a prior incumbrance, or prior right, shall not have his title impeached in equity, nor shall he be compelled to discover any writings which may weaken his title, neither shall any advantage be taken from him, which may defend him at law. *Harding v. Hardrett*, Rep. temp. Finch. 9; *Heyman v. Gorneldon*, id. 34; *Snelling v. Squib*, 2 Ch. Ca. 47; *Wilkes v. Bodington*, 2 Vern. 599; *Stephens v. Gaule*, id. 701. He must plead himself a purchaser without notice. *Bodmin v. Vandenbendy*, 1 Vern. 179.

2. Equity will not compel a man to discover what goods he really bought of a bankrupt after the bankruptcy, and before the commission sued out, where the party has no notice of the bankruptcy. *Abery v. Williams*, 1 Vern. 27.

3. Assignee of a mortgage from persons not having notice of mortgagor's being only tenant for life, not bound to discover whether he himself had notice. *Sweet v. Southcote*, 2 Bro. C. C. 66; Dick. 670.

4. A plea of purchaser without notice, is a bar to the discovery as well as the relief, but not insisted on by the defendant; he must answer and confess the notice, or the plaintiff may except to the answer; but if he does not except, the affirmative of proving notice will be on him, *semble*. *Eyre v. Dolphin*, 2 Ball & B. 303.

5. Bill by tenant in tail in possession, under marriage settlement, for discovery and delivery of title deeds. Plea, mortgage by tenant for life alleging himself to be seised in fee, and in possession of premises and deeds as apparent owner. *Walkyn v. Lee*, 9 Ves. 24.

6. Claimant under a marriage settlement, without notice of prior incumbrances, shall not be compelled to a discovery. *Williams v. Lane*, 8 Bro. P. C. 291.

7. A title deed of the defendant was ordered to be produced where it contained a recital that might affect him with constructive notice of the plaintiffs' interest in the estate. *Neesom v. Clarkson*, 2 Hare 166. n.; C. P. C. 93; 12 L. J., N. S., Ch., 99; 6 Jur. 1055.

8. An information made claim on behalf of a charity to a farm, out of which a fixed annual rent charge had for many years been paid. The defendant admitted the right to the rent charge, but contended that he represented parties who were purchasers of the farm for valuable consideration without notice. He admitted he had in his possession title deeds which made out his own title, but did not make out or evidence the title of the charity.—Held, that the defendant was not bound to produce them. *Att.-Gen. v. Strutt*, 3 Beav. 396; 10 L. J., N. S., Ch., 248.

9. Where the purchase of a reversionary interest was impeached on the ground of fraud and inadequate consideration, the purchaser was held bound to produce the deeds by which that transaction was effected, and all subsequent documents relating to it, but not any of the other title deeds. *Addis v. Campbell*, 1 Beav. 258; 8 L. J., N. S., Ch., 306.

10. A deed in the custody of a purchaser for valuable consideration which the bill impeached for fraud, ordered to be produced. *Kennedy v. Green*, 6 Sim. 6.

11. Under a commission against a bankrupt mortgagor, the commissioners have authority, by the 6 Geo. 4, c. 16, ss. 33, 34, to enforce from a mortgagee of the bankrupt's property the production of his mortgage deed. The rule that a purchaser for valuable consideration, without notice, cannot be compelled to discover his title deeds, does not extend to the mortgage or purchase deed itself. *Exp. Caldecott, Re White*, Mont. 55.

12. Person interested in issue *devisavit vel non*, refusing to be party to it, is yet allowed to attend trial by counsel, and ordered to produce deeds, etc., except those she held as mortgagee. *Pindar v. Smith*, 6 Madd. 48.

13. Motion, on the part of a plaintiff, for the production of a deed alleged to be in possession of the defendant as tenant in common with the plaintiff, refused, it appearing by the answer that the defendant had sold his share, and was in possession of the deed in question only as mortgagee to the purchaser. A mortgagee has no right to show the title of his mortgagor. *Lambert v. Rogers*, 2 Meriv. 489.

14. A jointress had her own part of the marriage settlement in her custody, and became possessed of her husband's, as his executrix; on motion, she was ordered to produce it to the clerk in court, but not to deliver it up, that being the very end of the bill. *Aston v. Aston*, 3 Atk. 802.

A jointress or purchaser ought to produce their deeds, to see if the lands they claim are comprised therein. *Id.*

15. A., the owner of an estate, first mortgaged it to B., and afterwards sold and conveyed it to C., to whom he delivered the title deeds. In a suit by B. against C., insisting on his priority, C., by his answer, professed to state the contents of the deed of conveyance to A. He admitted the possession of this and the other title deeds, but insisted that he was a purchaser for valuable consideration without notice; and he said that B. had no right or title to the production of the deeds, or any interest therein.—Held, that B. was entitled to the production of the conveyance to A., but that the other title deeds were privileged. *Hunt v. Elmes*, 27 Beav. 62; 5 Jur., N. S., 645; 28 L. J., Ch., 680; 7 W. R. 471.

If the defendant in his answer sets out partially the conveyance made to his vendor, he must produce the deed to verify the statement. *Id.*

16. Two trustees, one of whom was a solicitor, advanced money on mortgage. The mortgagor, with the concurrence of the solicitor trustee, sold part of the mortgaged property without disclosing the mortgage. Regular conveyances in fee to the purchasers were executed by the mortgagor, containing a recital that he was seised or otherwise well and sufficiently entitled in fee-simple. The solicitor trustee received the purchase money, and retained it. Eleven years afterwards both trustees executed a re-conveyance of the property so sold, the other trustee believing, on the representation of the solicitor trustee, that the property was then about to be sold by the mortgagor. Soon afterwards the solicitor trustee absconded, and the other trustee then filed a bill against the mortgagor and the purchasers, praying for foreclosure against

them:—Held, that though the purchasers were purchasers for valuable consideration without notice, they could not avail themselves of any legal estate acquired by means of the re-conveyance, which, having been obtained by fraud, must be cancelled; and that they had purchased only the equity of redemption. *Heath v. Crealock*, 10 L. R., Ch., 22; 44 L. J., Ch., 157; 31 L. T., N. S., 650.

Held, that, under the form of conveyance adopted, neither the plaintiff nor the mortgagor was estopped from denying that the legal estate had passed by the conveyance to the purchasers. *Ib.*

Held, that a decree must be made against the purchasers, but for foreclosure and not for sale; and that the purchasers would not be ordered to deliver up the deeds which were in their possession. *Ib.*

1. A plaintiff sought to set aside a lease and to obtain mesne profits. The defendant, the assignee of the lease, insisted on its validity, and that he was a purchaser for valuable consideration without notice:—Held, that the defendant was bound to answer as to the amount of rents and profits, the particulars of his underletting and of his receipts, and what charges he had created. *Robson v. Flight*, 33 Beav. 268.

2. A son who was heir-at-law to his father, who was one of the executors and trustees of his father's will, though he had not proved the will, and whose Christian names and description were identical with those of his father, after his father's death, executed mortgages of freehold and leasehold property of the father, and applied the mortgage money to his own purposes. He handed over the title deeds to the mortgagees. The transaction took place without the knowledge of his mother and sister, who were co-trustees and co-executrices with him, and who had proved the will. The will had not been registered in the Middlesex registry, though the property was situate in that county. The mortgage deeds were registered. They purported to be executed by the absolute owner of the property, and the solicitor who acted for both parties believed the son to be the absolute owner. The son told him nothing about the father's will. The solicitor searched the Middlesex registry. The son took a beneficial interest under the trusts of the father's will. After the son's death the fraud was discovered, and the mother and sister, as trustees of the father's will, brought an action against the mortgagees, claiming a declaration that the mortgages were void against them, and delivery up of the title deeds. The other beneficiaries under the will were made defendants:—Held, that the son in executing the mortgage deeds was personating his father; that the deeds were forgeries and passed nothing to the mortgagees, except the son's beneficial interest under the father's will; and that the mortgagees could obtain no title by virtue of the Middlesex Registry Act. *Re Cooper, Cooper v. Vesey*, 20 L. R., Ch. D., 611; 51 L. J., Ch., 862; 47 L. T. 89; 30 W. R. 648. Affirming 51 L. J., Ch., 149; 45 L. T. 532; 30 W. R. 148.

Semble, the son could have been convicted of forgery by reason of his executing the mortgage deeds. *Ib.*

Held, also, that the mortgagees must deliver

up the title deeds to the plaintiffs. Since the Judicature Act the Chancery Division has jurisdiction on the application of the legal owner of title deeds to order them to be delivered up by a purchaser for value without notice. *MoLeod v. Drummond* (14 Ves. 353; 17 Ves. 152) distinguished. *Ib.*

See also JOINTURE, VI.

VII. PLEADING.

1. *Averments*, 7358.
2. *Denial of Notice*, 7359.
3. *Ore Tenus*, 7359.

1. Averments.

3. In the pleading of a purchase or mortgage, the defendant must plead that the seller or mortgagor was, or pretended to be, seised in fee. *Head v. Egerton*, 3 P. W. 281.

4. Plea of purchaser from one having a reversionary estate, and consequently not in possession, overruled, because it did not set out how the person from whom the title was deduced became entitled. *Hughes v. Garth*, 2 Eden 168; Amb. 421.

5. Bill by tenant in tail in possession under marriage settlement for discovery and delivery of title deeds; plea, mortgage by tenant for life alleging himself to be seised in fee and in possession of premises and deeds as apparent owner, allowed. *Wallwyn v. Lee*, 9 Ves. 24.

Averments necessary to plea of purchase for valuable consideration, without notice, that vendor or mortgagor was owner, or pretended owner, and that he was in possession, not that purchaser was. *Id.* 32.

6. Plea of a purchase for valuable consideration must allege seisin and possession in the vendor. *Trevanian v. Mosse*, 1 Vern. 246.

7. To a bill stating a settlement, under which certain hereditaments were limited to A. for life, with remainder to the plaintiff, and praying a delivery of the title deeds, the defendant put in a plea of purchase for valuable consideration without notice, averring that "A., before the execution of the conveyance, alleged that she was seised," and was in possession. The Court held that such a plea must aver that the vendor was seised, or pretended to be seised, and was in possession at the time when the conveyance was executed. *Jackson v. Rowe*, 4 Russ. 514; 9 L. J., Ch., 32.

Quere, whether such a plea, not averring a title prior to, and independent of, the settlement, is a good defence to such a bill. *Ib.*

8. Plea of purchaser for valuable consideration, stating vendor seised, etc., but not adding in possession, overruled. *Lancashire (Lord) v. Kilmaine (Lady)*, 2 Moll. 403.

9. Bill by tenant for life in possession for discovery and delivery of the title deeds. Plea, a mortgage in fee, by a former tenant for life, alleging himself to be seised in fee without notice, ordered to stand for an answer, with liberty to except. *Strode v. Blackburne*, 3 Ves. 222.

10. Defendant pleading purchase for valuable

consideration without notice, must aver that the vendor was seised and was in possession, which would be satisfied by possession of his tenant. *Daniels v. Davison*, 16 Ves. 252. S. P. *Att.-Gen. v. Brookhouse*, 17 Ves. 290.

1. A plea of purchase for valuable consideration without notice of plaintiff's title; it is sufficient to aver that the person who conveyed was seised, or pretended to be seised, when he executed the purchase deeds; but where a fine or non-claim is the bar, averment of actual seisin is necessary. *Story v. Windsor (Lord)*, 2 Atk. 630; 1 Ch. Ca. 34.

In pleading, there is the same strictness in equity as at law. S. C. 2 Atk. 632.

If a person purchases an estate which he sees has a defect upon the face of the deed, yet a fine will be a bar, for that defect is the very occasion of levying the fine. *Secus*, as to a purchase from a trustee or mortgagee. *Ib.*

2. Plea of purchaser for value need not set forth the consideration paid. *More v. Mayhew*, 1 Ch. Ca. 34; 2 Freem. 175.

2. Denial of Notice.

3. If special notice of title is charged by bill, such notice must be denied as specially; a general demurrer is not sufficient. *Radford v. Wilson*, 3 Atk. 815.

4. On plea of purchase for valuable consideration without notice of plaintiff's title, it is not sufficient to deny notice at or before the execution of the conveyance to him; he must aver that he had none at or before payment of the purchase money. *Story v. Windsor (Lord)*, 2 Atk. 630; 1 Ch. Ca. 34.

If a person purchase an estate which he sees has a defect upon the face of the deed, yet a fine will be a bar, for that defect is the very occasion of levying the fine. *Secus*, as to a purchase from a trustee or mortgagee. *Ib.*

5. Denying notice of plaintiff's title at the time of the execution of the deed of payment of the consideration money is not sufficient; you must swear that you had no notice at or before the execution. *Fitzgerald v. Burk*, 2 Atk. 397.

6. In a plea of a purchase, it is a sufficient denial of notice to say that at the time of purchase he had no notice, without saying, or at any time before. *Jones v. Thomas*, 3 P. W. 243.

7. A defendant in a plea of a purchase for valuable consideration, omits to deny notice; if the plaintiff replies to it, all the defendant has to do is to prove his purchase, and it is not material if the plaintiff proves notice; for it was the plaintiff's own fault, that he did not set down the plea to be argued, in which case it would have been overruled. *Harris v. Ingledew*, 3 P. W. 94.

8. Notice must be denied positively, not evasively. *Cason v. Round*, Pre. Ch. 226.

9. Bill by a dowress to remove trust term; defendant pleads himself a purchaser, but does not deny notice; ordered to answer. *Bodmin v. Vandenbendy*, 1 Vern. 179.

10. If a defendant in his answer relies generally on his right as a purchaser for value without notice, but does not specifically deny notice of a particular matter, e.g., a private Act, with which he is charged in the bill, and

which would invalidate his title, the plaintiff, not excepting to the answer, is bound to prove notice. *Att.-Gen. v. Marrett*, 10 Ir. Eq. R. 167.

11. The bishop brings a bill against one that was an assignee of a lease, charging that defendant knew that the lease was expired, and that the same did appear by writing in his custody. Defendant pleads that he was a purchaser of the lease, and was then informed that there were fifty-seven years to come in the lease, and therefore gave nineteen years' purchase for it; allowed a good plea. *Worcester (Bishop) v. Parker*, 2 Vern. 255.

12. Plea averring in answer to a charge of constructive notice, that to the defendant's knowledge and belief there was no notice, disallowed. He ought to answer the facts, and the Court is to make the construction. *Jerrard v. Saunders*, 2 Ves. J. 187; 4 Bro. C. C. 322.

13. A defendant, who means to rely on his being a purchaser for value without notice, must, by his answer, deny notice, although it is not charged in the bill that he had notice. *Ireland v. Kidd*, Jon. & C. 249.

14. A defendant claiming as a mortgagee, and by his answer denying notice of the plaintiff's title, which was neither alleged by the bill nor proved, an inquiry for the purpose of affecting him with notice was refused; first, upon a petition to vary the minutes, and again upon a re-hearing. An inquiry as to what sums he had advanced upon the security of the mortgage, and at what times respectively, was granted. *Hardy v. Reeves*, 5 Ves. 426.

15. In plea of purchase for valuable consideration without notice, it is enough to deny notice generally, in plea, unless facts are specially charged in bill, as evidence of notice. *Pennington v. Beechey*, 2 Sim. & S. 282.

16. Where in a plea of purchase for valuable consideration, the purchaser omitted to deny notice, and the plaintiff replied to it, instead of setting it down for argument, if the defendant prove what he has pleaded, the bill as against him must be dismissed with costs. *Eyre v. Dolphin*, 2 Ball & B. 302.

So of an answer to that effect, unless fraud proved. *Ib.* 303.

A plea of purchaser without notice is a bar to the discovery as well as the relief; but if not insisted on by the defendant, he must answer and confess the notice, or the plaintiff may except to the answer; but if he does not except, *semble*, the affirmative of proving notice will be on him. *Ib.*

3. Ore Tenus.

17. The defence of purchaser for valuable consideration, without notice, must be stated distinctly in the pleadings, else it cannot prevail. Therefore, where it was not claimed as a ground of defence in an answer, or a plea, but only in an affidavit on a motion for a decree, it was not allowed. *Phillips v. Phillips*, 3 Giff. 200; 7 Jur., N. S., 1094; 5 L. T., N. S., 108. Affirmed 8 Jur., N. S., 145; 31 L. J., Ch., 321.

A. being entitled to an equity of redemption in fee in lands, by a deed of family arrangement, in February 1820, granted to his

brother B. an annuity of 20*l.* charged on those lands, and payable on the death of his mother, C. By a settlement made on his marriage in May 1821, A. settled the lands, subject to the mortgage existing thereon, and he at the same time covenanted that they were not otherwise encumbered. A. died in 1825, and C. died in 1839. The first payment of the annuity became due in March 1840. In 1859 B. filed a bill against those claiming under the settlement for payment of the annuity. The defendant set up orally at the bar the defence that they were purchasers for value, without notice of B.'s annuity:—Held, that such defence should have been pleaded formally, and could not be set up orally at the hearing, and a decree was made against the defendants for payment of the annuity. *Id.*

Although a cause is heard on motion for decree, the defence of purchase for value without notice must still be set up by the answer. Where, therefore, the defendants merely stated by their answer that the plaintiff was a volunteer whose charge was invalid as against a subsequent purchaser for value:—Held, that the defendants could not in evidence raise the question of absence of notice of the plaintiff's charge. 8. C. 4 De G. J. & F. 208.

VIII. PURCHASER WITH NOTICE. IN GENERAL.

1. A purchaser with notice is bound to the same manner as his vendor. Although a purchaser with notice be not a party to the original fraud, yet he is considered an accessory after the fact. *Dunbar v. Tredennick*, 2 Ball & B. 819.

Where the evidence of notice in the purchaser was very loose, and there exists only a suspicion of it, equity will not act upon it. *Id.* 301.

2. Purchaser with notice is bound in all respects as the vendor: therefore, where tenant for life granted leases for lives under a power, and bound himself, upon the dropping of a life, to grant a new lease, with the same provision for renewal on the death of any person to be named in any future lease, and afterwards joined in a sale, though the power is exceeded; yet, if a life drops in the life of the lessor, the purchaser, having notice, must specifically perform, by granting a new lease with the same provisions. *Brydges v. Chandos (Duke)*, 2 Ves. J. 437.

3. If a man will purchase with notice of another's right, giving a consideration will not avail him. *Mead v. Orrery (Lord)*, 3 Atk. 238.

4. A mortgagee with notice of the settlement cannot protect himself as a purchaser, or be distinguished from the tenant for life, the mortgagor. *Eyre v. Dolphin*, 2 Ball & B. 290.

5. Purchaser, with notice of agreement to settle:—Held, a trustee. *Skirne v. Meyrick*, 2 Com. 700.

6. Notice of ancient articles, by which the estate is agreed to be settled on the husband for life, remainder, subject to a charge by way of jointure for the wife, to the heirs male of the husband, by his wife, shall not affect the title of a purchaser claiming under

the husband by reason of the modern method of carrying such articles into execution. *Senhous v. Earle*, Amb. 285; 2 Ves. 450.

7. Those who, with notice of his title, deal with a person entitled to a partial interest in an estate, are responsible for any dealing with the property which professes to encumber and embarrass the estate of the other persons claiming under the same instrument. They are not at liberty to deal with the estate so as to embarrass the other persons claiming under the same instrument. *Nixon v. Robinson*, 2 J. & L. 4; 7 Ir. Eq. R. 520.

8. Equity will not relieve against a contract entered into by a child with a parent, for an appointment from him; and a purchaser from the parent, with notice of the fraud, will be affected with it. *Palmer v. Wheeler*, 2 Ball & B. 30.

9. A person, agreeing to purchase the right and interest of another, under a contract for a lease with full notice of the nature of it, cannot object to the payment of the consideration, either on the ground that such contract is not binding on the other party to it, or for want of title. *Baxter v. Conolly*, 1 Jac. & Walk. 576.

10. On the marriage of a female infant, her reversionary interest in choses in action was settled under the Court for her separate use for life, with remainder to her children. She afterwards contracted two subsequent marriages, but no further settlement was executed on those occasions:—Held, that the third husband, who had notice of the settlement previous to his marriage, and had for some years acquiesced in it, was bound thereby, and had no interest in the settled property. *Ashton v. M'Dougall*, 5 Beav. 56; 11 L. J., N. S., Ch. 344; 6 Jur. 447.

11. Account of arrears of annuity against purchaser with notice, length of time not being sufficient to presume satisfaction. *Wynn v. Williams*, 5 Ves. 130.

12. Purchaser from tenant in tail, with notice of agreement by him, to renew a lease which the father, tenant for life, had covenanted to renew, is bound to renew. *Brooke (Earl) v. Bulkeley*, 2 Ves. 498.

13. Lord of manor (his tenants refusing to renew) makes a lease of the premises to his daughter for ninety-nine years, and afterwards sells the manor to J., who has notice of the lease, but has security that the daughter when at age should surrender; daughter decreed to have the benefit of the lease. *Jennings v. Selleck*, 1 Vern. 467.

14. A sold to B. an estate in fee-simple expressly subject to a lease which purported to have been granted by A.'s predecessor in title. The lease was in fact invalid:—Held, that B. was not bound to give effect to the invalid lease. *Smith v. Widdale*, 25 W. R. 52.

15. A consignor who had purchased goods on account and at the risk of his correspondent and delivered them to the carrier, has no right, by reason of the variation of the accounts between them, to depart from his duty and deliver them to another person; and a party taking from the consignor with notice of the circumstances, is subject to the rights of the correspondent. *Green v. Maitland*, 4 Beav. 524.

16. An executor in trust for an infant resi-

duary legatee, renews a lease, part of the testator's personal estate, in his own name, and having mortgaged it, assigns the equity of redemption to a trustee to sell for payment of his own debts; the trustee sells it to one who had notice of the infant's title. Purchase set aside. *Walley v. Walley*, 1 Vern. 484.

1. A made an equitable mortgage to B., and afterwards agreed to grant a lease to C., who had notice of the mortgage: B. afterwards purchased the equity of redemption, with notice of C.'s agreement, and took a conveyance to himself:—Held, that B. was bound, out of his whole interest, to grant the lease to C. *Smith v. Phillips*, 1 Keen 694; 6 L. J., N. S., Ch., 253.

2. A. contracted to purchase real estate and died, having made his widow his universal devisee and legatee. The widow married B., who in 1793 took a conveyance of the premises contracted to be purchased by A. to himself, and a trustee reciting the contract by A., his will, and death,—the marriage of his widow with B., and that "thereupon B. became entitled to the beneficial interest in the purchase." B. in 1817 sold the premises to C., and C. took a conveyance from B., and his trustee, reciting that by certain good and sufficient assurances in the law, the premises stood limited to B. and the trustee, but not reciting the deed of 1793. The widow died, leaving her heir-at-law, an infant, who came of age in 1825, in the lifetime of B. The bill was brought by the heir-at-law in 1836, after the death of B., for a conveyance of the estate:—Held, that the recital in the deed must be understood as stating that the widow was devisee of the purchased premises, and that the title of B. accrued by the marriage; that the Court would not presume in favour of a purchaser that B. had any other title than was so represented; that C. must be presumed to have been cognisant of, and to have taken the title of, B. his vendor; that the equitable title of the heir-at-law of the widow was not affected by the lapse of time; and that the heir-at-law was entitled to the decree for conveyance of the estate. *Neesom v. Clarkson*, 2 Hare 163; 12 L. J., N. S., Ch. 99; 6 Jur., 1055.

3. A. voluntarily agrees to give certain houses to his niece and the heirs of her body, after the death of himself and his wife, in case they should have no issue; but no conveyance was executed by A., though he lived above twenty years afterwards. In the meantime, A. becomes indebted by mortgage, judgment, etc., and by his will devises all his estate, both real and personal, to his wife. This agreement is not good against a purchaser for valuable consideration, although he had notice by being a subscribing witness to it. *Pomell v. Pleydell*, 1 Bro. P. C. 124.

4. B. purchased a reversionary interest of A. at a gross undervalue, and under circumstances which rendered the transaction void in equity. C. had notice of the invalidity of the contract, but ten years afterwards he purchased the reversion of B., paying to B. the full value; A. joined in the conveyance and confirmed the sale. The Court, being of opinion that C. had not taken proper steps to protect A. in the second transaction, set it aside and decreed a re-conveyance, on re-pay-

ment of the consideration given by B. to A. in the first transaction. *Addis v. Campbell*, 4 Beav. 401.

5. A devisee obtains a decree to hold and enjoy against the heir, who, it was supposed, had suppressed the will. Pending the suit, a third person gets an assignment of a mortgage made by the testator, and then purchases the equity of redemption of the heir, with notice of the will. The Court would not admit the purchaser to dispute the justice of the decree, nor to try at law whether the will was not cancelled by the testator. *Finch v. Newnham*, 2 Vern. 216.

6. By marriage settlement a rent charge was granted to trustees and their heirs, upon trusts for the husband and the issue of the marriage; and the lands were granted to other trustees for a term of years, upon trust to secure the rent charge. One of the trustees of the rent charge admitted that, before the execution of the settlement, he had notice of a prior incumbrance on the lands; and one of the trustees of the term denied that he had such notice. No evidence of notice was given:—Held, that notice to the trustees of the rent charge was sufficient; but there being no issue of the marriage *in esse*, the Court would not declare that their interests were bound by the prior incumbrance, but declared that the trustee had notice of it. *Wise v. Wise*, 2 J. & L. 403.

7. A tenant for life of real estates, with a power to charge 20,000*l.* for the portions of younger children, mortgaged his life estate; he covenanted with some of the mortgagees that he would not execute the power without their consent. He subsequently exercised the power for the benefit of his children, and created a term of 1,000 years to secure payment of the 20,000*l.*, and upon the marriage of one of his daughters he appointed 5,000*l.* to her for a portion. The trustees, and also the appointees, had notice of the mortgages and of the covenant entered into by the tenant for life:—Held, that the appointees were not entitled to any priority, and that they must be postponed to the previous mortgage. *Hurst v. Hurst*, 22 L. J., Ch., 538.

XXVI. Orders under the Conveyancing Act 1881—Effect of Section 70.

8. By the 70th section of the Conveyancing Act 1881, the title of the purchaser is protected even where an objection to the order appears on the face of it. *Re Hall Dare's contract*, 21 L. R., Ch. D., 41; 51 L. J., Ch., 671; 46 L. T. 755; 30 W. R. 556.

XXVII. Easements.

9. A. buys a house and finds 12 flues in it, but 14 chimney-pots on the wall:—Held, that he has constructive notice of an agreement

under which the owner of the adjoining house uses the two remaining flues. *Hervey v. Smith*, 22 Beav. 299.

1. Where an owner in fee of two adjoining houses, let to A. and B. as yearly tenants, allowed A.'s house to have a waterpipe running into the well of B.'s house, and at a subsequent sale of the houses by auction each tenant purchased his own house, such privilege of water supply does not pass as against B. under an ordinary reservation in the conditions of sale of "rights of way and water and other easements." *Russell v. Harford*, 2 L. R., Eq., 507; 14 W. R. 982; 15 L. T., N. S., 171.

2. If a purchaser buys the fee-simple of a tenement for a valuable consideration, and has it conveyed to him without any reservation, he is not bound to take notice of the manner in which the tenement has, prior to the sale, been used by the vendor for the convenience of the adjoining tenement, on the principle that a grantor cannot derogate from his own grant. *Suffield v. Brown*, 10 Jur., N. S., 111; 33 L. J., Ch., 249; 12 W. R. 356; 9 L. T., N. S., 627; 4 De G. J. & S. 185; 3 N. R. 240; 2 N. R. 378.

When a purchaser buys a house, and has it conveyed to him without any reservation, he takes the house, not "such as it is," but such as it is described in the particulars of sale, and conveyed by the deed. *Id.*

In 1845 an owner of two adjoining tenements, a dock and a wharf, sold the wharf. The owner had been in the habit of allowing the bowsprits of ships in his dock to project over his wharf:—Held, that this was neither a continuous nor an apparent easement. *Id.*

The wharf having been sold in fee without reservation, it not being shown that there was any existing easement of this kind prior to the unity of possession which ended in 1845, and as this was neither a continuous nor an apparent easement:—Held, that a subsequent purchaser of the dock was not entitled to restrain a grantee of the purchaser of the wharf from interfering with his use of the dock in the manner above mentioned; in other words, that the dock owner could not exercise any right of placing ships in the dock in such a manner as that their bowsprits should overhang the wharf. *Id.*

3. In December 1864, B., who was in possession of land adjoining the river Thames, under an agreement for a lease for eighty years, gave notice to the Board of Works for the district that he desired to divert a public footway which crossed the land, and that he proposed to substitute a better footway, and also to make a new roadway to the water-side between two points specified, and throw the same open to the public. The vestry agreed to the application, subject to the proposed new roadway being made and thrown open to the use of the public, and the new footway being properly made. In April 1865, the justices made an order for the stopping up and diversion of the old footway. This was done by B., and he also constructed the new road. The owners of the fee, however, did not give their consent, and there was, in the opinion of the Court, no sufficient evidence of any actual dedication of the way to the public. In May 1866, a lease of the land to B. was executed, in which it was described as "All that piece of land, etc., as the same are more particularly delineated and

described on the plan drawn in the margin hereof," and the *habendum* was made "subject to the existing rights of way over the said land." In the plan the new road was shown, but was marked "Private road." There were other rights of way over the land. In June 1866, B. assigned the lease for value to the B. company, and there was nothing to show that they had any notice of B.'s agreement, or of the existence of a right of way over the road, other than such notice as was given by the lease itself, there being, in the opinion of the Court on the evidence, nothing in the appearance of the road or in the extent of its user by the public, to convey to a person inspecting the property any notice that there was a public right of way. After other assignments the lease became vested in W., to whom the defendants were tenants. In the sale plan, by reference to which W. purchased, the road was marked "Private road," but appeared to terminate at the Thames at a point marked "Ferry from Blackwall stairs." The defendants stopped up the road. An information was filed by the attorney-general at the relation of the vestry of the parish, to restrain the defendants during the remainder of their term from obstructing the road. The defendants, by their answer, alleged that W. was a purchaser for value without notice of the agreement between B. and the vestry:—Held, by Fry, J., that there was a valid contract between B. and the vestry for a license to the public to use the new road during his term which the vestry could have enforced against B., and that probably W. ought to be held to have purchased with notice of it; but that, looking at the lease and the plan together, no notice of the existence of a right of way over the new road was given to the B. company, and that as they had no other notice of its existence, they were purchasers of the lease for value without notice of the right of way, and therefore entitled to hold the property free from it, and that the defendants, as claiming through them, stood in the same position, even if any of the intervening assignees had acquired the lease with notice of the right of way; and that the information must therefore be dismissed:—Held, on appeal, that as the defendants had not by their answer alleged that the B. company had no notice of the right of way, they could not avail themselves of the defence that the B. company were purchasers for value without notice; but that the defence that W. was a purchaser without notice was sustained, there not being enough on the sale plans to affect him with notice that there was a public right of way; and that, therefore, assuming the existence of an agreement which could have been enforced against B., it could not be enforced against the defendants. *Att.-Gen. v. Biphosphated Guano Co.*, 11 L. R., Ch. D., 327; 49 L. J., Ch., 68; 40 L. T. 201; 27 W. R. 621.

4. The owner of land situated on an acclivity conveyed by deed of 1816 a portion of lower land, with liberty to enter on upper lands and fetch water from a spring, and to cut, open, cleanse, and cover in such gutters and drains as might be necessary for the purpose of conducting the spring to the conveyed land; and also with liberty to pass and repass for ingress

and egress on the upper land around or adjoining the conveyed land, and to put any ladders against the cottages then intended to be built upon the conveyed land. By another deed of 1820, other part of the lower land was conveyed, with liberty to take water from specified springs in the higher land, and to make such reservoirs in a particular field, part thereof, as might be necessary for taking up water for family use, and other necessary purposes, and with liberty to pass for ingress and egress in the upper land surrounding or adjoining the conveyed land. By other deeds of 1824, other portions of the lower land were released, with all watercourses, particularly as the same ran to an inn on the conveyed land, from the upper land. By other deeds of 1825, further portions of the lower land were released, with liberty to fetch water for family and domestic uses at a well on the higher land. By other deeds of 1834, other part of the lower land was released, with liberty to the re-lessee to make a covered goit, or watercourse, across the bottom part of a field, part of the upper land, and to open and repair the same when necessary. Several years afterwards the upper land was sold, according to a particular, describing it as fit for building, and subject to conditions of sale, providing that if any mistake were made in the description of the premises, or if any other error should appear in the particulars, such error or omission should not annul the sale, but compensation should be given or taken. The existence of the easements was not stated in the particulars or conditions:—Held, first, that the circumstances of the purchaser living in the neighbourhood, being acquainted with the property, and passing constantly some of the wells on the lower land, supplied from the upper land, did not affect him with notice of the easements; secondly, that the existence of the easements, granted by any one of the deeds of 1816, 1820, and 1834, alone constituted a material defect in the title to the upper land; thirdly, that the existence of easements granted by the deeds of 1824 and 1825 would have been alone sufficient to render the title subject to such serious doubt that a purchaser could not be compelled to accept it; fourthly, that under the circumstances, and inasmuch as the whole purchased land did not exceed thirty acres, the purchaser could not be compelled to take the title, with compensation as to lands prejudicially affected, which admeasured about four acres and a half. *Shackleton v. Sutcliffe*, 1 De G. & Sm. 609; 12 Jur. 199.

1. A deed of conveyance to a purchaser of lands held under a lease purported to grant the whole of the demised premises without exception or qualification, and the covenants for title corresponded with the granting part; the vendor had previously assigned a portion

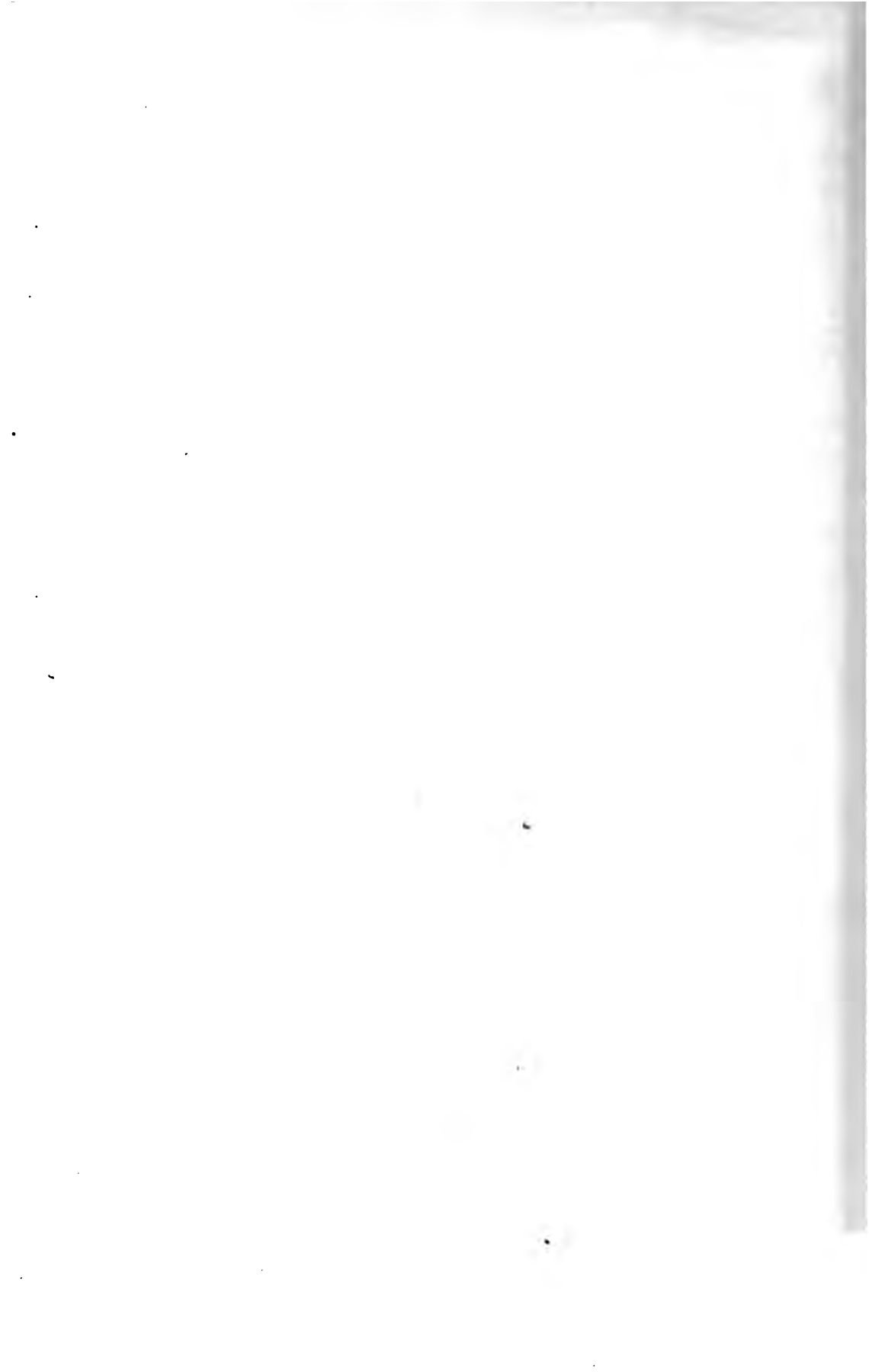
of the premises to a railway company by a deed which had not been disclosed to the purchaser, but the works constructed by the company upon that part of the premises were of such a character as to be apparent to any one approaching them, and the purchaser was aware of them before he purchased:—Held, that the condition of the premises being known to both parties at the time of the contract, they should be taken to have contracted as to them in that condition, and that the deed of conveyance should be rectified so as to carry out the real contract between the parties. *Young v. Halahan*, 9 Ir. R., Eq., 70.

2. Real estate, all belonging to the same owner, was sold by auction under the order of the Court of Chancery in lots. Lot 9 was sold as building land to S., with right of way over lot 16. At the time of the sale a right of footway only existed. But by the conveyance, which was duly executed, a right of way for carts and carriages was granted. S. conveyed lot 9 with the right which had been conveyed to him to C. Lot 16 was sold to T., who had no notice that a larger easement than the original one had been conveyed to the purchaser of lot 9. C. employed a builder to carry materials with carts over lot 16, but T., the owner of the latter lot, interfered. C. accordingly filed a bill for an injunction, and T. answered and filed a cross bill for a declaration that C. was entitled to a footway only. C. had not completed his purchase. Conflicting evidence was given as to inquiries and conversations at the sale, and it appeared that C. was present during the whole of the sale, and noted down the biddings; in consequence of which T. attempted to fix him with notice that lot 16 was subject only to the more limited right:—Held, that C. being in possession of the legal estate, and having purchased the land as building land, was entitled to an injunction against T., who was only an equitable owner, although T. purchased subject to the limited right only, and had no notice of the larger right actually conveyed. *Curtis v. Thomas*, *Thomas v. Curtis*, 33 L. T., N. S., 664.

3. The purchaser of lands situate below the level of the sea is bound to inquire how all walls necessary for the protection of his property against the encroachments of the sea are maintained. *Morland v. Cook*, 6 L. R., Eq., 252; 37 L. J., Ch., 825; 18 L. T., N. S., 496; 16 W. R. 777.

4. On the sale of a house or stables in *coul de sac*, the vendor is not bound to show a title to the roadway. *Curling v. Austin*, 10 W. R. 682; 2 Dr. & Sm. 129.

Creation and Reservation of Easements and Rights in respect of Easements in General.
See EASEMENT—LIGHT AND AIR—WATER AND WATERCOURSE—WAY.





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